

2019 – Study Question

Consumer survey evidence

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AIPPI AW 22
oktober 2019

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DISPOSITION

- *Bakgrund och introduktion*
- *Resolutionsarbetet under AIPPI:s konferens i London 15-18 september 2019*
- *Framtiden?*

BAKGRUND OCH INTRODUKTION

*Toronto Congress (2014) - **panel session** "Use of survey evidence in trademark cases". Focused on issues including admissibility and probative value.*



*Cancun Congress (2018) - **panel session** "Surveying the field - a gold standard for survey evidence". Explored a potential "gold standard" for different types of surveys.*

*London Congress (2019) –**Study Question** "Consumer survey evidence"*

Nu – Study Question

Omfång?

“This Study Question seeks to establish whether consumer survey evidence should in principle be admissible in trademark proceedings, and if so, in what types of proceedings and the weight or value that should be attributable to such evidence.”

“This Study Question will also explore what subject matter the survey evidence should encompass (e.g. confusion, reputation, acquired distinctiveness) and what requirements the survey should meet.”

Utmaningar för potentiell harmonisering

- Svårt att dra en skarp gräns (?) avseende vilket bevisvärde som ska tillmätas marknadsundersökningar (ex vis ska vi ha specifika procentsatser?)
- I vissa juristiktioner anses marknadsundersökningar som “hearsay” och ska därför underkännas per se. I de länder sådana tillåts uppkommer frågan om tillförlitlighet och bevisvärde oavsett
- Om våra domstolar/myndigheter förlitar sig på (läs: tillmäter “för stort” värde?) slutsatser i marknadsundersökningar, föreligger då risk att den rättsskipande funktionen undermineras? Kommer våra domstolar sluta göra en självständig prövning?

RESOLUTIONSARBETET

- 41 rapporter i årets ämne från nationella och regionella grupper samt oberoende medlemmar.
- Grupperna var splittrade gällande på två punkter:
 1. Om det skulle vara några specifika krav på marknadsundersökningar, och
 2. Hur myndigheter skulle värdera marknadsundersökningar
- Under AIPPI:s kongress i London 15-18 september 2019 diskuterades ämnet och förslag på resolutionen först i Study Committee och sedan i Plenary Session, innan slutlig resolution antogs av AIPPI:s Executive Committee.
- Slutlig resolution överensstämde i sin helhet med den svenska arbetsgruppens inställning.

Draft resolution

- Consumer survey evidence should be admissible in trademark proceedings.
- Consumer survey evidence should be admissible in any type of trademark proceedings, including administrative and court proceedings.

Final resolution

- Consumer survey evidence should be admissible **but not mandatory** in trademark proceedings.
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Draft resolution

- Consumer survey evidence should be admissible to prove or help prove any facts or circumstances relevant in trademark proceedings, in particular reputation, distinctiveness and confusion.
- There should be non-binding guidelines for the set-up of consumer surveys which should address items such as aim of the survey, methodology, number and selection of respondents and form and order of the questions.

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Draft resolution

- There should be no predetermined percentage of responses required to have a fact or circumstance deemed as sufficiently proved by a consumer survey.
- Courts or administrative authorities (i.e., the triers of fact) should not be involved in the set-up of a consumer survey.

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- Courts or administrative authorities (i.e., the triers of fact) should not be involved in the set-up of a consumer survey.

Draft resolution

- The weight or value of consumer survey evidence should be assessed on a case by case basis and taking into consideration, at least, the following factors:
 - a. relevance of the survey to the issues to be decided,
 - b. reliability of the consumer survey, in particular the neutrality, representativeness and formulation of the questions;
 - c. all other evidence submitted by the parties;
 - d. all other relevant circumstances of the case.

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FRAMTIDEN?



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Tack!