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THE EFFECT OF CONSUMER SURVEYS AND ACTUAL CONFUSION EVIDENCE IN TRADEMARK LITIGATION: AN EMPIRICAL ASSESSMENT

By Dan Sarel* and Howard Marmorstein**

I. INTRODUCTION

How essential is it for plaintiffs bringing trademark infringement claims to present evidence of actual consumer confusion or a consumer survey that assesses likelihood of confusion? The answer to this important question remains unclear. While courts long have voiced their preference for such evidence, the reality is that trademark plaintiffs may prevail—and frequently do prevail—without presenting examples of actual consumer confusion or a consumer survey.1

In all federal judicial circuits, courts analyze "likelihood of confusion" through a multi-factor test based on a weighted analysis of the factors considered. The test does not require presentation of evidence of actual confusion, although such evidence is identified as one of the factors to consider. Because evidence of actual confusion often is difficult to obtain, a survey can be presented as evidence to support a finding of likelihood of confusion. Under the multi-factor test, a trademark plaintiff need not demonstrate merit on every factor to prevail. Rather, to establish trademark infringement, the litigant needs only to establish that the overall weighted analysis is in its favor.

Given the practical realities of the multi-factor test, the wisdom of collecting actual confusion evidence or developing a survey can certainly be questioned. Obtaining any data from consumers, particularly when a properly conducted survey is entailed, is a complex, time-consuming, and expensive process. Accordingly, trademark litigants are often faced with the following questions: How much of a hindrance is the absence of such evidence to the plaintiff’s case? Under what circumstances should the plaintiff pursue such evidence? How much of an impact is the

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lack of actual confusion evidence or a survey likely to have on the case outcome? Does the need for a survey or actual confusion evidence depend systematically on identifiable factors such as the similarity of the marks in question?

To conduct a meaningful cost-benefit analysis, litigants need to have a better understanding of the relationship between such evidence and actual case outcomes. To address these questions, this article presents an empirical study of trademark infringement cases decided by U.S. District Courts between 2001 and 2006, and examines the relationship between the use of actual confusion and survey evidence by trademark plaintiffs and injunction outcomes. The findings presented in this article should provide meaningful insights into the questions posed above and assist litigants in making more informed decisions about litigation strategy.

In Part II, this article provides an overview of the multi-factor tests used by the courts and the role of consumer surveys and actual confusion evidence in determining “likelihood of confusion.” Part III presents the methodology and findings of the empirical study we conducted on the relationship between the presentation of consumer surveys and actual confusion evidence, and success in obtaining injunctions. Finally, Part IV of this article discusses conclusions and implications for litigants in light of the results of the empirical study.

II. THE MULTI-FACTOR APPROACH TO DETERMINING “LIKELIHOOD OF CONFUSION” AND ACTUAL CONFUSION AND SURVEY EVIDENCE

“Likelihood of confusion” is the test for trademark infringement in the United States. Accordingly, establishing a likelihood of confusion between the parties’ trademarks typically is the central issue in trademark infringement cases. Courts examine whether relevant consumers are likely to be confused under normal market conditions by the products or services identified by the parties’ respective marks. To make that determination, each federal judicial circuit has devised a multi-factor test designed to capture a set of issues that reflect the pertinent realities in any given marketplace. While the specific factors may vary somewhat from one jurisdiction to another, they generally tend to include the following:

1. The similarity of the respective parties’ marks;

2. The similarity of the parties’ marketing methods;
3. The similarity of the parties’ channels of distribution for their goods or services;
4. The level of sophistication of the prospective purchasers for the respective parties’ goods or services, and the degree of care used in purchasing such goods or services;
5. The source-designating strength of the mark sought to be protected;
6. Where the junior user’s goods or services differ from the senior user’s, the likelihood that prospective purchasers of the junior user’s goods or services would expect the senior user to have expanded its marketing or sponsorship into the junior user’s field;
7. The extent of overlap in the parties’ geographic markets and whether the prior user is known by its mark in geographic markets in which it does not actually sell its goods or services;
8. Whether the junior user intended to copy the senior user’s mark in order to cause confusion or deceive; and
9. The degree of actual confusion that has surfaced as a result of the two parties’ respective marks.3

Likelihood of confusion is based on a case-by-case assessment and weighing of this non-exclusive list of factors. Plaintiffs are not required to prevail on every factor. As long as the balance of the evidence indicates that confusion is likely, a plaintiff can establish trademark infringement. The relevance and weight of the factors to be considered vary depending upon the unique circumstances of each case. The weight of each factor also may vary depending on its expected impact on determining likelihood of confusion.4

In an empirical study of the effects of the multi-factor tests, Barton Beebe found significant variations among the circuits in the application of the various factors.5 Beebe argues that judges employ “fast and frugal” heuristics to short-circuit the

4. See Robins, supra note 3, at 3-8 (and cases cited therein).
comprehensive multi-factor analysis. According to his analysis, a few factors tend to dominate the decision process. Beebe even argues that other factors are redundant or even sometimes irrelevant.

The methodology Beebe employed is unorthodox and the findings are open to different interpretations. For example, the study is based on analyzing judges' stated opinions on each factor, such that the study does not account for any effects of factors that are not fully discussed by judges. Nevertheless, Beebe's article makes an important contribution by highlighting the potential dominance of some factors. Most importantly, the similarity of the parties' trademarks and relatedness of their goods and services is necessary—though not sufficient—for a trademark plaintiff to prevail. In other words, unless judges find the marks to be sufficiently similar or the goods and services sufficiently related, plaintiff cannot win. What remains unclear from the article is what drives judges' decisions to rule in favor of the trademark plaintiff on these two factors.

One way to establish likelihood of confusion is through presenting evidence of actual consumer confusion. Courts repeatedly have held that incidences of actual consumer confusion are the best and most definitive proof of confusing similarity. Yet, evidence of actual consumer confusion is not necessary to establish trademark infringement. Beebe reported, however, that when courts found that survey evidence or incidences of actual confusion favored a likelihood of confusion, the plaintiff win rate was 92.4 percent.

While the presentation of reliable evidence of actual confusion is certainly desirable, it is a challenge to obtain for a variety of reasons. First, many trademark infringement claims are brought

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6. Id. at 1586.
7. Id. at 1586-87.
8. Id. at 1586.
10. Notwithstanding this general rule, some courts find the absence of actual confusion evidence—especially if such evidence is expected from the parties' particular uses of their trademarks—supports a finding that no confusion will occur in the future or creates an adverse inference. See Sandra Edelman, Failure to Conduct a Survey in Trademark Infringement Cases: A Critique of the Adverse Inference, 90 TMR 746, 748-54, 763-65 (2000) [hereinafter Edelman] (reviewing trademark infringement cases that discuss the consequences of an absence of survey evidence); Robins, supra note 3, at 20-24; 4 McCarthy, supra note 1, § 23:18; Beebe, supra note 5, at 1640-42 (questioning the view that not presenting actual confusion evidence may cause an adverse inference).
11. Beebe, supra note 5, at 1609.
soon after the junior user commenced use in order to *prevent* consumer confusion from taking place.\(^{12}\) Under these circumstances, the trademarks may have not coexisted long enough for actual consumer confusion to arise.\(^{13}\) For other reasons, it may be prohibitively difficult to find confused consumers and to present reliable evidence of such confusion, even when the trademarks have coexisted for some time.\(^{14}\) In the extreme, if the junior user has been very successful in “deceiving” consumers, the confused individuals may not even be aware of such deception.\(^{15}\) Clearly, if most consumers are unaware of the problem, it will not be easy to identify these incidences and present them in court. In other instances, consumers who have been deceived may be unwilling to step forward. Finally, when actual confusion evidence is presented, the quality of the evidence is often dubious.

In an excellent review of the many difficulties involved in the gathering and presentation of actual confusion evidence, Mark Robins suggests that:

Plaintiffs’ attorneys often draw a false sense of security from such evidence, which is often not what it appears, at first glance, to be. Indeed, such evidence is typically characterized by vagueness, ambiguity, untrustworthy sources, and a host of unknown circumstances when sources are not identified or do not testify. Furthermore, such evidence is frequently characterized by circumstances that do not reflect the commercial realities of how marks are used and how consumers react to them, as well as by widely varying quantities of incidents that are difficult to assess when viewed in light of various factors that may lead one to expect more or less such evidence to have surfaced.\(^{16}\)

The oft-recommended alternative to presenting actual confusion evidence is to introduce a consumer survey,\(^{17}\) whereby survey professionals conduct consumer studies to measure whether an appreciable number of relevant consumers are likely to be confused by the unauthorized use of an mark. Like actual


\(^{13}\) Robins, *supra* note 3, at 13-15 (and cases cited therein).

\(^{14}\) *Id.* at 12.

\(^{15}\) 4 McCarthy, *supra* note 1, § 23:12, at 23-88 (noting “[p]ersons who are truly confused will often never be aware of the deception”).

\(^{16}\) See Robins, *supra* note 3, at 1.

confusion evidence, a consumer survey is not necessary to establish likelihood of confusion. Nevertheless, courts prefer such evidence, and some go as far as to draw an adverse inference of no likelihood of confusion if a trademark plaintiff does not present a survey.  

While courts’ predilection for survey evidence in this context is well-established, many litigants are reluctant to pursue this approach. The reasons for not presenting a survey typically include time constraints, the cost of a survey, technical difficulties in establishing likelihood of confusion, and other factors.  

Furthermore, many surveys suffer from multiple methodological problems and are never admitted into evidence. However, in most instances courts will admit a problematic survey but reduce the weight accorded it.

Thus, many trademark plaintiffs proceed without introducing either incidences of actual confusion or survey evidence. This approach, however, has been criticized by many courts in decisions to deny requests for an injunction by plaintiffs. While the preference of courts for the presentation of actual confusion or survey evidence is very clear, it is by no means mandatory. Favorable judgments on other critical factors may be more than sufficient to obtain an injunction. This may explain why in a study conducted by Graeme W. Austin over a ten-year period (1993-2003), surveys were introduced in only 57.4 percent of trademark infringement cases that went to final judgment. In 22.2 percent of the cases in that study, Austin concluded that the court discounted or accorded little weight to the survey evidence, while in 35.2 percent of the cases, it influenced the courts’ deliberations regarding what consumers might believe about likelihood of confusion. That study did not examine the relationship between survey evidence and case outcomes.

19. See id. at 754-57.
21. See Edelman, supra note 10, at 748-54, 763-65; see Robins, supra note 3, at 20-24 (citing cases discussing the absence of actual confusion evidence).
23. Id. at 867.
24. Id. at 866-71.
Although Beebe’s study analyzed the impact of judges’ crediting a trademark plaintiff's survey or actual confusion evidence, it did not analyze the judges’ decision-making process in deciding why survey or actual confusion evidence favored the trademark plaintiff. Beebe’s study does not indicate how often surveys were introduced. Judges directly addressed surveys in only 20 percent of the cases in that study. In 42 percent of the cases in Beebe’s study in which plaintiffs introduced surveys that were directly addressed by the court, judges credited that evidence as helping to win the case. Based on case analysis and literature review, the overall role and effect of surveys and incidences of actual confusion seems to be inconclusive. Yet when such evidence is introduced, Beebe found the plaintiff's likelihood of prevailing in the case to be extremely high. The study we conducted sheds light on when survey evidence and incidences of actual confusion are most likely to be helpful, and when their impact is minimal or even negative.

III. EMPIRICAL INVESTIGATION: THE ROLE OF ACTUAL CONFUSION AND SURVEY EVIDENCE

The practical issue for trademark plaintiffs is determining when to try to collect actual confusion evidence or develop survey evidence, given the cost, time, and other constraints involved with doing so. To shed light on this issue, we undertook a quantitative statistical analysis of trademark litigation cases in federal court. By examining multiple cases over a five-year period, we assessed the statistical relationship between presentation of actual confusion evidence and/or survey evidence and case outcomes. The goal of our study is to help trademark plaintiffs make more informed decisions about when to present actual confusion evidence and/or survey evidence.

A. Methodology and Criteria

The population for this study was defined as trademark infringement cases in which likelihood of confusion was the central issue of the litigation. The cases in the study were litigated and decided between 2001 and 2006 in U.S. district courts in various

25. Beebe, supra note 5, at 1641.
26. Id. at 1641.
27. Id. at 1609.
federal judicial circuits. The study included only cases in which the infringement plaintiff possessed an undisputed, valid trademark. A case had to be tried and resolved during this six-year period to be included in the study. We defined a “resolution” of the case as a clear decision by the court regarding likelihood of confusion and whether to grant or deny an injunction, either at the preliminary injunction stage, on summary judgment, or following a bench trial. The data set did not include cases that were dismissed on technicalities or that focused primarily on other legal issues. Furthermore, the data set only included cases with sufficient information about the basic issues of the case and evidence presented. The data set was obtained from the LexisNexis legal database. Based on the above criteria, the data set consisted of 126 cases.

Each case was read carefully by two trained researchers. The researchers classified and coded the cases using a predetermined set of variables that we considered relevant to whether the plaintiff would obtain the desired injunction. The classification variables included: the similarity of the parties’ marks, which we refer to as “name similarity;” the relatedness of the parties’ respective goods or services, which we refer to as “industry similarity;” whether the plaintiff presented evidence of incidences of actual consumer confusion; and whether the plaintiff presented a consumer survey bearing on likelihood of confusion. The outcome or criterion variable was whether the plaintiff’s injunction was granted. The researchers displayed a high degree of agreement on the initial coding of the study’s subjective variables, name similarity and industry similarity. In the few cases that initially were coded differently, the two researchers had a follow-up discussion and resolved any differences.28

Our analysis focused upon the similarity of the parties’ trademarks (name similarity) and the relatedness of the goods and services (industry similarity). We selected these factors for three principal reasons. First, the need for a senior user to protect its mark by seeking injunctive relief is a direct consequence of the perceived similarity of the junior user’s name and relatedness of goods or services. Inasmuch as courts are likely to consider these two factors as among the most important components in the multi-factor test,29 we expected to find that the impact of actual confusion and survey evidence would depend critically on these

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28. A more detailed definition of each variable provided in the context of the study’s findings and supplemented with examples is available in this article’s Appendix.

29. Beebe, supra note 5, at 1600.
considerations. Second, examination of these two factors facilitated the inclusion of the maximum number of cases in the study during the relevant time period because the authors could readily and accurately assess these case characteristics, irrespective of the level of disclosure in the study’s data. In contrast, measurement of other factors, such as the similarity of companies’ marketing methods or the strength of the mark, is more subjective. Also, the information necessary to permit an objective evaluation of these factors may not be fully disclosed in the judicial opinions. Finally, we believed that these two similarity factors could be assessed in a more objective and reliable fashion than the other predictor variables. This approach renders the statistical conclusions and related legal implications more robust than would otherwise be the case.

B. Findings

1. Overall Impact

The association between the presentation of evidence of actual confusion or a consumer survey and whether the court issued an injunction is reported in Table 1. As indicated in Table 1, injunctions were granted in 50 percent of all cases in the study. When either evidence of actual confusion and/or a consumer survey was presented, injunctions were granted in 55.6 percent of the cases. When no such evidence was presented, injunctions were granted in only 42.6 percent of the cases in the study. While the introduction of evidence of actual consumer confusion or a survey correlated with a slightly higher chance of establishing trademark infringement, the incremental impact is neither statistically significant nor substantively impressive. While, in part, this may be due to the study’s sample size, as will be described in greater detail below, actual consumer confusion evidence and consumer surveys have much greater impact in some cases and very low or even a negative impact in others. The analysis below explores these circumstances and identifies key factors that may contribute to these wide differences in impact.
Table 1
Actual Confusion or Survey Evidence and Injunction
(n=126)

<table>
<thead>
<tr>
<th>Injunction Granted?</th>
<th>Actual Confusion or Survey Evidence Presented?</th>
<th>All</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td></td>
<td>50.0%</td>
<td>57.4%</td>
<td>44.4%</td>
</tr>
<tr>
<td>Yes</td>
<td></td>
<td>50.0%</td>
<td>42.6%</td>
<td>55.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Chi-Square p=.15

2. Actual Confusion Evidence

Table 1 above examined the impact of presenting any type of consumer confusion evidence throughout every case in the study. In Table 2 we focus solely on the relationship between the presentation of *incidences of actual confusion* and injunction outcomes. As discussed above, evidence of actual confusion varies greatly in terms of strength and quality.\(^{30}\) To capture the variations in strength of the evidence and to measure more accurately the association with case outcomes, we developed and employed a multi-level actual confusion evidence variable. In the table, we divided the “Actual Confusion Evidence” variable into three levels: “None”—the plaintiff presented no actual confusion evidence; “Marginal”—the plaintiff presented evidence that was weak in magnitude or quality; and “Meaningful”—the plaintiff presented substantial and reliable evidence of actual consumer confusion. Furthermore, to qualify as “Meaningful” evidence of actual confusion, the plaintiff must have presented five or more incidences of actual consumer confusion by one or more parties disinterested in the case outcome (e.g., not the plaintiff’s employee or relative).

The results in Table 2 indicate that injunctions were granted in 75 percent of the cases in which plaintiffs presented actual confusion evidence in the “Meaningful” category, 42.9 percent of the cases in which plaintiffs presented no actual confusion evidence, and in only 30 percent of the cases in which plaintiffs presented actual confusion evidence in the “Marginal” category.

\(^{30}\) See supra note 13 and accompanying text.
These results reveal a strong statistical association between the presentation of meaningful incidences of actual confusion and obtaining an injunction. Conversely, presenting “Marginal” incidences of actual confusion is associated with a very poor likelihood of obtaining an injunction. In fact, cases in the “Marginal” category performed worse than those in the “No” category. A discussion of the implications of these findings, as well as all subsequent results, is provided in Part IV below.

Table 2
Actual Confusion Evidence and Injunction
(n=126)

<table>
<thead>
<tr>
<th>Actual Confusion Evidence</th>
<th>Injunction Granted?</th>
<th>None</th>
<th>Marginal</th>
<th>Meaningful</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td></td>
<td>57.1%</td>
<td>70.0%</td>
<td>25.0%</td>
</tr>
<tr>
<td>Yes</td>
<td></td>
<td>42.9%</td>
<td>30.0%</td>
<td>75.0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Chi-Square p=.003

3. Likelihood of Confusion Surveys

The impact of introducing a likelihood of confusion survey is examined in Table 3. As was done above for incidences of actual confusion, the “Confusion Survey” variable was also defined and measured at three levels: “None”—the plaintiff did not present a survey; “Rejected”—the plaintiff’s survey was presented and entirely rejected by the court; and “Admitted”—the plaintiff’s survey was presented and admitted into evidence. It should be noted that the “Rejected” category refers only to cases in which surveys were completely rejected, not those cases where the weight of surveys was reduced (and thereby included in the “Admitted” category).31

The results reported in Table 3 are both pragmatically important and statistically significant. In 76.0 percent of cases in which survey evidence was presented and admitted, injunctions were granted. These results are significantly higher than for the “None” category, in which the plaintiffs prevailed in 51.8 percent of

31. See supra note 13 and accompanying text.
cases, and the “Rejected” survey category, in which the plaintiffs prevailed in merely 5.6 percent of cases.

### Table 3
**Confusion Survey and Injunction**
(n=126)

<table>
<thead>
<tr>
<th>Injunction Granted?</th>
<th>Survey Evidence</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>None</td>
<td>48.2%</td>
<td>94.4%</td>
<td>24.0%</td>
</tr>
<tr>
<td>Yes</td>
<td>Rejected</td>
<td>51.8%</td>
<td>5.6%</td>
<td>76.0%</td>
</tr>
<tr>
<td></td>
<td>Admitted</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Chi-Square p=.00

#### 4. Likelihood of Confusion Surveys and Trademark Similarity

Marks accused of infringing an existing trademark vary in terms of name similarity (between the senior and junior marks). At the high end of the spectrum, the marks are identical or very close in pronunciation and/or spelling. At the other extreme, neither the spelling nor customary pronunciation of the marks are similar. In these “Less Similar” trademark cases, plaintiffs presumably were concerned about similarity in meaning or implication, such as use of the marks GLASS DOCTOR versus WINDSHIELD DOCTOR.32 For purposes of analysis, we coded the Name Similarity variable at two levels: “More Similar” and “Less Similar.”33 Table 4 examines the impact of survey evidence on case outcomes for each of the respective levels of name similarity of the litigants.

As one would expect, the results reported in Table 4 indicate that injunctions were more likely to be granted when names were “More Similar” than when trademarks were “Less Similar.” This serves as a face validity check of our study’s findings. More pertinent to the goal of this article, use of consumer surveys resulted in a statistically significant increase in the likelihood of obtaining an injunction against a defendant at each level of name similarity. In the “More Similar” trademarks category, courts granted injunctions in 91.7 percent of the cases in which the plaintiff presented a survey that was admitted into evidence. In


33. A more detailed definition of these variables are provided in the Appendix.
contrast, courts granted injunctions in 72.4 percent of the cases in which no survey was proffered. Strikingly, courts granted injunctions in only 25 percent of cases in which the proffered survey were rejected by the court.

The results are far more dramatic in the “Less Similar” trademarks category. Without an admitted survey, it was very difficult to obtain an injunction. In this category, plaintiffs that had surveys admitted into evidence prevailed in 61.5 percent of cases. In contrast, only 4 percent of plaintiffs obtained an injunction without a survey. Not one plaintiff in the “Less Similar” trademarks category obtained an injunction after the court rejected its survey. Thus, the correlation between presenting surveys that are admitted into evidence and obtaining injunctions is very strong when the senior user brings suit against a junior user using a less similar trademark.

<table>
<thead>
<tr>
<th>Trademark Name Similarity</th>
<th>Injunction Granted?</th>
<th>None</th>
<th>Rejected</th>
<th>Admitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Similar</td>
<td>No</td>
<td>27.6%</td>
<td>75.0%</td>
<td>8.3%</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>72.4%</td>
<td>25.0%</td>
<td>91.7%</td>
</tr>
<tr>
<td>Dissimilar</td>
<td>No</td>
<td>96.0%</td>
<td>100.0%</td>
<td>38.5%</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>4.0%</td>
<td>0.0%</td>
<td>61.5%</td>
</tr>
<tr>
<td>Chi-Square p=.033</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5. Likelihood of Confusion Surveys and Industry Similarity

Trademark infringement cases can be brought against junior users whose marks are used in connection with goods or services that are in the same or closely related industries, as well as against those users that are in unrelated industries. In the study, we defined the “Industry Similarity” variable as “High” if the
junior user’s mark was used in connection with a line of business in which the senior user was already participating or a closely related one. One example from our study is the case of BOWFLEX against BODYFLEX,\textsuperscript{34} in which both firms marketed exercise equipment. Here, industry similarity was coded as “High.” In contrast, we classified as “Low Similarity” cases involving ABSOLUT VODKA for vodka versus ABSOLUT MAGAZINE for magazines\textsuperscript{35} and MINNESOTA WILD for a sports team versus MINNESOTA WILD for specialty foods.\textsuperscript{36} The latter cases also delineate the distinction between the “Industry Similarity” and “Name Similarity” variables. Clearly, the marks even can be identical (and thus classified as “More Similar” in Name) while the “Industry Similarity” is categorized as “Low.”

Given that classification, this section examines the impact of survey evidence in cases involving different levels of relatedness of the parties’ goods or services. The results reported in Table 5 indicate that surveys were correlated with greater success in obtaining injunctions against all junior users, regardless of the relatedness of the parties’ goods or services. In the “High Similarity” industry category, courts granted injunctions in 72.2 percent of cases in the “Admitted” category. In the “No” survey category, courts granted injunction in 55.6 percent of cases. Finally, in the “Rejected” survey category, courts granted injunctions in only 6.2 percent of cases.

The influence of consumer surveys in cases in the “Low Similarity” industry category was even more pronounced. In 85.7 percent of cases in the “Admitted Survey” category, courts granted injunctions. In cases in the “No Survey” category, courts granted injunctions in only 27.3 percent of cases. Finally, not one court granted an injunction in the “Rejected” survey category. Thus, it was extremely difficult to obtain an injunction without an admitted consumer survey in “Low Similarity” industries.


\textsuperscript{36} See Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club LP, 2002 Dist. LEXIS 13991 (D. Minn. July 26, 2002).
Table 5
Industry Similarity, Confusion Survey & Injunction
(n=126)

<table>
<thead>
<tr>
<th>Industry Similarity</th>
<th>Survey Evidence</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Similar</td>
<td>Dissimilar</td>
<td>Survey Evidence</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Injunction</td>
<td>Granted?</td>
<td>None</td>
<td>Rejected</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td></td>
<td>44.4%</td>
<td>93.8%</td>
</tr>
<tr>
<td>Yes</td>
<td></td>
<td></td>
<td>55.6%</td>
<td>6.2%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Chi-Square p=.00

Chi-Square p=.021

IV. DISCUSSION

The goal of this study is to help plaintiffs determine the importance and value of presenting actual confusion evidence and/or surveys in trademark infringement litigation. The study identified circumstances under which the presentation of such evidence is likely to have a greater impact on outcomes. The discussion below summarizes the key findings and implications for plaintiffs.

A. The Overall Impact of Actual Confusion and Survey Evidence

In the aggregate, the findings indicate a modest improvement in positive outcomes for plaintiffs through the presentation of actual confusion or survey evidence. Overall, plaintiffs prevailed in 55.6 percent of cases with such evidence as compared to winning only 42.6 percent of the cases in which no actual confusion or survey evidence was presented. Despite the presentation of actual confusion or survey evidence, plaintiffs still failed to obtain an injunction in 44.4 percent of the study’s cases. Given the sample size, these differences, while directionally interesting, are not statistically significant. The findings suggest that in the aggregate the odds of winning improve only slightly with the presentation of actual confusion or survey evidence.
B. The Effects of the Quality of Actual Confusion and Survey Evidence on Case Outcomes

The study’s findings indicate that the quality of the actual confusion evidence and surveys presented is strongly and statistically associated with case outcomes.

1. Actual Confusion

The study indicates that when meaningful evidence of actual confusion (i.e., impartial and from more than a handful of sources) of relevant consumers in appropriate circumstances is presented, the likelihood of the court granting an injunction is very high (75 percent). If actual confusion evidence of marginal quality is presented, the likelihood of a positive outcome drops to only 30 percent (compared with 42 percent for no actual confusion evidence). It is important to note that the “quality” of actual confusion evidence is relatively easy to determine *a priori*. Courts frequently dismiss unreliable evidence of actual confusion. The reasons for doing so include witness testimony or evidence that appears not to be credible, not from the relevant classes of consumers, or ambiguous and unpersuasive. While this may appear to be axiomatic, the data set in this study indicates that many trademark plaintiffs still choose to present such unreliable evidence to their detriment. The findings of our study suggest that the presentation of unreliable evidence tends to weaken the plaintiff’s case. Therefore, if the only available evidence of actual confusion is weak, the plaintiff should consider not utilizing it. Rather, to maximize the chances of prevailing, our study suggests that trademark plaintiffs should consider conducting a likelihood of confusion survey.

2. Confusion Surveys

In this study, plaintiffs presented likelihood of confusion surveys in about a third of the cases (34.1 percent). Courts granted injunctions in 76 percent of the cases in which a consumer survey was presented and admitted into evidence. When surveys were presented to the court but not admitted into evidence, courts granted an injunction in only 5.6 percent of the cases. In contrast, courts granted an injunction in 51.8 percent of the cases in which no survey was presented. These findings highlight the dramatic impact of presenting a survey that the court refuses to admit into evidence. Thus, it is of utmost importance to ensure that a proper survey is developed to increase the likelihood that it will not be rejected. Plaintiffs are far more likely to prevail by enlisting professionally qualified researchers who are very familiar with the
C. Adverse Effects of Weak Evidence

Our study found that both inadmissible (i.e., rejected) surveys and actual confusion evidence of marginal quality markedly reduced the likelihood of obtaining an injunction. While our interpretation of such adverse effects admittedly is speculative, the consistent pattern of these findings warrants some consideration and could be due to a combination of a few factors.

One possible explanation for these results is that the introduction of weak evidence signals the weakness of a plaintiff’s case to the court. Specifically, if the plaintiff’s survey involved blatantly leading or biased methods to produce supposed evidence of likely confusion, perhaps it is not unreasonable for the court to infer that more reliable survey methodology was not available. Likewise, if the only individuals who are brought to testify of their confusion are affiliated with the plaintiff (e.g., employees or friends), the trier of fact may well surmise that a significant number of impartial consumers could not be located. This suggests that true likelihood of confusion was de minimis. A potential plaintiff also should consider the possibility that the introduction of unreliable consumer testimony may undermine the credibility of the remainder of its case. This may also explain the negative impact of weak consumer evidence on case outcomes, holding the objective difficulty of the case constant.

D. Impact of Survey Evidence Where Parties’ Marks or Goods or Services Are Dissimilar

In examining likelihood of confusion, the trier of fact evaluates the degree of similarity of the trademarks involved. In this study, we focused upon trademark similarity (name similarity) and the relatedness of the parties’ goods or services (industry similarity). While each examines a different perspective of trademark similarity, they both could be viewed as proxies for the strength of plaintiff’s case. The more similar the parties’ trademarks, the stronger the case and the higher the likelihood of prevailing in court. Thus, it is not surprising that the study’s data indicate that actual confusion or survey evidence are more important in cases involving dissimilar trademarks or unrelated goods or services. The magnitude of the impact is especially important to...
note. In cases involving parties with dissimilar trademarks, plaintiffs prevailed in only 4 percent of the cases in which a survey was not presented, 0 percent in which the plaintiff’s survey was rejected, and 61.5 percent in which the plaintiff’s survey was admitted. In cases involving dissimilar goods or services, the plaintiffs prevailed in only 27.3 percent of cases in which a survey was not presented, 0 percent in which the plaintiff’s survey was rejected, and 85.7 percent in which plaintiff’s survey was admitted. The study’s findings indicate that the less obvious the likelihood of confusion may be to the trier of fact, the greater the importance of the admitted survey.

Clearly, it may not be easy or inexpensive to conduct a survey that demonstrates consumer confusion when the trademarks at issue are dissimilar. Yet, the conclusions of our study suggest that these are the very situations where it may be most prudent to consider such an approach. If a proper survey can be conducted that supports likelihood of confusion, even if is not “perfect,” developing such a survey merits serious consideration. The same holds true for identifying incidences of actual confusion. The benefits of presenting credible evidence are far greater where the parties’ marks or goods or services are less similar. However, plaintiffs should remain aware of the potential negative effect of presenting marginal or ambiguous evidence, which is discussed above in greater detail in Part IV.C.

### E. Impact of Survey Evidence Where Parties’ Marks or Goods or Services Are Similar

Even in cases in which the parties have relatively similar marks, the impact of an effective survey and/or meaningful incidences of actual confusion may be quite substantial. The study found that in cases in which the parties had both similar marks and similar goods or services, the incremental improvement in obtaining an injunction with admitted surveys was still meaningful.\(^38\) In cases in which the parties had similar trademarks, plaintiffs prevailed in 72.4 percent of cases without surveys and in 91.7 percent of cases with admitted surveys. Likewise, in cases involving similar goods and services, plaintiffs prevailed in 55.6 percent won without surveys and 72.2 percent of cases with admitted surveys. These incremental increases are significant and pragmatically important when considering strategy.

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\(^38\) Due to the limited size of the study’s sample, these findings are not statistically significant, although they do suggest certain trends that anecdotally warrant some consideration.
in litigation involving even similar trademarks and closely related goods and services.

If available, meaningful incidences of actual confusion typically are relatively inexpensive to obtain. Surveys, on the other hand, are often time-consum ing and expensive—even for large firms. Any cost-benefit analysis, however, should include consideration of the potential impact of not prevailing against the junior user and others who may follow.

V. CONCLUSION

While our study focused on two dimensions of trademark similarity, the other factors in the multi-factor test applied in the various federal judicial circuits remain important. All factors should be assessed to determine the possibility of establishing likelihood of confusion. In general, the weaker the similarity between the parties’ trademarks and goods and services, the greater the value will be of presenting a survey or meaningful incidences of actual confusion.39

While the presentation of actual confusion and survey evidence is not required to establish trademark infringement, such solid evidence is generally of real value to most trademark plaintiffs. If solid meaningful incidences of actual confusion are unavailable, it generally is better not to present the questionable evidence, but instead consider the preparation of a consumer survey. It is of utmost importance to employ professional market researchers who are intimately familiar with the specific requirements of the court for trademark litigation surveys. The less obvious the case of confusion, the greater the importance of having a well-executed survey admitted as evidence. Finally, if the impact of losing a case is particularly significant, plaintiffs should seriously consider conducting a survey in almost every instance.

39. It is important to consider the potential effect of the presentation of a survey by the defendant. This study’s data set did not include a sufficient number of surveys introduced by defendants to permit a meaningful statistical analysis. Qualitatively, however, the limited number of cases examined support this study’s general conclusions; namely, that admitted surveys are helpful. In particular, those cases in which only defendant’s survey were admitted into evidence caused difficulties for the plaintiff.
APPENDIX

Variable Definitions

1. “Name Similarity” was coded at 2 levels: “More Similar” and “Less Similar.”
   Definition: The marks were classified as “More Similar” if either the marks were identical or very close in pronunciation and/or spelling to each other. Cases that did not fall into the “More Similar” category were coded as “Less Similar.”
   Examples: In a case involving the marks MAGNILITE versus MAGNI-LIGHTS the marks were coded as “More Similar.” In a case involving the marks BIG APPLE DELI versus BIG BAGELS DELI, the marks were coded as “Less Similar.” Likewise, in a case involving the marks LOAD ‘N GO versus STACK ‘N GO, the marks were classified as “Less Similar,” despite the similarity of meaning between the marks.

2. “Industry Similarity” was coded at two levels: “High Similarity” and “Low Similarity.”
   Definition: If the junior user of the mark had entered a line of business in which the senior user was already participating, then Industry Similarity was classified as “High.” Cases that did not fall into the “High” category were coded as “Low.”
   Examples: In a case that involved use of the marks ABSOLUT VODKA and ABSOLUT MAGAZINE, the Industry Similarity was coded as “Low.” In contrast, in a case that involved use of the marks BOWFLEX and BODYFLEX in connection with exercise equipment was classified as “High” in Industry Similarity.

3. The “Consumer Surveys” variable was coded at three levels of use: “No Survey,” “Rejected,” and “Admitted.”
   Definition: The three-level classification for whether the plaintiff introduced a consumer survey of likelihood of confusion was objective in nature. If the plaintiff did not present a survey, the case was coded as “No Survey.” If the plaintiff presented a survey that was rejected, the case was coded “Rejected.” Finally, if a survey was conducted and admitted, it was coded as “Admitted” (even if its weight was reduced by the court).

4. “Actual Confusion Evidence” was classified at three levels: “None,” “Weak,” and “Strong.”
   Definition: To be coded as “Strong” evidence, the plaintiff needed to present five or more incidences of actual consumer confusion including testimony by one or more parties disinterested in the case outcome (e.g., not an employee or relative of the plaintiff). “None” is when no actual confusion evidence was
presented. Evidence was coded as “Weak” if the plaintiff presented a few individuals who claimed to have been confused by junior mark or testimony that did not appear to be credible.