



Why the Internet Has Become the Smart Way to Do Trademark Surveys



By James Berger
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“While technology has crippled the older methodologies, it has strengthened the use of the internet in survey research.”

Making use of the internet for conducting trademark surveys has become the smart choice for survey experts.



A few years ago, internet surveys in intellectual property (IP) litigation were novelties—but not anymore. In fact, the internet survey has more than come of age, it has become the preferred methodology for many types of IP litigation-related surveys—especially trademark-related matters.

The biggest reason for the rise of the internet survey is the demise of the other more established conventional methodologies. At the same time, the internet continues to add new technological features that enhance its ability to reach populations and probe relevant target markets.

Older Methodologies Obsolete

While technology has made the internet survey what it is, technology has also contributed to the decline of older methods, such as telephone surveys and mall intercept surveys.

Not terribly long ago, telephone surveys were considered “coin of the realm,” the ultimate way to gather data. Telephone surveys are still used by the political pollsters. In the heyday of telephone surveys, call centers would work day and night telephoning people at work and at home. But technology and invention have just about killed the telephone survey for IP litigation—caller ID and cell phones being the biggest culprits.

Another very popular survey methodology, the mall intercept survey, has declined as shoppers increasingly avoid malls in lieu of shopping online. Also, people who frequent the malls are not necessarily a cross-section of the population. Elderly people routinely visit malls early in the day, before stores open, for exercise. Shoppers at malls tend to be youthful, and many mall visitors are parents of small children or babysitters. In short, you are not getting the population cross-sections that most consumer surveys require.

Enter the Internet

While technology has crippled the older methodologies, it has strengthened the use of the internet in survey research. Virtually everyone uses a computer and accesses the internet online. Most people go online every day some people are on the internet all the time. People are comfortable with the point-and-click methods of screening and inputting data.

There is a myriad of ways surveys can be presented on the internet. Templates abound. Questionnaires can easily be plugged into those templates like “Survey Monkey,” “Zoomerang,” and “Qualcomm.” These templates continue to improve and are extremely user-friendly. Moreover, the rise of the internet panels has made survey research on the internet even easier. Some of the survey panels have hundreds of thousands of constituents — people who volunteered to take surveys for the relatively modest rewards panel companies offer. Especially in researching consumer package goods and services, the internet can produce large numbers of respondents very quickly. Incentives provided by the internet panel companies are most affordable.

The research technique used most often in trademark-related survey is the “judgment survey.” This is a non-probability sample where the survey expert creates the respondent profile and then seeks to find some way of reaching this profile and obtaining a certain number of respondents (such as 200, 250 500, etc.).

Quantitatively, the internet surveys allows both closed-end and open-end answers. Qualitatively, the internet allows you to produce sounds as well as sights. The internet can deliver the most challenging of surveys—pre-recruit. Here you are looking for people with highly specific backgrounds, needs and buyer behavior characteristics. You can design the internet survey for these hard-to-reach people and initially contact them by email or telephone and steer them to the

survey by providing a Web link to the online questionnaire. Another variation is to combine a telephone methodology with an internet survey. Here you have the respondent accessing the stimulus online and then have a telephone researcher asking specific questions and record results.

Internet Helps in Validation Process

Because of the intense care the internet survey panel company takes in policing their panels through its own ongoing validation process. Thus, it is not necessary for the survey expert to have to spend the time and the client's money required by the old-fashioned validation method.

In most cases where telephone or mall-intercept methodologies were used, it is was desirable to “validate” a survey. This is usually was accomplished by hiring an independent research company. The task was to telephone a percentage of people who said they participated in the survey. Because some research facilities in shopping malls were compensated based on completed surveys. Some of these facilities had been unscrupulous about reporting the number of “completes.” The research company therefore called a percentage of the “completes” and asked: (1) if they were, indeed, qualified to take the survey and (2) if they recalled taking the survey. .

Courts Like Internet Surveys

Three important peer-reviewed articles all confirm that judges and juries view internet surveys most positively. Moreover, they confirm the internet has become the methodology of choice in the market research industry as a whole.

In “Internet Surveys for Trademark Litigation: Ready or Not Here They Come,” an article published in *The Trademark Reporter*, the official Journal of the International Trademark Association, in its September – October 2007 issue, authors Gabriel M. Gelb and Betsy D. Gelb, both trademark survey experts, wrote:

In 10 Recent Federal Court cases, no online survey was faulted for its data collection method....

In recognition that online research has no greater self-selection issues than does its telephone counterpart, and possibly fewer, use of Web-based surveys is zoomed upward as Internet usage has expanded....

... To our knowledge, Internet surveys have been introduced into evidence without anyone's raising an eyebrow....

The MMR strategy group published a white paper in 2008 authored by Dr. Bruce Isaacson, president of the MMR strategy group, Prof. Jonathan D Hibbard, PhD. and Prof. Scott D Swan PhD, both of Boston University School of Management. Titled "Why Online Surveys Can Be a Smart choice in Intellectual Property Litigation," the authors wrote:

...Online surveys have another significant – and growing – advantage. The courts have indicated that (on-line) surveys examining likelihood of consumer confusion to be as 'realistic' as possible in replicating 'real world' consumer shopping experiences....

Conducting surveys over the internet started around 1997 and now is widely seen as an accepted mode of interviewing. In fact, online research has grown faster than all other research modes and now accounts for 38% of all commercial research projects. The growth has occurred because online research is often the fastest and least expensive way of gathering reliable data....

Hal Poret, another survey expert, contributed yet another article in *The Trademark Reporter* in 2010, titled "A Comparative Empirical Analysis of Online versus Mail and Telephone Methodologies for Trademark Surveys," He wrote:

Judicial criticism of online surveys is quite small...

Courts considering online surveys conducted in 2009 and 2010 seem not to question the use of online methodologies at all, finding them admissible without raising any concerns regarding the use of the Internet...

Most importantly, perhaps, the Internet is now the single most common means of collecting consumer opinion and behavior data in the market research industry....

So widespread have internet IP surveys become in fact that you hardly ever see any other kind of survey in a trademark infringement case today. Moreover, the internet has increased versatility. Surveys are designed specially for cellphones and major advances have been made in image, graphics and sound reproduction. And the best news is that clients have come to appreciate online surveys because the costs keep coming down.

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James Berger is principal of Northbrook (IL)-based James T. Berger/Market Strategies, LLC. A marketing consultant with broad experience in corporate and agency marketing services, he also performs expert witness work and consulting for intellectual property attorneys throughout the U.S. He focuses on likelihood of confusion, trade dress, secondary meaning, genericness, distinctiveness and dilution issues. In addition to developing surveys, he also critiques adversarial surveys. He co-authored Trademark Surveys—A Litigator’s Guide (Oxford University Press) with Mark Halligan of FisherBroyles. The Third Edition of this book will soon be published. He has also given continuing legal education seminars before bar associations in the Midwest and Texas. He is a faculty member at Roosevelt University and an often-published freelance writer.

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