



2019 Study Question

Submission date: May 27, 2019

Jonathan P. OSHA, Reporter General
Ari LAAKKONEN and Anne Marie VERSCHUUR, Deputy Reporters General
Guillaume HENRY, Ralph NACK and Lena SHEN, Assistants to the Reporter General
Consumer survey evidence

Responsible Reporter(s): Lena SHEN and Anne Marie VERSCHUUR

National/Regional Group	Paraguay
Contributors name(s)	Hugo Mersan Lorena Mersan MERSAN, ABOGADOS
e-Mail contact	lorenamersan@mersanlaw.com

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

Yes, given that the Paraguayan Code of Civil Procedures (which regulates procedures under the Trademark Law or related to Intellectual Property Rights in a subsidiary forms) embraces a "freedom to produce evidence" principle, although not specifically regulated in the Law, consumer survey evidence should be admissible in trademark proceedings.

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

There are no specific statutory provisions in the Paraguayan legislation governing consumer survey evidence; however, given that the laws governing civil matters (which regulate IP procedures in a subsidiary manner) admit an ample scope of evidentiary elements, consumer survey evidence should be in principle, admissible in any trademark procedure.

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

Yes, there are no restrictions in the Law concerning the admissibility of consumer survey evidence.

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)?

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)?

Consumer survey evidence could prove or help prove several types of issues, including, acquired distinctiveness of a mark, a mark's reputation, confusion that could arise from the use of a certain mark with respect to another mark, dilution of a mark, the status of fame or high recognition of a mark and even the use of a mark.

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)?

In general, consumer survey evidence is not commonly or largely utilized in Paraguay as evidence in any types of procedures, least those concerning trademarks. But, if used, they should be used to prove the acquired distinctiveness of a mark or the degree of confusion a mark could create or give rise to when compared to another mark.

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 none; consumer surveys may be performed by any means and to any number of people/consumers, etc. The value or significance of a consumer survey as evidentiary material in a trademark procedure depends on the court's, judge's or administrative authority's criterion.

The only restrictions as far as consumer surveys are concerned are: the due respect of a person's privacy and freedom to participate in a survey or not.

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?

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

No

Please Explain

The number of respondents and percentages thereof is not established, either by jurisprudence or by statutory regulations.

Percentages should be established and assessed on the basis of the overall population in the area where the survey is conducted, the types of products involved, the market sector and are ultimately left to authority's criterion.

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

As mentioned above, there are no percentages regarding the number of respondents answering to certain questions in a consumer survey, therefore, the total number of respondents required in order for survey to be considered an admissible and/or sufficient evidence should be analyzed on a case-by-case basis and depends on the products, the market sector, etc.

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

In most cases no. However, the assistance of a court may be required or requested by the interested party in certain circumstance, particularly in those where the assistance of the court officers for the performance of a survey is required.

It is worth noting that the performance of surveys in Paraguay are carried out mostly by either private companies (set up for such specific purposes) or by an official governmental entity, the General Office of Statistics, Surveys and Censuses.

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?

The weight or value given to the court or the IP office to a consumer survey evidence is entirely at the discretion of the authority in charge of the decision.

The law does not provide any specifications/rules as to what merits should be conferred to a consumer survey evidence and the only provision regarding evidentiary value is written in article 269 of Paraguayan Civil Code of Procedures which sets forth that: unless otherwise stated by the Law, judges/courts shall reach a conclusion, make a resolution according to the rules concerning a good/sane judgement. They shall evaluate and take into account all the evidence produced that is essential and decisive to the final resolution of the case. They are not bind to take into account superfluous or non-decisive evidence.

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

We believe that consumer survey evidence should be admitted in all cases pertaining to trademarks and regulation of admissibility of such types of evidence is not required.

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

No

Please Explain

No. The ample scope and freedom of submitting and utilizing evidence currently foreseen by the Law is, in our opinion, accurate and should be maintained.

8.c Requirements of surveys;

Yes

Please Explain

Yes. There should be guidelines regarding consumer survey evidences as far as the method/ways in which the same should be performed, the number of people who should be reached in order to carry out the survey, among others.

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

Yes

Please Explain

Yes. At least, guidelines as to such bench-mark percentages, depending on the products/services, industry or market sector, etc.

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

No

Please Explain

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?

No

Please Explain

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

Yes, with respect to the value of such evidence, the types of procedures in which the same may be utilized and the forms or guidelines for their performance.

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)?

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)?

Consumer survey evidence should be allowed to prove or help prove: the acquired distinctiveness or reputation of a trademark, the status of

well-known or famous trademark, the confusion that could arise as a result of a dispute between two trademarks, the dilution of a trademark, among others.

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

Yes. Guidelines should be established, regarding the methods, number of respondents, questions, etc. always pertaining to the type of trademark, products, services, concerned.

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

No

Please Explain

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

There shouldn't be exact numbers or percentages, but a certain amount of consumers should be reached, specially depending on the products/services and the market sector.

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

No

Please Explain

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?

The same weight or value as that given to the other evidence submitted throughout the case. Courts and Administrative authorities make a global evaluation of all the evidence presented throughout the case and base their decisions on such overall evaluation.

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

There are no other additional issues the present Study Group would like to address.

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

Various industry sectors, including clothing, the food industry, the pharmaceutical industry, tobacco and beverages, cars and spare parts, services such as education, entertainment, courier services, telecommunications, etc.