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Costs, Expectations, and Methodologies for Trademark Surveys

By James T. Berger

In likelihood of confusion, trade dress, and secondary meaning cases, I am often called upon to develop surveys based on personal interviews at shopping malls, research centers, via telephone, or over the Internet. Most attorneys who have never personally been involved in such research generally

ask a number of key questions such as:

- How many interviews or responses are needed for significant results in such IP litigation surveys?
- How many research venues are needed?
- How do you gauge the effectiveness of results?
- What can my client expect to pay for this research?

“Significant” Results

What is considered a large or significant percentage of measured consumers? First, a good rule of thumb is to conduct a minimum of between 200 and 300 interviews. See Fred W. Morgan, *Judicial Standards for Survey Research: An Update and Guidelines*, 54 J. of Marketing 59–70 (Jan. 1990) (“Though sample size can always be criticized, minimum samples of 200 to 300 respondents seem to achieve a certain amount of face validity in the courts.”). Generally, “an informal rule of thumb is that four testing sites are a minimum number to ensure a reasonable degree of projection to universe of a larger area.” J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (4th ed. 1996).

McCarthy writes, “Percentages over 50 percent are usually viewed as persuasive evidence of likely confusion, with the Seventh Circuit remarking that a result of over 50 percent is strongly probative of a likelihood of confusion as ‘far in excess’ of the needed figure.” *Id.* at 32-315.

Generally, figures in the range of 25 percent to 50 percent have been viewed as solid support for a finding of likelihood of confusion. The Ninth Circuit has said that a

survey showing a 27.7% level of confusion is alone sufficient evidence to prevent a summary judgment that there is no likelihood of confusion. . . . [T]he Second Court found that a 15–20 percent rate corroborates a finding of likely confusion.

Id. at 32-326 to 32-327.

On the other hand, there are results that courts have considered to be too low. When the percentage results of a confusion survey dip below 10 percent, they can become evidence which will indicate confusion is not likely. The Seventh Circuit reviewing prior cases involving low percentage results found that 7.6 percent is “a factor weighing against the infringement.” Similarly low percentage figures have been relied upon to support a finding of no likelihood of confusion and no infringement.

Id. at 32-318.

What Do Surveys Cost?¹

The cost of doing a survey is a function of a number of things. The paramount factor is to make sure you are interviewing members of the relevant universe. For example, if the product in question is a package good available on supermarket or drug store shelves, one can safely develop a questionnaire directed to members of the general population. The shopping mall is the ideal venue for such research, and it can be done relatively quickly and inexpensively.

If the product is a specialty good targeted to specific consumers, a fast and relatively inexpensive telephone interview protocol can be employed. On the other hand, if the product in question is targeted to a specific market segment and a face-to-face interview is required, the researcher must recruit appropriate members of this target group and arrange for them to come into a research center at a specific time. Targeting this type of subject can be time-consuming and expensive.

In other cases, the face-to-face in-person interview is not feasible. Here, creative solutions that involve scheduling times for an Internet-type protocol or the air-expressing of materials that the subject will review while on the telephone with an interviewer will have to be employed.

Costs of Consumer Products Mall Surveys

Here recruiters from research companies within the mall screen and recruit suitable subjects. When the subjects enter the mall research center, they are signed in and taken to a room where the interview takes place. There is generally some small incentive involved. Depending on the length of the interview, who is being targeted, and the time constraints, a good rule of thumb is \$5.00. Most mall research centers will charge anywhere from \$20 to \$30 per interview in addition to the incentive fee. So, an attorney can figure a four- or five-venue survey of 250 people at from \$6250 to \$8750.

In addition, there is the cost of the research professional. When I contract to perform such studies, I like to be on hand to make sure that all the protocols are being followed. I observe the recruiting and the interviewing so that when I issue a report, I can do so with the assurance that I witnessed the execution. Daily fees for a research professional typically range from \$3000 to \$5000 per day plus the travel-related expenses of about \$500 per venue.

Totaling this up, one can safely figure a four-or-five venue mall study encompassing 250 participants to run from \$20,250 to \$30,750. Add to these costs the time involved in creating the questionnaire and tabulating and reporting on the results. Most questionnaires can be developed in approximately 10 hours of the expert's time (\$3000 to \$5000). Tabulation costs will run around \$1000. The cost of developing the expert's report will be in the range of 20 hours (\$6000 to \$10,000.)

Totaling all these variables, one can figure the cost of creating, executing, and reporting on a mall survey to be from \$31,000 to \$46,000, depending primarily on the hourly rate of the survey expert.

Costs of Consumer Products Telephone Surveys

This is perhaps the least expensive research alternative. Research companies operate call centers where they can interview randomly selected consumers or consumers whose phone numbers or addresses are generated by mailing lists. There is no incentive needed, and a good rule of thumb is \$20 per call. There is no need for the survey expert to be present at the call centers.

Therefore, one can figure a telephone survey of 250 to cost \$5000 plus the cost of the expert creating the survey (\$3000 to \$5000), the tabulations (\$1000), and the cost of developing the report (\$6000 to \$10,000). Thus, the total cost for this survey alternative will range from \$15,000 to \$21,000, depending on the hourly rate of the survey expert.

Specialty Surveys

Occasionally, I am called upon to develop surveys where specific respondents have to be specially recruited. For example, in doing a survey for a law firm representing a power tools company, it was necessary to interview professional tradesmen. The problem here is that these people are not available during the workday, so the interviews had to be scheduled on weekends or evenings during the week. Recruiting these people is time-consuming, and a rather large incentive is needed to bring them into the research center. The costs for recruiting can run from \$30 to \$40, and the incentive costs can run from \$40 to \$60.

All the other costs would be the same as for the mall study. So, one can figure for a four-or-five venue study of 250 participants, where members of a specific target market are brought into a research center, the costs can range from \$17,500 to \$25,000 for the basic threshold research costs. Adding the additional expert daily fees, travel expenses, plus the preparation of the questionnaire, tabulations

and developing the report, the total cost of such a survey can range from \$41,500 to \$63,000.

In the final scenario, when you have to do interviews and cannot bring people into a research facility, there is no basic way to figure costs. The incentives would be a function of the target market. For example, if you were to survey heart surgeons, what kind of incentive would you provide? It probably would have to be a substantial donation to a charity. Then, you would have to figure a way to communicate—especially if you want to ask specific questions about some products or brand names. One way would be through a customized Web site that the participant could access only when instructed by the interviewer on the phone. Another way would be through an air-expressed package, which the respondent would be instructed not to open in advance of the interview. These scenarios become extremely complex and costly.

Internet Surveys

In addition to being cost-effective, the Internet is fast and the data is often presented in a real time basis. For a normal, consumer package good kind of product, one can produce an Internet survey of about 250 respondents for under \$10,000. Additional costs will come from the survey expert. These costs include developing a survey protocol, questionnaire, working with the field research firm, analyzing the data and developing a final report. Different experts charge different rates for these activities.

The biggest reason for the rise of the Internet survey is the demise of the other more established in 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.

Not terribly long ago, telephone surveys were the rage. Call centers worked 24/7 calling people at home with her questionnaires. But technology and invention virtually killed the telephone survey. The biggest culprit is caller ID. Since most surveys emanate from 800 number call centers that 800-number shows up on the respondent's caller ID. Many people won't even answer the phone when they see that it comes from an 800 number.

The second technological culprit that killed telephone surveys is the cell phone. Virtually everybody has one and cell phone numbers are not listed in any directories. In fact, a very large percentage of telephone customers have given up their land lines in favor of cell phones.

Mall intercept surveys used to be very popular as well. The problem with mall surveys is the people who visit malls. Data shows that malls do not get that cross-section of the population that it is necessary for the right kind of relevant target market. Mall seem to be populated by young people and old people. Unfortunately, the average housewife and other members of families do not frequent the malls. Because of the problems with mall research, many malls have given up their research

facilities, which makes it very difficult to find shopping malls that are useful for survey research.

While technology and buyer behavior characteristics have crippled telephone and mall intercept research, this technology has strengthened the ability of the Internet to provide the trademark survey research function. Statistics show that people use their computers to access the Internet virtually every day. People also have become very comfortable with the point-and-click method of accessing and inputting data. Many surveys adapt nicely to the cell phone. Instead of having to use a computer, the survey researchers can obtain data input through cell phones.

Internet method favored by most survey experts involve the use of Internet survey panels. Survey panels consist of large numbers of people who volunteered to take surveys for compensation. Series are introduced to the panel so that qualified panel members can take the surveys. A problem with using these panels involves doing surveys with essentially professional survey takers. This problem often comes to light when a validation is needed for an Internet survey. A validation involves hiring an independent research organization to recontact a percentage of survey respondents to determine if these respondents are qualified to take the survey if these respondents remember taking the survey. Because Internet panelists are professional survey takers, there is a chance they may not remember taking the survey in question. There is no question that they took the survey, but they may be confused because they take so many surveys and may not remember taking the survey being validated.

No survey method is perfect. Short of an expensive probability study any of these judgment sample methods have problems. Realizing that any methodology will not be perfect, the Internet seems to possess more positives and negatives in determining what medium to use.

Courts like the Internet, too. A number of peer-reviewed articles that have appeared in respected journals all confirm that judges, courts, and the market research industry view Internet surveys in a positive light.² Moreover, they confirm that the Internet has become the methodology of choice in the market research industry.

Final Concerns

Even the least expensive of these alternatives is costly. Depending on the nature of the litigation and the characteristics of the target market, the costs can be enormous. Before embarking on any of these journeys, the smart IP attorney will do an inexpensive local test to determine (1) the merits of the questionnaire; (2) the time and expenses that will be required to recruit respondents and (3) most importantly, the approximate results that the survey can be expected to generate.

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This article expresses the personal views of the author and not necessarily that of the State Bar of Texas IP Law Section.

Endnotes

¹ Cost estimates expressed by this author are based on his personal experience. Actual costs may vary depending on who is selected as the survey expert to develop and manage the survey, the specific problem or opportunity being studied, and geographic locations. Estimates referenced here are not meant to be quotations of the costs that the expert charges. Instead, these are averages ranges for marketing survey costs.

² See, e.g., Gabriel M. Gelb & Betsy D. Gelb, *Internet Surveys for Trademark Litigation Ready or Not Here They Come*, 97 *The Trademark Reporter* 1073 (2007); Hal Poret, *A Comparative Empirical Analysis of Online Versus Mall and Phone Methodologies for Trademark Surveys*, 100 *The Trademark Reporter* 756 (2010) (noting that “[d]espite . . . many theoretical and practical concerns, the number of actual judicial criticisms 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”).