

## Good Data Drives Out Bad Cases

BY ROBERT L. KLEIN, PRESIDENT,  
APPLIED MARKETING SCIENCE



*Bob Klein is president of Applied Marketing Science, a market research consulting firm based in Waltham, Massachusetts. He has been a frequent speaker to business and profes-*

*sional groups, and has served as an expert witness in over 30 cases involving marketing science and consumer behavior for cases related to trademark infringement, confusion, patent damages, class certification, trade secrets, sales forecasting and others. Bob can be reached at [bklein@ams-inc.com](mailto:bklein@ams-inc.com) or (781) 684-1230, X121.*

### BEAUTY IS IN THE EYE OF THE BEHOLDER

The origins of this proverb have been traced to the mid 1500s, but most attorneys would recognize its truth in the eyes of their clients. Clients rarely express any doubts about the validity of their claims or the seriousness of the damage they have suffered due to the egregious actions of the (soon to be) defendant. By the same token, the other side will rarely concede even the existence of the alleged behavior, much less the possibility that the plaintiff was harmed in any way.

Soon letters are exchanged, a lawsuit is filed and the case begins to wind its way

through the legal system. At some point in the process, hopefully sooner rather than later, the parties attempt to negotiate a settlement of the dispute. But only when both sides take off their rose-colored glasses, or have them convincingly removed, can a settlement be reached. Here is where good data can play a critical role.

Both parties need to be able to assess their likelihood of winning, the cost of moving forward, and the potential payoff. Sometimes this calculation is done implicitly and sometimes one of the numbers in the equation is so large or small that the best course of action is obvious. Often, however, the uncertainty around the numbers makes the business decision difficult.

The cost of litigation is measured not only in legal fees, but also in the time that corporate management must commit and the distraction that legal actions can cause to a company's real business. An experienced attorney will balance these and other factors in advising his client on the appropriate course of action.

In considering the proper course of action, good data can make all the difference. Data can come from many sources. Case law can provide some guidance on the likelihood of success for a given matter and what the payoff might be. Internal corporate records can be a basis for estimating lost sales and profit. But market research survey data can sometimes provide even more valuable input, particularly at the early stages of a case.

When most attorneys think of surveys, they generally are thinking about trade-

mark- or advertising-related issues where the perception of the customer is a key fact element. In these sorts of cases, a survey often forms the basis for an expert to opine on the likelihood of confusion, secondary meaning, customer perceptions of advertising claims, or what a customer would have done "but for" the egregious actions of the defendant. Surveys have become so much a standard part of trademark cases that the lack of a survey showing confusion can lead to the adverse inference that either the plaintiff was not completely serious in their case or that had such a survey been done, the results would not have been favorable.

Most companies are familiar with market research and are users of many forms of market research in the normal course of their business. Even the smallest firms often make use of syndicated research studies that include surveys as part of the total information package. But in the early stages of litigation, survey research is rarely the first thing that attorneys or their clients think of to help shape a case or judge its merits.

### WHY USE A SURVEY?

A survey can be a very effective way of helping a client see the true "beauty" of her case. For example, a survey showing that a patent infringement caused minimal lost sales can encourage a party to accept a smaller than hoped for settlement. A survey showing significant confusion due to packaging or trademark similarity, can motivate a defendant to negotiate rather than fight on. A survey establishing that marketplace realities bear little resemblance to the allegations can persuade a plaintiff to drop the case.

When both sides are able to look at the same information and consider how that information will impact a judge or jury,

cases settle. Armed with valid and reliable survey data, attorneys are better able to assess the merits of their case and advise their clients as to the best way to proceed. Good data drives out bad cases.

Over the past few years, there have been a number of cases where the presence of survey data has helped bring parties together and facilitate a settlement without the expense and uncertainty of a trial. Because these cases never resulted in published opinions, (and in some situations are subject to confidentiality agreements), the role of surveys in their resolution is known only to the parties involved. Here are some examples drawn from actual cases in which survey research has been an important component in the disposition of a case before trial.

- In a case involving the alleged interference by an auto manufacturer in the business of an automobile customizer, the plaintiff claimed lost sales of over ten million dollars a year. A survey of the plaintiff's potential customers, however, showed that the actual lost sales was only a small fraction of the claimed amount and the case settled before the start of trial.
- In a case involving automobile aftermarket parts, one company commissioned an overseas manufacturer to create an exact duplicate of another company's signature product. Confusion was a given because the product that resulted was indistinguishable from the original product. Even the original manufacturer had difficulty telling them apart. Although the product was protected by neither patent nor trademark registration, a survey showed that the product configuration had acquired distinctiveness in the market and was widely recognized as coming from a single source. When presented with this survey data, the copier agreed to license the design from the original manufacturer.
- In a class action alleging false advertising of the capabilities of a computer printer, a survey of the putative class members showed that the alleged misrepresentations of the defendant were relatively minor and not a factor in the

customer's decision process. The case settled before class certification.

Some attorneys may resist commissioning a survey for fear that the results will not be supportive of their client's case. Surveys are not cheap, and sometimes the attorney's instincts will be correct. But if a survey is going to expose the weakness of one side's case, the other side should reasonably be expected to conduct the same survey and see the same result. The first side to know the truth can set the agenda for how the suit proceeds.

But all too often, surveys are one of the last steps in the process. Attorneys are understandably reluctant to incur the expense of a survey too early in the life of a case. Waiting until the last minute, however, can be more expensive for the client. If good data can persuade the other side to soften its position or accept a reasonable settlement offer, an early survey can be money well spent.

### THE VALUE OF EARLY DATA

Sometimes even the results of a survey pre-test can be valuable. Pre-testing or pilot testing a survey is a standard research practice that often improves the survey by eliminating confusing wording or awkward question sequences. In addition, pre-testing can provide a rough indication of the likely results of a full-scale study. While the information that comes from pre-testing is not as precise as the results of a full-scale survey, the data can have an important impact on the strategy of the parties.

- In a case alleging trade dress infringement, the parties were attempting to negotiate a settlement while a pre-test of a survey was being conducted on behalf of the plaintiff. When the plaintiff's representative in the negotiation introduced that very day's pre-test results into the discussion, the defendant accepted the settlement offered.
- In a case involving cartoon characters on children's clothing, the defendant maintained that there could be no confusion with the plaintiff's trademarked character. Pre-test results in this case, however, showed a considerable amount

of confusion. Recognizing that they were unlikely to prevail if they went forward with the case, the defendant withdrew the infringing characters.

- In a case involving alleged trade dress infringement of certain interior design features of a nightclub, the plaintiff conducted an inexpensive Internet survey prior to mediation. The survey showed that few customers related the specific design elements at issue with the plaintiff's establishment. Without secondary meaning for these design elements, the plaintiff decided there was little to be gained by continuing the fight.
- Often just the threat of a survey or the designation of a survey expert can motivate a plaintiff to rethink their strategy. A shoe manufacturer sued a boutique shoe store alleging that their distinctive product design was being infringed. Rather than giving up and rolling over, the alleged infringer retained a survey expert and indicated their intention to fight. This caused the plaintiff to take another look at the cost of proceeding and possible damages should they win. Their reevaluation of the case made continued litigation look like a poor business decision and the matter was dropped.

Surveys can be a powerful weapon in helping each side in a dispute see the real value of their position. And when the parties see both the truth and the beauty of their cases, settlement can occur. Because good data drives out bad cases. **IPT**



Applied Marketing Science, Inc.

303 Wyman Street, Waltham, MA 02451

tel: 781-684-1230

fax: 781-684-0075

web: [www.ams-inc.com](http://www.ams-inc.com)