By **Robert W Sacoff**

People power? A survey of surveys

Survey evidence can be a potent weapon in trademark cases. However, not all surveys are equal and none is immune to criticism. Counsel must ensure that surveys are properly designed and conducted so that they can carry their points successfully

Why have surveys become so common in trademark litigation? Properly conducted, they provide persuasive direct evidence of buyer perceptions of the brands and products at issue. They can be used to prove or contest many key contentions in trademark and advertising cases, including the following:

- Is the defendant's mark likely to cause confusion?
- Is the mark merely descriptive?
- If so, has it acquired distinctiveness?
- Is the term really a trademark or merely a generic term?
- What message do people take away from an advertisement?
- Is the senior mark 'famous' and the junior mark likely to dilute it?

With likelihood of confusion – the issue on which surveys are perhaps most commonly conducted – good survey evidence can often be as powerful as evidence of actual customer confusion in the marketplace. But this of course depends on the quality of the specific survey and confusion evidence in hand. And actual confusion evidence is notoriously hard to come by. Even if actual confusion has occurred, it is often unreported. If it is reported, it is often undocumented.

The US rules of evidence applied by the federal courts, where infringement cases are tried, and the Trademark Trial and Appeal Board (TTAB), where trademark oppositions and cancellations are tried, have come a long way towards accepting evidence of properly conducted surveys. In the early days, the courts viewed survey evidence with great scepticism, often refusing to admit it on hearsay grounds, based as it was on the out-of-court statements of respondents not subject to cross-examination.

However, surveys are seldom excluded on such grounds today, either because the results are recognised as not being hearsay (ie, they are not out-of-court statements submitted to prove the truth of the matter asserted – for instance, whether products sold under the respective marks come from the same company), or because the evidence merely shows the respondent's state of mind. Today, Federal Rule of Evidence 803(3) provides a broad statement of the state-of-mind exception, regardless of whether the declarant is available or unavailable to testify as a witness: "Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."

The US Supreme Court has held that these rules require trial judges to perform a gatekeeper function, determining whether the expert testimony offered into evidence "rests on a reliable foundation" and "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue" (*Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 1993).

Today, trademark surveys in the United States are typically held to be not barred by the hearsay rule and – if properly designed, executed and interpreted by a qualified expert – will be admissible as evidence.

Globally, the courts and administrative tribunals that deal with trademark issues in many (but not all) other countries have also shown increasing acceptance of trademark surveys as important probative evidence in disputes, though often sceptically and always carefully.

In a recent case the Supreme Court of Canada commented at length about the value of expert testimony and survey evidence on likelihood of confusion (*Masterpiece, Inc v Alavida Lifestyles Inc*, [2011] 2 SCR 387). First, the court critiqued the (non-survey-based) opinion of an expert as to likelihood of confusion as unnecessary, unhelpful and distracting from the real issues (*id* at pars 79-80). However, the court went on to view survey evidence quite differently: "Surveys, on the other hand, have the potential to provide empirical evidence which demonstrates consumer reactions in the marketplace – exactly the question that the trial judge is addressing in a confusion case. This evidence is not something which would be generally known to a trial judge, and thus unlike some other expert evidence, it would not run afoul of the second *Mohan* requirement that the evidence be necessary. However, the use of survey evidence should still be applied with caution" (*id* at par 93).

The author moderated a workshop panel discussion in 2006 at the International Association for the Protection of Intellectual Property (AIPPI) 40th World Intellectual Property Congress in Gothenburg, Sweden. The panel included lawyers from Argentina, England, France, Japan and the United States,

discussing "The Role of Survey Evidence In Trademark Proceedings and Disputes" in countries and regions around the world. The summary of proceedings (available at www.aippi.org/download/gothenburg2006/report_workshop_V.pdf) stated in part:

> *The Workshop discussion indicated that the courts in the US, UK and the common law countries all expressed skepticism of survey evidence early on, largely because of its nature as hearsay evidence. But eventually, they came to recognize the more important question is whether the survey is designed and conducted in a scientific, objective and unbiased manner. If so, it is powerful evidence of the mental reactions and associations of members of the relevant consumer universe, which are directly relevant to the central issues in most trademark, unfair competition and false or deceptive advertising cases. If a survey is not designed in a reliable and trustworthy manner, however, it will either be rejected by the court altogether, or given diminished persuasive weight in accordance with the severity of its defects. Today, unbiased surveys designed and executed with careful controls and scientific integrity are routinely accepted by the courts. In some countries such surveys are strongly encouraged, if not virtually required, in trademark and unfair competition cases. However, the Workshop panelists agreed that survey evidence is still only one of several ways to prove distinctiveness, likely confusion or deceptiveness, and surveys should not be legally required as an element of proof in all cases.*

Survey evidence also enjoys acceptance, in similar circumstances and subject to similar conditions, in France and the civil law countries of the European Union, though surveys are used more often to prove distinctiveness than likelihood of confusion. This is also the situation in Japan, where surveys have been accepted in a number of cases and are becoming more commonplace. In Argentina and South America, however, surveys are seldom used, with the courts sometimes noting that surveys are unnecessarily expensive and burdensome on the parties. However, it was noted that surveys were slow in gaining acceptance in other jurisdictions, and that this could prove to be the long-term trend in South America as well.

Surveys can also be useful in infringement disputes even before formal litigation is initiated. Rights holders can test the water with an informal survey to see whether a significant percentage of respondents exhibit confusion between the marks, in which case a more formal evidentiary survey would be expected to show the same results. If counsel is sufficiently familiar with survey methodology, this can be carried out more cheaply than a full-blown evidentiary survey and may provide useful results to help a rights holder decide whether to file a case. Alternatively, in pre-litigation or early litigation negotiations, or in an alternative dispute resolution mediation, it may be effective to share the results of an informal survey with the adversary to show the extent of confusion and the strength of the case.

The need or advisability of evidentiary surveys that are designed to be submitted in litigation should be considered early in developing the case strategy. Surveys cannot be designed, conducted and interpreted into a report overnight, and it is essential to have enough time to engage a qualified expert. There are no hard-and-fast rules on whether to carry out a survey. Some courts have suggested that the absence of one should weigh against a party on the issue of likelihood of confusion (*Star Industries v Bacardi & Co*, 412 F 3d 373 (2d Cir 2005)). The Fifth Circuit Court of Appeals noted in a recent case that no survey evidence had been submitted by the plaintiff, and suggested it would have been useful to have some (*Amazing Spaces, Inc v Metro Mini Storage*; *Landmark Interest Corp*, 608 F 3d 225 (5th Cir 2010)). However, the majority rule in the US federal courts and the TTAB is that survey evidence is not required to show likelihood of confusion. The US Court of Appeals for the Federal Circuit, which has jurisdiction to hear appeals against opposition decisions by the TTAB, stated in one case, "[N]either the Board nor this court has required survey evidence in order to show a likelihood of confusion", citing "sister circuit" rulings in the First, Third, Fourth and Eighth Circuits, along with rulings issued by the TTAB (*Midwestern Pet Foods, Inc v Societe Des Produits Nestle SA*, 685 F 3d 1046 (Fed Cir 2012)).

The decision of whether to run a survey depends on consideration of the facts, circumstances, venue, strengths and weaknesses of the case. If the case is important and expense is not a strong limiting factor (it is always a factor), a survey should probably be explored.

However, if the case is strong (eg, involving very similar marks, closely related goods, evidence of actual confusion or bad intent), a survey may not be essential. In a more borderline case (eg, less similar marks, less related goods, no confusion or intent evidence, perhaps a problematic third-party picture), survey evidence may tip the balance. "In borderline cases where evidence of actual confusion is not available or is not overwhelming, the gap should be filled by a properly conducted survey of the relevant class of prospective customers of the goods or services at issue" (*Steak Umm Co, LLC v Steak 'Em Up, Inc*, 868 F Supp 2d 415, 434 (EDPa 2012).

The other factor that needs to be considered is what your adversary plans to do. If it is likely to conduct a survey and introduce it as evidence, this obviously bears on your client's decision as to whether to carry out its own. In one TTAB opposition, the opposer submitted strong survey evidence of likely confusion and the board noted with implicit criticism that the applicant neither carried out its own survey nor submitted an expert critique of the opposer's (*Arrow Trading Co, Inc v Victorinox AG*, Opp No 91/103,315 (TTAB 2003)). In both federal court and TTAB litigation, the parties, through their counsel, are obligated to conduct an early discovery conference in which the timing of certain disclosures, such as expert reports, must be discussed. However, counsel often claim that they have not yet decided whether to submit survey evidence at this point. The TTAB routinely sets a simultaneous deadline for the parties to submit their expert reports, if any, 30 days before the close of discovery. The standard disclosure, unless otherwise agreed or ordered, must include:

- the expert's written report and a complete statement of his or her opinion with its bases and reasoning;
- all data relied upon in forming the opinion;
- any exhibits;
- the expert's qualifications;
- a listing of cases in the past four years in which the expert has testified; and
- the expert's compensation for preparing the report and opinion and presenting testimony.

If one or both parties submits a survey report, fact discovery is suspended for expert discovery and a deadline is set for the submission of rebuttal reports, if any. In federal court proceedings, the parties are required to have an early case management conference, and to agree upon and suggest to the court a discovery schedule, including the timing of expert disclosures, reports and discovery. That schedule may provide for simultaneous survey report deadlines, as occurs before the TTAB. If agreed, it may set staggered deadlines for identifying potential experts, with a later deadline for submitting the actual reports. Or if the parties agree and the court or the TTAB orders, one party (typically the party bearing

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the burden of proof) may be required to identify potential experts and/or to submit its expert reports earlier than the other party.

In any event, if your adversary runs a survey and submits an expert report, you must decide whether to run a counter-survey or engage your own expert to critique and submit a report debunking the other expert's report or just to cross-examine the opposing expert to expose methodological flaws. If you take the approach of submitting an expert critique or the riskier approach of cross-examining the opposing expert, it is even more important to conduct a thorough discovery deposition of the opposing expert, tying him or her down to the written report and examining the explanations and defences of the survey's vulnerabilities.

Assuming that you have decided to do a survey, how should it be designed, executed and interpreted? The US rule structure starts with Rules 702 and 703 of the Federal Rules of Evidence, which apply to both federal court and TTAB litigation. They speak broadly to the types of expert testimony that should be admitted into evidence, including survey experts and survey evidence. Rule 702 provides: “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Rule 703 provides: “If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the [expert's] opinion or inference [based thereon] to be admitted.”

Survey evidence is typically relied upon by experts in forming opinions on the issues in trademark cases, as shown by a long list of decisions in such cases. The battles over whether a particular survey report will be admitted and the weight to be accorded to it depend on the design, execution and interpretation of the survey methodology and results. The Federal Judiciary Centre lists the following criteria for conducting surveys in a methodologically sound manner:

- Respondents should be selected from the proper universe.
- They should constitute a representative sample of that universe.
- The resulting data should be accurately reported.
- The data should be analysed in accordance with accepted principles.
- The survey questions should be clear and not leading.
- Qualified persons should conduct the survey using proper interviewing procedures (*Manual for Complex Litigation* (Fourth), § 11.493 (2010)).

These factors are the most common battlegrounds for contesting the admissibility and persuasiveness of an adversary's survey. Given the frequency with which surveys are submitted by one side and criticised by the other, and the sheer volume of case law on survey evidence, the courts often observe that no survey is perfect. The ultimate issue, after flaws have been alleged and defended, is whether the alleged flaws preclude the survey's admissibility into evidence or whether, if admissible, the alleged flaws count against its weight and credibility. The majority rule, according to the Fourth Circuit (and Professor McCarthy), is that “technical deficiencies” can reduce a survey's weight, but will not prevent its admission into evidence (*Belk, Inc v Meyer Corp, US*, 679 F 3d 146, 163 (4th Cir 2012), citing 6 McCarthy, *Trademarks and Unfair Competition* § 32:170 (4th ed 2012)). The court stated: “While there will be occasions when the proffered survey is so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible, such situations will be rare” (*id* at 163).

Survey evidence must be put in through an expert witness (*Bobak Sausage Co, v A&J Seven Bridges, Inc*, 2010 WL 1687883 (ND Ill 2010)). Therefore, the threshold issue of the expert's qualifications is always a potential issue. In exercising its gatekeeping functions under the Federal Rules of Evidence, the court must confirm that the proposed expert has specialised knowledge to assist the finder of fact in deciding particular issues. In determining this, the court considers the proposed expert's full range of experience and training, not just his or her professional qualifications (*id* at 162). In the *Belk* case, an expert was allowed to testify even though it was his first trade dress case and survey. He had been qualified as an expert witness in marketing, consumer behaviour and evaluative studies, and had testified as an expert in consumer behaviour and marketing in about 20 prior cases. In another case involving a first-time designer of a likelihood of confusion survey, the expert was allowed to testify because he had some experience designing and administering surveys other than consumer confusion surveys. The court said that while his relevant experience was not extensive, it was sufficient to qualify him as an expert, and his limited specific expertise in customer confusion surveys would impact his credibility, but not the admissibility of his testimony (*1-800 Contacts, Inc v Lens.com, Inc*, 2010 WL 5186393 (D Utah, 2010)).

Experts who critique the surveys of other experts must also be qualified under the applicable rules of evidence. In a recent case, *E&J Gallo, v Proximo Spirits, Inc* (2012 WL 273076 (ED Cal 2012)), a criticising expert was challenged on the ground that his testimony and report were not based on “facts or data”, as required by Federal Evidence Rule 702. The court rejected the objection and admitted the critique, stating “Dr. Ostberg's report is within his area of expertise. In addition, the Proximo plaintiffs cite a number of cases that support its position that expert reports evaluation [sic] the methodology of a survey are permitted under Daubert and Fed. R. Evid. 702.”

Proper universe

It is essential to identify and correctly define the group whose

perceptions are relevant to determining whether confusion is likely. Typically, this group consists of purchasers and/or potential purchasers of the type(s) of products or services involved in the case. But whose products or services? This varies depending on whether the case is a forward confusion or reverse confusion case. "In contrast to cases of 'forward confusion', where 'the new or junior user of the mark will use to its advantage the reputation and good will of the senior user by adopting a similar or identical mark ... [r] everse confusion occurs when a larger, more powerful company uses the trademark of a smaller, less powerful senior owner and thereby causes likely confusion as to the source of the senior user's goods or services" (*Fancaster, Inc v Comcast Corp*, 832 F Supp 2d 380,403 (DNJ 2011)). When the case involves (traditional) forward confusion, the proper universe is the purchasers and potential purchasers of the junior user's products or services, as those are the people who will allegedly be deceived. When the case involves reverse confusion, the customers and potential customers of the senior user constitute the proper universe.

For example, in one recent case, *1-800 Contacts, Inc v Lens.com, Inc* (2010 WL 5186393 (D Utah, 2010)), the plaintiff challenged the defendant's use of sponsored links on websites, alleging that the defendant's activities were likely to confuse consumers who purchased contact lenses over the Internet. The challenged survey qualified respondents by asking them whether they had purchased contacts within the last 12 months or intended to purchase contacts within the next 12 months. The survey's universe was challenged on the ground that it was overinclusive, not being limited to people who had purchased, or were likely to purchase, contact lenses over the Internet, as only those people would have seen or would see the sponsored link at issue. The court agreed with the objection, found the universe to be overinclusive and excluded the survey from evidence (noting other methodological flaws as well).

However, in a different case, the universe was challenged because it was limited to referring physicians rather than the general allergy-suffering public at large (*Atlanta Allergy and Asthma Clinic, PA v Allergy & Asthma of Atlanta, LLC*, 685 F Supp 2d 1360 (NDGa 2010)). The plaintiff successfully defended its stated universe on the ground that 85% of the defendant's patients came from physician referrals, and the defendant devoted virtually all of its marketing towards doctors and not individual consumers.

In *Bobak Sausage Co v A&J Seven Bridges, Inc* (2010 WL 1687883 (ND Ill 2010)) the universe was held to be both overinclusive and underinclusive at the same time, in different respects. It was overinclusive because it included people living in the entire Chicago metropolitan area (or at least anybody in that area with a telephone), and had no limitation based on the respondents' relevant purchasing preferences (eg, whether they had purchased sausages or rented banquet facilities or were likely to do so). At the same time, it was underinclusive because it included only individuals and not businesses, which represented a large sector of the defendant's trade. The survey was admitted, but these and other flaws in its methodology counted against it.

Representative sample of the customer universe

Surveying a handful of people proves little or nothing. A survey must cover a sufficient number of qualified (ie, in the proper universe) respondents to be probative. There is no litmus test for the number, but it is customary to include hundreds of respondents. Surveys fall into the categories of probability and non-probability surveys. Probability surveys are projectable to the entire universe as per the scientific rules of statistics. They are also extremely expensive.

More common in trademark litigation are non-probability surveys, of which the most common variety is the mall intercept survey. Typically, individuals are intercepted in a shopping mall, or perhaps in a collection of shopping malls in different cities, and asked the survey questions. The TTAB has accepted mall intercept surveys in trademark opposition proceedings, provided that they are otherwise methodologically sound (*Miles Labs, Inc v Naturally Vitamin Supplements, Inc* (1 USPQ 2d 1445, 1455-56 n33 (TTAB 1986)). Similarly, the federal courts have traditionally accepted mall intercept surveys. The Fourth Circuit Court of Appeals stated in a recent case: "this court has also noted that '[m]all intercept studies have been accepted by this court and others, despite their lack of projectability... Thus, the fact that a survey was based on a non-probability sample goes to its weight, not its admissibility" (*Fancaster, Inc v Comcast Corp*, 832 F Supp 2d 380, 405 (D NJ 2011)).

Not all surveys are mall intercept interviews. Depending on the nature of the stimulus that needs to be given to the survey respondents, telephone surveys may be suitable and there is a growing exploration of internet surveys, reflecting changing patterns of consumer behaviour and different purchasing environments.

Accurate reporting

The *Reference Manual on Scientific Evidence* (Fed Judicial Centre, 2d ed 2000) identifies the following elements which should be included in a survey report:

- the survey's purpose;
- a description of the universe and the sample taken from it;
- a description of how respondents in the sample were selected, the interviewing method, validation (post-interview confirmation callbacks), screening criteria used and other pertinent information;
- a description of how many potential respondents were contacted to obtain the final sample and how many interviews were conducted to obtain the final, completed interviews;
- the questions that respondents were asked, including a copy of the questionnaire, interview instructions and exhibits shown;
- a description of how the expert categorised responses;
- an estimate of any sampling error in probability samples; and
- clearly labelled statistical data tables.

Analysis in accordance with accepted principles

Reviewing the verbatims – the pages completed in the field recording the exact words and responses of the survey respondents – and classifying responses fairly as 'confusion' or 'non-confusion' are critical tasks that call for the survey expert's expertise and objectivity.

Ultimately, the expert will draw conclusions as to the extent of confusion revealed by the survey results. Increasingly, there is a trend to require running a control cell to measure and adjust for the amount of 'noise' present in the survey results. Noise is non-responsive survey data that results either from irrational answers, guesses or reactions to elements of a stimulus other than the mark being tested. To design a proper control, the expert should select a stimulus for the control group of respondents that shares as many characteristics as possible with the original stimulus being measured, with the key exception of the particular word, phrase or other characteristic whose influence is being assessed (*United States Polo Ass'n, Inc v PRE USA Holdings, Inc*, 800 F Supp 2d 515, 534 (SDNY 2011), internal citations omitted). Once the amount of noise is measured, it is subtracted from the gross percentage of survey results showing confusion to reach a net confusion percentage.

There is no statutory or universally agreed-upon percentage of confusion results that is acceptable to show the likelihood of

confusion. One district court observed: "When the percentage results of a confusion survey dip below 10%, they can become evidence which will indicate that confusion is not likely. The Seventh Circuit, reviewing prior cases involving low percentage results, found that 7.6% is 'a factor weighting [sic] against infringement.' Similar low percentage figures have been relied upon to support a finding of no likelihood of confusion and no infringement" (*HealthOne of Denver, Inc v UnitedHealth Group Inc*, 2012 WL 1949008 (D Colo 2012), citing McCarthy §32:189)). However, the Seventh Circuit also found in a different case that 15% confusion evidenced a likelihood of confusion sufficient to establish the plaintiff's right to relief (*James Burrough, Ltd v Sign of the Beefeater, Inc* (540 F 2d 266, 279 (7th Cir 1976)). Courts, and counsel deciding whether to submit a survey, should be wary of applying a strictly numerical test, as these can be misleading. The survey results should be viewed in the broader context of the methodology, control (if any), objectivity and overall credibility of the survey at hand.

> **"There is no statutory or universally agreed-upon percentage of confusion results that is acceptable to show the likelihood of confusion"**

Clear and non-leading questionnaires

Numerous questionnaire formats have been accepted by the courts. A traditional, common "confusion" format is the *Eveready* template used in *Union Carbide Corp v Ever-Ready, Inc* (531 F 2d 366 (7th Cir 1976)). The plaintiff, the maker of the well-known EVEREADY batteries, sued to enjoin the defendant's use of EVER-READY for flashlight lamps and minibulbs. After the respondents were qualified to make sure they were in the proper universe, they were shown the defendant's product as the stimulus and asked:

- What company do you think puts out this product?
- What makes you think so?
- Please name any other products made by the same concern that puts out the lamp shown here.

Additional probing questions are often added today to determine perceived authorisation or sponsorship of the defendant's product by the plaintiff, such as:

- If you have an opinion, do you believe that the product shown on this card is or is not made or put out with the approval or sponsorship of any other company or brand? If yes, which other company or brand?
- Whether you know the name of the other company or brand that approved or sponsored the product shown on this card, what, if anything, can you tell me about that company or brand?

The counterclaim defendant in *E&J Gallo v Proximo Spirits, Inc* (2012 WL 273076 (ED Cal 2012)) effectively used an *Eveready* survey to demonstrate that confusion was unlikely. Of 216 respondents shown a sample of Proximo's bottle and asked the basic *Eveready* questions, only one person expressed confusion based on the shape of the bottle. The court "agree[d] that Dr. Ford's survey results and conclusion are highly probative of likelihood of confusion or the absence thereof".

The goal of the survey is to replicate the purchaser's decision in the actual marketplace as closely as possible. Thus, the stimulus in an infringement case is usually a sample of the defendant's product in the actual packaging in which it is sold. If the actual product is too large, a photograph is sometimes used. However, in opposition proceedings the focus is on the mark sought to be registered. Typically, the stimulus in such a case would be a card showing the word mark, if it is applied for registration in standard characters, or a photograph of the logo or composite mark sought to be registered.

The stimulus was criticised as diverging significantly from the marketplace purchasing experience in *Fancaster, Inc v Comcast Corp* (832 F Supp 2d 380 (DNJ 2011)). The stimulus was a printout of a static screenshot instead of hands-on access to live websites such as those that would be used in the actual selection and purchasing process.

Illustrating the leading question issue, the questionnaire in *1-800 Contacts, Inc v Lens.com, Inc* (2010 WL 5186393 (D Utah, 2010)) was held to contain improperly suggestive closed-ended questions. The pertinent question was "Do you think that the link marked with the asterisk (*) originates from 1-800-CONTACTS?" Respondents could choose "Yes", "No" or "Don't know". No other company name was mentioned. The court found: "The problem . . . is not the failure to use an open-ended question, but the failure to design a close-ended question that offers exhaustive alternative responses. Here, the form of the question strongly suggested the response."

Qualified survey-takers using proper interviewing procedures

Typically, the expert retains a professional survey-taking company, provides it with the stimulus, questionnaire and precise instructions on how to execute the survey (eg, whether to hand the stimulus to the respondent, how long to allow for examination, whether to take it back). As another safeguard against bias, surveys are usually conducted in a 'double-blind' manner, with neither the survey takers or the survey respondents knowing what companies are behind the survey or its target. Experienced experts and survey companies will have solid procedures for control and post-survey validation of results. The absence of such procedures can be an issue.

In sum, surveys in trademark cases can serve as potent evidence, but only if they are designed, executed, interpreted and presented methodically and objectively by a qualified expert. Despite the greatest care, every survey can be criticised in one way or another. It is counsel's job to navigate around potential pitfalls, and to minimise and defend any vulnerabilities in the client's survey, within the factual nuances of the case, while finding and exposing the flaws of the adversary's work. WTR

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