

**London Study Question – 2019 – Explanatory Note**

**Consumer survey evidence**

In many proceedings, particularly in the context of trademarks, the ultimate determination of any dispute may rest upon key findings pertaining to, for example, the degree of distinctiveness or reputation of a trademark, and any confusion, parasitism or dilution.

Issues often arise as to the manner in which such elements can be proven. One evidentiary tool that may be used is consumer surveys. These surveys are submitted to the court or other trier of fact as evidence (often as expert evidence) on the basis that the results are representative of the views at large of the relevant consumer group.

However, both the admissibility of and weight accorded to consumer survey evidence in trademark proceedings are continuing topics of controversy, making it desirable to have a harmonized approach.

In recent years, consumer survey evidence has twice been on AIPPI's agenda: at the Toronto Congress (2014), a panel session entitled "Use of survey evidence in trademark cases" focused on issues including admissibility and probative value. The panel session "Surveying the field - a gold standard for survey evidence" at the Cancun Congress (2018) will seek to determine the "gold standard" for different types of surveys.

Whether survey evidence may be used at all and if so, the value attached to it, varies between jurisdictions. In some jurisdictions, such evidence may be considered hearsay and is therefore inadmissible per se. If admissible, questions may nonetheless arise as to the probative value or reliability of such evidence. Criticisms have also been raised in the context that, where a court or other trier of fact relies upon consumer survey evidence, such evidence risks supplanting the role of the trier of fact on critical issues.

Nevertheless, the potential importance of such survey evidence can be substantial, whether in opposition proceedings, revocation proceedings or infringement proceedings before the IP Office and/or a court. Such evidence may be helpful in respect of a variety of issues including whether a sign is perceived as being used as a trademark, the degree of descriptiveness or distinctiveness, evidence of reputation, evidence of deception or confusion, the extent of any free-riding, dilution or other negative impact on goodwill, and the extent of any harm or damage to the rights holder.



### **Trademark – Option 1**

Issues that may be considered as part of this possible Study Question include the admissibility of consumer survey evidence per se, the types of proceedings in which such evidence may be used, types of surveys (e.g. telephone surveys, Internet surveys, shopping mall interrupt surveys, etc.), any restrictions on the use of or reliance on such surveys, any requirements for such surveys (e.g. the use/nature of controls, the number and selection of respondents, the appropriate form and order of survey questions), and whether any counter evidence (e.g. in the form of an expert statement criticising the survey evidence) is admissible.