



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

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, 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)?

Survey evidence can be used to help prove a variety of issues, such as risk of confusion/association, acquired distinctiveness, reputation and use, genericness, goodwill rest on a mark, distinctiveness...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)?

Based on our experience, consumer survey evidence is mostly used to help prove in evidence of reputation and acquired distinctiveness.

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

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?

Since there are no specific requirements for surveys, it is not easy to determine characteristics.

According to Turkish Patent and Trademark Office's (PTO) Guideline; "In order to obtain the desired results from the survey, it is important that the sample size chosen for the survey is at a level that is able to represent the target public."

Besides according to Turkish PTO decisions, it is important to choose the participants matching the target audience characteristics. After reviewing some cases where consumer survey is conducted to prove acquired distinctiveness and well-known nature of a trademark, we note that face-to-face interview method where visual elements can be shown to participants is preferred; a total of 150-200 interviews are performed; the selection of respondents as well as the appropriate form and order of survey questions are set by the instructing company together with the survey company in light of the target consumers. That is, people interviewed were chosen based on their ages, genders, the cities they live in and their socio-economic status. Experienced interviewers (respondents) were said to be trained by the survey company on the questionnaire and the selection of the right people.

In addition, survey quality was tested via content and phone checks. In the reviewed cases, 2 or 3 questions are deemed sufficient and asked to reveal, if any, identification of a trademark with the specific product or service. For example, people matching the target audience characteristics were shown the bottle of VapoRub without a label and asked which brand the bottle belonged to. Those that didn't mention a brand name were asked whether the package in question can belong to Vicks VapoRub or not. In these cases, we did not encounter the use of controls and therefore cannot comment on the nature thereof. Please note that these characteristics highlighted above do not have any bindery nature.

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

No

Please Explain

there is no obligation about type and format of surveys, any type of survey can be presented, the related authorities decide on type, content, scope, and format of surveys, so it is not easy here to state a %.

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

There is no data available.

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

There is no regulation for the court or IP offices about setting up survey evidences.

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 Turkish Trademarks Law and Implementing Regulations do not contain any provisions regarding the weight or value to be given to consumer survey evidence by the court and/or IP office.

With respect to recognition of well-known trademarks and/or acquired distinctiveness and/or non-use action, it is known that consumer surveys statistically measuring the awareness of a mark or assessing the level of association between the characteristics of a product/service and its trademark are taken into consideration by the IP Office and/or the court. However the weight or value attached to consumer survey depends on the discretion of the examiner and/or the judge.

It is not possible to provide a common picture in relation to the value attached and weight accorded to Consumer Survey Evidences by Trademark Registry or by courts since their decisions quite rarely cover assessment as to the evidences and do not state the reason on which they are based.

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;

Yes

Please Explain

The Turkish Trademarks Law and Implementing Regulations do not contain any provisions which limit the use of consumer survey to certain trademark proceedings. Therefore it can be concluded that consumer survey evidence is allowed in all types of trademark proceedings and “types of trademark proceedings in which survey evidence is admissible” needs no further improvements.

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

Yes

Please Explain

Since in Turkey consumer survey can be applicable in all types of trademark proceedings and the value attached and weight accorded to it is judged by the IP Office at the prosecution stage and/or by the courts at the litigation stage, it can be concluded that “what survey evidence can prove or help prove” needs no further improvements.

8.c Requirements of surveys;

Yes

Please Explain

The Turkish Trademarks Law and Implementing Regulations do not set any principles as to the requirements of surveys and no case law /jurisprudence has been developed. Therefore it seems this field is open to considerable improvement and carefully crafted consumer surveys with sound methodology and high reliability and more specific regulation and/or guideline are greatly needed.

The proposed regulation and/or guideline should focus on the following criteria (which are exactly cited in other Office's/ EUIPO Guidelines) which would determine the weight and value of the survey:

- The survey should be conducted by an independent and recognised research company
- The survey should be of a size which is sufficient to produce some relevant result viewed on a statistical basis.
- Information as to the selection and basis of the respondents (number, age, gender, occupation, region etc) should be provided (How respondents are chosen, number of respondents surveyed, total number of respondents...)
- The way of the survey, the sampling method and the formation process of the survey conclusion should be described in detail.
- The complete list of questions included in the questionnaire should be annexed
- It should be ensured that the survey questions are not leading (The questions found in the survey should be phrased in an open-ended manner, should not lead the consumer, open-ended questions like "What does this sign mean to you?" or "Are you able to identify this sign?" should be preferred to leading questions like, "Do you regard this sign as a badge of origin for the applicant's goods?")...

8.d

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

No

Please Explain

Turkey does not have any pre-defined bench-mark percentages for consumer surveys and from the worldwide practice it can be concluded that proceeding-specific bench-mark percentages may also be identified in Turkey.

8.e

The weight or value given to consumer survey evidence.

Yes

Please Explain

From our scan of the any legal decisions or IP Office decisions, it seems that the probative weight of surveys has been slight, and they are used to support, rather than determine, the outcome of a case. Nevertheless, if carefully crafted consumer surveys with sound methodology and high reliability exist, the weight or value given to consumer survey evidence might be raised.

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

it is necessary to harmonise consumer survey evidences.

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

consumer survey evidence is admissible in trademark porcedures.

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

consumer survey evidence should be admitted in all types of trademark proceedings.

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 the degree of descriptiveness or distinctiveness, evidence of reputation, evidence of deception or confusion, acquired distinctiveness and as proof of use.

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

Even though we think there should be specific requirements, we hesitate in that different requirements may apply to different procedures and different goods and services. However, we are all of the opinion that a survey guideline should be prepared which should clarify as arching

requirements that a survey to be submitted either before the Office or the Court should clearly state how target consumers are defined; how respondents are selected; and how the questions are formed.

The Office and/or the Court and/or together should also prepare a list of accredited research institutes or companies that are eligible to submit consumer surveys in trademark proceedings.

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

The balance between strength of evidence and strength of objection should be separately discussed for each case. There should be no specific percentages to prove items.

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

The balance between strength of evidence and strength of objection should be separately discussed for each case.

The Registrar and/or the Court should not specify any benchmark that must be attained for any consumer survey result.

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 probative weight and value of consumer survey should be determined by the status and degree of independence of the entity conducting it, by the relevance and the accuracy of the information it provides, and by the reliability of the applied method.

While evaluating the credibility of a consumer survey, the following criteria (which are cited in other Office's/ EUIPO Guidelines) should be exactly discussed and known by the Office and/or the Court:

- Whether or not it has been conducted by an independent and recognised research institute or company, in order to determine the reliability of the source of the evidence
- The number and profile (sex, age, occupation and background) of the respondents, in order to evaluate whether the results of the survey are representative of the different kinds of potential consumers of the goods/services in question.
- How independent the respondents are (Evidence from any party under the control of the applicant...)
- The method and circumstances under which the survey was carried out and the complete list of questions included in the questionnaire.
- Location of survey; the place where the survey was conducted
- Date of survey

- Whether the percentage reflected in the survey corresponds to the total amount of persons questioned or only to those who actually replied.

Unless the above indications are present, the results of a consumer survey should not be considered of high probative value, and not in principle be sufficient on their own to support a fact.

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

NO ADDITIONAL ISSUES.

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

Telecommunication & Banking and Finance