Asking the right questions

MMR Strategy Group’s Dr Bruce Isaacson discusses the importance of question phrasing in trademark litigation surveys

In past decades, surveys have become increasingly common in litigation matters, particularly for matters involving concepts such as confusion, secondary meaning, false or misleading advertising, or consumer response to marketplace practices such as pricing. Plaintiffs who fail to provide a survey may be received skeptically by courts1 who may wish to look at the survey for evidence that there is indeed something about which to complain. As a result, surveys have become frequently submitted evidence in certain types of intellectual property matters.

Despite their growing frequency, surveys travel a difficult route for acceptance and weight, as they face well-credentialed opposing attorneys, and suspicious courts. Daubert and other related challenges are commonplace2. As attorneys, experts, and courts design and evaluate surveys, they can use as touch points a number of widely-cited reference materials, including the “Reference Guide on Survey Research”3, selected sections of McCarthy on Trademarks, articles published in reputable sources, and relevant references written in fields such as surveys, marketing, and marketing research. These materials typically address the proper conduct of surveys, such as research design, the use of controls, management of interviewers, or the selection of appropriate respondents. However, relatively little has been written about how to phrase survey questions, which is obviously a critical component of a litigation survey. A survey expert designing a litigation survey will likely spend many hours and much deep thought on this topic, and courts often look at question phrasing to see whether a survey is reliable and non-biased. This article provides three guidelines that can aid experts in the proper design of survey questions, and can aid those who evaluate such surveys in determining whether survey questions are likely to produce reliable data.

Guideline 1
Survey questions must be written so they can be clearly understood by survey respondents

The first rule for writing survey questions is fundamental: survey questions must be written so they can be clearly understood by respondents taking the survey. Although this guideline is simple to state, it has a number of profound and complex implications.

One implication is that survey items must be written using language and phrasing that can be understood by respondents for that particular survey. For example, a survey written for a respondent database of medical professionals will likely phrase questions differently than one written for primary grocery shoppers.

A second implication is that survey questions must ask about a single construct, so that when respondents answer the question, respondents and experts know what topic they were addressing in their answer.

A third implication is that the phrasing of survey questions should be designed in a manner that can be understood by laypeople, who likely do not have a lawyer’s understanding of the law. A good example is the phrasing of questions relating to confusion as to permission, which has been the subject of a number of court cases and much debate over past decades. There have been two main ways of phrasing the questions about trademark permission: one asks whether the company that made a product in question “needed to get permission”, while the other asks whether the company that made the product “received permission”.

A number of court cases have addressed these alternative phrasings. For example, in Indianapolis Colts v Metropolitan Baltimore, a survey asked whether the team or league needed someone’s permission to use a particular name on shirts and hats4. While a few other courts have favoured the “need to get” formulation, more recent decisions have criticised this phrasing as improperly asking respondents to come to a legal conclusion5. Other criticisms of this phrasing have raised the concern that some consumers may think permission is needed even when there is little or no likelihood of confusion6.

Guideline 2
Survey questions must be phrased to address the issues in dispute

A second guideline for survey questions is that they should be phrased to address the issues in dispute. To demonstrate, I will use an example from likelihood of confusion surveys. In any confusion matter, there are a variety of different types of confusion, which might include:

- **Confusion as to product:** When a consumer mistakenly confuses one product for another.
- **Confusion as to source:** When a consumer mistakenly believes that the company who made one product also made another product.
- **Confusion as to connection:** When a consumer mistakenly believes that the companies who make two products are connected, perhaps by means such as sponsorship, affiliation, permission, or endorsement.

Given the wide range of possible types of confusion, which types should a confusion survey ask about? It is not practical to ask about every type of confusion, because such a long list might cause respondents to conclude that the survey researchers were “fishing” for a yes answer in such a long list.

Two touch points can help determine whether the survey questions ask about the right types of issues. One is the complaint, which typically lists the types of marketplace activities that are claimed to occur in the matter. For example, in a matter involving confusion, to provide relevant evidence, the survey should ask about some or all of the types of confusion that the complaint alleges have occurred or are likely to occur. Phrasing questions to address the issues in dispute requires a thorough understanding of how the issues are described and defined.

A second touch point is past precedent, which might reflect the types of questions asked about in prior surveys on similar subjects.

As an example, consider the ‘Eveready’ format for likelihood of confusion studies7. In this format, respondents see one trademark or product, and are asked a series of questions to see whether their responses indicate they are thinking about the other product or trademark. This format is widely used, and has been called a “now-standard survey format to prove likely confusion”8 in certain cases. Although this type of format may be similar across cases, the questions asked in an Eveready format likelihood of confusion study can differ...
substantially from study to study.

The questions for an Eveready study start in a manner similar to the original study upon which this format is based, which asked “Do you think puts out the [product] shown here?” and then asked, “What makes you think so?” Since then, Eveready format surveys have asked about other types of confusion, such as authorisation, permission, sponsorship, or approval. For example, Starbucks Coffee Company v Marshall S Ruben\(^{10}\) involved a survey focused on company names. The first question asked for the name of the company, and follow up questions asked, “Do you think the company that owns this retail establishment is connected or affiliated with any other company? What other company?” A final set of questions asked about confusion as to authorisation, permission, or approval.

Given that an Eveready survey can ask about so many different types of confusion, careful reading of the complaint can help an expert determine which avenues of inquiry are most relevant for the survey. The same rule applies to other types of surveys. For example, in surveying for secondary meaning, some cases conform to the so-called anonymous source rule, which was described in \(v\) Lanard Toys as indicating that “… knowledge that a product comes from a single source, even without naming that source, is sufficient to establish secondary meaning\(^{11}\). In other words, when following the anonymous source rule, respondents simply need to indicate that they associate a trademark with one source, not identify the source. However, there have been cases involving secondary meaning where the courts have been interested in the specific source of the product, particularly where litigants have wished to establish secondary meaning\(^{12}\).

Guideline 3
Survey questions must be phrased in a non-biased and non-leading manner

A third guideline for the phrasing of questions in litigation surveys is that the questions must be phrased in a non-biased and non-leading manner. This guideline has a number of implications.

One implication is that the responses to significant questions should be rotated. When the order of response options is randomised, it reduces the effect of the bias that would occur if respondents are more likely to pick responses in a certain position, such as the first or last option. With rotation, responses are listed in an order so that each appears first or last an equal percentage of the time.

A second implication is that the question should be phrased in a neutral manner. Typically, this means that questions must include both positive and negative phrasings. For example, a false advertising study might want to ask about whether a commercial implies a certain message. The question to ask about that message would likely start with phrasing similar to, “Does or does not the commercial imply that …?”. This phrasing, and others like it, are equally balanced between the positive and the negative.

A third implication, perhaps underappreciated, is the importance of providing a “do not know” response to discourage guessing for all key questions in a survey. In the absence of a “do not know” option, respondents may feel forced to select a response they may not actually prefer over “do not know”. Not only is providing a “do not know” response critical to reduce guessing, it is also important to let respondents know that “do not know” is an acceptable response. As one source has written, “By signaling to the respondent that it is appropriate not to have an opinion, the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply \(^{13}\).”

A fourth implication is that a survey must not imply or suggest that the researchers are seeking a particular type of answer. Survey respondents are well-known to try to be helpful in answering questions. Just as in everyday conversation, respondents expect the communications they receive in survey questions to be informative and relevant; however, unlike an everyday conversation, their ability to ask clarifying questions is severely restricted during an interview. As a result, respondents attempt to gather information during interviews, even when the inference they received was not actually intended by the interviewer\(^{14}\). In other words, respondents may pick up subtle cues from the way products are presented, the order of question phrasing, and even the manner in which responses are presented. Interviewers must be careful to minimise these cues, and make sure that they do not unduly influence the data gathered.

Summary
This article has presented three guidelines for writing interview questions. The questions must be written so survey respondents can clearly understand them, they must provide data relevant for the matter in dispute, and they should be phrased in a non-biased and non-leading manner. Attention to these guidelines can help provide survey data that has greater levels of reliability and lower levels of bias.

Footnotes
7. MMR Strategy uses this type of research method in litigation surveys. For further reading see: bit.ly/THi4N8.

Author
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