2019 Study Question

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Consumer survey evidence

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I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

1.a **Is consumer survey evidence in principle admissible in trademark proceedings? Please answer YES or NO.**

Yes

Please Explain

1.b **Are there specific statutory provisions in your law governing consumer survey evidence?**

If YES, what do they state and do they specifically concern trademark matters or do they have a more general nature?

No

Please Explain

If you have answered NO to Q1)a), please skip Q2)-Q5) and proceed to Q6); If you have answered YES to Q1)a), please proceed to Q2).

2.a **Is consumer survey evidence admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?**

Yes

Please Explain

2.b **If consumer survey evidence is not admitted in all types of trademark proceedings, in which types is it admitted and in which types is it not (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?**

Not applicable

3.a **What can consumer survey evidence prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?**

Consumer survey evidence can, in principle, prove or help prove any assertion relating to the public's perception, e.g. whether a sign is perceived as being used as a trademark, the degree of descriptiveness or (acquired) distinctiveness, the extent of the trademark's reputation, whether and to what extent a sign deceives the public and/or dilutes or causes confusion with the trademark, the extent of any free-riding, other negative impacts on goodwill, and the extent of any harm or damage to the rights holder. Furthermore, the Group considers that consumer survey evidence can, in principle, also help prove any assertion relating to facts (such as supporting evidence regarding genuine use).

3.b **What is consumer survey evidence most used for in practice to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?**

Taking into account the Dutch case law of the last five years, consumer survey evidence is most commonly used to help prove acquired distinctiveness, to prove a reputation and to serve as evidence of confusion or association between two signs. However, consumer survey evidence is also frequently used to assist in proving that the public perceives a sign as a trademark.

4.a **Are there specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?**

Yes

Please Explain

Specific requirements for consumer surveys are not laid down in guidelines or legislation that must be met in order for the court to accept them as evidence, but rather in common practice and case law. A survey conducted in a manner that is not in accordance with standards of proper research will likely lead to the court to regard its contents with scepticism, or to disregard the survey in its entirety. To this end, Dutch case law has developed certain ‘best practices’ that are generally taken into account when assessing such surveys as evidence.

The starting point for assessing the value of a survey is commonly whether it was conducted by an independent and reliable research agency. [1] Selecting a recognized and experienced agency will most often avoid such discussion. Survey evidence will furthermore be considered of limited value if the methodology of the survey is not explained in the report, as well as if the full respondent data (‘raw data’) are not submitted.

Both internet surveys as well as other ways of conducting a survey are generally accepted, although internet surveys seem to be gaining in popularity nowadays (e.g. as they usually come at lower costs, can be executed faster and their representativity has increased strongly). A potential pitfall, however, is demonstrated in the 2008 *Toblerone* case, in which an internet survey was criticised (and in the end rejected) partly because of it not being close enough to the actual market conditions of the product in question. [2] Since then, internet penetration and market conditions (e.g. internet shopping) have changed.

The manner in which the questions are posed is often also a point of discussion. In any case, the first question may not be leading. [3] For example, when assessing whether a sign is perceived as a trademark or has acquired distinctiveness, the first question should not be to ask what 'brand' the respondents think the product originates from. However, even a survey containing a leading first question may be taken into account to some extent, although our research shows that Dutch courts tend to have become more critical towards such questioning. Further it is accepted that subsequent questions may increasingly assist the respondent in the recognition of the trademark.

In the *Toblerone* case the Court concluded that the correct question is as follows: *"I show you this [trademark/photo of trademark] and I mention the word [product type]. Does anything come to mind?"* The idea is to have the respondent spontaneously classify the mark as an indication of origin (i.e. a trademark). Mentioning that the sign shown is in fact a trademark (i.e. *"I show you this trademark/brand")* negates this idea.[4]

The Court generally looks at both spontaneous recognition, as well as so-called "assisted" recognition whereby the respondents are provided with several options to choose from. However, in some cases Courts have criticised drawing conclusions from assisted recognition, suggesting that the survey should focus on spontaneous responses from respondents. [5] This is, however, no settled case law at this point.

It also follows from case law that an initial open question should ideally be followed up by control questions. Firstly, respondents should be asked why they have given a certain response. [6] And secondly, where relevant, it has been suggested that a survey needs to compensate for the so-called market leader effect; referring to the effect whereby respondents may name a company merely because it is one of the leaders on the product market in question and not necessarily because they recognise the relevant sign as a trademark (originating from that company).[7] This can be done for example by adding a realistic fantasy name or names of competitors in the survey and asking for its recognition in relation to the same goods/services as the actual trademark researched. In theory, the recognition of the fantasy name as originating from the market leader should be deducted from the results of the actual trademark researched.

Also, in comparing two signs for similarity, one cannot leave out parts of a mark to emphasise similarities, as this is regarded an improper application of the 'global appreciation' of the 'overall impression' of the marks. [8]

Further, the date of a survey has also proven to be a point of debate in Dutch case law. For instance, if a market survey is relatively old, it can still prove a current reputation if the marketing efforts of the trademark holder have remained unchanged. [9] However, case law also suggests there are boundaries to this concept. [10]

Finally, with regard to the group of respondents, the group of respondents must, firstly, be independent and representative [11] of the relevant public. In terms of the size of the group, more respondents are generally desired, but smaller sample groups are not rejected outright. Group sizes range from several hundred to several thousand. However, a sample group with as few as 100 respondents can suffice, but a considerably more statistically significant result is then usually required for the survey to be accepted as conclusive evidence. [12]

It must also be taken into account that for establishing acquired distinctiveness of a Benelux trademark, recognition of the trademark must be proven for the entire Benelux and a survey that is carried out merely in the Netherlands will not suffice. [13] On the other hand, for proving reputation of a Benelux trademark, conducting a survey merely in the Netherlands may suffice, following the CJEU's decision in *Chevy*.[14]

Footnotes

1. ^ *See for example Dutch Supreme Court 16 June 2006, NJ 2006, 585 (Lancôme v Kecofa); District Court The Hague 25 November 2009, IEF8385 (G-Star v Pepsi Raw), para 4.19.*

2. ^ *Court of Appeal The Hague 3 January 2008, NJ 2010, 133 (Toblerone), para 14.*

3. ^ *District Court The Hague 25 November 2009, IER 2010, 10 (G-star v Pepsi Raw II), para 4.21; District Court The Hague 8 May 2002, BIE 2003, 66 (Toblerone), para 3.11; District Court The Hague 18 December 2018 (Lacoste v Hema).*

4. ^ *District Court The Hague 8 May 2002, ECLI:NL:RBSGR:2002:AK4702 (Toblerone), para 3.11.*

5. ^ *See for example Court of Appeal The Hague 21 March 2017, ECLI:NL:GHDHA:2017:3096 (De Nederlandse Energie Maatschappij v Nederlandse Internet Maatschappij), para 31.*

6. ^ *See for example District Court The Hague 9 June 1999, BIE 2000, 68 (Mars v Nestlé).*

7. ^ *See for example Court of Appeal 26 January 2010, LJN: BL1936 (Ikea v Serboucom); District Court The Hague 7 September 2011, IEF 10151 (Tuc v Apéro); Court of Appeal The Hague 14 March 2017, ECLI:NL:GHDHA:2017:561 (Redbull v Bulldog), para 4.5; District Court The Hague 18 December 2018 (Lacoste v Hema); Court of Appeal The Hague 5 July 1999, BIE 1999, 126 (Becel v Benecol).*

8. ^ *Court of Appeal The Hague 14 March 2017, ECLI:NL:GHDHA:2017:561 (Redbull v Bulldog), para 4.5.*

9. ^ *District Court Middle-Netherlands 25 April 2018, ECLI:NL:RBMNE:2018:1768 (De staffing groep Nederland v staffing IT), para 4.16 – this concerned a survey of three years old.*

10. ^ *District Court The Hague 5 April 2017, ECLI:NL:RBDHA:2017:3544 (Majestic Products v Atg Gloves), para 2.7.*

11. ^ *See for example District Court The Hague 5 April 2017, ECLI:NL:RBDHA:2017:3544 (Majestic Products v Atg Gloves), para 2.6-2.7.*

12. ^ *Court of Appeal Amsterdam 25 February 1986, BIE 1987, 9 (Fenjal).*

13. ^ *See for example District Court The Hague 14 March 2018, IEPT20180314 (Footsie v Birkenstock); Court of Appeal The Hague 3 January 2008, NJ 2010, 133 (Toblerone), para 14.*

14. ^ *Court of Justice of the European Union 14 September 1999, C-375/97 (Chevy), para. 28 and decision.*

4.b **If your answer to Q4a) is NO, what characteristics do surveys generally have, e.g. as to the way of conducting the survey, the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls?**

Not applicable / see above.

5.a **Are specific percentages of respondents answering certain questions required or sufficient to prove certain items? If so, which?**

No

Please Explain

There are no minimum percentages required, which follows implicitly from settled European case law (CJEU 14 December 1999, case C-375/97 (Chevy)). However, rough guidelines can be extracted from the case law. See the answer to question 5b) below.

5.b **What percentages of respondents answering certain questions are typically deemed insufficient?**

We note that Dutch case law does not always disclose what the percentages actually demonstrate (e.g. spontaneous awareness or 'assisted' awareness) as concrete questions and/or results are often not literally included in the text of the decisions and debate is possible on what is a leading question or not. However, rough guidelines can be extracted from the case law.

Generally speaking, percentages of 30% and higher (spontaneous awareness) and 45-55% and higher (assisted awareness) seem to be sufficient for proving acquired distinctiveness. [1] For proving a reputation (ex article 2.20 (2) (c) Benelux Convention on Intellectual Property) the doctrine states that ca. 25-50% (assisted awareness) suffices. [2] Usually, both with respect to acquired distinctiveness, 25% or lower is usually deemed to be insufficient. [3] In less convincing cases (e.g. around 30%) additional evidence will be helpful in proving acquired distinctiveness and/or a reputation.

Cases dealing with a well-known status ex art. 6 bis Paris Convention are rare. The communis opinio is that a higher percentage is required for proving that a mark possesses such a well-known status when compared to proving a reputation in the Benelux. Despite the lack of decisions, it has become clear that 25% is not sufficient for establishing such well-known status. [4]

Usually, percentages of 25-40% (spontaneous awareness) and 40% or higher (assisted awareness) seem to be sufficient for proving a risk of confusion. [5] Case law has shown that percentages between 10% and 25% (assisted awareness) do not suffice, [6] although there are some rare exceptions. Dutch courts may take into consideration the role of the so-called 'market leader effect' (see above at question 4).

Footnotes

1. ^ *Court of Appeal Amsterdam 27 July 2000, ECLI:NL:GHAMS:2000:AK4332 (Beursplein 5), par. 5.6; District Court The Hague 28 May 2003, IER 2003, 60 (Unilever v Artic), par. 12; Court of Appeal 's-Hertogenbosch 29 July 2003, IER 2004, 9 (Distillers & Vintners v Koninklijke Cooymans), par. 4.5.4; Court of Appeal The Hague 26 January 2010, IEPT20100126 (IKEA v Multimate), par. 18;*

Provisions Judge District Court The Hague 9 August 2011, IEPT20110809 (G-Star v C&A), par. 4.5; Court of Appeal The Hague 22 March 2016,ECLI:NL:GHDHA:2016:669 (H&M v G-Star), par. 4.22.

2. ^ *T. Cohen Jehoram, 'Het Benelux merkenrecht in Europees perspectief', page 272.*
3. ^ *Provisions Judge Court of Appeal The Hague 15 July 2014, C/09/446226(Kettle v Intersnack).*
4. ^ *Provisions Judge District Court The Hague 17 December 2013, IEPT20131217 (Popstars), par. 20*
5. ^ *Court of Appeal Amsterdam 30 September 2004, BIE 2005, 53 (ID&T Mobile), par. 4.11; Provisions Judge District Court The Hague 10 December 2010,KG ZA 10-1121 (G-Star v H&M), par. 4.15; Court of Appeal The Hague 22 March 2016, ECLI:NL:GHDHA:2016:669 (H&M v G-Star), par. 4.31.*
6. ^ *Court of Appeal Arnhem 24 April 2012, ECLI:NL:GHARN:2012:BW3655 (FrieslandCampina v Natuurhoeve), paras 4.9 and 4.10; Court of Appeal The Hague 21 March 2017, ECLI:NL:GHDHA:2017:3096 (De Nederlandse Energie Maatschappij v Nederlandse Internet Maatschappij), para 33.*

6 **Is the court or IP office involved in the set-up of the survey, or can it be, and, if so, to what extent?**

No

Please Explain

Typically the court nor the Benelux IP office are involved in the set-up of the survey. The survey is typically set-up and done by one of the parties and presented as evidence. Nevertheless, it has occurred that a court, at the request of an applicant, appoints an expert to conduct a survey.[1]

Footnotes

1. ^ *District Court Arnhem 9 September 2009, IEF 8200 (Coca-Cola v Superunie) and District Court The Hague 25 November 2009, IER 2010/10 (G-Star v Pepsi Raw II).*

7 **What weight or value is generally given by the court or IP office to consumer survey evidence, if such is admitted, and which factors are relevant in considering the extent of such weight or value?**

The weight or value given by the court or IP office to consumer survey evidence depends on whether and how well the opposing party contests the consumer survey evidence and on the quality of the set-up and execution of the survey (see under question 4). If two contradicting consumer surveys are submitted as evidence by the parties, courts in the Netherlands tend to attach less weight to both surveys.

II. Policy considerations and proposals for improvements of your Group's current law

8 **Could any of the following aspects of your Group's current law or practice relating to consumer survey evidence be improved? If YES, please explain.**

8.a **Types of trademark proceedings in which survey evidence is admissible;**

No

Please Explain

In the Netherlands consumer survey evidence is admitted in all types of trademark proceedings. There is therefore no area where improvement is required.

8.b **What survey evidence can prove or help prove;**

No

Please Explain

Again there is no improvement required in this area for the Netherlands

8.c **Requirements of surveys;**

Yes

Please Explain

The Dutch practice would benefit from additional certainty and clarity as to what standards a survey should meet in terms of methodology. In this respect, the Group would appreciate if courts would stipulate guidelines regarding the minimum requirements that market surveys would have to comply with in order to allocate any weight to such surveys in legal proceedings.

The Group agrees with the requirements currently resulting from Dutch case law (see our answer to 4) a) above). Courts have taken different approaches on how much weight to attach to such surveys. Due to the absence of a legal framework, it is not sufficiently clear when a survey is properly designed and executed, which makes it difficult to determine the evidential value. Another issue is that surveys submitted in trademark proceedings often appear to give rise to skepticism by Dutch courts and extensive discussions between the parties on the soundness of a particular survey (regularly resulting in the outcome that the survey submitted is of no or only little value, which is undesirable for companies as such surveys are rather costly).

Guidelines stipulating clear rules and standards regarding the methodology, to be drawn up and issued by the courts or IPO, may be beneficial to the quality of the surveys as well as give clarity to all parties involved (judges, lawyers, experts and parties to the proceedings) in order to overcome such skepticism and limit discussion on the methodology of the survey (which, in the end, may simplify and shorten the length of proceedings). If market surveys were designed and conducted in accordance with such guidelines, those could be ascribed a larger role in trademark proceedings. Moreover, this would better enable judges to assess the extent to which objections against market survey results are valid.

If guidelines were to be issued, we would recommend that such guidelines in any event stipulate the requirements as proposed in our answer given under 14) below.

8.d **The application, or lack thereof, of bench-mark percentages;**

No

Please Explain

8.e **The weight or value given to consumer survey evidence.**

No

Please Explain

The Group would find it undesirable if a court, confronted with two contradicting consumer surveys, attaches less weight to both surveys without examining the merits of each consumer survey.

9 **Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?**

No

Please Explain

The group, supported by industry members, considered that there is no necessity for improvement in any other particular area.

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

10 **Do you believe that there should be harmonisation in relation to consumer survey evidence?**

Yes

Please Explain

The Group considers that the industry could benefit from global harmonisation. The group proposes to promote harmonisation in steps:

(a) acceptance of survey evidence as a method of evidence across the globe.

The current situation is such that not all jurisdictions accept survey evidence as a method of evidence.

(b) harmonisation of areas for which survey evidence is accepted as a method of evidence.

The group considers that it would be useful if survey evidence would be accepted as a method of evidence for at least the following areas: (i) distinctiveness; and (ii) reputation. In next phase one could extent harmonization to other areas where acceptance of survey evidence would be useful, such as confusion.

(c) harmonisation of the accepted methods for survey evidence.

It would be a major step if harmonisation in the areas identified above would take place.

If YES, please respond to the following questions without regard to your Group's current law or practice.
Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

11 **Should consumer survey evidence in principle be admissible in trademark proceedings? Please answer YES or NO.**

Yes

Please Explain

12.a **Should consumer survey evidence be admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?**

Yes

Please Explain

Save that under question 10 the group has deliberately excluded confusion to be proven by means of survey evidence. Once the first three steps (as explained in question 10 above) are taken one may consider acceptance of survey evidence to prove confusion.

12.b **If consumer survey evidence should not be admitted in all types of trademark proceedings, in which types should it be admitted and in which types should it not be admitted (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?**

Not applicable.

13 **What should consumer survey evidence be allowed to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?**

Consumer survey evidence should in any event be allowed to provide proof of or help proving:

- distinctiveness;
- lack of distinctiveness;
- the fact that a trade mark has become generic;
- reputation;
- confusion.

14 **Should there be specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?**

Yes

Please Explain

As set out in our answer to question 8) c), the Group would welcome guidelines or best practices to which market surveys must conform. As multiple jurisdictions may be targeted in one survey and used in connection with multinational trademark applications or litigation, harmonisation of such guidelines may be useful in terms of efficiency and certainty.

We propose that such guidelines should in any event address the following minimum requirements as golden standards if a survey is to have any validity at all:

- the survey must be designed, conducted and interpreted by a recognised and independent expert at a reliable market research company (e.g. with an ISO certification and/or membership of ESOMAR);
- the survey report should be disclosed, including at least (i) the questions and the totality of all exact answers, (ii) the method and circumstances under which the survey was carried out, (iii) how interviewers and respondents have been selected and on what basis (iv) the totality of the number of persons involved and (v) the response rate;
- the respondents must be independent and must be selected as to represent a relevant cross-div of the public;
- the sample size (i.e. number of respondents) should be sufficient to produce some relevant, reliable and valid results in light of the relevant public;

- questions must be clear and neutral (e.g. not leading or lead to speculation) and asked in the correct order (build-up from non-leading to more leading);
- opportunities should be provided to answer "don't know" in order to reduce guessing;
- questions should be followed by control questions ("why?");
- if applicable, controls must be used in order to correct any market leader effect.

15.a **Should specific percentages of respondents answering certain questions be required or deemed sufficient to prove certain items? If so, which?**

No

Please Explain

The Group considers that it is impossible to provide general benchmark percentages which would be applicable in all cases because this differs for different markets (e.g. general markets vs. niche markets). In addition, the consulted industry members confirmed that the application of benchmark percentages would be undesirable.

15.b **What percentages of respondents answering certain questions should be deemed insufficient?**

Not applicable. Reference is made to our answer under question 15a).

16 **Should the court or IP office be involved in the set-up of the survey and, if so, to what extent?**

Yes

Please Explain

Although the Group believes that there may be a few practical objections (for example, in terms of the time involved which is less desirable in preliminary injunction proceedings) if the court would be involved in the set-up, it could be useful in order to overcome possible distrust of the evidential value of surveys. Currently, the fact that the survey is conducted by only one party can damage the credibility of survey evidence, especially when judges are confronted with contradictory results from a report of the counterparty. Dutch Courts are critical of attaching value to market surveys and the weight given to survey evidence can vary greatly. In the situation where two well-performed surveys contradict, Dutch courts may ignore the results from both. Market surveys (which are time consuming and expensive) often appear to be later of no or only limited value.

In light of the above, the majority of the Group supports introducing procedural options for court-appointed survey experts. For example, a study proposal for a market survey can then only be conducted if it is submitted to the court and commented on by the parties, after which the judge specifies the proposal and appoints a survey expert.

This would allow judges to be more actively involved in the process of selecting the method and organising the survey. Consequently, it would allow judges to give more weight to the results of a survey. Also, it would prevent the submission of wrongly designed surveys into the proceedings.

Another option, in the view of the majority of the Group, would be if an expert is to be appointed by the court in order to comment on the set-up of surveys submitted by parties.

Over time, a wealth of knowledge can accumulate over the years by everyone involved (judges, lawyers and experts), thus improving the quality of surveys and case law. Lastly, it may result in the use of standard guidelines for preparing questionnaires.

This involvement should be limited to the methodology of the surveys; it should still be up to the court to weigh the evidence and it should not be bound by the outcomes of a market survey

17 **What weight or value should be given by the court or IP office to consumer survey evidence, if such is admitted, and which factors should be relevant in considering the extent of such weight or value?**

The weight or value given by the court or IP office to consumer survey evidence depends on whether the opposing party (convincingly) contests the consumer survey evidence and on the quality and reliability of the set-up and execution of the survey and to what extent the information is significant, relevant and valid. If conducted properly and in line with the above guidelines (see under 14) above) surveys can help to show the actual perception of the relevant public.

However, the Group is of the view that the outcome can never constitute the sole basis for evidence in trademark proceedings. In other words, surveys should be used as a complement to other circumstances of the case. Likewise, the absence of such evidence may not be regarded as a failure to substantiate arguments. Yet, the group recognises that acquired distinctiveness may in practice be difficult to prove without such a consumer survey.

18 **Please comment on any additional issues concerning any aspect of consumer survey evidence you consider relevant to this Study Question.**

Not applicable.

19 **Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.**

The Group consulted in-house counsel from the following industry sectors: telecoms, media and alcoholic beverages.