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Issues arising in using samples as evidence in trademark cases☆

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Abstract

This article reviews the use of survey evidence in cases involving alleged infringement of trademarks. Because courts do not admit "hearsay" evidence, at first, courts were reluctant to accept evidence based on a sample or portion of the relevant population. Some early cases that led to the legal acceptance of samples and surveys are described. The role of survey evidence in a variety of types of trademark litigation, e.g., dilution or deceptive advertising are illustrated with data from actual cases.

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1. Introduction

Many of the most important data sets by economists are based on statistical samples. For example, the labor-force data and related income distribution and poverty count are obtained from a monthly sample of households and the Consumer Price index is based on a sample of prices of items bought by the "typical" household. The legal system was slow to accept information based on samples but more recently survey data has been

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used in a variety of cases. For example, samples of financial records are used to estimate hospital overcharges in Medicaid or Medicare cases (Heiner et al., 1984), economic damages in equal employment and lost profits cases (Walker and Monahan, 1998; Hall and Lazear, 2000) and estimating the tax basis of stock acquisitions. Samples of the assessed value and sales prices of farms or homes are utilized in cases concerning the fairness of property assessments (Gastwirth, 1988, 1992). Samples are also used in criminal cases, e.g., estimating drug quantities (Aitken, 2000; Izenman, 2000). Two areas of special importance to economics are the use of surveys to define the relevant market area and the characteristics that affect consumer preferences in anti-trust cases (King, 1986; Diamond, 1994, 2000) and to assess whether a product infringes upon an established trademark (Gastwirth, 1988; Diamond, 1994, 2000). After reviewing early cases involving the acceptance of samples by courts, this article describes the evidentiary role of surveys in Lanham Act litigation.

Some early cases are described in Section 2 to illustrate how it took some time for the legal process to accept sample information in lieu of data for the entire population. Section 3 is devoted to the different uses of surveys in trademark and misleading advertising cases concerning possible violations of the Lanham Act. This is the legal area that most frequently relies on survey evidence. The importance of measuring the appropriate concept as well as properly designing the data collection process so the sample represents the relevant population of potential consumers data is emphasized.

2. The gradual acceptance of samples by the US legal system

The Federal Rules of Evidence, especially Rule 703, which focuses on whether the facts or data submitted are "of a type reasonably relied on by experts in the particular field in forming opinions or inferences", allows survey and other sample-based evidence to be used by experts in forming their opinion. The rule allows experts to rely on information that is inadmissible itself in forming their opinions. Before these rules were adopted, some courts were reluctant to consider evidence based on samples. The *Sears Roebuck vs. City of Inglewood* case, discussed by Sprowls (1956–57) and Gastwirth (1988, p. 495), concerned a tax refund request made by Sears. The city imposed a tax of 1/2 of 1% on all sales made by stores within the city limits but excluded sales made to persons not living in the city. During a routine audit the company found it had overpaid its tax because it relied on an erroneous definition of an "out of city" sale. To support its request for a refund of \$27,000 Sears relied on a random sample of sales slips. The sampling was done by choosing 3 days from each quarter of a year during the time period. Using maps of the area to determine a purchaser's residence, the 95% confidence interval for the estimated fraction, p, of out of city sales was 0.367 ± 0.03. As the company had paid the city \$76,975, the corresponding confidence interval for the amount of overpayment is $\$28,250 \pm 2310$. Although accounting experts testified that sampling methods were an accepted method for conducting audits, the court did not accept the results because the sales tax return called for a computation for each sale. Subsequently, a complete audit was made, which yielded an overpayment of \$26,750. The complete audit cost \$3500. The sample cost slightly more than 10%

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