INTELLECTUAL PROPERTY SURVEYS: 2021

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I. INTRODUCTION

This paper is the annual follow-up to eighteen previous papers:[1]
(1) "Lanham Act Related Surveys: The Year in Review & Emerging Issues" published in the 1999 Practising Law Institute Handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner
(2) "Lanham Act Surveys: 2000" published in the 2000 Practising Law Institute Handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner
(3) "Lanham Act Surveys: 2001" published in the 2001 Practising Law Institute Handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases
(4) "Lanham Act Surveys: 2002" published in the 2002 Practising Law Institute Handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases
(5) "Lanham Act Surveys: 2003" published in American Intellectual Property Law Association annual proceedings, 2003
(6) "Lanham Act Surveys: 2004" published in the Law Education Institute National CLE Conference proceedings, 2005
(7) "Lanham Act Surveys: 2005" presented at a meeting of the Intellectual Property Law Section of the State Bar of Georgia, reprinted in the NAD Annual Conference proceedings, 2006, and in the Law Education Institute National CLE Conference proceedings, 2007
(8) "Intellectual Property Surveys: 2006" published on the INTA website
(9) "Intellectual Property Surveys: 2007" published on the INTA website
(10) "Intellectual Property Surveys: 2008-2009" published on the INTA website
(11) "Intellectual Property Surveys: 2010" published on the INTA website
(12) "Intellectual Property Surveys: 2011-2012" published on the INTA website
(13) "Intellectual Property Surveys: 2013-Mid 2014" published on the INTA website
(14) "Intellectual Property Surveys: Mid 2014-2015" published on the INTA website
(15) "Intellectual Property Surveys: 2016" published on the INTA website
(16) "Intellectual Property Surveys: 2017" published on the INTA website
(17) "Intellectual Property Surveys: 2018" published on the INTA website
(18) "Intellectual Property Surveys: 2019" published on the INTA website
(19) "Intellectual Property Surveys: 2020" published on the INTA website

The following provides short excerpts of a number of selected opinions referencing survey evidence published in opinions from January 2021 through December 2021, which might be of interest to the Lanham Act litigator.[2] The bibliographies to this paper provide citations, by circuit and by survey issue, for all identified opinions published during this time period in which survey evidence was referenced.

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[1] Copies of the previous papers published by the Practising Law Institute (PLI) are available from the PLI or Westlaw. The previous paper published in the Proceedings of the American Intellectual Property Law Association (AIPLA) is available from the AIPLA. A compilation of all these papers is available at INTA.org. Copies of these papers and the compilation are also available from Ford Bubala & Associates.

[2] The primary focus of this paper and prior annual reviews of survey evidence is on surveys related to Lanham Act claims. Notwithstanding this focus, this paper, as well as previous papers, may include reference to surveys in other intellectual property matters as they are identified.

II. THE YEAR IN REVIEW: 2021

A. GENERICNESS SURVEYS

Gibson Brands, Inc. v. Armadillio Distribution Enterprises, Inc., 2021 U.S. Dist. LEXIS 75158, *5-6 (E.D. Tex. 2021)

> Armadillo asks this Court to exclude [Plaintiff's expert's] testimony because his survey is not narrowly tailored to the asserted trade dress. Armadillo argues [Plaintiff's expert's] survey is unreliable because the survey showed respondents full-color pictures of Gibson's guitars. Instead, Armadillo argues [Plaintiff's expert] should have showed respondents the simple drawings of guitar silhouettes that were submitted to the United States Patent and Trademark Office. The photographs contain additional details beyond the registered trade dress and so Armadillo argues it should be excluded.
>
> The Court finds the survey reliable. Just because the survey uses photographs, rather than drawings, does not make the survey fundamental flawed and unreliable. Armadillo does not identify any cases to support its position that a survey is only reliable if it isolates the registered trade dress.
>
> Indeed, [Plaintiff's expert's] use of photographs appears justified. If the survey used the silhouette drawings submitted in the trademark applications, the survey may have created a bias in respondents. Specifically, respondents may have been biased towards saying the silhouettes represent a "brand shape," particularly among those knowledgeable about trademark law. Instead, [Plaintiff's expert] used photographs to "mimic marketplace conditions" and avoid one possible bias). This is a plausible explanation and suggests that [Plaintiff's expert's] survey is not so flawed it should be excluded.

In re Grupo Bimbo, S.A.B. de C.V., 2021 TTAB LEXIS 126 *36-38, *40-41, *53-54, *56 TTAB (2021)

> 3. The probative value of Applicant's survey.
>
> As noted above, Applicant commissioned a Teflon survey to determine whether consumers understand the term ARTESANO as functioning as a brand or as a generic term for "pre-packaged sliced bread." Applicant's survey results show that 55.2% of respondents identified ARTESANO as a brand name for the relevant goods (with a 5.7% margin of error), whereas only 23.7% identified it as a common name (with a 4% margin of error).
>
> In a detailed analysis regarding the probative value of Teflon surveys, the Board found that Teflon surveys are ineffective at determining the true weight of public perception where the purported trademark owner previously did not control the term at issue as a coined or arbitrary term. In other words, the survey results may reflect "de facto secondary meaning." [94] *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1202-03 (TTAB 2017) (citing *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411, 414 (CCPA 1961) ("Even though they succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect. When the board said "Ha-Lush-Ka" *could not* acquire a secondary meaning it meant that no secondary meaning *of legal significance*

could be acquired. It would perhaps be more realistic to say that the descriptive name of a product is unregistrable regardless of acquired secondary meaning.").

> [94] In Booking.com, the Supreme Court held that "[s]ufficient to resolve this case is the undisputed principle that consumer perception demarcates a term's meaning." Booking.com, 140 S. Ct. 2298, 2020 USPQ2d 10729 at *5 n.3. The Court also recognized the principle that "no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise. …,it cannot deprive competing manufacturers of the product of the right to call an article by its name." Id. at *7 (quoting Abercrombie & Fitch Co. v. Hunting World Inc., 537 F.2d 4, 9, 189 USPQ 759 (2d Cir. 1976)). The sole challenge in Booking.com was that "as a rule, combining a generic term with '.com' yields a generic composite." Id. at *9. Thus, the issue of whether the Board erred in its weighing of evidence was not before the Court. Id. Sotomayor concurring at *9. Here, in this appeal, the presence of a survey is simply one more piece of evidence to weigh. Thus, the consumer survey, whether or not it may show some consumers perceiving it as a brand, is not, in and of itself, dispositive, and we must consider it in light of the entire record. However, when a term does not begin as arbitrary, the probative value of a survey measuring the distinctiveness, if any, of that term, may be diminished.

…

The Board's holding in *Frito-Lay N. Am.* is applicable in this appeal because we have found ARTESANO is the Spanish equivalent of the word "artisan," and artisan is a generic term for a type of bread. Therefore, ARTESANO is not a coined or arbitrary word Applicant previously used in connection with "pre-packaged sliced bread." In this regard, we note that Applicant's evidence of the commercial strength it has developed in its ARTESANO mark, discussed more fully below, may have affected the survey results. While we do not totally discount the survey results because it is relevant evidence as to the issue before us, under the circumstances discussed above, we find that the survey has little probative value in determining whether ARTESANO is a trademark or a generic term. Booking.com, 2020 USPQ2d 10729 at *9 (Sotomayer, J., concurring) ("Flaws in a specific survey design, or weaknesses inherent in consumer survey***s*** generally, may limit the probative value of survey***s*** in determining whether a particular mark is descriptive or generic in this context.)

While we gave limited weight to Applicant's Teflon survey in our analysis of whether ARTESANO is generic, we find that it is probative in determining whether ARTESANO has acquired distinctiveness. *In re Country Music Ass'n, Inc.*, 100 USPQ2d 1824, 1834-35 (TTAB 2011) (finding Teflon-style survey showing 85% of respondent's categorized COUNTRY MUSIC ASSOCIATION as a brand name to be probative evidence of acquired distinctiveness). *See also Stuart Spector Designs*, 94 USPQ2d at 1571 n.46 (suggesting that a Teflon-style survey would be helpful in analyzing).

Generally, survey results showing over 50% brand recognition are sufficient to establish acquired distinctiveness. *See In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424-25 (Fed. Cir. 1985) (finding 50% probative in establishing acquired distinctiveness given the totality of the evidence); *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381, 382 (CCPA 1960) (survey showing a "majority" of respondents associated mark with a single source sufficient to prove acquired distinctiveness)…

…

> [112] The acquired distinctiveness analysis presupposes that ARTESANO is not a generic term. A finding that ARTESANO is not generic means that our application of the doctrine of foreign equivalents is not correct and that ARTESANO and "artisan" are not equivalents. Moreover, it means that Applicant's Teflon survey is not evidence of de facto secondary meaning. Thus, we need not concern ourselves with the third-party use of "artisan" that we relied on to find ARTESANO to be generic in determining whether ARTESANO has acquired distinctiveness.

In re Hall Financial Services, Inc., 2021 TTAB LEXIS 266 *31 (TTAB 2021)

> …In a case involving a genericness determination, the Board "noted that we can give 'little weight' to a survey where a mini-test was not performed and we do not know whether survey participants actually understood what they were being asked." …
>
> …
>
> In this case, [Plaintiff's expert] did not conduct any sort of mini-test or other evaluation of the participants' ability to recognize an indicator of source, and we cannot determine whether the survey respondents understand or can identify a mark. As a result of this apparent flaw in [Plaintiff's expert's] methodology, we discount the value of his survey based upon the lack of proper foundation for their introduction. …

Snyder's Lance, Inc. v. Frito-Lay North America Inc., 2021 U.S. Dist. LEXIS 105944 *57, *59-60 (W.D.N.C. 2021)

> While the Court does not find fault with [Plaintiff's expert's] expertise, survey methodology or the execution of the survey, it does question her conclusion and confidence in the results. First, even taking the results at face value, the survey suggests only a small majority of respondents (55%) believed that PRETZEL CRISPS is a brand, as compared to the vast majority who correctly identified Sun Chips (96%) and Cheese Nips (85%).
>
> Moreover, Plaintiffs and [Plaintiff's expert] cite the 55% result without any discussion of the inherent "margin of error" in the survey…
>
> …
>
> …the answers of the survey respondents with respect to a number of the "control" terms do not inspire confidence in the survey results and appear to reflect that the survey respondents' choices may have been driven, in significant part, by commercial success or notoriety rather than a valid assessment of the distinction between generic and trademark names. While over 90% of respondents correctly identified "macadamia nuts" and "onion rings" as generic names, 25% incorrectly identified "gourmet popcorn" as a brand. More significantly, less than half of respondents correctly identified FLAVOR TWISTS (which are twisted corn chips) as a brand. The Court finds that this failure indicates that the bulk of survey respondents did not fully understand the distinction between common names and brands. The mark FLAVOR TWISTS is plainly not a common name (TWISTS is certainly not a common name for corn chips, if it has any "common" meaning at all).

B. SECONDARY MEANING SURVEYS

Black & Decker Corporation v. Positec USA Inc., 2021 U.S. Dist. LEXIS 10620 *19-20 (N.D. Ill. 2021)

> Plaintiffs have presented evidence that their use of a yellow and black color combination on packaging generally—rather than on one particular packaging style—has an established secondary meaning, associating the packaging in the consumers' mind with the DeWalt brand. In … "[Plaintiffs' expert's] 'secondary meaning' survey, 72.7% of survey respondents asked, 'If you were shopping at a Home Depot, Lowe's, or another similar retail store and you saw a yellow and black packaged power tool or power tool accessory, would you associate that package with any particular company?', answered DeWalt/Black & Decker, while a net of 63.5% did so." At trial, Defendants' Vice President of Marketing, Ms. Taylor, admitted that yellow and black packaging is DeWalt's "iconic look." Plaintiffs' survey and Ms. Taylor's admission are relevant to both of the packaging styles that Plaintiffs had introduced (or at least arguably introduced) by the time Defendants' "sunburst" packaging entered the market—the predominately yellow style and the black bar style—since both share the distinctive formative components of the use of a yellow and black color scheme on power tool packaging

Souza, Alana et al. v. Exotic Island Enterprises, Inc. 2021 U.S. Dist. LEXIS 149036 *19, *39 (S.D.N.Y. 2021)

> … Case law helps explain the survey flaws… the court held that "[Plaintiff's expert's] failure to use a control group also makes it difficult to measure the effect of the specific images on the respondents or to account for participants' . . . guessing." 2020 U.S. Dist. LEXIS 55421, [WL] at *7. The Second Circuit affirmed the importance of a control group in Electra, rejecting [Plaintiff's expert's] explanation that his survey was "a communications study, not a consumer confusion study" as "insufficient to set aside the district court's conclusion that the [Plaintiff's expert] Report was fatally flawed."…
>
> [3] The recognition questions in [Plaintiff's expert's] survey are also defective for the independent reason that they "provided no opportunity for respondents either to express uncertainty or to provide the identity of the [p]laintiff." Edmondson, 2020 U.S. Dist. LEXIS 55421, 2020 WL 1503452, at *8. The Second Circuit has held that such failure "to provide respondents with an opportunity to indicate lack of knowledge" is a "defect."…
>
> ...
>
> …Among the criticisms in the [Defendant's expert] Report is that [Plaintiff's `expert's] survey did not instruct respondents "not to guess or [tell] them what to do if they didn't have an answer for a question, were unsure[,] or simply did not have an opinion."…

C. LIKELIHOOD OF CONFUSION SURVEYS

Beyond Blond Productions, LLC v. Heldman, Edward III et al., 2021 U.S. Dist. LEXIS 203259 *14-15 (C.D. Cal. 2021)

> …[Defendant's expert's] survey is flawed because he did not differentiate between confusion due to the Mark in a potentially protectable, styled form, and confusion due to the generic, unprotectable term.
>
> …although similar sound and meaning may be considered in evaluating likelihood of confusion, **[**Defendant's expert] needed to find a way to "exclude confusion that is attributable to the use of the generic term itself."

Epic Tech, LLC v. Fusion Skill, LLC, 2021 U.S. Dist. LEXIS 78310 *9-10 (S.D. Tex. 2021)

> Finally, the seventh digit of confusion—actual confusion—also weighs in Epic Tech's favor. Only Epic Tech has submitted evidence relevant to this digit of confusion, in the form of [Plaintiff's expert's] consumer survey. Defendants attack the survey on several grounds, which the Court set forth on the record when it orally denied Defendants' Motion to Exclude [Plaintiff's expert]. Defendants' only compelling objection is that survey respondents in the control group reported confusion between the infringing marks and relatively dissimilar control marks at a rate of 50%, suggesting that the survey more broadly overstated confusion between Epic Tech's marks and the allegedly infringing marks. Nonetheless, even if the Court assumes that the survey reported confusion at higher levels than justified, its topline results—that all three tested infringing marks produce a substantial likelihood of confusion—are still entitled to substantial weight given [Plaintiff's expert's] expertise, the 900-consumer sample size, the robustness of the data, and the absence of contrary evidence from Defendants. (See Doc. 183-8 at 9 (noting that a "net confusion of 28.5% is a clear indication of the likelihood of confusion" in comparison to other consumer surveys).

Gilead Sciences, Inc. (Opposer) v. Gilead Capital LP (Applicant), 2021 TTAB LEXIS 160 *85-86 (TTAB 2021)

> …we will not infer there is a likelihood of confusion from Opposer's survey because (i) it does not sufficiently replicate the marketplace, (ii) it presents a side-by-side comparison of the marks when Applicant's services and Opposer's goods and services are not offered for sale on a side-by-side basis, (iii) the survey style is more conducive where Opposer's mark is not famous or commercially strong as we have found it to be here, and (iv) because Opposer did not introduce the sampling error derived from a survey of 209 respondents.

Hi-Tech Pharmaceuticals Inc. v. Dynamic Sports Nutrition, LLC, 2021 U.S. Dist. LEXIS 101946 *58-59 (N.D. Ga. 2021)

> …In general, a Squirt survey is appropriate where the senior mark is not well known, and the marks often appear side by side in the marketplace…But where the products at issue "are not sold in the same stores or, for the most part, on the same websites, such a format may over-estimate confusion by forcing consumers to consider the marks in close proximity in a way they would not in the marketplace."

Icleen Entwicklung… v. Blueair AB, 2021 U.S. Dist. LEXIS 203259 *21, *23 (C.D. Cal. 2021)

> Blueair submits evidence of two separate consumer surveys conducted by [Defendant's expert]…
>
> "[Defendant's expert] first conducted an 'Eveready' survey to determine the likelihood of confusion in situations, like this one, where Blueair HealthProtect and IQAir HealthPro products are not proximate in the marketplace"…

Kudos Inc. v. Kudoboard LLC, 2021 U.S. Dist. LEXIS 224311 *36-37 (N.D. Cal. 2021)

> The Court agrees with defendant. To be "probative and meaningful," surveys "must rely upon responses by potential consumers of the products in question." Dreyfus Fund Inc. v. Royal Bank of Canada, 525 F. Supp. 1108, 1116 (S.D.N.Y. 1981). Accordingly, the utilization of an improper universe can render a survey inadmissible. See Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112, 118 (2d Cir. 1984) (excluding a survey on consumer confusion when the survey "was conducted among individuals who had already purchased or leased Donkey Kong machines rather than those who were contemplating a purchase or lease."). The "appropriate universe of respondents in a trademark-related survey are those consumers 'most likely to purchase' the competing products" sold by the junior user of the mark. Hi-Tech Pharms. Inc. v. Dynamic Sports Nutrition, LLC, No. 1:16-CV-949, 2021 U.S. Dist. LEXIS 101946, 2021 WL 2185699, at *17 (N.D. Ga. May 28, 2021).
>
> Here, [Plaintiff's expert's] relied exclusively on current users of employee recognition software rather than prospective buyers of Kudoboard's good or service…

Longoria v. Kodiak Concepts LLC, 2021 U.S. Dist. LEXIS 55039 *10-11 (D. Ariz. 2021)

> Generally, "survey evidence should be admitted as long as it is conducted according to accepted principles and is relevant." *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010) (internal quotation marks and brackets omitted). "[T]echnical inadequacies in a survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility."…Put another way, a court must answer the following "threshold question" when presented with survey evidence: "Is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles?" *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001). If so, "follow-on issues of

methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility." *Id. See generally Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) ("Survey**s** are to be admitted as long as they are conducted according to accepted principles and are relevant. Challenges to survey methodology go to the weight given the survey, not its admissibility."); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 (9th Cir. 1997) (holding that objections as to "leading questions" and an unrepresentative sample "go only to the weight, and not the admissibility, of the survey"); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992) ("[I]t is routine to admit a relevant survey; any technical unreliability goes to weight, not admissibility.")

Longoria v. Kodiak Concepts LLC, 2021 U.S. Dist. LEXIS 55040 *39-40 (D. Ariz. 2021)

…[Plaintiffs' expert] indicated in his report that, on average, 15% of the 300 people who responded to a survey he conducted recognized Plaintiffs, with a range of recognition between 13% and 24%. It is within the province of the jury to weigh this evidence and determine the strength of each Plaintiff's mark. *See, e.g.*, *Gray*, 2020 U.S. Dist. LEXIS 200224, 2020 WL 6200165, at *6 ("The jury could conclude that since 16% of respondents recognized Plaintiffs, Plaintiffs are sufficiently recognizable; or it could conclude than since 84% of respondents did not recognize Plaintiffs, Plaintiffs are too obscure. Or the jury could attribute little weight to any percentages from [Plaintiffs' expert's] survey based on problems with the representativeness of the sample or other problems with the methodology.")

Longoria, Jaime v. Million Dollar Corporation, 2021 U.S. Dist. LEXIS 38478 *21-22, *31-32 (D. Colo. 2021)

…To succeed on both a false advertising and false association claim, a plaintiff must show a likelihood of confusion between the use of the "mark," in this case the photograph, and the sponsorship, endorsement, or approval of the product to which the mark is attached. *See Digital Ally*, 882 F.3d at 978; *Amazon*, 2000 U.S. Dist. LEXIS 17864, 2000 WL 1800639, at *7. While likelihood of confusion is sufficient to make out a claim under § 1125, it is insufficient to recover damages. To recover damages, a plaintiff must show actual confusion. *Brunswick*, 832 F.2d at 525.

While a party may utilize a survey to demonstrate consumer confusion, the survey's evidentiary value depends on the methodology used and the questions presented to respondents. *See Universal Money Ctrs. v. AT&T*, 22 F.3d 1527, 1534 n.3 (10th Cir. 1994). "Although methodological flaws in a confusion survey will typically affect only the survey's weight and not its admissibility, these flaws may justify exclusion under Rule 702 if they are serious and pervasive enough. " *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1246 (10th Cir. 2013) (citations omitted). In a consumer confusion survey, if the[y] flaws are serious and pervasive enough, they render the expert's opinions drawn from the survey unreliable because the survey cannot serve as the basis for the expert's conclusions. *See Vail Assocs., Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d

853, 864 n.8 (10th Cir. 2008). Moreover, if a survey's flaws lead to results that lack any probative value, the Court may exclude the survey as irrelevant. *See Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1145 (10th Cir. 2013) (affirming district court's conclusion that methodological flaws in a consumer survey rendered the survey's results "devoid of any probative value and therefore irrelevant").

…

Taken together, these flaws "are serious and pervasive enough," *1-800 Contacts*, 722 F.3d at 1246, to justify the exclusion of [Plaintiff's expert's] survey and opinions regarding the confusion caused by defendant's posting of plaintiffs' images. [Plaintiff's expert's] results include information regarding endorsement and recognition of non-plaintiffs, he fails to include a control group or an adequate control question, and his survey does not probe the relevant questions in a false endorsement or advertising claim. As a result, [Plaintiff's expert's] opinions that stem from the survey - that defendant's use of the photos caused or is likely to cause consumer confusion - are unreliable because the source of his opinions, the survey, is flawed. *See Vail Associates*, 516 F.3d at 864. Furthermore, because the survey includes irrelevant information, fails to account for background noise, and does not answer the relevant legal questions, it provides no probative information and is irrelevant to plaintiffs' claims. *See Water Pik*, 726 F.3d at 1146. Therefore, the Court will exclude [Plaintiff's expert's] survey and his opinions that defendant's use of the photographs caused or is likely to cause consumer confusion.

Longoria, Jaime v. Million Dollar Corporation, 2021 U.S. Dist. LEXIS 62286 *10-11 (D. Colo. 2021)

Third, plaintiffs have failed to provide any evidence of actual confusion. The only evidence that plaintiffs point to is the report of [Plaintiff's expert]. *See id.* at 15. However, the Court has excluded [Plaintiff's expert's] opinions regarding the level of confusion as well as his consumer survey report.

Mahindra & Mahindra Ltd. v. FCA US LLC, 2021 U.S. Dist. LEXIS 17974 *28 (E.D. Mich. 2021)

…the Court finds that Defendant's presented evidence concerning the Advertisement, specifically the [Defendant's expert] survey, is sufficient to demonstrate the requisite causation of harm. Indeed, the findings in the [Defendant's expert] survey, discussed *supra*, support Tallon's emphasis on the imagery in the Advertisement and its connection to Defendant's heritage. For example, 37.0% of respondents believed that the Advertisement's message pertains to the U.S. military. ECF No. 417-8, PageID.42827. The Court finds that this evidence, which must be viewed in the light most favorable to Defendant in this Motion, creates a dispute of fact as to whether it is harmed by the Advertisement.

Mahindra & Mahindra Ltd. v. FCA US LLC, 2021 U.S. Dist. LEXIS 93168 *29 (E.D. Mich. 2021)

> [9] Importantly, the Commission determined that the 19 percent net confusion rate from the [Defendant's expert] survey, which FCA cites to in its present Motion to support its requested relief, "is not significant enough to support likelihood of confusion, particular in view of the [ALJ's determination] and the Commission's findings as to *DuPont* factor 1 that the Post-2020 Roxor is not substantially similar to the Jeep Trade Dress." *Id.* at PageID.44495. In making this determination, the Commission cited authority which explains the need to carefully view survey evidence below the 20 percent threshold "against the background of other evidence weighing for and against a conclusion of likely confusion." *Id.* The Court takes notice of FCA's citation to cases within the Sixth Circuit which have determined that similar percentages are sufficient to show a likelihood of confusion, ECF No. 447, PageID.44703 n.7. However, the Court declines to depart from the ITC at this juncture, after recently granting summary judgment in light of the ITC's conclusions, and view the [Defendant's expert} survey results in isolation of the other evidence carefully viewed in the Modification Proceedings.

Vital Pharmaceuticals, Inc. v. Monster Energy Company, 2021 U.S. Dist. LEXIS 144689 (S.D. Fla. 2021)

> …unlike Monster's expert—who designed his survey independently,…[Plaintiff's expert] conducted his survey with substantial assistance and direction from VPX's attorneys,…(testifying that VPX's attorneys helped to "determine what the criteria were for the drinks that you were going to use" in the survey);…(testifying that the "design of [his] stimulus was a joint effort" between him and VPX's attorneys); …(testifying that the call-outs in the cooler images were "engineered" by VPX and its attorneys);…testifying that "the flavors repeat" in his prompt because that was simply the "array presented to [him] by [VPX's attorneys]"). Thus, unhinged from the independence we generally expect in a reliable survey, [Plaintiff's expert's] process was unreliable from the start.

D. FAME SURVEYS

Combe Incorporated v. August Wolff GMBH & Co. KG Arzneimittel, U.S. App. LEXIS 10536 *10-11 (4th Cir. 2021)

> The court viewed the fame survey's results as "substantial and certainly support[ing] a finding that the VAGISIL mark is commercially famous." J.A. 289. It rejected Wolff's challenges to the fame survey, explaining that "the existence of third-party marks alone is insufficient to demonstrate that a mark is commercially weak" particularly where, as here, most of the marks were "commercially insignificant" because they were either not in use or had "meager sales and advertising figures." J.A. 290-91. The court also concluded that the criticism of the survey's design was "unpersuasive" because Wolff had not introduced any empirical evidence to support its expert's view that the control's name was strange or that a different or additional control would have affected the results. J.A. 294.

Combe Incorporated (Opposer) v. Marke Enterprises, LLC (Applicant), 2021 TTAB LEXIS 141 *41-42 TTAB (2021)

> According to Applicant, to claim, as Opposer does, that "VAGISIL is both 'famous' and 'strong' (see, 67 TTABVUE 35-40) is to prejudice the analysis against Applicant by seeming to ascribe to the prior mark superiority in two separate likelihood of confusion criteria where *DuPont* only allows for one." Applicant argues that in an opposition proceeding, "it is not competent for the opposer to seek to prove that its mark is 'famous." Thus, Applicant contends that Opposer's "fame" survey should be disregarded and the analysis limited to the conceptual and commercial strength of VAGISIL and VAGISTAT as compared to VAGISERT.

III. BIBLIOGRAPHY

INTELLECTUAL PROPERTY SURVEYS: 2021 BY CIRCUIT

This appendix contains citations, by Circuit, for all identified opinions published from January 2021 through December 2021**,** in which survey evidence was referenced.

Second Circuit

Easy Spirit, LLC v. Skechers U.S.A., Inc., 2021 U.S. Dist. LEXIS 14343 (S.D.N.Y. 2021) (Secondary Meaning) (Likelihood of Confusion)

Easy Spirit, LLC v. Skechers U.S.A Inc., 2021 U.S. Dist. LEXIS 220765 (S.D.N.Y. 2021) (Likelihood of Confusion)

Riseandshine Corporation v. Pepsico, Inc., 2021 U.S. Dist. LEXIS 203259 (S.D.N.Y. 2021) (Likelihood of Confusion)

RVC Floor Décor, Ltd. v. Floor & Decor Outlets of America, Inc., 2021 U.S. Dist. LEXIS 58478 (E.D.N.Y. 2021) (Secondary Meaning)

Solid 21, Inc. v. Breitling U.S.A., Inc., 2021 U.S. Dist. LEXIS 184059 (D. Conn. 2021) (Genericness)

Souza, Alana et al. v. Exotic Island Enterprises, Inc., 2021 U.S. Dist. LEXIS 149036 (S.D.N.Y. 2021) (Likelihood of Confusion)

Third Circuit

Lontex Corporation v. Nike, Inc., 2021 U.S. Dist. LEXIS 55647 (E.D. Pa. 2021) (Likelihood of Confusion)

Fourth Circuit

Combe Incorporated v. August Wolff GMBH & Co. KG Arzneimittel, U.S. App.. LEXIS 10536 (4th Cir. 2021) (Fame)

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V. BIOGRAPHICAL INFORMATION

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Dr. Sartore is the cofounder and CEO of the marketing research and consulting firm, Ford Bubala & Associates, located in Huntington Beach, California.

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