



2019 Study Question

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Consumer survey evidence

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I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

1.a Is consumer survey evidence in principle admissible in trademark proceedings? Please answer YES or NO.

Yes

Please Explain

1.b Are there specific statutory provisions in your law governing consumer survey evidence?

If YES, what do they state and do they specifically concern trademark matters or do they have a more general nature?

No

Please Explain

If you have answered NO to Q1)a), please skip Q2)-Q5) and proceed to Q6); If you have answered YES to Q1)a), please proceed to Q2).

2.a Is consumer survey evidence admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Yes

Please Explain

There is no restriction regarding the admittance of consumer survey evidence in trademark proceedings.

2.b If consumer survey evidence is not admitted in all types of trademark proceedings, in which types is it admitted and in which types is it not (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?

N/A

3.a What can consumer survey evidence prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Theoretically, there are no restrictions with respect to what consumer surveys can prove or help prove. In practice, consumer survey evidence can prove or help to prove acquired distinctiveness, enhanced distinctiveness, reputation, well-known character and confusion between marks, as well as damages to / taking unfair advantage of the reputation or distinctive character of trademarks.

Article 300 of the Act CXXX of 2016 on the Code of Civil Procedural (hereinafter the “CCP”) states that “[a]n expert shall be engaged if specific expertise is considered necessary so as to define the framework of the dispute or for establishing, ascertaining facts considered material for the case.” Case law shows that expert evidence is not necessary for the court to assess likelihood of confusion: “when assessing the confusion between conflicting marks the court will conduct the comparison from the perspective of an average consumer which does not require such an expertise which the court is not in possession of” (Pf. IV. 22.424/1998. published as BH 2001/166, confirmed in Supreme Court Pfv. IV. 21.031/2011. published as EBH 2011.2409).

3.b What is consumer survey evidence most used for in practice to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Consumer survey evidence is mostly used to prove acquired distinctiveness and reputation.

4.a Are there specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?

No

Please Explain

There are no specific requirements for conducting (consumer) surveys. Case law shows that consumer surveys shall be conducted by third parties and shall be representative. It shall be noted that there are specific statutory requirements for expert evidence in general.

4.b If your answer to Q4a) is NO, what characteristics do surveys generally have, e.g. as to the way of conducting the survey, the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls?

There is only limited guidance in the case law in this respect. As a basic rule, consumer surveys shall be conducted by independent professionals. The Hungarian courts tend not to accept consumer survey evidences prepared by one of the parties (4.G.41.320/2017/39).

confirmed by 8.Pf.20.832/2018/2.).

The main requirement concerning consumer surveys is that those shall be conducted on a representative part of the relevant public. To this end, the relevant public is to be determined on the basis of the goods and services concerned.

Potential sources of errors of consumer surveys are typically (i) errors in planning and project management, (ii) errors in the data collection process, and (iii) errors in the analysis. There exist professional standards aiming to exclude the possibility of manipulation and to establish controls within the survey.

5.a Are specific percentages of respondents answering certain questions required or sufficient to prove certain items? If so, which?

No

Please Explain

The results of consumer surveys are evaluated in trademark proceedings on a case-by-case basis.

5.b What percentages of respondents answering certain questions are typically deemed insufficient?

There is no clear guidance established by case law in this respect. A case has been reported where likelihood of confusion was established on the basis of 7 % of the consumers actually finding the signs confusingly similar (3.Pk.21.226/2008/5). The Hungarian group does not believe that this decision will be followed by case law.

6 Is the court or IP office involved in the set-up of the survey, or can it be, and, if so, to what extent?

No

Please Explain

The Hungarian Group is not aware of any case law where the court or the IP office was involved in the set-up of the survey. The set-up of such a survey is usually done by the party wishing to submit the outcome of the survey as an evidence.

The Hungarian Group is of the view that, Hungarian courts are entitled to appoint a marketing professional to conduct a consumer survey in a trademark dispute under the CCP. However, the Hungarian Group is not aware of any case law where the court or the IP Office would have appointed an expert to conduct a consumer survey.

7 What weight or value is generally given by the court or IP office to consumer survey evidence, if such is admitted, and which factors are relevant in considering the extent of such weight or value?

In case the court or the IP office finds the submitted consumer survey evidence representative, such consumer survey evidence has significant weight.

II. Policy considerations and proposals for improvements of your Group's current law

8 Could any of the following aspects of your Group's current law or practice relating to consumer survey evidence be improved? If YES, please explain.

8.a Types of trademark proceedings in which survey evidence is admissible;

No

Please Explain

8.b What survey evidence can prove or help prove;

No

Please Explain

Under current law, there is no restriction regarding the subject matter what consumer survey evidence can prove or help prove with which the Hungarian Group agrees.

8.c Requirements of surveys;

Yes

Please Explain

Guidelines should be issued regarding minimum requirements, such as minimum requirements for the respondents involved, etc.

8.d The application, or lack thereof, of bench-mark percentages;

Yes

Please Explain

The law could specifically state in which proceedings / for which facts the survey-based evidence is not admitted. Bench-mark percentages in a guideline would be very much welcomed.

8.e The weight or value given to consumer survey evidence.

No

Please Explain

This should be decided on a case-by-case basis.

9 Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

Yes

Please Explain

Courts should be able to appoint survey professionals as experts and have surveys set-up and conducted upon the motion of a party and upon consultation with both parties, especially in case both parties have filed conflicting survey results.

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

10 Do you believe that there should be harmonisation in relation to consumer survey evidence?

Yes

Please Explain

**If YES, please respond to the following questions without regard to your Group's current law or practice.
Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.**

11 Should consumer survey evidence in principle be admissible in trademark proceedings? Please answer YES or NO.

Yes

Please Explain

2.a Should consumer survey evidence be admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Yes

Please Explain

2.b If consumer survey evidence should not be admitted in all types of trademark proceedings, in which types should it be admitted and in which types should it not be admitted (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?

N/A

13 What should consumer survey evidence be allowed to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

The consumer survey evidences may help the evidencing procedure in any matter, no restrictions concerning the subject matter should apply.

14 Should there be specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?

Yes

Please Explain

Consumer surveys shall be conducted by independent professionals and shall be representative for the consumers in relation to the specific subject matter (e.g. goods or services involved).

5.a Should specific percentages of respondents answering certain questions be required or deemed sufficient to prove certain items? If so, which?

Yes

Please Explain

Percentages required or deemed sufficient to prove certain items shall be decided on a case-by-case basis. The court could set a minimum percentage requirement before the survey is conducted.

5.b What percentages of respondents answering certain questions should be deemed insufficient?

Percentages required or deemed insufficient to prove certain items shall be decided on a case-by-case basis. The court could set a minimum percentage requirement before the survey is conducted.

16 Should the court or IP office be involved in the set-up of the survey and, if so, to what extent?

Yes

Please Explain

Pre-approval or pre-validation of questions and surveying methods would be helpful. Moreover, courts should be able to appoint survey professionals as experts and have surveys set-up and conducted upon the motion of a party and upon consultation with both parties, especially in case both parties have filed conflicting survey results.

17 What weight or value should be given by the court or IP office to consumer survey evidence, if such is admitted, and which factors should be relevant in considering the extent of such weight or value?

This should be decided on a case-by-case bases. The representativeness of the consumer survey and the methods applied shall always be closely examined.

18 Please comment on any additional issues concerning any aspect of consumer survey evidence you consider relevant to this Study Question.

Pre-validation of questions and necessary benchmarks in specific consumer surveys would be welcomed.

19 Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

Pharmaceutical industry.