

# Simulating Consumer Surveys Using an iPod

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## Why this matters:

Many real life disputes, as well as some of those that turn up on the pages of trademark textbooks, turn on evidence of consumer confusion, secondary meaning, or genericism provided by consumer surveys. And yet, few trademark courses and texts devote time and space to this topic. One notable exception is Pattishall, Hilliard, & Welch, *Trademarks and Unfair Competition*, 6<sup>th</sup> edition, which includes over 16 pages on surveys and experts. Other textbooks relegate information about surveys to a footnote or brief comment after a case.

While lawyers will generally not be administering these surveys, they do need to understand how consumer surveys work, what is the value of the evidence, and how to attack an opposing party's survey evidence.

## The Technology:

Each student was provided with a 30GB video iPod, headphones, and a MicroMeme microphone.

The students created their survey podcasts on their own computers using freeware (Microsoft Powerpoint or other Paint-type program to develop the images, Microsoft Photostory to create the slide show with or without audio and visual effects, and Jodix iPod Video Converter to create an .mp4 file to upload via iTunes). The surveys were administered using the iPod's video capability and the results captured on the iPod using the record capability and the microphone.

## Abstract:

What happens if you loan a video iPod to every student in your trademark class? Besides earning you the tag of "coolest teacher ever," your students might just get a chance to learn a few things that don't get fully covered in most textbooks.

With the help of iPod technology, the students in my trademark class completed group projects that simulated (on a very small and unscientific scale) a consumer confusion survey.

Not only were the students able to reinforce their trademark knowledge, but they also got a peek into how difficult working with survey evidence can be. The exercise also enhanced their technological knowledge, teamwork skills, and legal reasoning capabilities. Finally, the students came out of the class with the perspective that trademark law can be pretty cool.

## The Project Assignment:

- Create a consumer survey
  - Identify a trademarked good and a potentially infringing good
  - Obtain photos of the goods
  - Create a video podcast to present visuals to the subject
  - Draft a set of questions to determine appropriate survey universe, subject bias, and confusion
- Administer the survey
  - Using the iPod, show the subject the video podcast
  - Using the microphone and iPod, record both the asking of the survey questions and the subject's responses to each question
- Analyze and defend the survey
  - Prepare a brief paragraph analysis about the results of your survey (Was the survey audience correct? Were the results conclusive? Would you change anything?)
  - Listen to another team's audio files (questions and answers)
  - Prepare a brief paragraph or two analysis describing what arguments you might make against the other team's survey evidence in court
  - Come to class prepared to make these arguments and defend your own survey

## Outcomes:

Although I believed in this project from the outset, I wasn't sure that the students would be enthusiastic about an out-of-class project that was so different from usual law school tasks. I was thrilled that the students' feedback was generally positive and every group put significant effort into the project, some going well beyond the requirements.

Besides providing a diversion from reading case law, the students also gained significant insight about consumer surveys in trademark cases. Although their surveys and results were highly unscientific, the students learned about the types of surveys used, how the composition of the survey universe alters the results, how poorly framed questions can affect the survey, and how most surveys can be interpreted in multiple ways. The students also practiced their legal reasoning and argument skills by developing arguments against another group's survey, presenting the arguments in class, and defending their own surveys.

The students also were reminded about human behavior and how the fact that consumers are indeed human can affect surveys. For example, one group picked a trademarked antacid remedy as their subject and were surprised to learn that most random people do not like being asked about their recent stomach ailments. Another group was surprised that the 1L in the library did not want to take two minutes to talk to them.

Overall, I was very pleased with the outcome of the project. The students achieved the objective of learning more about surveys than is available in the textbooks, will likely remember what they learned since it was not simply memorized, and had a good time doing it.



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