

London Study Question – 2019

Consumer survey evidence

In many proceedings, particularly in the context of trademarks, the ultimate determination of any dispute may rest upon key findings pertaining to, for example, the degree of distinctiveness or reputation of a trademark, and any confusion, parasitism or dilution.

Issues often arise as to the manner in which such elements can be proven. One evidentiary tool that may be used is consumer surveys. However, both the admissibility of and weight accorded to consumer survey evidence in trademark proceedings are continuing topics of controversy, making it desirable to have a harmonized approach.

The potential importance of survey evidence can be substantial, whether in opposition proceedings, revocation proceedings or infringement proceedings before the IP Office and/or a court. Such evidence may be helpful in respect of a variety of issues including whether a sign is perceived as being used as a trademark, the degree of descriptiveness or distinctiveness, evidence of reputation, evidence of deception or confusion, the extent of any free-riding, dilution or other negative impact on goodwill, and the extent of any harm or damage to the rights holder.

Issues considered as part of this Study Question include the admissibility of consumer survey evidence per se, the types of proceedings in which such evidence may be used, what it can (help) prove and requirements for such surveys (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).