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Maximizing the Strength of Intellectual Property in Today's Marketplace: Consumer Surveys and Patent Valuation

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Determining a fair and reasonable royalty is often . . . a difficult chore, seeming often to involve more the talents of a conjurer than those of a judge.¹

Although consumer surveys have long been used in trademark, false advertising, and antitrust cases, the use of such surveys to demonstrate the value of patented technology in patent cases is a relatively recent phenomenon. This phenomenon has developed largely in response to the increased scrutiny that the Federal Circuit has placed on damage awards in patent infringement cases over the past few years—a trend illustrated by its recent decision in *Uniloc USA, Inc. v. Microsoft Corp.* As the Federal Circuit has explained, damage awards in patent infringement cases must be supported by sound economic theory and tied to the patented invention's "footprint in the marketplace."² In addition, when a patent covers only one feature of an accused product,

a patent holder wishing to present evidence regarding the overall profitability of the accused product must demonstrate that the patented feature creates consumer demand for the product or its components. A well-crafted consumer survey can provide powerful evidence of an invention's value in the marketplace—or can be used to refute an unfounded damage claim. Counsel responsible for managing patent litigation should understand both the potential role of survey evidence and the common pitfalls associated with the use of such evidence at trial.

The Changing Law of Patent Valuation

Increased scrutiny from the Federal Circuit on damages awards in patent cases is part of a broader trend that has seen changes impacting patent valuation and litigation strategies alike. The recent passage and enactment into law of the Leahy-Smith America Invents Act, as well as significant rulings from the Federal Circuit over the past few years, have presented numerous and significant considerations for parties contemplating or currently involved in patent litigation in the United States. Last fall, Chief Judge Randall Rader of the Federal Circuit presented a "State of the Union" address for patent litigation, in which he described his view of how patent litigation can be improved.³ Judge Rader discussed a new model order for e-discovery, advocated increased use of summary judgment as an efficient tool for resolution, and recommended early procedural and substantive valuation of cases. Judge Rader concluded with an imaginative description of two common parties to patent litigation:

Of course, before we can control trolls and grasshoppers, we have to know who they are. And again, OF COURSE, that is the difficulty! Even some Supreme Court justices have referred to the nonpracticing entity, the proverbial NPE. We also all understand that the NPE designation sweeps in some unintended "culprits" like universities and research clinics and can also extend to almost

every corporation and business because they practice only a fraction of their patent portfolio. For that reason, I have always preferred an alternative definition of a “troll,” namely, any party that attempts to enforce a patent far beyond its actual value or contribution to the prior art.

Every “troll” discussion, however, needs a note of balance. Just as trolls litter the patent system with marginally meritorious lawsuits, so the system also suffers from the IP “grasshopper.” The IP grasshopper is the entity that is quick to steal the “inventor-ant’s” work and research investment because he did no work himself and the winter of competition approaches. We can recognize the grasshopper because he refuses to pay any license fee until his legs and claws are held to the proverbial litigation fire. Once again, a grasshopper is hard to define, but I can venture a description according to the same basic notion that helped us identify the troll: A grasshopper is any entity which refuses to license even the strongest patent at even the most reasonable rates.

Frankly I am not sure who causes more meritless litigation—the troll asserting patents beyond their value or the grasshopper refusing to license until litigation has finally made it impossible to avoid.⁴

Judge Rader’s recognition that parties with valuable intellectual property should be able to protect it—as opposed to parties that enforce a patent beyond its true worth—underscores the importance of an early and accurate valuation of parties’ intellectual property. Evidence of actual consumer perceptions regarding a claimed invention can provide effective, real-world evidence of the “true worth” of intellectual property in today’s marketplace.

Consumer Surveys and Patent Valuation

The patent statute provides that a prevailing patent holder in an infringement action is entitled to “in no event less than a reasonable royalty for the use made of the invention by the infringer.”⁵ In most patent infringement cases, damages evidence focuses on proving a royalty that reasonably approximates what the parties would have agreed to during a hypothetical negotiation occurring at the time the infringement began. A “reasonable royalty” consists of two elements: (1) a royalty base, which reflects the revenue pool implicated by an infringement and (2) a royalty

rate, applied to the base, representing the percentage of the revenue pool to which the patent holder is entitled. The reasonable royalty analysis, both as to the royalty base and the royalty rate, must be targeted to compensation for the economic harm caused by infringement of the patented invention. As the Federal Circuit explained in *ResQNet.com, Inc. v. Lansa, Inc.*,⁶ expert testimony as to a reasonable royalty “must carefully tie proof of damages to the claimed invention’s footprint in the marketplace.”

Determining the Royalty Base

Depending on the nature of a patented invention, an appropriate reasonable royalty base can depend on the extent to which a patented feature is actually used by consumers. In such cases, consumer surveys demonstrating real-world consumer behavior can provide powerful evidence to demonstrate an appropriate royalty base. For example, in *i4i Limited Partnership v. Microsoft Corp.*,⁷ the patent holder used survey evidence to prove the extent to which consumers used the XML formatting feature in Microsoft’s ubiquitous Word software program. The patent holder claimed Word infringed its patent relating to XML custom formatting. At trial, the patent holder presented survey evidence demonstrating that this patented feature was used by approximately 2 percent of all businesses owning Microsoft Word.⁸ The patent holder’s damages expert then applied this percentage of allegedly infringing use to Microsoft’s overall sales of the Word program to determine the base to which a reasonable royalty rate would be applied. The jury’s \$240 million damage award reflected this royalty base.⁹ On appeal, the Federal Circuit affirmed the jury’s damage award and rejected Microsoft’s challenge to admission of the survey evidence, finding that the survey and its results had enough reliability to meet the evidentiary standards for expert testimony established in *Daubert*.¹⁰

Applying the Entire Market Value Rule

As the Federal Circuit explained in *Uniloc USA, Inc. v. Microsoft Corp.*, “the entire market value rule allows a patentee to assess damages based on the entire market value of the accused product only where the patented feature creates the ‘basis for consumer demand’ or ‘substantially creates the value of the component parts.’”¹¹ Thus, a patent holder seeking to apply the entire market value rule must show not only the existence of consumer demand for an accused product, but also an evidentiary link between such demand and the patented feature. A properly conducted consumer survey can persuasively demonstrate or refute this

evidentiary link—especially when a patent covers only one feature of an accused product.

For example, in *Cornell University v. Hewlett-Packard Co.*,¹² the patent holder alleged that Hewlett-Packard had included an infringing component within a processor that was in turn incorporated into the building blocks of Hewlett-Packard's computer workstation. The Federal Circuit's Judge Rader, sitting by designation in the district court, rejected the patent holder's reasonable royalty claim and slashed the jury's \$186 million damage award, noting that the patent holder had failed to present real-world evidence of consumer demand for the patented component. But Judge Rader noted that a patent holder may collect royalties on some part of a system that encompasses more than the claimed invention "when defendant's real world earnings derive from real world systems sales generated by demand for the claimed invention."¹³

Surveys directed at assessing why consumers make their purchasing decisions, and whether the patented feature at issue creates demand for the product as a whole, can demonstrate, or refute, the causal link necessary to allow reference to the overall profitability of an accused product as part of a reasonable royalty base. But the survey evidence offered must have some plausible economic connection between the patented feature and consumer demand.¹⁴ In *IP Innovation v. Red Hat*,¹⁵ Judge Rader, again sitting by designation, rejected statements collected from an online user forum for a third-party product as proof of consumer demand. Judge Rader reasoned the selected consumer statements lacked "a relationship to the actual claimed technology" and did not reflect an accurate economic measurement of the contribution of the patented feature to the demand for the entire system because the claimed invention was a relatively small component of the accused operating system and the feature represented only one of "over a thousand" components included in the accused system.¹⁶

Similarly, in *Schindler Elevator Corp. v. Otis Elevator Co.*,¹⁷ the district court excluded the patent holder's claim for damages based on the entire market value rule, finding that the patent holder failed to provide a sound economic connection between demand for the accused system and the specific patented feature. In that case, the patent holder's damages expert sought to rely on statements from customers who had purchased the accused elevator system which incorporated the patented "seamless entry" feature. In excluding the expert's testimony, the court explained that although the customer statements demonstrated that the patented feature was desirable to purchasers, they did not establish that the entire system's value substantially derived from that single feature.¹⁸ The

district court also found fault with the lack of quantifiable consumer evidence, noting that "[n]one of the evidence provided to the Court includes any sort of statistical or regression analysis. None of it consists of consumer surveys or even interviews asking customers why they selected the patent holder to provide their elevator installations."¹⁹

Determining a Reasonable Royalty Rate

Consumer surveys also can provide highly persuasive evidence supporting determination of a reasonable royalty rate. Calculation of a royalty rate is governed by the so-called *Georgia-Pacific* factors. These factors expressly allow for consideration of several data points directly impacted by consumer attitudes and behaviors. Parties involved in patent litigation are increasingly using consumer survey evidence to support their analyses under the *Georgia-Pacific* factors and, thus, meet the Federal Circuit's increased demand for economic evidence that supports an award of damages.

Specific *Georgia-Pacific* factors likely to be impacted by consumer surveys include:

- Effect of selling the patented specialty in promoting the sale of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales (*Georgia-Pacific* factor 6);
- Established profitability of the products made under the patent, its commercial success and its current popularity (*Georgia-Pacific* factor 8);
- The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefit of those who have used the invention (*Georgia-Pacific* factor 10);
- The extent to which the infringer has made use of the invention and the value of such use (*Georgia-Pacific* factor 11); and
- The portion of realizable profit attributable to the invention as distinguished from non-patented elements, significant features/improvements added by the infringer; the manufacturing process or business risks (*Georgia-Pacific* factor 13).

Moreover, survey evidence often is more compelling than anecdotal assessments because it provides a quantitative input into the assessment of the "value" obtained through the use of a patented invention.

In *Lucent Technologies v. Gateway*,²⁰ for example, the Federal Circuit reversed a \$358 million damage award because it lacked a sufficient quantitative

support. The court noted that the royalty analysis of the patent holder's damages expert relied on licenses that were too vague and "radically different from the hypothetical agreement under consideration." The Federal Circuit held that use of the entire market value rule was inappropriate in the absence of evidence showing the patented date-picker feature was a basis of consumer demand for the accused Gateway computer products. The Federal Circuit observed that the record was devoid of any data showing evidence of usage—how often consumers used the patented date-picker feature—evidence that could have helped determine whether the invention was more valuable than a comparable invention used less frequently.²¹ The court further found that there was no evidence showing how many Microsoft Outlook customers had ever used the patented feature or how often they did.²²

But survey evidence offered to support a royalty rate must be connected to the patented technology at issue. In *Fractus S.A. v. Samsung Electronics*,²³ the district court excluded evidence of a consumer survey because it was not tied to the alleged advantages of the patented technology, which created smaller antenna size and multiband functionality. Instead, the survey measured the value consumers placed on internal antennas over external ones. The court found that the survey results did not measure how consumers valued the purported advantages of the patent holder's technology. As a result, the court excluded the valuation opinion of the patent holder's expert.

A more recent example of the importance of tying survey evidence to the patented technology at issue in determining a reasonable royalty rate is the *Apple v. Motorola* case, in which the district court excluded testimony of Apple's damages expert as to the reasonable royalty for an asserted "notification window" patent where the expert relied on a consumer survey that was not directed to determining the relative value of the patented technology. That survey asked respondents to pick, from a list of attributes of a Motorola cell phone, their top five "main reasons" for buying the phone. Fifteen percent of respondents selected "appealing features & functions" as among their top five main reasons for purchasing the phone. The district court noted, however, that the survey expert improperly assumed that the only "appealing features & functions" contributing to the phone's value were those used by a consumer every day²⁴ and critically failed to consider non-infringing alternatives that may satisfy consumer preferences. Ultimately, the district court excluded Apple's damages expert testimony, noting that Apple's proffered consumer survey failed to adequately tie to the specific patented invention at issue.²⁵

Demonstrating Harm to Support an Injunction

Consumer surveys also can provide potent evidence as to whether alleged infringement is likely to cause irreparable harm to the patent holder in connection with a claim for an injunction to remove a competitor's products from the marketplace. An injunction can be particularly useful in protecting relatively short lifecycle products in the consumer electronics and high technology space. The Federal Circuit's recent decision in *Apple v. Samsung*²⁶ illustrates this point well. In that case, Apple sought an injunction prohibiting ongoing sales of Samsung's accused smartphone and tablet products. The district court judge initially declined to order an injunction, noting that Apple had failed to demonstrate irreparable harm in part because Apple had failed to establish a causal connection between Apple's claims of lost market share and brand dilution, and the alleged infringement. On appeal, the Federal Circuit noted that Apple had presented survey evidence showing some linkage between implicated software design and sales of accused products, but there also was considerable "countervailing evidence indicating that it was not a determinative factor in consumer decision making."²⁷ Directly addressing Apple's survey evidence, the Federal Circuit noted:

We do not hold that customer survey evidence or other proof of what Apple calls "consumer motivation" is a prerequisite to a finding of irreparable harm in every design patent case. On the record before us, however, we conclude that the district court did not abuse its discretion in concluding that Apple failed to submit sufficient evidence of the very harm it claimed—lost sales (both immediate and downstream) attributable to Samsung's sale of allegedly infringing phones.²⁸

Although not a "prerequisite," survey evidence directed at showing lost sales can provide potentially powerful evidence in establishing or disproving a causal connection with the alleged infringement.

Types of Survey Analyses Relevant To Patent Cases

Consumer surveys come in all shapes and sizes. The ability to tailor a survey to quantitatively test specific propositions relevant to a given case provides one of the primary benefits of consumer surveys in patent cases. Surveys overcome the limitations of existing consumer evidence because they can be

crafted to provide quantitative evidence that directly ties to the incremental value of the patented feature. Depending on the specific issues involved, there are a number of available consumer survey models that may be particularly appropriate in assessing damages in patent cases.

Choice Modeling

Choice modeling is a survey methodology that presents respondents with one or more groups of products from which to choose; each product having a different set of product features—most often including the specific product feature claimed in the patent and a price for the overall product. Survey respondents are asked to identify the product that would be their first choice (and respondents also may be asked to identify runner-up choices). This type of survey allows a relative comparison of consumer preferences for various product features and combinations. (See Exhibit 1.)

Choice modeling is particularly useful to demonstrate:

- Consumers’ willingness to pay for incremental improvements to a product incorporating several features; and/or
- The quantitative value consumers place on a given product feature.

For example, choice modeling can be used to determine the relative importance of the patented technology in the context of other technologies in the infringing product. Survey data describing the patented technology’s relative importance can then be used to support an opinion as to the patented technology’s relative value as it relates to the entire value of the product. The survey also can be crafted to identify respondents’ choices as they relate to the next best alternative—if one exists—which is relevant in the context of an apportionment analysis (the value of the patented technology over the next best alternative).

Conjoint Analysis

Conjoint analysis is closely related to choice modeling in that survey respondents are provided with a group of products with differing features. But, instead of forcing respondents to make choices between products, respondents rank the products within a group, or place various product features on a scale in order of importance. Conjoint analysis presents survey respondents with greater flexibility in identifying their product choice than choice modeling. But, depending on the specific features at issue, conjoint analysis surveys may not be as effective as choice modeling at differentiating between product features. (See Exhibit 2.)

Exhibit 1—Exemplary Choice Modeling Survey Question

If you were in the market to purchase a personal computer today, and if these were your only alternatives, which of the following would you choose?			
Apple	HP	Dell	None
4 GHZ processor	3 GHZ processor	2 GHZ processor	If these were my only choices, I would not make the purchase.
8 GB RAM	4 GB RAM	2 GB RAM	
24-inch display	21-inch display	19-inch display	
\$2,099	\$1,199	\$699	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Exhibit 2—Exemplary Conjoint Analysis Survey Question

If these products were identical in all other ways, which would you prefer?								
Apple 4 GHz processor 8 GB RAM 24-inch display \$2,099				or	Dell 2 GHz processor 2 GB RAM 19-inch display \$699			
O	O	O	O	O	O	O	O	O
Strongly Prefer Left		Somewhat Prefer Left		Indifferent		Somewhat Prefer Right		Strongly Prefer Right

Direct Queries

Measuring both the existence and strength of consumer demand for a patented feature also can be achieved through a wide variety of direct queries. These kinds of survey questions might include open-ended queries about the specific attributes associated with an accused product, allow yes/no answers, allow multiple choices, or ask respondents to rank or rate attributes or product choices.

Although direct queries specifically addressing attitudes relating to the patented technology may appear more straightforward than choice modeling or conjoint analysis, direct queries must be carefully crafted to avoid potential bias. For example, a consumer survey commissioned by the patent holder in *Lucent Technologies v. Microsoft Corp.*,²⁹ sought to assess consumer usage of a patented drop-down calendar feature in Microsoft Outlook. Many of the survey questions asked highly targeted questions of respondents, such as whether and how they used Microsoft Outlook's calendar features, including what they would be willing to pay for certain features. (See Exhibit 3).

Other portions of the survey, however, did not force the respondents to make a choice between features or rank their usage against other features included in Microsoft Outlook. Microsoft criticized this survey, arguing that the questions were leading and failed to allow respondents a full range of potential responses.³⁰ Lucent argued the questions were randomized to limit bias,

and that its use of exhaustive options (*i.e.*, don't know/no opinion) did in fact cover all possible alternatives.³¹ While criticism of survey methodology is to be expected in most cases for which survey evidence is offered, Lucent's arguments illustrate the types of criticisms commonly asserted when direct queries are involved.

Presenting Consumer Survey Evidence at Trial

In most instances, evidence of consumer survey results is presented at trial by a qualified survey expert directly involved in design of the survey instrument, implementation of the survey, and analysis of survey data. But no guarantees exist that a survey expert will make it to the witness stand. In patent cases, consumer survey evidence is most often used to support, or refute, opinions regarding damages. Accordingly, trial courts may choose to exclude direct testimony by the survey expert and, instead, allow the party's damages expert to present evidence of a survey on which the damages expert relies.

When a damages expert relies on survey data for his or her damages opinions, counsel should take steps to ensure that the expert is familiar with details necessary to ensure the validity and reliability of survey data. The risk of failing to do so is illustrated by *The Braun Corp. v. Vantage Mobility International, LLC*.³² In that case, the district court struck portions of

Exhibit 3— Exemplary Direct Query Question from *Lucent v. Microsoft*²⁹

Assume that it cost approximately \$109 to purchase Microsoft Outlook.

About how much extra would you have been willing to pay for Microsoft Outlook to include the capability of entering the date of an appointment by using the drop-down calendar?

Select one answer only

- Less than \$1
- \$1
- \$2
- \$3
- \$4
- \$5
- \$6
- \$7
- \$8
- \$9
- \$10
- More than \$10
- Don't know/No opinion

testimony by the defendant's damages expert relating to a histogram derived from consumer survey. The district court explained that because the damages expert's report failed to disclose details of the underlying survey, the expert had failed to establish the validity and reliability of underlying survey data.³³

Regardless of how survey evidence is presented at trial, proponents of survey evidence should carefully consider how that evidence might be used against the proffering party. For example, in *Lear Automotive v. Johnson Controls*,³⁴ the defendant provided its expert with a survey directed to assess the frequency with which purchasers of accused garage door systems utilized a patented feature. The defendant's damages expert relied on the survey to opine that the defendant would have only agreed to a "modest" royalty rate for the patented feature. Lacking better evidence, the patent holder relied on the same survey to meet its burden of proof for demonstrating direct infringement that at least one user had used the infringing feature. The defendant was left in the awkward position of arguing that the survey data that it supplied to its own expert—and that its expert had relied on in determining a reasonable royalty—was inadmissible hearsay and not sufficiently reliable to support the patent holder's infringement claims.³⁵ Not surprisingly, the district court rejected this claim, finding the data was admissible as an adoptive admission.³⁶

Avoiding Common Challenges to Consumer Surveys

Consumer surveys can provide highly persuasive evidence of a patented technology's value—but hazards abound for poorly-constructed surveys. The general admissibility of consumer survey evidence is well established.³⁷ Consumer survey evidence is used regularly in connection with a wide variety of cases, including those involving trademark, false advertising, and antitrust disputes. But specific consumer surveys commonly are challenged on a variety of technical grounds. The established rule in most Circuits is that such technical challenges go to the weight and not the admissibility of survey evidence.³⁸ For example, the Fourth Circuit has explained "while technical deficiencies can reduce a survey's weight, they will not prevent the survey from being admitted into evidence."³⁹ The Ninth Circuit similarly has held that "issues of methodology, survey design, reliability, critique of conclusions and the like go to the weight of the survey rather than its admissibility."⁴⁰ Nevertheless, serious flaws in survey design and implementation can lead to the exclusion of survey evidence. Moreover, surveys conducted for litigation purposes

often differ substantially from those a company may conduct for non-litigation marketing purposes.

Making the most of survey evidence requires a survey that:

- Has clearly defined objectives;
- Is directed to the specific patented technology;
- Properly defines the survey population;
- Uses procedures to ensure a fair sampling;
- Has an appropriate mode of data collection;
- Uses clear, precise, and unbiased questions;
- Controls objectivity;
- Ensures proper recording of methodology and data; and
- Has a post-survey data validation process.

This basic understanding of survey methodology can help in-house counsel effectively limit the impact of such challenges and maximize the positive impact of consumer survey evidence at trial.

Clearly Defining the Survey Objectives

Surveys conducted for marketing purposes outside of a litigation context often are constructed to gather information on a variety of disparate topics. When commissioning a survey for evidentiary purposes, however, it is important to carefully define the survey objectives and tailor survey questions to squarely address those objectives. If the goal of a survey is to determine whether a given feature drives consumer demand for a product, questions about product usage likely will not generate relevant data. Moreover, including unnecessary questions in the survey may generate confusing or unhelpful data.

Directing the Survey to the Specific Patented Technology

Like any other evidence, admissible survey evidence must address a legally relevant topic. Consumer survey evidence in patent cases frequently is challenged on the ground that it does not specifically address the issues in dispute. Two recent patent cases from the Eastern District of Texas illustrate this type of challenge. In *Fractus, S.A. v. Samsung Electronics*, the district court excluded testimony regarding a survey "intended to determine the value to consumers of 'incorporating internal antennas in cell phones in the place of external antennas.'"⁴¹ Significantly, however, the patent-in-suit did not claim *all* internal cell phone antennas, but rather covered only a single antennae type that offered claimed advantages of multi-band functionality and reduced size. Because the survey was not directed to the specific features claimed in the patent, the court excluded evidence of the survey

because the survey failed to measure the value of patented technology. Similarly, in *LaserDynamics v. Quanta Computer*,⁴² the district court excluded expert testimony regarding a survey of royalty rates in the computer component industry, because the survey was not limited to comparable technologies.

Properly Defining the Survey Population

A primary benefit of a properly conducted survey is that data collected from a limited number of survey participants can validly be applied to a larger population. A properly designed survey should ensure that survey participants are selected from a population that includes all persons whose perceptions or attitudes the survey is intended to represent. For example, if the goal of a survey is to determine attitudes of businesses that actually purchase an accused product, the population will likely be *over inclusive* if it includes non-business purchasers, and *under inclusive* if it fails to include certain types of business purchasers.

Disputes over the definition of an appropriate survey population are another frequent source of challenges to survey evidence. For example, in *Hodgdon Powder Co. v. Alliant Techsystems*,⁴³ the survey population consisted of the plaintiff's customers—a small target population that was disproportionately familiar with the plaintiff's products. The district court excluded the survey noting that the sample set was too narrow and should have included purchasers of competing products across the entire industry. Likewise, surveys based on populations that are too broad may be similarly limited in probative value. In *Leelanau Wine Cellars v. Black & Red*,⁴⁴ the Sixth Circuit criticized a survey conducted by the plaintiff in shopping malls because it queried an overbroad target population. While the plaintiff sold products through a variety of channels, the defendant sold its allegedly infringing product only through a specific narrow trade channel.⁴⁵ Although the district court did not exclude the survey, it gave the survey minimal weight, noting that the universe of respondents was overbroad and was not specifically designed to include potential purchasers of the product at issue. The Sixth Circuit affirmed the district court's decision noting that the trial court had broad discretion to limit the evidentiary weight given to a survey based on methodological errors.⁴⁶

A survey's scope also can present challenges if the survey population has a potential interest in the outcome of the survey. For example, in *United States v. Southern Indiana Gas & Electric Co.*,⁴⁷ the defendant failed to exclude respondents with a potential interest in the outcome of the survey. The survey results were

ultimately excluded as hearsay because they lacked "circumstantial guarantees of trustworthiness."

Using Procedures that Ensure a Fair Sample of the Population

In most cases, it is impractical to survey an entire target population. Accordingly, consumer surveys often apply some type of sampling. A properly conducted survey should generally use procedures to ensure that the chosen sample accurately reflects a cross-section of the total population. Some survey methods, such as telephone surveys, allow for true random sampling. If a chosen survey methodology does not allow for true random selection, such as is the case with the commonly-used mall intercept study, surveys often use various quotas (such as age and gender) to ensure that survey participants reflect a reasonable cross section of the target population.

Determining an Appropriate Mode of Data Collection for the Survey

Survey data can be collected in numerous ways, including in-person interviews, telephone surveys, mail surveys, and Internet surveys. The choice of data collection can directly impact the evidentiary impact of the survey, as well as its cost. Although Internet surveys have become increasingly prevalent based on ease-of-use and low cost, a key limitation is that the target population is limited to computer users.

Using Clear, Precise, and Unbiased Questions

Although this may seem obvious, structuring questions to meet this goal often is a difficult task. Even well-intentioned survey experts may draft survey questions in a less-than-straightforward manner. Even if the individual questions are clear and unbiased, it is important to ensure that the order in which questions or answers are presented does not bias survey results.

Using Controls to Ensure Survey Objectivity

Courts may exclude survey data in which attorneys have undue influence.⁴⁸ For example, in *United States v. Southern Indiana Gas & Electric Co.*, defense counsel in a Clean Air Act violation case submitted a survey of other similarly-situated companies in order to illustrate maintenance practices in the industry. Defense counsel sent a letter to the CEOs of each company shortly before they received the survey, ostensibly to encourage participation in the questionnaire.⁴⁹ The court excluded the survey, finding it inherently trustworthy, and noted that it was "troubled" by the fact that counsel sent letters—that "could be interpreted as

pressure or guidance”—to each of the survey participants only three days prior to receipt.⁵⁰ While some attorney involvement in the survey design is necessary to ensure that the relevant questions and survey population are queried, surveys should be designed to eliminate potential bias. Attorneys should be excluded from direct participation in the interview and results tabulation process.

Using Procedures to Ensure Proper Recording of Survey Methodology and Data

Once survey data is collected, the data is recorded, often coded, and then tabulated to allow for a quantitative presentation. Procedures for data handling should in most cases include checks for reliability and accuracy. One common area for potential dispute is the coding of open-ended or narrative responses. Using clear rules for the coding of such responses will help to avoid potential disputes over data accuracy.

Validating Data Post-Survey

Unlike many surveys conducted for internal marketing purposes, surveys commissioned for litigation purposes should in most cases involve independent validation of survey data. This generally consists of engaging an independent survey firm to randomly contact a subset of survey participants to confirm their participation in the survey.

Surveys commissioned for litigation purposes generally are conducted by outside experts. Retaining a survey expert with extensive practical experience should help to minimize the risk of a successful challenge. A survey expert with experience in patent litigation can play a key role in effectively presenting survey results at trial. In many cases, however, in-house and outside counsel must apply their knowledge of the survey goals, accused product, and product market to act as final checks on the work of their outside survey expert. Ensuring that counsel are familiar with these basic concepts of survey methodology will help to minimize the risk that consumer survey results will be successfully challenged, and will help to ensure that survey results can be presented with maximum effect.

Conclusion

Recent patent reform legislation and Federal Circuit decisions underscore important changes impacting the valuation of intellectual property in today's marketplace. Survey evidence of consumer preferences and perceptions regarding a claimed invention can provide effective, real-world evidence illustrating the “true worth” of intellectual property. Parties contemplating or involved in litigation should understand—and thoroughly evaluate at an early stage—the potential role of survey evidence in assessing the value of patented technology.

1. ResQNet.com v. Lansa, 594 F.3d 860 (Fed. Cir. 2010).
2. Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1317 (Fed. Cir. 2011) (citing ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860, 869 (Fed. Cir. 2010)).
3. Chief Judge Randall Rader, Keynote Address at the Judicial Conference for the Eastern District of Texas, September 27, 2011, available at http://www.ipsectioncolorado.org/content/Rader_EDTex_State_of_Patent_Lit.pdf.
4. *Id.* at 17–18.
5. 35 U.S.C. § 284.
6. ResQNet.com, Inc., 594 F.3d at 869.
7. i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831 (Fed. Cir. 2010).
8. *Id.* at 855.
9. *Id.* at 856–858.
10. *Id.* at 856. The Federal Circuit noted that “[b]oth of i4i's experts . . . opined that the survey dramatically underestimated the amount of infringing use. Given the survey's conservative assumptions, the district court did not abuse its discretion in admitting the survey. Further, the survey was properly admitted over Microsoft's hearsay objection under Fed. R. Evid. 703, since the survey was used to estimate the amount of infringing use, a key number in i4i's damage calculation. Given the survey's importance, evidence about its methodology and findings could certainly help the jury evaluate the expert testimony.” *Id.*
11. Uniloc USA, Inc., 632 F.3d at 1318.
12. Cornell Univ. v. Hewlett-Packard Co., 609 F.Supp.2d 279 (N.D.N.Y. Mar. 2009).
13. *Id.* at 288.
14. IP Innovation v. Red Hat, 705 F.Supp.2d 687,690 (E.D. Tex. Mar. 2010).
15. *Id.*
16. *Id.* at 690.
17. Schindler Elevator Corp. v. Otis Elevator Co., No. 06-CV-05377, Rulings on Motions in Limine at 4-7 (S.D.N.Y. June 23, 2011).
18. *Id.* at 5–6.
19. *Id.* at 5.
20. Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1327–1328 (Fed. Cir. 2009).
21. *Id.* at 1333–1334.
22. *Id.* at 1334–1335. As discussed above, depending on the specific damage theory asserted, these issues could also be relevant to determination of an appropriate reasonable royalty base.
23. Fractus, SA v. Samsung Elecs. Co., No. 09-CV-00203, Order at 1 (E.D. Tex. Apr. 29, 2011).
24. Apple, Inc. v. Motorola, Inc., No. 11-CV-08540, at 7 (N.D. Ill. May 22, 2012).
25. *Id.* at 10 (citing *i4i Ltd. P'Ship*, 598 F.3d at 855–856; *Lucent Techs.*, 580 F.3d at 1333–1334).
26. Apple, Inc. v. Samsung Electronics Co. Ltd., No. 2012-1105 (Fed. Cir. May 14, 2012).
27. *Id.*
28. *Id.*
29. Lucent Techs., Inc. v. Microsoft Corp., No. 07-CV-02000, Declaration of E. Deborah Jay, Ph.D. (S.D. Cal. Dec. 13, 2010).
30. LucentTechs., Inc. v. Microsoft Corp., No. 07-CV-02000, Lucent's Opposition to Microsoft's Pre-Verdict Motion for Judgment as a Matter of Law at 5-7 (S.D. Cal. Jul. 27, 2011).
31. *Id.*
32. The Braun Corp. v. Vantage Mobility Int'l, LLC, No. 06-CV-00050, 2010 BL 317293 (N.D. Ind. Jun. 21, 2010).
33. *Id.* at *21.
34. Lear Auto. Dearborn, Inc. v. Johnson Controls, Inc., No. 04-CV-07346, 2011 BL 30230 (E.D. Mich. Feb. 7, 2011)
35. *Id.* at *23.
36. *Id.* at *25.

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37. PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 123 (4th Cir. 2011).
38. *Id.*
39. *Id.* (citing 6 McCarthy on Trademark, § 32:170).
40. Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1263 (9th Cir. 2001).
41. Fractus, SA. v. Samsung Elecs. Co., No. 09-CV-00203, Order at 1 (E.D. Tex. Apr. 29, 2011).
42. LaserDynamics, Inc. v. Quanta Computer, Inc., No. 06-CV-00348, 2011 BL 275489 (E.D. Tex. Jan. 7, 2011).
43. Hodgdon Powder Co. v. Alliant Techsystems, 512 F.Supp.2d 1178, 1181–1182 (D. Kan. 2007),
44. Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 502 F.3d 504, 517–518 (6th Cir. 2007).
45. *Id.* at 518.
46. *Id.* at 518–519.
47. U.S. v. S. Ind. Gas & Elec. Co., 258 F.Supp.2d 884, 895 (S.D. Ind. 2003).
48. *Id.*
49. *Id.* at 894.
50. *Id.*

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