Use of Survey Analysis in Intellectual Property Cases at the ITC

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INTRODUCTION

Lawyers seeking to acquire information, describe, or quantify the beliefs, attitudes, or behavior of consumers often rely on consumer surveys.[1] Through these versatile data-collection tools, consumers respond to a series of – typically – standardized questions. Surveys are often used to describe or enumerate the attributes of technology and consumer products. In litigation, surveys can be especially useful tools to evaluate claims about certain consumer characteristics, such as whether consumers are likely to be misled by statements contained in advertisements or which product attributes consumers focus on when making purchasing decisions.

While this article focuses on using consumer surveys in intellectual property (IP) disputes at the US International Trade Commission (ITC), surveys also have a long history of use in other types of legal disputes (such as in antitrust, labor, and false advertising). Surveys can be a powerful addition to the legal arsenal used in IP disputes under Section 337 of the Tariff Act of 1930 (Section 337). We provide an overview of types of consumer surveys that can support economic analyses in various IP matters, including trademark infringement, false advertising, misappropriation of trade secrets, and patent infringement matters under Section 337.

OVERVIEW OF IP INVESTIGATIONS AT THE ITC

Over the years, the US has become one of the top import destinations for technology and other consumer products.[2] Consequently, the ITC has risen in importance as a forum for IP disputes under Section 337 for both US and foreign companies with requisite US presences.[3] Additionally, the fast-track nature of the ITC – and injunctive remedies for successful complainants – makes it an attractive forum for complainants looking for a speedy resolution to avoid irreparable injury to their brand, reputation, and business. For example, between 2006 and 2020, the number of active ITC investigations increased by more than 70%, from 70 active investigations in 2006 to 120 in 2020.[4]

To find a violation under Section 337(a), the Commission must investigate three key issues mentioned in 19 U.S.C. § 1337(a): (1) whether "[u]nfair methods of competition and unfair acts in the importations of articles […] into the United States, or in the sale of such articles" exist; (2) whether such unfair methods and acts represent a threat or have an effect of "destroy[ing] or substantially injur[ing] an industry in the United States;" and (3) whether affected industry in the US "exists or is in the process of being established."[5] While patent infringement cases account for a majority of ITC investigations, the ITC also investigates a broad array of other IP matters, including

trademark and copyright infringement, trade secret misappropriation, and false advertising.[6]

Using consumer surveys in such cases would be beneficial to Section 337 investigations not only because surveys can measure the extent of consumer confusion in trademark and false advertising matters; but also because they can help assess economic injury from any brand or reputational loss due to misappropriation of trade secrets or commercial product success and reasonable royalty rates for economic bond analysis. In addition, consumer surveys can help assess the extent of use of the patented technology in complex products and help with threshold issues surrounding the availability of substitutes in public interest analysis, as well as allocation of domestic investments in a complex mix of licensing-related investments.

USING CONSUMER SURVEYS TO ANALYZE CONSUMER CONFUSION

Trademark and false representation matters at the ITC can be similar to Lanham Act matters, in that one can demonstrate how "consumer confusion" caused an economic injury to the owner of the trademark. Consumer surveys can be a straightforward way to demonstrate instances of consumer confusion, such as whether consumers are likely to be deceived into believing the alleged infringer's mark is associated with the asserted mark.

As mentioned above, according to 19 U.S.C. § 1337(a)(1)(A)-(D), "unfair acts" and "[u]nfair methods of competition" cover all types of claims relating to registered intellectual property, including registered copyright and trademark; common law theories, such as common law trademark; and unfair acts, such as false representation. Together with evidence of the complainants' lost sales to infringing products, consumer surveys that evaluate consumer confusion between complainants' and infringers' products or marks can be powerful tools in determining whether there is economic injury.

To determine whether consumer confusion exists, courts typically consider the non-exclusive list of factors known generally as the DuPont factors.[7] In such disputes, consumer surveys can be used to measure the likelihood that consumers are confused by communication about the products at issue – an advertisement, product packaging, or some other form of communication regarding the product.

For example, in a false advertising matter, a "treatment" group of consumers (survey participants) in the relevant target population would be shown the actual advertisement that is claimed to be deceptive. Another "control" group would see a similar – but slightly modified – advertisement. The control advertisement could be an actual advertisement that is substantially similar to the ad that was actually run, but without the statement at issue; or an altered version of the actual ad, either with the problematic language removed or with additional statements providing context for the at-issue language. After seeing one of these ads, participants would answer a series of questions on the message they took away from the advertisement they saw. The responses of the two groups would be compared to evaluate whether the at-issue statements are likely to deceive consumers.

In matters involving trademarks, two standard formats of consumer surveys can be used to establish consumer confusion: Eveready and Squirt. In an Eveready survey, consumers in the relevant target population are shown only the infringing mark and asked to identify similarities with a non-infringing, senior brand, typically through a series of open-ended questions.[8] In the Squirt survey format, consumers are shown both the infringing and non-infringing marks in a manner designed to reflect the reality of the marketplace. They typically answer several closed-ended questions, which the survey administrators can review to ascertain whether confusion might exist about the source or maker of the at-issue products.[9]

Consumer surveys can also be used to measure the extent of reputational harm when infringing products are of lower quality or otherwise inferior to the complainant's products. In those cases, consumer surveys can assess whether the market presence of infringing products deteriorated consumer perception of the complainant's brand or product quality.

USING CONSUMER SURVEYS TO ANALYZE ECONOMIC INJURY FROM BRAND AND REPUTATIONAL HARM

The ITC has long interpreted Section 337(a)(1)(A) to include trade secret misappropriation among the "[u]nfair methods of competition and unfair acts" that it declares unlawful.[10] Accordingly, a complainant may satisfy the domestic industry requirement for a trade secret misappropriation claim by establishing either that (1) the domestic industry that is the "target" of the trade secret misappropriation is actually or threatened to be "destroy[ed] or substantially injure[d]" by the misappropriation, or (2) the "establishment" of such a domestic industry has been "prevent[ed]" by the trade secret misappropriation.[11]

In determining whether certain unfair methods or acts have had the effect of destroying or substantially injuring a domestic industry, "the Commission has considered a broad range of indicia, including the volume of imports and their degree of penetration, lost sales, underselling by respondents, reduction in complainants' profits or employment levels, and declining production, profitability and sales."[12]

The reputational harm from trade secret misappropriation may result from a failure to be first to the market, poor quality of misappropriators' competing products, and/or unreliability of misappropriators' competing products. In these cases, a specially designed survey can help to assess whether consumers associate the misappropriator's product with products of the primary brand, and whether consumer perception of the primary brand is tarnished by that association.

USING CONSUMER SURVEYS TO ESTABLISH THE EXTENT OF PATENTED TECHNOLOGY USAGE

Survey evidence can also help establish the extent of usage of the patented technology. It can be particularly useful in assessing the availability of substitutes in public interest analysis as well. Once the ITC determines that a patent violation has taken place, it has a legal obligation to determine the effect of an exclusion or a cease-and-desist order on: (1) public health and welfare; (2) competitive conditions in the US economy; (3) the production of like or directly competitive articles in the US; and (4) US consumers.[13] The ITC will not issue an exclusion order if it "find(s) that issuing an exclusion order would have a greater adverse impact on the public health and welfare […] than would be gained by protecting the patent holder."[14]

The economic foundation for analyzing the public interest factors is the availability of substitutes for products that might be subject to an exclusion order. Survey evidence can be particularly useful in analyzing the extent of usage of patented technology, and assessing how consumers and manufacturers perceive the availability of substitutes.

For instance, surveys can be used to evaluate how substitutable two or more products are with one another.

Similarly, survey evidence regarding the extent of the patented technology usage can also be useful in allocating domestic investments in a complex mix of licensing-related investments. The survey can elicit the degree to which the licensed technology at issue contributes to the product's sales. This is especially the case when the licensed technology is part of a larger patent pool or portfolio license, or when the requisite licensing revenue is bundled across multiple products and/or technologies and cannot be readily allocated to the at-issue technology (or product).

USING CONSUMER SURVEYS TO DETERMINE COMMERCIAL SUCCESS

In Section 337, disputes involving patents, "secondary considerations" (such as commercial success), long-felt but unsolved needs, and failure of others may be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.[15] Thus, the commercial success of a product practicing a patent-at-issue can be used to show whether specific inventions claimed in that patent would have been obvious to a person of ordinary skill in the art at the time of the invention.[16]

Survey evidence can be directly used to address commercial success and link the patented technology to the success of a product. One such survey well-suited to address this issue is a conjoint survey. This survey presents respondents with a series of side-by-side comparisons of hypothetical products, all with slightly different features and associated prices. By comparing the choices that respondents make across all options presented, an expert is able to estimate the price that consumers are willing to pay for the attribute(s) of interest, thereby quantifying the importance of the at-issue patented feature(s) in driving product sales.

Depending on the specific claims at hand, other survey formats may be appropriate. For example, a survey can present respondents with two alternative products, one with features enabled by the at-issue patent in the case and one containing nearly identical products without the disputed features. Respondents then answer a set of questions assessing the likelihood that they would purchase each product. The extent to which respondents' preferences vary for the two products suggests that the at-issue patents may affect their purchasing decision-making.

USING CONSUMER SURVEYS TO ESTABLISH A REASONABLE ROYALTY RATE

In cases in which the ITC determines that a Section 337 violation has taken place and issues a limited exclusion or cease and desist order blocking the importation and/or marketing, distribution, and sale of infringing goods in the US, the President has 60 days to review and disapprove the decision on policy grounds.[17]

During the 60-day presidential review period, a respondent can continue to import and sell infringing goods only after posting a bond "in an amount determined by the Commission to be sufficient to protect the complainant from any injury" from the continued unfair acts.[18] Such bond on sales of infringing goods can be based on price differentials and/or "at a reasonable royalty rate during the Presidential review period."[19] In this circumstance, a conjoint survey can be used to provide evidence on reasonable royalty rates, particularly when the infringed patent pertains to a feature of a larger product that is not priced individually.

In sum, survey evidence is often used in federal and state court litigation to address questions for which existing data are not well suited. In the context of IP litigation, surveys frequently provide important data for experts to evaluate numerous questions, including whether consumers are likely to be confused or deceived by an allegedly infringing mark, the extent of use of a patented technology, and the commercial success of a product or specific features of a given product. Surveys can likewise be used to provide evidence in Section 337 matters in front of the ITC when the existing data do not fully address questions in front of the Commission.

ENDNOTES

1 The opinions expressed are those of the authors and do not necessarily reflect the views of the The Brattle Group or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

2 In 2019, for example, the imports of Advanced Technology Products (including Biotechnology, Life Science, Optoelectronics, Information and Communications, Electronics, Flexible Manufacturing, Advanced Materials, Aerospace, Weapons, and Nuclear Technology products) amounted to $497 billion. See, "Trade in Goods with Advanced Technology Products," US Census Bureau, https://www.census.gov/foreign-trade/balance/c0007.html (last accessed December 15, 2020).

3 In order for foreign companies to qualify for protection under Section 337, they need to show the requisite amount of domestic activity related to the intellectual property rights at issue. See, Robert Rogowsky, Pallavi Seth, and Coleman Bazelon, "An Economic View Of The ITC's Domestic Industry," *Law360* (June 18, 2012). "Section 337 Statistics: Number of New, Completed, and Active Investigations by Fiscal Year (Updated Quarterly)," US International Trade Commission, https://www.usitc.gov/intellectual_property/337_statistics_number_new_completed_and_active.htm (last accessed January 25, 2021).

4 "Section 337 Statistics: Number of New, Completed, and Active Investigations by Fiscal Year (Updated Quarterly)," US International Trade Commission, https://www.usitc.gov/intellectual_property/337_statistics_number_new_completed_and_active.htm (last accessed January 25, 2021).

5 See, 19 U.S.C. § 1337(a).

6 In FY 2019 and 2020, 17 (or 13.4% in 2019 and 14.2% in 2020 of) ITC investigations involved trademark and/or copyright infringement, trade secret misappropriation, false advertising, and/or other unfair acts. See, "Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations by Fiscal Year (Updated Annually)," US International Trade Commission, https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm (last accessed October 28, 2020).

7 These factors were laid out in *In re E. I. DuPont DeNemours & Co.,* 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Relevance and importance of respective DuPont factors is context dependent, and "any one of the factors may control a particular case." See, *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

8 See, *Union Carbide Corp. v. Ever-Ready, Inc.,* 531 F.2d 366, 385-88 (7th Cir. 1976).

9 See, *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1089 n.4, 1091 (8th Cir. 1980).

10 See, for example, *Certain Cast Steel Railway Wheels, Processes For Manufacturing Or Relating To Same And Certain Products Containing Same*, Inv. No. 337-TA-655, Commission Opinion, February 2010.

11 *Cast Steel Railway Wheels* at p. 80, ("injury or destruction"); *Certain Caulking Guns,* Inv. No. 337-TA-139, Initial Determination, November 1983, at p. 54, ("prevention of establishment").

12 *Certain Electric Power Tools, Battery Cartridges, and Battery Chargers,* Inv. No. 337-TA-284, Commission Opinion, February 1990, at p. 246.

13 19 U.S.C. § 1337; 19 C.F.R. § 210.50. See also, *Certain Automatic Crankpin Grinders,* Inv. No. 337-TA-60, Commission Opinion, December 1979, at p. 17.

14 *Certain Inclined-Field Acceleration Tubes and Components Thereof,* Inv. No. 337-TA-67, Commission Opinion, December 1980, ("Acceleration Tubes") at p. 22; see also *Certain Baseband Processor Chips and Chipsets*, Inv. No. 337-TA-543, Commission Opinion, June 2007 ("Baseband Processor Chips"), at pp.136–137.

15 *Graham v. John Deere Co. of Kansas City,* 383 US 1, 17-18 (1966).

16 *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1071-72 (Fed. Cir. 2018); *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1337 (Fed. Cir. 2016). In addition, the complainant needs to show that a nexus exists between the commercial success and the merits of the inventions claimed in the patent at issue. See, e.g., *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995); *Merck & Cie v. Gnosis* S.P.A., 808 F.3d 829, 837 (Fed. Cir. 2015).

17 See, 19 U.S.C. § 1337(j). Such reviews are typically performed by the Office of the US Trade Representative on behalf of the President. See 70 Fed. Reg. 43251 (Jul. 26, 2005).

18 See, 19 U.S.C. § 1337(j)(3) and 19 C.F.R. § 210.50(a)(3).

19 See, for example, *Certain Semiconductor Chips Having Synchronous Dynamic Random Access Memory Controllers & Prods. Containing Same,* Inv. No. 337-TA-661, Commission Opinion, July 2010, at p. 2.

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