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Surveys, science & skepticism

By Daniel Kegan

"All we can know are the results of our experiments and observations, not some ultimate reality that lies beyond our perceptions." (Walter Isaacson, Einstein, Chap 20, epage 2038, on the Bohr-Einstein perspectives on reality.) Judges and juries have the same problem, having to find facts based on witnesses with classic human frailties.

Limited Human Knowledge

Trials are human endeavors, and the human frailties of perception, memory, communication, and sincerity were well known by John Henry Wigmore (Roalfe, William R. John Henry Wigmore: Scholar and Reformer. Northwestern University Press, 1977) and are well known by current judges and juries. Judges and juries do not simply add the pieces of evidence introduced by each side and award a judgment to the heavier side; nor are lawsuits decided by a random dart throw. Judges and juries are human, and within the limitations of human memory and judgment, they attempt to give a just decision.

Moreover, triers of fact know that all witnesses are not perfectly honest. Even if a witness seeks to be honest, he or she may have misremembered the facts of some years ago. Even if the witnesses' memory is correct, the witness may not have correctly perceived the event in the first place. Bad lighting, poor hearing, illegible handwriting, ambiguous human communications all make the trier of fact's task difficult.

Beyond common human frailties, some facts are complicated. To help the trier of fact to understand the evidence or to determine a fact in issue, FRE 702 permits expert testimony. Expert witnesses are used in diverse areas of the law, including intellectual property, and are typically paid for their work, as attorneys commonly are. A skilled expert may find consistent employment helping fact finders understand the evidence and implied facts.

Consumer Survey Research

Once upon a time survey evidence was considered inadmissible hearsay. *United States v. 88 Cases,* 187 F2d 967 (3d cir. 1951) (survey evidence not inadmissible hearsay).

> Parties sometimes object that an opinion survey, although conducted according to generally accepted statistical methods, involves impermissible hearsay. When the purpose of a survey is to show what people believe—but not the truth of what they believe—the results are not hearsay. In the rare situation where an opinion survey involves inadmissible hearsay, Federal Rule of Evidence 703 nevertheless allows experts to express opinions based on the results of the survey.

(Manual for Complex Litigation, 4th ed, § 11..493, pp. 103-04, Federal Judicial Center 2004).

Now, consumer survey evidence is often expected in trademark cases, and other intellectual property disputes. Eg, Kegan, Daniel. Survey Evidence in Copyright Litigation, 32 J Copyright Society USA 283 (June/Aug 1985). Recently proposed federal discovery amendments recognizing "proportionality" for electronically stored information (ESI), and for the entire scope of discovery, may excuse poorer parties from presenting survey evidence (FRCP 26(b)(1), "discovery must be proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties's resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit"). Before and after the scope of discovery rule may be amended, discovery ought to be reasonable (See FRCP 26(c), Protective Orders).

> Consumer perception lies at the heart of trademark law, but identifying precisely what that perception might be in a form which satisfies judicial inquiry can prove elusive. Many parties turn to market surveys. By simply asking individuals what is their response to certain stimuli and recording the results, the hope is that an understanding can be gained of how a mark is perceived by consumers in the marketplace. Unfortunately however, surveys are often found by courts and tribunals to be so poorly designed and lacking in objectivity that they are given little weight and rendered useless as evidence. As a consequence, parties frequently waste significant time and money and place an unnecessary burden on the legal infrastructure.
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> To try and address this inefficient use of resources, members of the International Trademark Association's (INTA) Courts & Tribunals Subcommittee sought details from practitioners across the world as to whether any official guidance or useful case law had been published in their jurisdiction as to how to properly conduct a survey. By understanding the best practices adopted by courts and tribunals in survey design, execution and presentation, the intention is that a framework for authoritative and universal guidance could be developed. This will allow a degree of harmonization and prove a persuasive tool for those countries where guidance is under-developed or non-existent.

International Trademark Association, Report on Best Practices in Conducting Surveys in Trademark Matters, 2013.

Among major corporations, intellectual property now comprises over 80% of total enterprise value (Parr, Russell L & Gordon V Smith. Intellectual Property: Valuation, Exploitation, and Infringement Damages, 11th ed, 2013 cumm supp, p. xvii, Wiley, 2013).

After more than a half-century of development, the social science of survey research is well developed.

(Diamond, Shari Seidman & Jerre B Swann. Trademark and deceptive Advertising Surveys: Law, Science, and design. ABA, 2012; Jacoby, Jacob. Trademark Surveys: Designing, Implementing, and Evaluating Surveys, vol 1. ABA, 2013). Although half the professionals may perform below average, some avoid regression artifacts and consistently have unusually good records (Silver, Nate. The Signal and the Noise: Why So Many Predictions Fail—But Some Don't, Penguin Press HC, 2012).

Skeptical Criticisms

"Consumer surveys conducted by party-hired expert witnesses" are no more "prone to bias" than are party-hired attorneys. (Quoted phrases from *Kraft Foods Group Brands LLC v Cracker Barrel Old Country Store, Inc* (7th Cir, 13-2559, 14Nov2013).

Attorneys are to "zealously asserts the client's position under the rules of the adversary system" (IL MR 3140, IL Rules of Professional Conduct of 2010, Preamble, 2). "When an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done" (Id. 8). The evidence rules and trial

court judicial discretion are designed to eliminate immaterial and unduly prejudicial evidence from fact finding (FRE 403).

There is “a wide choice of survey designs” (Kraft), none foolproof. No measurement is without error, all research designs contain plausible rival hypotheses. (Heisenberg, observation influences the measured; Campbell, Donald T & Julian C Stanley. Experimental and Quasi-Experimental Designs for Research, 1963; Huck, Schuyler, W & Howard M Sandler. Rival Hypotheses: Alternative Interpretations of Data Based Conclusions, Harper & Row, 1979).

> A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer” (IL R Professional Conduct, R 3.3 (a)(1)). “In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person; or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

(Id. R 4.1).

When an expert witness acts for a lawyer, the lawyer shall make reasonable efforts to ensure that the expert’s conduct is compatible with the professional obligations of the lawyer. Id., Standard 5.03, Comment (b). Backstopping legal ethics is FRCP 11. Sometimes “experts abandon objectivity and become advocates for the side that hired them” Kraft. Such is true for trademark surveys and throughout litigation.

Most professionals also have ethics codes against dishonesty. “Psychologists seek to promote accuracy, honesty and truthfulness in the science, teaching and practice of psychology. In these activities psychologists do not steal, cheat or engage in fraud, subterfuge or intentional misrepresentation of fact” (American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, 2010, Principle C: Integrity). “Psychologists do not make false, deceptive or fraudulent statements concerning…the scientific or clinical basis for or results or degree of success of, their services; or their research findings” Id., Standard 5.01.

There are several well-known remedies for asserted biased expert testimony. A well-pled motion in limine might reduce the risk of irrelevant expert testimony (FRCP 26(a)(2) Disclosure of Expert Testimony). As an ounce of prevention is worth a pound of cure, following the suggestion of the Manual for Complex Litigation, that the litigation parties jointly agree on a common survey design should eliminate most survey disputes, or at least reduce many of them. (4th ed, Federal Judicial Center 2004; <https://public.resource.org/scribd/8763868.pdf>, 15Jan2014).

> Parties who propose to offer sampling or survey evidence may want to consider whether to disclose details of the proposed sampling or survey methods to the opposing parties before the work is done (including the specific questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process). Objections can then be raised promptly and corrective measures taken before the survey is completed. A meeting of the parties’ experts can expedite the resolution of problems affecting admissibility.

(Id., Sampling/Opinion Surveys, § 11.493, p. 102). As with much wise preventative advice, this is rarely done.

The number of survey participants required for reasonably reliable evidence depends on several factors, including the characteristics of the universe to which the survey sample is intended to generalize and the frequency of the measured traits. A national quasi-random survey of 50 adults in the USA will likely yield a reliable measure of the national percentage who believe the moon is made of cheese. Strong data survives random error.

Although many people may consider themselves average or typical, depending on the product, marketing, trade channels, and the like, special survey design and differing results evaluation may be required. Surveys for some products regulated by

the Food and Drug Administration may need to include "the ignorant, the unthinking and the credulous" (*Unites States v. An Article … Sudden Change*, 409 F2d 734, 740 (2d Cir. 1969), citing *Florence Mfg. Co. v. J.C. Dowd & Co*, 178 Fed 73, 75 (2d cir. 1910).

Conclusion

Since all measurement includes potential error, a professional forensic expert report not only presents the expert's factual findings and conclusory opinions on non-ultimate legal questions and the "reliable principles and methods" used (FRE 702), but also discusses the plausible rival hypotheses and the survey elements designed to reduce their material impact on the data. Preemptory pretrial explanation, perhaps coupled with a clear brief for or against a motion in limine, may permit more concise expert testimony and less fact finder confusion.

Science is a collection of temporarily proven hypotheses (Cf Ptolemy, Newton, Einstein; *Bradwell v. Illinois*, 83 US (16 Wall.) 130 (1873) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life... [T]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.").

Judicial decision-making rarely expects 100% certainty. Civil matter require only half-plus certainty—a preponderance of the evidence. While there are multiple alternatives in trademark litigation to consumer surveys—Kraft suggests statistical data and other types of expert testimony—every means of assessing reality has its errors and limits. While Jorge Mario Bergoglio may decline to make some judgements ("who am I to judge"), our district court judges are tasked with efficiently managing the truth seeking and error winnowing process of litigation. Absent clear error we generally accept balancing the relative merits of the parties living with quantum, albeit imperfect evidence. ■

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