

Use of survey data in Sport Trademark Litigation: Issue of Psychometrical validity of survey instrument in light of Federal Rules of Evidence, Daubert V. Merrell Dow Pharmaceuticals and Congenerity Test

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This study examines the issue of psychometrical validity of an a priori survey instrument in light of sport trademark infringement litigation. It concludes that: (1) the issue of the psychometrical validity of a survey instrument can be a dispositive concern in legal proceedings under the Lanham Act, Federal Rules of Evidence ("FRE") and Daubert v. Merrell Dow Pharmaceuticals ("Daubert"); and (2) a multivariate technique introduced by this project, i.e., Congenerity Test (Bagozzi, 1980), would provide an effective gatekeeping solution for parties and courts.

Lanham Act 43(a) provides a cause of action for a plaintiff in a trademark infringement claim. It prohibits the use of "false designations of origin in connection with goods, services, or their containers that are likely to cause confusion as to the affiliation, connection, or association of [the producer or seller] with another person or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities." Under the statute, a Federal District Court would determine whether a defendant's unauthorized use of a trademark is likely to cause an appreciable number of consumers to be confused about the source, affiliation, or sponsorship of the goods or services. Empirical evidence of the actual confusion in the market, e.g., consumer survey data, can be a powerful basis of a plaintiff's argument in trademark litigation.

On the other hand, the FRE in conjunction with so-called Daubert rule prescribes what type of social science data would be accepted by courts. In general, modern courts under the Legal Realism allow social science information such as survey data if they are reliable. The FRE provides that judges will perform gatekeeping roles in determining the admissibility of all scientific data in federal proceedings. In Daubert, U.S. Supreme Court enumerated the criteria to determine the admissibility of the expert testimonies in relation to scientific data: i.e., (1) whether the technique at issue has been tested; (2) whether it has undergone peer review; (3) whether it provides its error rate; and (4) whether it has been accepted by the relevant scientific community. In lights of the FRE and Daubert rule, the validity of survey instrument in a trademark infringement case would be a dispositive issue. That is, while the plaintiff is likely to introduce some empirical data demonstrating some actual confusion in the market, an expert witness for the defendant would attack the questionable validity of the survey instrument, if any. Specifically, if a survey instrument used by a plaintiff primarily intends to measure some vague concepts such as brand image, it may be vulnerable to the challenges of instrumental validity.

Given the critical issue, this study demonstrates an advanced multivariate technique that may vigorously examine the psychometrical validity of a survey instrument possibly used in trademark litigation. It tests the instrumental validity of an a priori measurement model, i.e., the Brand Personality Scale (Aaker, 1997) by using the Congenerity Test. The measurement platform, the Brand Personality Scale, consists of five factors, i.e., sincerity, excitement, competence, sophistication, ruggedness, with 42 observable items. The Congenerity Test examines the extent to which different entities can be psychometrically compared under a measurement solution. It tests the comparability of a priori solution by implementing a series of stepwise constraint modeling procedures of the Structural Equation Modeling. The comparability of the measurement solution presented by the Congenerity Test indicates whether the survey instrument is reliable in demonstrating actual confusion in the market due to the defendant's trademark infringement.

This project demonstrates how the technique might be used in a real situation. It measures brand personalities of two professional sports (PGA & MLB) and two sponsors (Nike & Mercedes Benz). Respondents are college students at a major university in northeast U.S. (N=541). To test the instrumental validity of the BPS, it conducts multiple sets of Congenerity Tests. The result indicates that: (1) Mercedes Benz and MLB are psychometrically comparable with respect to the BPS factors of sincerity, competence and ruggedness; (2) Nike and MLB are comparable with respect to sincerity, excitement, competence and ruggedness; (3) Mercedes Benz and PGA are comparable with respect to sincerity, competence and ruggedness; and (4) Nike and PGA are comparable with respect to sincerity and competence. The result clearly shows that only a limited number of the BPS dimensions are psychometrically comparable.

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This research demonstrates that the Congenerity Test is empirically applicable for testing psychometrical validity of image-based constructs. In lights of the FRE and Daubert rule, the proposed technique would be a gatekeeping solution for parties in trademark litigation.