



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

There is no special law governing consumer survey evidence in Russia. But consumer surveys are mentioned as a type of evidences in the trademark and industrial design Regulations. Russian Patent Office (Rospatent) adopted Guidelines which apply to the consumer survey evidence in the proceedings in connection with well-known marks. Although these Guidelines apply to well-known marks, the rules in it are generally accepted in other trademarks proceedings in Rospatent and in courts. These rules can be also relevant in the proceedings related to the industrial designs when it is necessary to prove the confusion of design and trademark or to prove that design is not original. The Supreme Court of the Russian Federation on April 23, 2019 has adopted Directive devoted to the application of the part four of the Russian Civil Code dealing with the Intellectual Property. Paragraph 162 of this Directive states: "To determine the possibility of confusion it is possible to take into account presented by the parties proofs of real confusion of the marks, including survey evidences of the consumers of the relevant goods".

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

Consumer survey evidence is admitted in all types of 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)?

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 can prove a variety of issues including the degree of distinctiveness, acquired distinctiveness, similarity, evidence of reputation, confusion, misleading of consumers, etc.

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 or help prove confusion, acquired distinctiveness, reputation and well-known character of the 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?

Yes

Please Explain

The mostly used way of conducting surveys are Internet surveys or face-to-face surveys. The way of conducting surveys usually depends on the subject of the survey, type of mark and the kind of goods. In most of the cases both Rospatent and the courts prefer to have the survey which shows the opinion of the consumers on the whole territory of Russia. So the general requirements for the surveys are the number of respondents (minimum 1500) and the number and kind of the cities they are coming from (6 cities, including Moscow and Saint-Petersburg). Selection of respondents also depends on the kind of goods (e.g. consumer goods or industrial goods) and the survey can be conducted among average consumers or specialists. The questions in the survey should not contain leading questions. Control questions should be asked to prove the objectivity of the survey. Detailed technical notes, questionnaires, question cards should be attached to the survey report.

Survey evidence will not be accepted and will be considered as not reliable due to lack of detailed information, leading questions in the questionnaire, insufficient number of respondents, not relevant respondents, etc.

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

Specific percentages are not indicated in the Guidelines and Regulations. In the court decisions it is indicated that to prove the confusion of the marks it is enough if from 20% to 60% of consumers are confused. But in any case the results of the surveys are always evaluated together with the other evidences and facts of the case and cannot be automatically regarded sufficient to prove certain facts.

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

Usually less than 10%.

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

Rospatent is never involved in the set-up of the survey. The court can be involved in the set-up of the survey if corresponding request is filed by the parties or one of the parties and such request is satisfied by the court. The court can approve the questionnaire of the survey and check that the questions do not contradict to the legislation and are not the questions of law.

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?

If the consumer survey evidence is considered reliable it is usually admitted by the courts or Rospatent and is taken into account. But it is evaluated together with other evidences and facts of the case.

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

8.c Requirements of surveys;

Yes

Please Explain

Yes - it is necessary to introduce survey standards in the legislation for different types of cases in respect of survey presentation and documents proving that the survey has been really conducted.

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

Yes

Please Explain

Yes - It will be good to have at least general recommendations in respect of bench-mark percentages that can be taken into account by the courts and Rospatent.

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

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)?

The degree of distinctiveness, acquired distinctiveness, similarity, evidence of reputation, confusion, misleading of consumers, etc.

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

Any way of conducting surveys should be admissible but formal requirements should be regulated (e.g. number and selection of respondents, use of controls, etc.)

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

Yes. Usually 20% or more.

5.1 What percentages of respondents answering certain questions should be deemed insufficient?

Less than 10%.

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

Rospatent should not be involved. The courts can be involved but only if the parties file corresponding request.

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?

Consumer surveys should be admitted if they are considered reliable but all other relevant facts of the case should always be taken into account.

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

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

Financial sector, food industry, cosmetic products.