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*Markedsundersøkelser som bevis i varemerke-
og markedsføringsrett*

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ved Copenhagen Business School

2011

Abstract

The focus of this thesis is an analysis of the legal aspects and use of surveys in trademark and marketing practice litigation in Norway. I examine the legal relevance of surveys and analyse how they are considered as evidence by the courts and administrative bodies.

Human behaviour can be defined within a legal context by interpreting legal sources and also by developing a survey based on the market place. In this thesis, I compare the use of survey findings as evidence of human perceptions in the context of the average consumer who represents the opinion of the relevant group. If the factual public opinion of the respective group of addressees is taken into consideration, the rules are interpreted with a basis in the market place (reality), and not within a formal legal framework (abstraction).

There is little doubt that the public's view can have an impact on legal assessment, but what is not entirely transparent is on which grounds surveys are admitted, or excluded, as evidence of public opinion. An analysis of the relationship between legally set criteria in trademark and marketing practice litigation, as opposed to scientifically set criteria, may clarify this picture.

In addition to the introduction in part one (1), the thesis is divided into five main parts: (2) legal basis and relevance of surveys, (3) procedural rules and limitations, (4) scientific criteria in a legal context, (5) surveys as admissible evidence and finally (6) general comments and discussion concerning legal consequences.

The objective in part two is to analyse the legal basis of the use of market surveys in Norwegian trademark and marketing practice law. Surveys can be relevant in trademark law when evidencing a trademark as a distinctive sign of someone's goods or services and when documenting likelihood of confusion between two signs. Moreover, they can be used as evidence for well-known trademarks. Surveys can be relevant in marketing practice law to determine whether advertising is misleading, to spot counterfeit products and to determine whether a competitor has taken unfair advantage of a company's reputation. The main focus is to determine the perceptions of a cross-section of an appropriate population representing the relevant market. Consequently, it is vital to determine the legal definition of the relevant market and how key players in this market will react. I discuss to what extent surveys can be relevant as a proof of this reaction.

The objective in part three is to discuss the impact of civil procedural law and evidential rules when surveys are presented as evidence. The point of departure is a common principle stating that relevant evidence is admissible, unless it is specifically excluded by law. It must

be taken into consideration that limitations due to written statements, made for the purpose of the case, may exclude surveys as evidence. Furthermore, the need for expert opinion can have an impact on the application of surveys as evidence. The expert responsible for the survey may be called as a witness in court, in order to give evidence on development and data analysis. In this respect it must be considered whether the costs involved are reasonably proportionate to the importance of the case. If not, a survey may be excluded as evidence. In this respect, I discuss whether the need for expert knowledge will impact the role of the courts and administrative bodies with regard to how they are organised.

In part four, I consider the legal impact of the scientific techniques used as a basis for developing surveys. The objectives of science and law are not necessarily the same. Thus, I examine whether this has been recognized in legal practice when discussing evidential admittance and value of a survey. I discuss whether the scientific criteria for market surveys developed in other countries, e.g. Germany, England and the United States, can be of relevance when surveys are considered to be admitted as evidence in Norway. I analyse some commonly accepted principles for empirical legal research and discuss them in the context of relevant cases in the Scandinavian countries. For example, the courts and administrative bodies must take into consideration that the legal definition of a relevant market must correspond with the relevant target group established as a survey criterion.

In part five I examine whether scientific criteria are taken into consideration when evaluating the weight of the survey. Scientific standards of reliability and validity can be seen as minimum requirements for the evidential value of a survey, but it must be taken into consideration that the courts have general power to assess evidence. It can be discussed whether judges only base their judgment on their own pragmatic experience, e.g. as consumers in the relevant market, instead of basing judgment on a survey. In this respect, I discuss to what extent the judge has sufficient knowledge to assess a survey.

Finally, in part six, I analyse potential consequences of surveys being generally admitted and given substantial weight as evidence. A survey may ensure influence from the market reality and result in more precise decisions, but it may also increase litigation costs. There is also a risk that the courts give an aura of reliability to an incompetent survey or destroy confidence in a survey which deserves better. Whether a survey should be admitted or not must therefore be based on evaluations with focus on interactions between legal needs and scientific criteria, together with procedural rules. Clear and precise instructions will be of great value in these evaluations.