



2019 Study Question

Submission date: May 18, 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	Sweden
Contributors name(s)	Rebecka HARDING, Emelie FYHRQVIST, David RAMSJÖ, David LEFFLER, Bodil EHLERS, Stefan WIDMARK, Kristian FREDRIKSON, Gustav MELANDER, Wenzel NISSHAGEN, Maria YNGNER, Per SAHLQVIST, My BYSTRÖM, Christina BERGGREN, Alma FALK and Anna TARRING.
e-Mail contact	rebecka.harding@delphi.se

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

No, specific statutory provisions concerning consumer surveys as evidence as such. However, according to Chapter 35, Section 1, Paragraph 1 of the Swedish Code of Judicial Procedure (1942:740), all evidence is in principle admissible and it is up to the Court to evaluate its evidential weight. Formal requirements for the Court to consider when evaluating evidence are further seldom provided in Swedish procedural law.

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, see answer to Question 1 b).

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)?

All aspects of the dispute (e.g. confusion, acquired distinctiveness, trademark degeneration 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)?

Reputation and acquired distinctiveness. Confusion is also a rather common subject for market surveys.

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

No requirements follow from Swedish legislation.

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?

The general characteristics (i.e. the features that will have an impact on the evidentiary value of a market survey) follow from indicators that have been set by case law and, as regards the issue of acquired distinctiveness through use and reputation, to a certain degree from the methods used by the "Trademark Board of the Stockholm Chamber of Commerce" (an independent body conducting market surveys that existed until 2011) on features of market surveys. These indicators include e.g. the following:

- That the purpose of the survey has been achieved (i.e. the validity of the survey).

- The respondent group shall be representative of the relevant consumer group for the disputed products or services (the relevant sector of the public).
- The respondent group shall consist of a sufficient number of respondents. Case law indicates that approx. 500 is a sufficient number of respondents (see for example the Court of Patent Appeals' judgement in case no PBR 05-080). It is however generally important to take into account the statistical margin of error in the specific case.
- The method and circumstances under which the survey was carried out.
- How and in what order the questions were formulated, in order to ascertain whether the respondents were confronted with leading questions.
- The point in time when the market survey was conducted should be relevant for the disputed issue.
- The survey shall be performed by an independent party.
- That market surveys concerning acquired distinctiveness shall include questions which identifies that the sign has become capable of distinguishing goods and services from those of other undertakings because they are perceived as originating from a particular undertaking.

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

No

Please Explain

No, but see answer to Question 4 above.

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

There are no fixed percentages, but a lower number of respondents would result in a larger margin of error and could consequently have an adverse impact on the evidentiary value of the market survey in question.

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

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 a market survey fulfils the requirements set in case law (see e.g. answer to Question 4 above) it would typically be given a high evidentiary value.

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

No. The Swedish code of judicial procedure stipulates two fundamental principles regarding evidence. Firstly, a party is entitled to bring forward any evidence the party deems suitable in support of its claims and legal facts. Secondly, the court is free to assess the evidentiary value of the evidence provided by the parties. Due to this legislative context, we do not consider legislative measures limiting these fundamental principles as a viable option.

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

No

Please Explain

In light of the fundamental principles of the Swedish code of judicial procedure mentioned in 8 a, no clarifications regarding what survey evidence can prove or help prove may be introduced in the legislation as such.

8.c Requirements of surveys;

No

Please Explain

No clarifications regarding precise instructions on how the evidence is to be structured/ the information is to be gathered may be introduced in the legislation as such. Therefore, on the civil procedure side, i.e. as handled by the courts, such guidance must be provided through case law. On the prosecution side, i.e. as handled by the Swedish trademarks office, clarifications could be provided through decisions from the office (as well as the courts of appeals) as well as through guidelines issued and made publicly available by the Office.

At present, beyond what has been set out in 4 b, Sweden has no clear and uniform case law on methods for conducting consumer surveys and how to present the results to a court/the trademarks office. This in turn renders practical problems for parties involved in legal proceedings as well as for their legal advisors and, not least, for the courts.

The courts have no expertise as regards statistics and so they lack the ability to fully understand and scrutinize consumer surveys, which in turn may lead to the presented results being overrated, underrated or even dismissed.

For legal advisors the lack of uniformity in case law is problematic since it rests with the advisors to – often during the course of just a few weeks – assist the client in ordering a consumer survey relevant for them which may very well be the most important evidence in a legal proceeding.

In light of this, considering the principle of free sifting of evidence which is set out in Chapter 35, Section 1, Paragraph 1 of the Swedish Code of Judicial Procedure (1942:740), it would be very helpful for courts, legal advisors and their clients if Sweden could achieve greater uniformity in case law on how consumer surveys shall be conducted and how they should be assessed in court. Such case law or guidelines should ideally include clarifications on inter alia the following issues:

- Requirements on full disclosure of how the survey has been conducted, including disclosure of all instructions given to interviewees and disclosure of all questions and all answers.
- Clarifications on what would constitute a representative cross-selection of the public.

Clarifications on how to pose questions (preferably stating that leading questions and questions encouraging speculation should be banned).

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

No

Please Explain

No. First of all, it is impossible to draw any conclusions from a given percentage as such, i.e. without taking into account the (many) other factors that affect the probative value of a survey (e.g. the reliability/independency of the source, the choice and number of interviewees, the method of the survey, the accuracy of the questions).

Also, a survey is only one of the factors to be taken into account when assessing a particular issue, such as acquired distinctive character. In this regard, the ECJ has already clarified that it is not possible to state in general terms, for example by referring to predetermined percentages relating to the degree of recognition, when a mark has acquired a distinctive character (see the joined cases C-217/13 and C-218/13, Oderbank, paragraph 48).

In view of the above, we believe that the benefits of bench-mark percentages would be very limited as they would be very difficult to apply by analogy and in general terms. In turn, they could potentially be misleading.

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

No

Please Explain

The weight and value given to consumer survey evidence should depend on the overall credibility of the survey, see comments under question 8 c above.

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

Yes. The Swedish Trademark database should indicate if a mark is registered on the basis of acquired distinctiveness. This would enable applicants, authorities, scholars and courts to make a more systematic use of information derived from decisions involving consumer survey evidence.

The addition of this information in the database would require an amendment of the Swedish law on trademarks.

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, we believe there should be harmonization because actors often cover several markets at the same time. Harmonisation prevents conflicting judgements on different markets.

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

Yes, because different types of surveys have different implications. Surveys regarding acquired distinctiveness are for example easier to conduct and to assess than surveys regarding confusion between marks.

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)?

Consumer survey evidence should be allowed to prove/help prove any circumstances mentioned above. A different question is how different surveys should be assessed as evidence.

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?

No

Please Explain

Specific requirements could mean a restriction. On the other hand, guidelines are valuable. Such guidelines need to fulfil the basic requirement to be statistically correct, for example regarding the number of respondents etc. The guidelines are also developed through

guidelines from trade associations and case law.

Since all countries differ in size it can be difficult with a general number of respondents considering that population size varies greatly between countries. One way of solution could be to have a size measure in relation to population volume.

Proposal:Proportional number of respondents based on population. It is important to have a truly representative selection of respondents in terms of for example, gender, age and regions in order to be statistically correct. One way is to make a random selection from the population register to the panel/survey. Less suitable are self-recruited panels because they often get a distorted selection (the respondents have reported their interest in getting involved in a panel or survey and are therefore more interested in participating than the general population).

Proposal:It is of great importance to have a truly representative sample of respondents as a basis for the survey. There are several methods that are suitable for obtaining a nationally representative survey, for example web surveys or telephone surveys. When it comes to Sweden the conditions for web surveys are good, as 98% of the population has access to the Internet at home. However, not all countries have such Internet coverage. The method used in an individual country must therefore be guided by its conditions. Shopping surveys are less suitable for studies on acquired distinctiveness, as this requires a national representative selection, but can work well with surveys regarding confusion between brands (where statistic quality is not as crucial).

Proposal:The method should be in line with the country's technical development and be designed to have as high statistic quality as possible. When it comes to studies on acquired distinctiveness, it is important to have questions about both knowledge/awareness and questions related to distinctiveness. Surveys regarding confusion between brands is often more free when it comes to their design and it is difficult to give any direct guidelines.

Proposal: Surveys on acquired distinctiveness should contain questions about both knowledge/awareness and questions related to distinctiveness

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?

N/A

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

No they should not. When the surveys have been conducted it is up to the court to assess them and conclude what could be proven from them, but they should not be involved in the early stage.

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?

As regards relevant factors to consider we refer to list in answer 4b) above. The more of the factors that have been considered and are fulfilled the higher evidentiary weight the survey should be given. In cases where all factors are fulfilled the survey should – of course always depending on the circumstances – be given very high weight and possibly be sufficient to prove the issue in questions as stand-alone evidence.

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

N/A

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

Appliances, Tools & Housewares.