

Survey Evidence in Trademark Law: Use and Evidential Value in the United States and Turkey

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Article Info

ABSTRACT

Article History

Received: 15.10.2024

Accepted: 10.12.2024

Published: 28.12.2024

Anahtar Kelimeler:

Trademark law, Survey evidence, Evidential value, Expert witness, Expert report.

Surveys are important tools for evaluating public perception of trademarks. However, they carry various criteria to ensure methodological accuracy and their admissibility as evidence. These criteria include the proper formulation of questions, appropriate selection of the relevant public, and meticulous execution of the survey process. Additionally, supplementary measures should be established concerning the interpretation of survey data into a report. In American trademark law, surveys play a critical role, especially in determining likelihood of confusion, distinctiveness, genericness, and dilution claims. American courts, under the Lanham Act and the Federal Rules of Evidence, prescribe strict standards for the admissibility of survey evidence as expert testimony.

In contrast, the use of survey evidence in Turkish trademark law is more limited compared to American law. In Turkish law, surveys can be used in disputes involving distinctiveness, determination of well-known status, and likelihood of confusion. Courts should prioritize surveys that focus directly on the views of the relevant public over expert reports based solely on the subjective assessment of an individual or a panel in trademark disputes. Particularly, greater emphasis should be placed on the survey method as evidence, which is frequently utilized and standardized in trademark and competition law in the United States, Germany, and Switzerland.

The primary aim of this study is to examine the methodological criteria that surveys must possess in trademark law, their areas of use, and their evidential value. In this context, comparative legal research will be used as the main data collection method; guidelines and decisions of international and national institutions, court decisions, and opinions in the doctrine will be consulted.

Marka Hukukunda Anket Delili: Amerika Birleşik Devletleri ve Türkiye’de Kullanımı ve Delil Değeri

Makale Bilgisi

ÖZET

Makale Geçmişi

Geliş: 15.10.2024

Anketler, kamuoyunun markalara yönelik algısını değerlendirmede önemli araçlardır. Ancak, metodolojik doğruluğun sağlanması ve delil olarak



Kabul: 10.12.2024

Yayın: 28.12.2024

Anahtar Kelimeler:

Marka hukuku, Anket delili, Delil değeri, Bilirkişi-Tanık, Bilirkişi raporu.

kullanılabilirliği için çeşitli kriterler bulunmaktadır. Bu kriterler arasında soruların doğru formüle edilmesi, ilgili kesimin uygun şekilde belirlenmesi ve anketin uygulama sürecinin titizlikle yürütülmesi yer alır. Ayrıca, anket verilerinin yorumlanarak bir rapor haline getirilmesi sürecine ilişkin ek ölçütler de belirlenmelidir. Amerikan marka hukukunda anketler, özellikle karıştırılma ihtimali, ayırt edicilik, jenerik hale gelme ve sulandırma iddialarını belirlemede kritik bir rol oynar. Amerikan mahkemeleri, Lanham Yasası ve Federal Delil Yasası kapsamında anket delillerinin kabul edilebilirliği için katı standartlar öngörmüştür.

Türk marka hukukunda ise anket delillerinin kullanımı Amerikan hukukuna göre daha sınırlıdır. Türk hukukunda anketler, ayırt edicilik, tanınmışlığın tespiti ve karıştırılma ihtimali gibi uyuşmazlıklarda kullanılabilir. Mahkemeler, marka uyuşmazlıklarında yalnızca bir kişinin veya bir heyetin subjektif değerlendirmesine dayanan bilirkişi raporları yerine, doğrudan ilgili kesimin görüşüne odaklanan anketleri esas almalıdır. Özellikle ABD, Almanya ve İsviçre hukuklarında marka ve rekabet hukukunda sıklıkla başvuru ve standartları belirlenmiş olan anket yöntemine, delil olarak daha fazla önem verilmelidir.

Bu çalışmanın temel amacı, marka hukukunda anketin sahip olması gereken metodolojik kriterlerin, kullanım alanlarının ve delil değerinin incelenmesidir. Bu bağlamda, temel veri toplama yöntemi olarak karşılaştırmalı hukuk araştırması kullanılmış; uluslararası ve ulusal kurumların kılavuzları ve kararlarına, mahkeme kararlarına ve doktrindeki görüşlere başvurulmuştur.

To cite this article:

Dinçer, Y./Altun, M. Y. (2024). "Survey Evidence in Trademark Law: Use and Evidential Value in the United States and Turkey", *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, 7(3), s. 795-836. <https://doi.org/10.51120/NEUHFD.2024.140>

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INTRODUCTION

Surveys are used as a data collection method in a wide range of fields, from social sciences to political and marketing research.¹ Survey method is an effective tool for collecting data from large samples. These data provide important information about people's attitudes, behaviors, and characteristics. However, to achieve the expected benefit from surveys, many factors such as the sample size, the way the survey is prepared, number of questions and options, relationship between the questions, and statistical analysis to be applied to the obtained data are taken into consideration.

Surveys play an important role in trademark law, such as in determining distinctiveness, recognition and likelihood of confusion. The subject of our study is determination of the areas of surveys application in trademark law and the evidential value of surveys. In the court decisions and doctrine, concepts such as opinion poll, demographic survey, empirical research,

¹ For other areas of law where surveys are used outside of competition law and intellectual property law, and for related court decisions, see Becker, Ralf. *Das demoskopische Gutachten als zivilprozessuales Beweismittel*, Peter Lang, Frankfurt am Main, 2002, p. 72 ff.

market research, field survey, social research, consumer survey, sounding, and market survey are used. In our study, we will use the term “survey” to refer to all of these.

The (proper) use of empirical approaches offers significant opportunities and advantages in certain areas of law. Especially in areas such as industrial property law and competition law, such approaches can be used for deeper understanding and resolution of legal issues. In this context, surveys can be considered as an effective tool to identify and analyze perceptions of society segments. Surveys enable more robust and realistic legal assessments by understanding social perceptions, behaviors, and tendencies in a way that serves the purposes of law.

I. METHODOLOGICAL STANDARDS FOR LEGAL SURVEY

A. General Overview

It is essential that the measurement method has certain standards. An ordinary measurement cannot be of value in a judicial or administrative process. Many requirements have been set by international and national courts, institutions, and doctrine.² It is therefore necessary to outline these requirements for the use of surveys.

A survey is a measurement tool and measurement tools always influence the results. It is an illusion that survey measures only “existing” opinions and that therefore the measurement cannot change the outcome. Otherwise, instead of well-designed questions, only certain keywords would be needed to get ‘readily available’ opinions. Many criteria set by courts, institutions and doctrine, notably the correct formulation of the questions, aim to ensure that the survey is conducted in a way that minimizes the impact on the results. These criteria are

² EUIPO, *Trade Mark Guidelines*, Part A, Section 10 Evidence, 2024, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/guidelines/trade_mark_guidelines_track_changes_en.pdf, Access Date: 20.08.2024; EUIPN, *Common Communication, CP12*, Evidence in Trade Mark Appeal Proceedings, 3.3.3, 2021, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/EUIPN/common_communication/cp12/common_communication_cp12_de.pdf, Access Date: 20.08.2024; EUIPO, *Beschluss Nr. 2020-8*, Beschluss des Präsidiums über Marktstudien als Beweismittel, 2020, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/presidium_boards_appeal/Decision_2020-8_de.pdf, Access Date: 25.08.2024; DPMA, *Richtlinie für die Prüfung von Markenmeldungen und für die Registerführung (Richtlinie Markenmeldungen)*, Teil 2, XVII, 7, 2020, <https://www.dpma.de/docs/formulare/marken/w7735.pdf>, Access Date: 20.08.2024; IGE, *Richtlinien in Markensachen*, Teil 5, Ziff. 12.3, 2024, https://www.ige.ch/fileadmin/user_upload/schuetzen/marken/d/richtlinien_marken/Richtlinien_Marken_D_2024_01.pdf, Access Date: 10.08.2024; IPO, *The Examination Guide*, 5. 15 and 5.19-5.24, 2021, <https://www.gov.uk/guidance/trade-marks-manual/the-examination-guide>, Access Date: 10.08.2024; for the Whitford guidelines expressing strict requirements under English law, see *Imperial Group Plc & Another v Phillip Morris Limited & Another*, RPC, Volume 101, Issue 17, 1984. For the criteria set out in the doctrine in terms of Turkish law, see Kale, Serdar. *Marka Davalarında Yargılama Usulü*, Adalet Yayınevi, Ankara, 2020, pp. 184-188; Büyükkılıç, Gül. *Marka Hukukunda Tanınmış Markanın Sulandırılmaya Karşı Korunması*, Oniki Levha Yayınları, İstanbul, 2019, pp. 664-669. There is a need for a standardised methodology for surveys evaluation in trademark law. As trademark rights are property rights, it should not be possible to deny or grant them on an uncertain basis. Grabrucker, Marianne. “Demoskopische Umfragen zur Verkehrsdurchsetzung in der deutschen Rechtsprechung”, *GRUR-Prax* 2016, 93-94, p. 94.

important for the evidential value of the questionnaire in trademark-related judicial or administrative proceedings.³

Validity and reliability are the most important qualities for the results of measurement instruments. The validity of a survey indicates its ability to elicit appropriate responses to the research topic, while its reliability indicates its ability to produce similar results when the survey is repeated in the same ways.⁴ In other words, validity refers to whether a survey measures what it is supposed to measure; reliability refers to the stability of the result with repeated measurements or the independence of the result from a single measurement process.⁵

B. Designing Surveys

First of all, the purpose of a survey should be determined. The purpose of a survey has an impact on the evidential value of the survey, as it may affect the sample selection, the formulation of the questions and thus the results of the study. Therefore, studies prepared for a purpose other than the subject matter of the dispute should be handled with caution.⁶ The requirement that the survey must be relevant to the subject matter of the dispute is significantly ensured by determining the purpose correctly.

The evidential value of a survey depends largely on how the questions are formulated.⁷ Questions should be formulated clearly and understandably and should not direct the respondent to a specific answer. They should not contain long preliminary or intermediate texts that are suggestive.⁸ For example, in “*Sparkassen-Rot*”⁹ the German Federal Court found the question “*Have you ever seen this color in connection with financial services or does it look familiar to you?*” to be leading because the phrase “*look familiar*” pushed too many people towards certain

³ Quitt, Helmut. “Einige Anmerkungen zur Praxis demoskopischer Gutachten”, in: Heldrich, Andreas (Hrsg.), *Medien zwischen Spruch und Informationsinteresse. Festschrift für Robert Schweizer zum 60. Geburtstag*, Nomos Verlag, Baden-Baden, 1999, pp. 469–483, p. 483. For example, in the US, methodological rigor is crucial for survey evidence to be admitted. Surveys must meet the standards set in the landmark *Daubert* case, which requires the methodology to be scientifically valid, subject to peer review, have a known error rate, and be generally accepted within the relevant scientific community. Failure to meet these criteria can lead to the exclusion of the survey. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).

⁴ Büyüköztürk, Şener. “Anket Geliştirme”, *Türk Eğitim Bilimleri Dergisi*, Vol. 3, No. 2, 2005, pp. 133-151, p. 135.

⁵ Dobel, Heiko. *Verkehrsauffassung und demoskopische Gutachten im Marken- und Wettbewerbsrecht*, Nomos Verlag, Baden-Baden, 2014, p. 118; Stiel, Daniel. *Die Verkehrsdurchsetzung von Marken nach § 8 Abs. 3 MarkenG unter dem Blickwinkel der Demoskopie*, Inaugural-Dissertation, Augsburg, 2015, pp. 176-177; IGE, Richtlinien in Markensachen, p. 230.

⁶ EUIPO, Beschluss des Präsidiums, pp. 5-6. “... Moreover, several of those surveys relate to the existence of a likelihood of confusion resulting from the use of the represented signs and not to their acquisition of distinctive character through use.”, 19/06/2019, T-307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, § 135.

⁷ Interviews presented lack probative value if they are not sufficiently relevant to the subject matter. BVGer, 01.02.2022, (B-1306/2021), YT-EYT (fig.). When formulating questions, it can be difficult to anticipate all possible answers. The formulated questions are expected to produce answers that will clarify the survey topic. Whether the prepared questions will fulfill this need can be understood with a method called pre-testing. Pflüger, Almut/Dobel, Heiko. § 9 Rechtsdemoskopie, Rn. 39, in: Hasselblatt, Gordian N. (Hrsg.), *Münchener Anwaltshandbuch Gewerblicher Rechtsschutz*, 6. Auflage, C.H. Beck, München, 2022.

⁸ EUIPO, Trade Mark Guidelines, p. 197-198; IGE, Richtlinien in Markensachen, p. 233; Büyükkılıç, pp. 667-668. Büyüköztürk, p. 144. Decisions; 24/10/2018, T-261/17, SALOSPIR 500 mg (fig.)/Aspirin et al., EU:T:2018:710, § 68; 13/09/2012, T-72/11, Espetec, EU:T:2012:424, § 79.

⁹ BGH, GRUR 2016, 1167 - Sparkassen-Rot.

answer option and as an outcome the results of the subsequent questions were too high.¹⁰ The evidential value of a survey will be lower where it cannot be excluded that the non-objective formulation of the questions facilitates the association of the mark with a particular undertaking in the minds of the respondents or where the order of the questions leads to speculation.¹¹

Many criteria need to be considered concerning the wording and structure of questions in surveys: A survey should use clearly structured questions that follow the same order and format for all respondents.¹² The language of these questions should be clear and concise and formulated to elicit spontaneous responses. In particular, the main topic of the survey should not be addressed directly or indirectly, otherwise, it is impossible to determine the perceptions of the respondents at the outset without any focus.¹³ Since the survey needs to be understood by the respondents, questions should be formulated considering their level of knowledge¹⁴; a survey using technical concepts does not comply with this requirement. For example, in a survey on likelihood of confusion, respondents should not be asked questions regarding the evaluation of the classes of goods or services of two trademarks.¹⁵

The type of question used in a survey is also important. Closed-ended questions consist of pre-filled response options from which the respondent can choose, while open-ended questions ask the respondent to provide feedback in their own words. In terms of survey methodology, answers such as 'yes', 'no' or 'don't know'¹⁶ are easy to understand and measure. Closed questions are used for this to happen. However, sometimes open questions may be needed to learn more about respondents' opinions or preferences.¹⁷ The important thing here is to explain which type of question is preferred, considering the survey topic and the respondents.

EUIPO prefers open questions that elicit free answers without providing any answer catalogue in order to ensure an impartial and non-suggestive questionnaire, and is more cautious towards closed questions that use an answer catalogue to elicit answers on the grounds that they have a lower evidential value.¹⁸ In Germany, the closed question type is preferred with three stages.¹⁹ The EUIPO is increasingly adopting the question type used in Germany.²⁰ In U.S. courts, there is often a preference for open-ended questions in cases concerning likelihood of confusion and genericness, as they tend to capture more spontaneous and unbiased responses.

¹⁰ Pflüger, Almut. "Rechtsdemoskopische Gutachten - Fallstricke bei der Verkehrsbefragung", *GRUR* 2017, 992-1004, p. 996.

¹¹ Lerach, Mark. "Demoskopie im Markenrecht", *GRUR-Prax* 2017, 137-139, p. 139; EUIPO, Trade Mark Guidelines, p. 198; Pflüger, p. 996.

¹² LaFrance, Mary. *Understanding Trademark Law*, 4th ed., Carolina Academic Press, Durham, 2020, p. 345.

¹³ Pflüger/Dobel, Rn. 65. For relevant decisions, see BGH, GRUR 1983, 257 - bis zu 40 %; BGH, GRUR 1989, 440 - Dresdner Stollen; BGH, GRUR 1990, 461 - Dresdner Stollen II.

¹⁴ Pflüger/Dobel, Rn. 39.

¹⁵ Pflüger, p. 995; Pflüger/Dobel, Rn. 11.

¹⁶ The option not to decide in favor of any of the answers presented should not only be included in the questionnaire for the interviewer, but should also be clearly presented to the respondent. Quitt, p. 480.

¹⁷ For detailed explanations on question types, see Stiel, p. 96 ff.

¹⁸ Niedermann, Anne. "Empirische Erkenntnisse zur Verkehrsdurchsetzung", *GRUR* 2006, 367-374, p. 373; Stiel, pp. 97-98.

¹⁹ For the outline of the three-stage test provided by the DPMA in its guidelines, see DPMA, Richtlinie Markenmeldungen, Teil 2: XVII.7. See also IGE, Richtlinien in Markensachen, pp. 233-235; Pflüger, p. 998 ff.; Niedermann, p. 368.

²⁰ Stiel, pp. 97-98.

However, the effectiveness of either open-ended or closed-ended questions depends on the type of information they are designed to gather.²¹

Identifying the target group/proper universe/relevant public opinion is also important.²² This is because, if this group is determined incorrectly, very different results will emerge and the decisions made based on this will not be in accordance with the law.²³ In this framework, in terms of the relevant survey, attention should be paid to whether the segment of the public to which the survey will be directed is the target audience of the trademark, whether they are selected appropriately, whether their socio-economic profiles, geographical distribution, age, etc. are sufficient for the successful conduct of the survey.²⁴

Since it is not possible to interview the entire population or every consumer/interested professional on a particular topic, a sample universe should be taken. A sample universe refers to a much smaller group of manageable size. The sample should be planned to be faithful to the structure of the entire group to be researched and should be a miniature version of the 'population' to be researched.²⁵ Therefore, the criteria applied in sample selection are decisive in determining whether the sample is representative and whether the questionnaire is valid.²⁶

There is no general minimum number of participants for the representativeness of survey results. It is a mistake to assume that the more people surveyed, the more 'representative' the results will be.²⁷ It depends on the group of consumers involved.²⁸ For consumer goods aimed at the general public, there is a particular danger that small samples may be unreliable.²⁹ However, small samples could be representative for certain groups of professionals or more specialised goods and services.³⁰ As the German Federal Court stated in the "test" decision³¹, 1000 interviews are considered sufficient for the total population³², in which case margins of error no longer need to be taken into account and the results from the tables can be directly referred to. For experts (specialized circles), 300 or only 200 interviews may be sufficient, but in some specific cases 100 to 150 interviews are also considered sufficient.³³ The sample size should not be evaluated in isolation, but in the context of the specific case and, more

²¹ Diamond, Shari Seidman. "Reference Guide on Survey Research", pp. 359-424, p. 394, in: *The Reference Manual on Scientific Evidence*, 3rd ed., The National Academies Press, Washington, DC, 2011.

²² Regarding whether potential consumers should be considered when determining the relevant segment, see Pflüger/Dobel, Rn. 55.

²³ Kale, p. 187.

²⁴ Diamond, p. 376; Kale, p. 187; Büyükkılıç, p. 665.

²⁵ EUIPN, CP12, p. 31; Stiel, p. 162. For a decision to the same direction, see 29/01/2013, T-25/11, Cortadora de cerámica, EU:T:2013:40, § 88.

²⁶ EUIPO, Trade Mark Guidelines, p. 196.

²⁷ Pflüger/Dobel, Rn. 43.

²⁸ 01/06/2011, R 1345/2010-1, Fukato Fukato (fig.)/DEVICE OF A SQUARE (fig.) et al., § 58.

²⁹ 09/09/2020, T-187/19, Color Purple -2587C (col), EU:T:2020:405, § 100-101.

³⁰ EUIPO, Trade Mark Guidelines, p. 197.

³¹ BGH, GRUR 2014, 483 - test.

³² In principle, samples of 1000-2000 interviewees are considered sufficient, if they are representative of the relevant public opinion. EUIPO, Trade Mark Guidelines, p. 197.

³³ Pflüger, pp. 995-996; Quitt, pp. 473-477; Stiel, pp. 165-166; EUIPN, CP12, pp. 32-33; Büyükkılıç, pp. 665-666. For example, for the service of organizing trade fairs in the field of toys, a sample of 202 persons was accepted as the right relevant public. For the relevant decision, see BPatG, GRUR 2013, 394 - Spielwarenmesse. For another decision on the expert environment, see BPatG, BeckRS 2014, 10751 - starres Endoskop.

importantly, taking into account the other evidence presented.³⁴ What is important for the evaluation of the survey and its evidential value is to explain how the sample size was chosen for the relevant public opinion and that the sample is representative.

The way to achieve correct representativeness is to apply a scientific sampling procedure. There are basically two methods for selecting representative cross-sections of people to be surveyed. In the random method or random sampling, the sample is randomly selected from the population. Every element of the population, i.e. every potentially relevant respondent, is represented and always has the same chance of being interviewed. In quota sampling, on the other hand, the selection is done using quotas that dictate to the interviewer or public opinion research institute how many people from different groups of interested people they should interview.³⁵ In terms of social science logic, it would be pure dogmatism to reject one or the other selection procedure in general, given the possibilities of errors that affect the outcome of the research. However, random sampling is theoretically more appropriate for most surveys, as it requires less information about the structure of the population of interest and reduces the risk of systematic bias according to objective criteria.³⁶

The margin of error measures the possible deviation between the survey result obtained from the sample and the result that would have been obtained if the entire population had been surveyed.³⁷ If a sufficiently large sample of at least 1000 respondents forms the basis of market research, margins of error need not be considered.³⁸ Results from smaller sample sizes are subject to larger margins of error than results based on a larger number of interviews. However, this is not the only criterion to consider in terms of the evidential value of the survey. For example, the usability of a survey with a sample size of 300 interviews depends on whether the methodological requirements are met.³⁹

C. Conducting and Administering Surveys

As a method of conducting the survey, it is possible to apply face-to-face, telephone, written and online surveys.⁴⁰ There is no mandatory method or channel for the implementation of the survey. The method and conditions under which respondents are interviewed have a direct impact on the quality and reliability of the survey results.⁴¹ In the survey report, it is important to explain the chosen survey method, otherwise, the reliability of the survey may be questioned. The method of conducting the survey is determined by taking into account factors such as the purpose of the survey, the number of interested public and potential respondents, whether there

³⁴ EUIPO, 30.4.2019 - R 1429/2018-5, GRUR-RS 2019, 61145, § 44. The number of people to be interviewed may depend on whether the survey is for litigation or for preliminary injunctions. If a questionnaire is being submitted for an application for an preliminary injunction, a survey with a relatively small number of interviews may be sufficient. Stiel, p. 166.

³⁵ Stiel, p. 167.

³⁶ Stiel, p. 175.

³⁷ Brown, Katie/Brison, Natasha T./Batista Paul J. "An Empirical Examination of Consumer Survey Use In Trademark Litigation", *Loyola of Los Angeles Entertainment Law Review*, Vol. 39, No. 3, 2019, pp. 237-283, p. 276; Dobel, p. 126; Stiel, p. 163.

³⁸ Lerach, p. 139; BGH, GRUR 2017, 75 - Wunderbaum II.

³⁹ Quitt, pp. 471-473.

⁴⁰ For methods of conducting surveys see Dobel, pp. 129-131; Büyüköztürk, p. 143.

⁴¹ 12/07/2006, T-277/04, Vitacoat, EU:T:2006:202, § 38.

is a need to show a sign or product packaging to the interviewees, and the possibilities to ensure traceability of the answers.⁴² In legal surveys, face-to-face interviews are usually used.⁴³ This method is preferred if the survey subject (color sign, advertising spot, foreign language or difficult-to-pronounce name, etc.) needs to be shown or if various answer options need to be presented on cards/lists to distinguish them in the best possible way.⁴⁴ Online and paper surveys are generally not considered in legal survey work because it cannot be guaranteed that respondents will actually (i.e. seriously) complete the survey or that they will not learn about the survey topic elsewhere during the survey.⁴⁵

The time of the survey is also one of the criteria taken into account in terms of evidential value.⁴⁶ The period in which the survey was conducted must be relevant to the period in which the cause of action arose, as then the survey will be useful. However, a survey compiled some time before or after the relevant date may contain useful indicators, but its probative value may vary depending on whether the period covered is close to or far from the relevant time.⁴⁷

In addition to the methodological requirements of the survey, there are also several requirements for the provider, i.e. the person conducting the survey. In principle, surveys should be conducted by independent research institutes, survey companies or independent experts. Given the complexity of such surveys and their use as evidence in legal proceedings, the experts commissioned to conduct them should have relevant knowledge and experience.⁴⁸ A competent independent expert or survey company/institute better understands the purpose of the survey and can therefore structure and conduct the survey more reliably. In addition, the interpretation of survey results requires expertise as well as the conduct of the survey. The survey report cannot be rejected solely because the expert or institute conducting the survey is not a well-known/international/major person or organization, provided that the above-mentioned essential elements are properly present, and the survey methodology meets the standards.

Those conducting and interpreting the survey should also be impartial and it must be considered during the evaluation of the evidence.⁴⁹ A close relationship between one of the

⁴² EUIPN, CP12, pp. 33-34.

⁴³ VasIU, Ioana/VasIU, Lucian. "Survey Evidence in Trademark Actions", *DePaul Business & Commercial Law Journal*, Vol. 22, No. 1, 2024, pp. 57-80, p. 68.

⁴⁴ IGE, Richtlinien in Markensachen, p. 232; Pflüger, p. 994; Pflüger/Dobel, Rn. 10. For an example of conducting the survey through the presentation of goods bearing the mark together, see Jacob, Robin. "Anforderungen an Meinungsumfragen: Empfehlungen aus britischer Praxis", *GRUR-Prax 2016*, 97-99, p. 99.

⁴⁵ Pflüger/Dobel, Rn. 10.

⁴⁶ Knaak, Roland. *Demoskopische Umfragen in der Praxis des Wettbewerbs- und Warenzeichenrechts*, VCH Verlagsgesellschaft, Weinheim, 1986, pp. 73-75. For a decision in this regard, see Ankara 5th Civil Court of Intellectual and Industrial Rights, 15.01.2021, 2019/82, 2021/26, Lexpera, Access Date: 05.09.2024.

⁴⁷ EUIPN, CP12, p. 26; Pflüger/Dobel, Rn. 50-53; Kale, p. 187; Büyükkılıç, p. 667. For a decision to this direction, see 12/07/2006, T-277/04, Vitacoat, EU:T:2006:202, § 38. The Court will assess the date of the survey according to the concrete case and other evidence. See EUIPO, 30.4.2019 - R 1429/2018-5, GRUR-RS 2019, 61145, § 36-37: "... in view of the whole of the evidence submitted, the fact that the date is some three years earlier than the filing date is not a sufficient reason to discard the survey."

⁴⁸ The identification of the right sampling, the appropriate design of the survey, the organization of the interviews and the scientific evaluation require expert knowledge and experience. Lindacher, Walter F. "Die gerichtliche In-Auftrag-Gabe demoskopischer Gutachten: Struktur- und Dogmatikfragen", *GRUR 2016*, 242-245, p. 242.

⁴⁹ BGE 148 III 409, 414.

parties and the person conducting the survey is undesirable.⁵⁰ However, the survey results can be verified by the court, which relativizes the risks of any conflict of interest. The expert does not make a subjective assessment but only reproduces the objective data obtained into meaningful conclusions.

D. Interpreting Survey Data

There are also various methodological considerations in the interpretation of the questionnaire. For example, the base cannot be changed when interpreting the results of the survey. In other words, it is unacceptable to manipulate real relationships by changing percentages.⁵¹ For this reason, the results for each question must be shown separately and in full. To ensure transparency, the results must be tabulated and rigorously audited.⁵² Or, if the report refers to decisions or other sources, these should be checked. In case of any ambiguity, clarification should be requested. Especially in the case of foreign citations, it is important to explain the correlations.⁵³ In addition, the report must have a coherent structure in terms of meaning and form.⁵⁴

In this section we have considered the methodological requirements for a scientifically designed and properly conducted legal survey. The criteria discussed here do not represent a binding list; they should be determined on a case-by-case basis.⁵⁵ It cannot be assumed that courts and institutions directly adopt the information obtained from survey results; rather, they thoroughly discuss research approaches and methods and decide what to recognize or not recognize or what to apply. This evaluation results in the evidential value of the survey.⁵⁶

II. U. S. LAW

A. Overview of Trademark Law in the U. S.

Trademark law serves as the cornerstone for protecting intellectual property rights associated with symbols, names, and phrases that businesses use to differentiate their products

⁵⁰ In the U.S., it is common for parties to select their own experts to conduct surveys. This party selection means that the expert is typically hired by either the plaintiff or the defendant. However, to mitigate any concerns of bias, U.S. courts apply strict scrutiny through cross-examination and the Federal Rules of Evidence, especially Rules 702 and 703, which require experts to use reliable methods and base their conclusions on sufficient facts or data. Additionally, under Rule 706, the court itself may appoint an independent expert to ensure neutrality and help the court evaluate complex issues.

⁵¹ If 20% of 100 know a color and 11% of them correctly describe the color, then only 11% of the total know the color in the correct context. If a change of base is made and the reference value is not based on the initial base of 100%, but on 11% of 20%, then a rate of 55% is reached. Pflüger, p. 997. For a decision to this end, see BVGer, 14.9.2016, (B-5653/2015), HAVANA CLUB-CANA CLUB.

⁵² For the sake of transparency, full answers should be recorded, not abbreviations or summaries. EUIPN, CP12, p. 34. Questions and answers as well as instructions for participants should be provided in full. EUIPO, Beschluss des Präsidiums, p. 5. In addition, all documents on which the survey is based must be presented in full detail. This includes the forms filled in by the respondents, all questions and answers, analysis documents and everything else related to the survey. IGE, Richtlinien in Markensachen, p. 235; Jacob, p. 97.

⁵³ Pflüger, p. 997.

⁵⁴ Niedermann, p. 372.

⁵⁵ Ünlüönen, Kurban/Battal, Ahmet/Yaylı, Ali/Yüksel, Sedat. "Marka İltibas Davalarında Kamuoyu Görüşünün Hukuki Sürece Dahil Edilmesi: Üç Boyutlu Bir Araştırma Örneği", *Elektronik Sosyal Bilimler Dergisi*, Vol. 6, No. 22, 2007, pp. 1-12, p. 6.

⁵⁶ Pflüger, p. 994; Kale, p. 185.

or services from those of others. At the core of the U.S. federal trademark law lies the Lanham Act, enacted in 1946, which codifies the federal statutes regulating trademarks. This extensive legislation delineates the processes for trademark registration, granting legal protections that bolster the use of trademarks in commerce and offering remedies for infringement disputes.⁵⁷

Under the Lanham Act, trademarks serve several critical functions. Primarily, they identify the source or origin of goods and services and differentiate one source from another.⁵⁸ This dual role allows consumers to recognize the origin of products and distinguish among the numerous choices available in the market, aiding them in making informed purchasing decisions.⁵⁹ The legal basis for these functions is provided in the Lanham Act, particularly in Section 45, which defines a trademark as “*any word, name, symbol, or device, or any combination thereof*” used by a person “*to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.*”. The definition for service marks is nearly identical.⁶⁰ This definition highlights the importance of trademarks in identifying the source and distinguishing goods or services, emphasizing their vital role in protecting consumer interests and promoting fair competition in the marketplace.⁶¹

To effectively carry out their functions, trademarks must be both distinctive and non-functional.⁶² Distinctiveness is essential for trademarks to reliably indicate the source of goods or services and to allow differentiation within the market.⁶³ This distinctiveness can be inherent, where the mark is naturally unique, as seen in fanciful, arbitrary, or suggestive marks, or acquired over time through usage, known as acquired distinctiveness.⁶⁴ Although not analyzed as frequently as a mark’s distinctiveness, the “*use*” requirement under the definition of a trademark under Section 45 and Section 1 is also critical. A trademark must be used in a manner that adheres to general standards of trademark usage.⁶⁵ The relationship between the mark and the goods or services it labels is another critical consideration, ensuring the mark effectively serves as an identifier to consumers.⁶⁶ Additionally, it is necessary to maintain and monitor a trademark’s distinctiveness to prevent the loss of its identifying function and protective rights over time.⁶⁷

⁵⁷ Ochoa, Tyler T./Ghosh, Shubha/LaFrance, Mary. *Understanding Intellectual Property Law*, 4th ed., Carolina Academic Press, Durham, 2020, p. 466.

⁵⁸ Ochoa/Ghosh/LaFrance, p. 467.

⁵⁹ Schechter, Roger E./Thomas, John R. *Principles of Trademark Law*, West Academic Publishing, St. Paul, 2021, p. 11.

⁶⁰ Ochoa/Ghosh/LaFrance, p. 476.

⁶¹ Widmaier, Uli. “Use, Liability, And The Structure Of Trademark Law”, *Hofstra Law Review*, Vol. 33, No. 2, 2004, pp. 603-709, pp. 618, 619.

⁶² LaFrance, p. 17.

⁶³ LaFrance, p. 17.

⁶⁴ Schechter/Thomas, p. 52.

⁶⁵ Roberts, Alexandra J. “Trademark Failure to Function”, *Iowa Law Review*, Vol. 104, No. 4, 2019, pp. 1977-2054, p. 1981.

⁶⁶ Schechter/Thomas, p. 52.

⁶⁷ Schechter/Thomas, p. 51.

B. Usage of Survey Evidence in the US Trademark Law

In the U.S. trademark law, surveys play a crucial role in litigation by providing valuable insights into how consumers perceive a particular mark. These surveys are used as tools to collect data on consumer opinions, beliefs, and attitudes, offering a real-time snapshot of public perception surrounding a trademark at the time of the survey.⁶⁸ The empirical data gathered can be instrumental in assisting courts to base their decisions on concrete evidence rather than speculation which is especially critical in cases where the likelihood of consumer confusion is questioned.⁶⁹

While the likelihood of confusion is a common focus, surveys are also significant in other trademark-related matters, such as trade dress confusion, determining secondary meaning, evaluating genericness, and measuring dilution claims. Additionally, surveys can be employed to examine distinctiveness, determine trademark strength, and assess the recognition of well-known marks. These varied applications highlight the broader relevance of survey evidence in trademark law and will be discussed in detail in the sections that follow, demonstrating how consumer perception is central to resolving an array of trademark disputes.

1. Likelihood of Confusion

The likelihood of confusion arises when consumers encountering a particular mark are likely to believe that the product or service it represents is connected to another product or service identified by a similar mark.⁷⁰ Courts assess several key factors when determining the likelihood of confusion, drawing from various legal frameworks.⁷¹ These factors include the similarity between the marks in their appearance, sound, connotation, and overall commercial impression; the relatedness of the goods or services; and the similarity of trade channels through which the products are marketed.⁷² Additional considerations are the conditions under which the products are sold and the nature of the buyers, the strength (whether it is fanciful, arbitrary, suggestive, descriptive, or generic) or fame of the senior mark, and any evidence of actual consumer confusion. Other important aspects include the intent of the defendant in adopting the mark, the quality of the defendant's product, and the sophistication of the buyers.⁷³ Confusion must be more than a mere possibility, it must be probable, and this evaluation is based on the perspective of an ordinarily prudent consumer.⁷⁴

An important consideration in trademark litigation is whether the likelihood of confusion is treated as a question of fact or a question of law, as this distinction impacts the scope of appellate review. U.S. federal courts currently vary in their definitions of likelihood of confusion, resulting in different standards for appellate review.⁷⁵ Some circuits treat it as a

⁶⁸ VasIU/VasIU, p. 58.

⁶⁹ VasIU/VasIU, p. 58.

⁷⁰ Thomas, Janet Shiffler. "Likelihood of Confusion Under the Lanham Act: A Question of Fact, a Question of Law, or Both?", *Kentucky Law Journal*, Vol. 73, No. 1, 1984, pp. 235-253, p. 237.

⁷¹ Ochoa/Ghosh/LaFrance, p. 542.

⁷² Thomas, p. 237.

⁷³ Thomas, p. 237.

⁷⁴ Ochoa/Ghosh/LaFrance, p. 543.

⁷⁵ Thomas, p. 252.

question of fact, which requires narrow appellate review under the “clearly erroneous” standard of Federal Rule of Civil Procedure 52(a). This approach gives deference to trial court findings and acknowledges the case-specific nature of confusion analysis. Treating likelihood of confusion uniformly as a question of fact respects the trial court's role as the fact-finder and enhances consistency across cases by reducing subjective appellate interpretations.⁷⁶ This view aligns with the principle that likelihood of confusion resists rigid formulae and must be assessed based on the unique facts and circumstances of each case.

Surveys are a critical component in establishing whether there is a likelihood of confusion in trademark disputes.⁷⁷ By collecting data on how consumers perceive a particular mark, surveys provide tangible evidence of confusion regarding the source of a product or service.⁷⁸ These surveys help the court to determine whether consumers are mistakenly associating the junior user's product with that of the senior user. Through surveys, lawyers can better illustrate whether confusion exists in the minds of consumers, making them a powerful tool in trademark litigation. In some cases, firms may choose to conduct a preliminary survey study to gauge the likelihood of confusion before committing to litigation, potentially saving significant legal costs if the survey reveals not enough confusion.

The success rate in likelihood of confusion cases is often significantly influenced by the inclusion of survey evidence. Even though courts do not require a majority of consumers to be confused, relatively low rates of confusion—typically between 15-20%—are often deemed sufficient to support claims of actual confusion.⁷⁹ Studies have shown that admitting survey evidence increases a plaintiff's chances of success by over 24%, particularly in instances where the marks or products are not identical.⁸⁰ The evidence not only provides a clearer picture of consumer confusion but also strengthens the plaintiff's case in securing injunctions, even when the trademarks in question are somewhat dissimilar.⁸¹ However, the effectiveness of surveys can vary depending on their construction and execution, making the design and methodology of the survey crucial to its impact.⁸²

2. Distinctiveness and Determining Trademark Strength

As explained above in Section A; to effectively serve their functions, trademarks must possess distinctiveness. The distinctiveness of a mark typically falls within five categories, forming a spectrum from least to most distinctive: generic, descriptive (including surnames), suggestive, arbitrary, and fanciful.⁸³ The position of a trademark on this spectrum defines its strength, with fanciful marks being the strongest and generic terms being ineligible for protection. A mark's strength not only plays a crucial role in its initial registrability but also

⁷⁶ Thomas, p. 253.

⁷⁷ Berger, James T./Halligan, R Mark. *Trademark Surveys: A Litigator's Guide*, Matthew Bender, 2023, § 1.02.

⁷⁸ Berger/Halligan, § 1.02.

⁷⁹ Ochoa/Ghosh/LaFrance, p. 543.

⁸⁰ Berger/Halligan § 1.03.

⁸¹ Berger/Halligan § 1.03.

⁸² Ochoa/Ghosh/LaFrance, p. 552.

⁸³ Schechter/Thomas p. 52.

impacts later disputes, such as in likelihood of confusion cases, where the distinctiveness of the mark may be challenged.

Survey evidence can be utilized to assess where a mark falls on the distinctiveness spectrum, especially when there is uncertainty between descriptive and suggestive categories. For example, in a case involving two dental practices in Arizona, a survey was conducted to determine whether the name “*General Dentistry for Kids*” was perceived by the relevant market—parents of children under 16—as generic, descriptive, or suggestive.⁸⁴ In this case, a mall intercept study was used, with two hundred interviews conducted across various locations in Arizona.⁸⁵ Such surveys provide essential data on consumer perceptions and help courts or trademark offices decide whether a mark is distinctive enough to warrant protection.

3. Secondary Meaning

For descriptive, geographic, or personal name marks that lack inherent distinctiveness, achieving secondary meaning offers a path to legal protection. Secondary meaning occurs when a significant portion of the public begins to associate the words or features of a mark with a specific source, rather than merely conveying information about the product itself.⁸⁶ The Supreme Court has clarified that establishing secondary meaning requires demonstrating that, in the public’s mind, the primary significance of the mark or feature is to identify the source of the product, rather than the product itself. The Restatement echoes this by stating that secondary meaning exists when a term or designation, though not inherently distinctive, becomes associated with a specific source through its use in the marketplace.⁸⁷ Importantly, it is not necessary for all consumers to recognize the mark as identifying a single source; rather, a substantial or appreciable number of relevant consumers must make this association.⁸⁸

Under both state and federal law, courts frequently consider similar factors when evaluating secondary meaning, although the precise formulation may vary by jurisdiction. For instance, the Ninth Circuit consider survey evidence, consumer testimony, exclusivity of use, advertising efforts, sales, market positioning, and instances of intentional copying by the defendant.⁸⁹ Survey evidence, in particular, often serves as a powerful indicator of consumer recognition and is frequently regarded as the most convincing proof of secondary meaning.⁹⁰ This is particularly relevant in cases where a product’s non-functional features, rather than its name, have gained market recognition. Secondary meaning surveys do not require that consumers recall the exact manufacturer or retailer but instead focus on whether they recognize that the product comes from a singular, albeit potentially anonymous, source.⁹¹

⁸⁴ Berger/Halligan § 7.14.

⁸⁵ Berger/Halligan § 7.14.

⁸⁶ Schechter/Thomas, pp. 73-74.

⁸⁷ Schechter/Thomas, p. 74.

⁸⁸ Schechter/Thomas, p. 74.

⁸⁹ Ochoa/Ghosh/LaFrance, p. 480.

⁹⁰ (*Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1358 (9th Cir. 1985)).

⁹¹ Berger/Halligan, § 1.02.

4. Genericness

A generic term refers to a word or phrase that is commonly used to describe goods or services, rather than identifying the source of those goods or services.⁹² For example, the term “banana” is generic when referring to the fruit, and “fruit” itself is generic for a broader category of product. Generic terms are inherently ineligible for trademark protection under both state and federal law, as they are incapable of serving as indicators of source.⁹³ Unlike descriptive terms, generic terms remain in the public domain regardless of efforts to market or promote them as brand names.

Additionally, a trademark can lose its protected status and become generic if the public begins using the term as a synonym for the product itself, rather than as a marker of its source.⁹⁴ This phenomenon, known as genericide, results in a previously protected trademark losing its legal protections. Ironically, the more popular a trademark becomes, the more vulnerable it is to losing its distinctiveness. This is precisely what happened to famous terms such as “thermos,” “escalator,” “cellophane,” and “shredded wheat,” which all started as trademarks but lost their legal protection as they became generic descriptors for the products they once exclusively identified.⁹⁵

Surveys are critical tools in determining whether a term has become generic, and they have become almost standard practice in litigation involving genericness claims.⁹⁶ By gathering empirical data on public perception, surveys help determine whether consumers still associate the term with a specific source or simply view it as a generic word for the product. This is particularly important in cases where a brand’s success has led to its mark becoming synonymous with the product itself, as seen with well-known trademarks like Band-Aid, Post-It, and Xerox, which have all faced genericness challenges.⁹⁷ The “Teflon” survey is the most widely used format in these disputes, allowing experts to gauge whether a term serves both as a product descriptor and a brand name.⁹⁸ Unlike surveys for likelihood of confusion or secondary meaning, more than 50% of respondents must associate the term with the product itself, rather than a specific brand, for a finding of genericness.⁹⁹ Thus, survey evidence is critical in both proving and preventing claims of genericness.

5. Trade Dress

Trade dress refers to the overall visual appearance and design of a product or service, which is distinctive enough for consumers to identify it with a particular manufacturer or

⁹² LaFrance, p. 138.

⁹³ LaFrance, p. 139.

⁹⁴ Ingram, John Dwight. “The Genericide of Trademarks”, *Buffalo Intellectual Property Law Journal*, Vol. 2, No. 2, 2004, pp. 154-163, p. 159.

⁹⁵ Ingram, p. 159.

⁹⁶ Thornburg, Robert H. “Trademark Surveys: Development of Computer-based Survey Methods”, *John Marshall Review of Intellectual Property Law*, Vol. 4, No. 1, 2004, pp. 91-124, p. 109.

⁹⁷ Thornburg, p. 109.

⁹⁸ Berger/Halligan, § 1.02.

⁹⁹ *Big Island Candies, Inc. v. Cookie Corner*, 269 F. Supp. 2d 1236, 1251 (D. Haw. 2003).

source.¹⁰⁰ This concept includes various elements such as the layout of a restaurant, the design of a bottle, or the shape of a smartphone. Unlike trademarks, which typically involve specific words or symbols, trade dress encompasses the combined visual elements that create the product's total image, making it more challenging to define and protect.¹⁰¹ These rights are safeguarded under both state and federal law, with the Lanham Act serving as a primary source of protection.¹⁰²

In trade dress cases, surveys are vital tools to determine whether the product's overall presentation could lead to consumer confusion. This confusion is not limited to names or logos but includes how the product is packaged, its color schemes, shapes, and other visual elements. Competitors may copy these aspects to benefit from the established market presence of the original product, leading to potential consumer confusion and claims of trade dress infringement.¹⁰³

6. Dilution

Trademark dilution, which protects highly distinctive marks from having their distinctiveness weakened, was first federally recognized in 1996 with the Federal Trademark Dilution Act (FTDA). Before that, dilution was primarily governed by state laws. The FTDA was revised in 2006 with the Trademark Dilution Revision Act (TDRA), which further clarified federal protections for famous marks.¹⁰⁴ Dilution under the Lanham Act involves lessening a famous mark's ability to identify and distinguish goods or services, regardless of competition or likelihood of confusion.¹⁰⁵ The two primary forms of dilution are blurring, where a mark's distinctiveness is diminished by association with different products, and tarnishment—where the mark's reputation is harmed by unsavory associations.¹⁰⁶

Even though some state statutes and courts have allowed dilution claims for not famous marks, at federal level only famous marks are generally eligible for dilution protection, and courts consider factors such as the mark's duration and extent of use, geographic reach, level of distinctiveness, and public recognition.¹⁰⁷ Courts evaluate a mark's fame based on factors such as its level of distinctiveness, duration and extent of use, and public recognition. To demonstrate fame, courts often rely on consumer surveys, as they provide the most direct evidence of a mark's actual recognition. Although there is no statutory bright-line rule for fame, scholars like Professor McCarthy have suggested that at least 75% of survey respondents should be familiar with the mark for it to be considered famous.¹⁰⁸ While courts have not strictly

¹⁰⁰ Locke, Scott D. "Trade Dress in the Age of Ecommerce: the Challenge of Protecting the "Look and Feel" of Websites and Mobile Apps", *Albany Law Journal of Science & Technology*, Vol. 27, No. 3, 2017, pp. 213-231, p. 215.

¹⁰¹ Locke, p. 216.

¹⁰² Locke, p. 215.

¹⁰³ Berger/Halligan § 1.02.

¹⁰⁴ Schechter/Thomas, p. 228.

¹⁰⁵ 15 U.S.C. § 1125.

¹⁰⁶ Berger/Halligan, § 10.00.

¹⁰⁷ Schechter/Thomas, p. 226.

¹⁰⁸ Schechter/Thomas, p. 234.

adopted this threshold, they generally require a significant majority of respondents to recognize the mark.¹⁰⁹

Surveys also play a pivotal role in assessing dilution beyond proving fame, especially in determining whether the public associates the famous mark with the allegedly dilutive mark. Courts rely heavily on consumer survey evidence to gauge whether consumers perceive a link between the two marks and if this association diminishes the strength or reputation of the famous mark.¹¹⁰ For example, in the Starbucks case, surveys revealed that some consumers associated the “Charbucks” brand with bitter coffee, but this did not rise to the level of tarnishment as the perception of the Starbucks mark was not significantly impacted due to the quality of the Charbucks product.¹¹¹ As courts continue to evaluate dilution claims, survey evidence remains one of the most persuasive tools to demonstrate either blurring or tarnishment.

7. Well-Known Marks

The doctrine of well-known marks, often referred to as the famous marks exception, has sparked significant controversy in U.S. trademark law. The doctrine allows trademark owners to assert rights in a mark that is not used in the United States but is widely recognized by U.S. consumers. While this concept has been embraced in some jurisdictions, particularly under the Ninth Circuit’s ruling in *Grupo Gigante S.A. de C.V. v. Dallo & Co.*, it remains disputed, with the Second Circuit rejecting its application under the Lanham Act.¹¹² In *Grupo Gigante*, the Ninth Circuit held that applying an absolute territoriality rule without a famous marks exception could lead to consumer confusion, especially for marks with significant cross-border recognition.¹¹³ However, the Second Circuit, in *ITC Ltd. v. Punchgini, Inc.*, refused to extend this exception to federal law, though it left open the possibility of applying the doctrine under state common law claims.¹¹⁴

Establishing whether a mark qualifies as well-known often hinges on the level of fame the mark holds among U.S. consumers. Courts typically require proof that U.S. consumers primarily associate the mark with the foreign trademark holder. Consumer surveys are vital in these cases, as they provide empirical evidence of how consumers perceive the mark. For example, in *ITC Ltd. v. Punchgini, Inc.*, the New York Court of Appeals emphasized that consumer surveys could demonstrate the necessary level of recognition by showing that consumers link the defendant’s goods with the foreign mark.¹¹⁵ Surveys are often used to measure whether a mark has achieved the requisite fame by asking respondents about their

¹⁰⁹ Schechter/Thomas, p. 234.

¹¹⁰ Ochoa/Ghosh/LaFrance, p. 594.

¹¹¹ *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 110,111 (2d Cir. 2009).

¹¹² Ochoa/Ghosh/LaFrance, pp. 498-499.

¹¹³ *Grupo Gigante S.A. de C.V. v. Dallo & Co.*, 391 F.3d 1088, 1094 (9th Cir. 2004): “An absolute territoriality rule without a famous-mark exception would promote consumer confusion and fraud. Commerce crosses borders. In this nation of immigrants, so do people. Trademark is, at its core, about protecting against consumer confusion and “palming off.” There can be no justification for using trademark law to fool immigrants into thinking that they are buying from the store they liked back home.”

¹¹⁴ Darnton, James E. “The Coming of Age of the Global Trademark: the Effect of Trips on the Well-Known Marks Exception to the Principle of Territoriality”, *Michigan State International Law Review*, Vol. 20, No. 1, 2011, pp. 11-32, p. 27 ff.

¹¹⁵ Ochoa/Ghosh/LaFrance, p. 550.

familiarity with the mark and whether they associate it with the foreign trademark owner.¹¹⁶ Direct evidence, such as surveys, helps courts determine the extent of recognition and whether the mark meets the threshold of being well-known, providing crucial insights into consumer associations and awareness.

C. Admissibility and Evidential Value of Survey Evidence and Some Precedence

In U.S. law, the admissibility of evidence is governed by the Federal Rules of Evidence, which establish the standards for what can be presented in court. At the core of these rules is the concept of relevance. Under Rule 401 of the Federal Rules of Evidence, evidence is considered relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. This is a relatively low threshold, meaning that even evidence that has a slight influence on the probability of a fact can be considered relevant.¹¹⁷ Once relevance is established, Rule 402 further stipulates that all relevant evidence is admissible unless there are specific legal exceptions. However, even relevant evidence may be excluded under Rule 403 if its probative value is substantially outweighed by risks such as unfair prejudice, confusion, or misleading the jury, or by considerations like undue delay or wasting time. Thus, relevance is the essential gateway to admissibility, but the court retains discretion to exclude evidence that could unfairly affect the proceedings.¹¹⁸

One of the legal exceptions to the admissibility of evidence is the hearsay rule. Under Rule 801 of the Federal Rules of Evidence, hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally inadmissible unless it falls under a specific exception. In the early days of survey evidence, consumer surveys were frequently regarded as untrustworthy because they contained hearsay statements made by survey respondents outside of the courtroom and presented to prove the truth of their assertions.¹¹⁹ Courts were reluctant to admit survey evidence, particularly because the respondents could not be cross-examined, raising concerns about the reliability of such data.¹²⁰ In addition to hearsay issues courts also raised concerns about the reliability of sampling methods. Sampling techniques were viewed skeptically, as courts questioned whether the data collected could be truly representative of the larger population. These combined doubts often led to the exclusion of surveys as evidence.¹²¹

However, by the 1950s, judicial attitudes toward surveys began to shift. Some courts held that surveys were not hearsay because they were used to establish respondents' beliefs or perceptions, rather than to prove the truth of their statements.¹²² Others accepted surveys as evidence of a present state of mind, which falls under a recognized hearsay exception.¹²³ As Rule 703 of the Federal Rules of Evidence redirected the focus to the validity of the techniques

¹¹⁶ Ochoa/Ghosh/LaFrance, p. 550.

¹¹⁷ Merritt, Deborah Jones/Simmons, Ric. *Learning Evidence: From the Federal Rules to the Courtroom*, West Thomson Foundation Press, St. Paul, 2009, p. 69.

¹¹⁸ Merritt/Simmons, p. 56.

¹¹⁹ *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 224 (2d Cir. 1999).

¹²⁰ Berger/Halligan § 1.01.

¹²¹ Vasiu/Vasiu, p. 61.

¹²² Brown/Brison/Batista, p. 253.

¹²³ Berger/Halligan, § 1.01.

used in surveys, courts began to assess whether the survey methods were reasonably relied upon by experts in the field. This shift led to greater acceptance of survey evidence, particularly when conducted according to generally accepted principles and statistical standards.¹²⁴ Over time, surveys became critical tools in trademark cases. With the 1993 *Daubert v. Merrell Dow* decision emphasizing the importance of reliable scientific evidence, courts became more sophisticated in weighing survey evidence, leading to its routine use in modern litigation.¹²⁵

Survey evidence in trademark cases is considered expert testimony, governed by Rule 702, which regulates Testimony by Expert Witnesses, and Rule 703, which addresses the Bases of an Expert's Opinion Testimony. In the U.S., it is common for parties to select their own experts to conduct surveys. This party selection means that the expert is typically hired by either the plaintiff or the defendant. However, to mitigate any concerns of bias, U.S. courts apply strict scrutiny through cross-examination and the Federal Rules of Evidence, especially Rules 702 and 703, which require experts to use reliable methods and base their conclusions on sufficient facts or data. Additionally, under Rule 706, the court itself may appoint an independent expert to ensure neutrality and help the court evaluate complex issues.

Under Rule 702, an expert may testify if their scientific, technical, or specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue. The expert must also be qualified by their knowledge, skill, experience, training, or education. Their testimony must be grounded in sufficient facts or data, rely on reliable principles and methods, and apply those principles and methods appropriately to the facts of the case. Rule 703 further requires that the facts or data forming the basis of the expert's opinion be of a type reasonably relied upon by experts in the field. However, if the underlying facts or data would otherwise be inadmissible, they may only be disclosed to the fact finder if their probative value in helping the fact finder evaluate the expert's opinion substantially outweighs their potential prejudicial effect. As a result, survey evidence is subject to the same rigorous standards as other forms of expert testimony, requiring both the reliability of the expert's qualifications and the soundness of the survey's methodology.¹²⁶

While the exclusion of survey evidence can occur, it is generally the exception rather than the rule. For instance, in *Valador v. HTC*, expert testimony was excluded because the expert lacked sufficient qualifications.¹²⁷ Courts often require experts to have specialized training in fields such as psychology, sociology, marketing, or statistics, and expect them to be well-versed in survey methodologies like sampling, instrument design, and statistical analysis.¹²⁸ In complex cases, rebuttal testimony from opposing experts can challenge the validity of the survey's methods or conclusions. For example, in a case involving Sony's PlayStation 2, a survey was discredited because it focused on purchasers rather than users, diminishing its

¹²⁴ Diamond, p. 374.

¹²⁵ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 582 (1993).

¹²⁶ VasIU/Vasiu, p. 64.

¹²⁷ *Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448, 456,457 (E.D. Va. 2017).

¹²⁸ Diamond, p. 375.

evidential value.¹²⁹ Despite these challenges, surveys continue to be a crucial part of trademark litigation when conducted with appropriate rigor.

To determine the admissibility of surveys, courts typically assess several key factors: defining the proper universe, drawing a representative sample, the methodology and execution of the survey, the accuracy of the data reported, and the extent to which the survey approximates real-world marketplace conditions.¹³⁰ In U.S. law, the burden is on the party submitting the survey evidence to prove that it is both relevant and reliable. Courts frequently evaluate survey evidence under the framework established by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), which emphasizes the role of judges as “gatekeepers” for the admissibility of scientific evidence.¹³¹ Under *Daubert*, judges consider four factors when determining reliability: (1) whether the technique has been tested in field conditions, (2) whether it has undergone peer review and publication, (3) whether it has a known or potential error rate, and (4) whether it is generally accepted by the relevant scientific community.¹³² Surveys that fail to meet these standards may be excluded, particularly if they do not adequately satisfy the *Daubert* test’s requirements of scientific rigor.¹³³

While some courts hold that methodological flaws can justify the exclusion of survey evidence, most courts treat these errors as issues that impact the weight of the evidence rather than its admissibility.¹³⁴ The prevailing view is that minor methodological flaws, such as the selection of survey parameters, do not warrant the exclusion of the survey.¹³⁵ Instead, they are addressed through cross-examination and opposing expert testimony. Courts have repeatedly held that disputes over survey methodology are insufficient grounds for exclusion unless the flaws are so severe that they render the survey unhelpful to the trier of fact, with probative value substantially outweighed by the risk of unfair prejudice or jury confusion under Sections 403 and 702 of Federal Rules of Evidence.¹³⁶

The weight of survey evidence in U.S. courts is not determined uniformly but typically relies on several critical factors. These include whether the proper “universe” of respondents was defined, if a representative sample of that universe was selected, the clarity and neutrality of the survey questions, and whether sound interview procedures were followed by unbiased interviewers. Additionally, the accuracy of the data reported, and the objectivity of the process play a crucial role in determining the survey’s evidential value.¹³⁷ The courts have consistently recognized that while surveys can be powerful tools, their weight heavily depends on how well they adhere to these rigorous standards. For example, the success rates in trademark cases, particularly regarding likelihood of confusion, have been shown to increase significantly when

¹²⁹ Berger/Halligan § 1.08.

¹³⁰ VasIU/Vasiu, p. 71.

¹³¹ Brown/Brison/Batista, p. 254.

¹³² Brown/Brison/Batista, p. 254.

¹³³ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).

¹³⁴ VasIU/Vasiu, p. 64.

¹³⁵ VasIU/Vasiu, p. 65.

¹³⁶ *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 576 (S.D.N.Y. 2007).

¹³⁷ LaFrance, p. 345.

survey evidence is admitted, with studies indicating a 24.2% boost in success rates when surveys are used effectively.¹³⁸

The methodology and the definition of the survey universe are paramount to ensuring the validity of the survey results. Surveys must accurately capture the opinions of the average consumers likely to purchase or encounter the product in question. In defining this "universe," courts require the inclusion of a representative cross-section of consumers.¹³⁹ The method of sampling must be random and representative of the relevant population, and any biases or limitations in sample selection can severely undermine the probative value of the survey.¹⁴⁰ Survey methodologies also require careful design to avoid pitfalls such as unrealistic marketplace assumptions or the inclusion of unrelated perceptions, which could distort the results.¹⁴¹ For instance, telephone surveys, which lack visual interaction and verification of respondent demographics, have been criticized for failing to replicate real-world marketing conditions.¹⁴²

Finally, while flaws in survey methodology can diminish the evidential weight of the survey, they do not necessarily lead to its exclusion. Most courts prefer to address minor methodological flaws through cross-examination rather than outright exclusion, evaluating the deficiencies in the context of the weight the evidence should be given. However, significant issues, such as improper universe selection, biased questioning, or errors in sample design, may justify exclusion or severely diminish the survey's value.¹⁴³ Ultimately, courts acknowledge that survey evidence, when conducted and analyzed according to established principles, provides important insights into consumer perceptions and can play a decisive role in resolving trademark disputes.¹⁴⁴ Therefore, despite the challenges associated with survey design and interpretation, surveys remain a critical form of proof in trademark cases, provided they are executed with precision and objectivity.

III. TURKISH LAW

A. Overview of Trademark Law in Turkey

The initial regulation for trademark protection in Turkey dates to 1872.¹⁴⁵ Since that time, various changes and regulations have been introduced. However, the trademark protection system became significantly more dynamic after Turkey joined the European Union Customs Union in 1995.¹⁴⁶

¹³⁸ Berger/Halligan § 1.03.

¹³⁹ Diamond, p. 376.

¹⁴⁰ Borger, Michael J. "Diamonds in the Rough: A Review of *Tiffany v. Costco* and a Call to Apply *Daubert* to the Admissibility of Consumer Survey Evidence in Trademark Infringement Litigation", *Touro Law Review*, Vol. 34, No. 2, 2018, pp. 431-458, p. 450.

¹⁴¹ Borger, p. 450.

¹⁴² VasIU/Vasiu, p. 68.

¹⁴³ Brown/Brison/Batista, p. 276.

¹⁴⁴ LaFrance, p. 345.

¹⁴⁵ Çolak, Uğur. *Türk Marka Hukuku*, 5th ed., Oniki Levha Yayınları, İstanbul, 2023, pp. 3-4.

¹⁴⁶ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union.

In 2017, the regulations for registered trademarks, geographical indications, traditional specialty guarantees, designs, patents, and utility models were unified into a single code that complies with the Turkish Constitution, international agreements, and EU regulations. This legislation is known as the Turkish Industrial Property Code No. 6769 (IPC). Article 1 defines the purpose and scope of this Code as follows: “(1) [...] to protect the rights relating to trademarks, geographical signs, designs, patents, utility models, and traditional product names, thereby contributing to technological, economic, and social progress. (2) This Code encompasses applications, registrations and post-registration processes regarding trademarks, geographical signs, design, patent, utility model and traditional product names and legal and criminal sanctions concerning the violation of these rights.”.

Under Article 4 of the IPC, a trademark “may consist of any signs such as words, including personal names, figures, colors, letters, numbers, sounds, and the shape of goods or their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings and can be represented on the register in a manner that clearly and precisely defines the subject matter of the protection afforded to its proprietor”. According to this definition, a trademark comprises three elements: “sign”, “distinctiveness” and “clarity and preciseness.”.¹⁴⁷

The sign element functions as a symbol representing an enterprise targeting its audience and conveying information and messages that can be perceived through any of the five senses. It includes anything that can be externally observed.¹⁴⁸

Regarding the second element of distinctiveness, distinguishing between abstract and concrete qualities is essential. Distinctive quality is divided into two types: abstract and concrete.¹⁴⁹ Signs that incapable to distinguish one undertaking’s products or services from those of others cannot be registered as trademarks under Article 4 of the IPC, which highlights “abstract distinctiveness.”.¹⁵⁰ This means that if a sign cannot be distinctive for any conceivable product or service, it lacks the necessary abstract distinctiveness.¹⁵¹ In contrast, “concrete distinctiveness” is determined by assessing whether a sign is capable to specifically distinguish the goods or services for which registration is sought from those provided by others.¹⁵² If the sign does not fulfill this distinguishing role for the particular goods or services, it is considered to lack concrete distinctiveness.¹⁵³ Similarly to the US, under Article 5(2), “[i]f

¹⁴⁷ Arkan, Sabih. *Marka Hukuku Vol 1*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, 1997, p. 35; Tekinalp, Ünal. *Fikrî Mülkiyet Hukuku*, 5th ed., Vedat Kitapçılık, İstanbul, 2012, § 22, N. 1; Kaya, Arslan. *Marka Hukuku*, 2nd ed., Vedat Kitapçılık, İstanbul, 2024, p. 41 ff.; Karasu, Rauf/Suluk, Cahit/Nal, Temel. *Fikri Mülkiyet Hukuku*, 7th ed., Seçkin Yayıncılık, Ankara, 2023, p. 184.; Çolak, p. 10.

¹⁴⁸ Karasu/Suluk/Nal, p. 185.

¹⁴⁹ İmirlioğlu, Dilek. *Marka Hukukunda Ayırt Edicilik ve Markanın Ayırt Ediciliğinin Zedelenmesi*, 2nd ed., Adalet Yayınevi, Ankara, 2018, p. 21 ff.; TÜRKPATENT. *Trademark Examination Guide*, 2021, p. 3, <https://webim.turkpatent.gov.tr/file/83c114e4-499d-4791-a98e-4d02fd1d439d?download>, Access Date: 28.08.2024.

¹⁵⁰ Karasu/Suluk/Nal, p. 185; İmirlioğlu, p. 22.

¹⁵¹ Çolak pp. 172-175; Karasu/Suluk/Nal, p. 185.

¹⁵² Karasu/Suluk/Nal, p. 185.

¹⁵³ Karasu/Suluk/Nal, p. 185; İmirlioğlu, p. 22.

a trademark has been used before the application, and through this use, has acquired distinctive character in respect of the goods and services subject to the application,” it is eligible for registration as a trademark.

The final element clarifies that virtually any sign can serve as a trademark, provided it is identifiable. Recent regulatory changes have eliminated the requirement for a sign to be represented graphically or depicted through a drawing for trademark registration. Consequently, the Code now adapts more flexibly to technological advancements, allowing for the registration of unconventional marks such as sounds or scents.¹⁵⁴

In Turkish trademark law, the functions of trademarks are generally divided into primary and economically oriented functions. The primary functions include distinguishing the goods or services of one business from those of competitors and indicating the origin or source of the products. Economically oriented functions encompass ensuring the quality of the goods and services, aiding in advertising and consumer communication, and safeguarding and enhancing the investments made in these goods and services.¹⁵⁵

B. Usage of Survey Evidence in the Turkish Trademark Law

In Turkish trademark law, the use of surveys is quite limited. However, surveys can be a valuable tool for data collection in various contexts. For example, they can be employed to assess the perceptions of consumers, business partners, and other relevant stakeholders to determine the value of a trademark. The resulting valuation can serve as a reference point in legal proceedings.

Surveys may also be used as evidence of trademark use. Public opinion or market surveys concerning the prevalence of goods and/or services associated with the trademark, market share, and brand awareness are recognized in institutional guidelines as valid evidence for proving trademark use.¹⁵⁶ In a case, must present surveys showing the decrease in the well-knownness of the trademark were accepted as proof of actual damage.¹⁵⁷

1. Distinctiveness

The distinctive power of a trademark refers to the whole set of features that serve to distinguish the goods or services of an undertaking from the goods or services of other undertakings. These features ensure that the sign is different from other signs or is perceived as such.¹⁵⁸

¹⁵⁴ Çolak, pp. 69-74.

¹⁵⁵ Yasaman, Hamdi/Yusufoğlu Bilgin, Fülürya. *Yasaman Sınai Mülkiyet Kanunu Şerhi*, Seçkin Yayıncılık, Ankara, 2021, p. 52 ff.

¹⁵⁶ TÜRKPATENT. *Guide to Proof of Use*, 2017, p. 11, <https://webim.turkpatent.gov.tr/file/d4645118-5757-46ee-9e01-fc1e0ff01b86?download>, Access Date: 28.08.2024.

¹⁵⁷ For decision in this regard, see Bakırköy 2nd Civil Court for Intellectual and Industrial Rights, 02.03.2022, 2021/287, 2022/34, Lexpera, Access Date: 05.09.2024.

¹⁵⁸ Tekinalp, § 22, N. 22-24; Kaya, p. 80; Çolak, p. 29. The distinctiveness assessment is a relative grading of the sign between the scale of lack of distinctiveness and having a high level of distinctiveness due to recognition. For

In determining distinctiveness, all material conditions should be considered. Many criteria such as the integrity of the sign, whether it is descriptive or not, the impression it creates in the relevant segment of the society, its conceptual power, etc. should be taken into consideration.¹⁵⁹ Among these criteria, the relevant segment of the society/public is distinguished from the others. This is because the distinctive power of a trademark materialized by distinguishing the goods or services bearing the mark from other goods or services in the relevant public. The relevant public to which the mark is addressed is presumed to be reasonably informed, observant, and attentive. The relevant public includes not only the purchasers of the goods and services, but also the producers and distributors of the relevant goods or the providers of the relevant services. The relevant public must be determined in each concrete case according to the real and actual situation.¹⁶⁰

The extent to which the sign must have acquired distinctiveness in the relevant public is not regulated in the IPC and the predecessor texts. However, in the doctrine, it is stated that distinctiveness must be acquired in “*a large or significant part*”¹⁶¹ of the relevant public, and that it is not possible to determine general rules and abstract numbers in advance, and that each case should be evaluated separately and a decision should be made according to the characteristics of the particular case.¹⁶² For example, the German Federal Court, in its decision regarding a case in which it was claimed that distinctiveness was acquired through use, did not consider 43% trademark perception alone to be sufficient.¹⁶³ In the practice of the TÜRKPATENT, a strict ratio understanding is not dominant and an evaluation is made according to the data in the concrete case. For example, in the decision regarding the abstract lilac color, the rate of 31% in the identification of the product directly with the color and the rate of 53% in the identification of the sign with the enterprise when the name of the product is given was found sufficient.¹⁶⁴

Under Turkish law, the distinctiveness of a sign can be proved by any evidence. However, since it is a question of proving the perception of the relevant public, the survey method should be accepted as a direct means of proof.¹⁶⁵ As survey evidence is not used

the line showing the levels involved in the distinctiveness assessment, see TÜRKPATENT, Trademark Examination Guide, pp. 200-201.

¹⁵⁹ For more detailed explanations, see Tekinalp, § 22, N. 25-33; İmirlioğlu, p. 16 ff.; TÜRKPATENT, Trademark Examination Guide, p. 22 ff.

¹⁶⁰ İmirlioğlu, p. 197; Stiel, p. 140 ff. According to one view in the doctrine, it is generally inappropriate to include potential consumers in the relevant environment. This is because such an extension is not useful as it does not contain a clear limitation necessary for the reliability of the survey. Stiel, p. 157.

¹⁶¹ Stiel, pp. 231-232. A fixed ratio determination regarding the major or significant part is avoided. However, the level of distinctiveness of the sign and the proportion required for it to become a sign of origin are evaluated. In court decisions, it is stated that no determination below 50% can be made unless special circumstances justify a different assessment. For the relevant decisions, see BGH, GRUR 2001, 1042 - REICH UND SCHOEN; BGH, GRUR 2006, 760 - LOTTO; BGH, GRUR 2008, 710 - VISAGE.

¹⁶² Dirikkan, Hanife. *Tanınmış Markanın Korunması*, Seçkin Yayıncılık, Ankara, 2003, p. 38 ff.; Arkan, p. 84; İmirlioğlu, p. 198. In the same direction, see BGH, GRUR 1999, 723 - Windsurfing Chiemsee.

¹⁶³ BGH, GRUR 2014, 483 - test.

¹⁶⁴ İmirlioğlu, pp. 199-200.

¹⁶⁵ Kale, pp. 204-205. “... when it is evaluated that there is no survey in the file that the relevant consumer remembers the plaintiff's trademark without thinking when he sees only the products consisting of the color subject to the application. ...”, Ankara 3. Civil Court of Intellectual and Industrial Rights, 25.05.2023, 2023/530, 2023/231, Lexpera, Access Date: 05.09.2024. In German law, see Dobel, p. 135 ff.

sufficiently in Turkish practice, expert opinion is frequently utilized in the determination of distinctiveness. Attempting to determine distinctiveness through expert opinion may lead to misleading results. The fact that the expert is from the user group or sector addressed by the trademark in question does not eliminate the misleading.¹⁶⁶ This is because, for the court to accept that the sign in question has acquired distinctiveness, the court must attach importance to the perception of the audience to which the mark in question is addressed. A distinctiveness assessment that is squeezed between the subjective assessment of a person from the relevant public or a small committee and the subjective assessment of the judge will not yield accurate results. For the trademark to be recognized as distinctive, the sign used must be clearly identified with the trademark in the relevant user environment in terms of the class of goods or services in question.¹⁶⁷

Distinctiveness may be present from the beginning for a sign, or it may arise later, especially due to the use of the trademark (IPC Art. 5/2). Accordingly, if a sign that does not have a distinctive character has been used before the date of application and has acquired a distinctive character for the goods or services subject to the application as a result of this use, the registration of this trademark cannot be refused on the grounds that the relevant sign does not have concrete distinctiveness, is of a descriptive nature and is one of the commonly used signs ((IPC Art. 5/1-b, c, d), respectively).¹⁶⁸

There is no provision in the IPC regarding the manner of use in terms of acquiring distinctive character through use. For this reason, the conditions and determination of distinctiveness through use will be determined in each case according to the characteristics of the case. Whether a trademark becomes distinctive as a result of use is understood by evaluating all the aspects that may show that the trademark can identify the goods or services in question as originating from a particular undertaking and thus distinguish them from the goods or services of others.¹⁶⁹ In this sense, the determination of distinctiveness should consider the result obtained by conducting surveys and interpreting the research conducted by an expert.¹⁷⁰ In Turkish law, as in the determination of distinctiveness, in practice, it is observed that the expert's vote and opinion are taken into account.¹⁷¹ It should not be possible to determine whether the distinctiveness is acquired later based solely on the expert report. In the expert committee formed in such disputes, it is seen that a person from the sector, a financial advisor and a trademark attorney constitute the committee. Clearly, the report obtained from the

¹⁶⁶ Ünlüönen/Battal/Yaylı/Yüksel, p. 5; Kale, p. 206.

¹⁶⁷ Kale, p. 206.

¹⁶⁸ İmirlioğlu, p. 187 ff.; Kale, p. 62 ff.

¹⁶⁹ Especially the market share of the goods marketed with the trademark, the intensity of use, the geographical scope and duration of use, and all relevant conditions such as advertising activities should be considered CJEU, GRUR Int 2000, 73 - Chevy; BGH, GRUR 2003, 1040 - Kinder.

¹⁷⁰ Küçükali, Canan. *Marka Hukukunda Karıştırma Tehlikesi*, Seçkin Yayıncılık, Ankara, 2009, p. 135; Dirikkan, p. 135; Çolak, pp. 52-53; İmirlioğlu, p. 189. The Office emphasized that the surveys conducted by independent market research institutions also constituted important evidence, and all the surveys submitted indicated that the percentage of people associating purple with "WHISKAS" was between 53% and 75%. The Appeals Board concluded that all the evidence showed that the applied-for mark was highly recognizable among the relevant public and held that the mark acquired distinctive character through use in relation to the goods applied for. OHIM R 1620/2006-2, 04.05.2007, Yasaman/Yasaman, p. 514.

¹⁷¹ Çolak, p. 217, fn. 821.

committee formed in this way cannot give healthy results. In determining distinctiveness through use, survey will give healthier results.¹⁷²

There is no fixed ratio in terms of acquiring distinctive character through use.¹⁷³ The ratio is determined according to the level of distinctiveness, i.e. whether the sign has weak or strong distinctiveness. For a sign that is initially weakly distinctive, a degree of distinctiveness of 40% has not been found sufficient.¹⁷⁴ In the field of telecommunications, the word “Telecom”, short for “Telekommunikation”, is purely descriptive and has no inherent distinctive character. However, it has been stated that it has become a mark with average distinctiveness, pointing to the survey showing that it has 60% distinctiveness.¹⁷⁵ If a trademark is registered for a descriptive sign because it has acquired distinctiveness as a result of use, a degree of distinctiveness significantly higher than 50% is considered necessary; 58% or 60% degrees of distinctiveness have not been considered sufficient in such cases.¹⁷⁶

2. Well-Known Marks

The concept of well-known trademark is not defined both in our law and in international treaties.¹⁷⁷ This is because the concept of well-known trademark may need to be evaluated differently in each particular case, and it is difficult to adapt the predetermined criteria. For this reason, some criteria for well-known trademarks have been determined in doctrine and practice.¹⁷⁸ International criteria were set forth with the “WIPO-Paris Union Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks”.¹⁷⁹ After the Recommendation, the decision on “Principles and Practice Regarding the Well-known Level of Trademarks” was announced by TÜRKPATENT.¹⁸⁰

As mentioned above, there are many criteria for determining a well-known trademark. The degree of well-knownness in the relevant sector, the duration, and geographical area of the use, promotions, and advertisements, the economic value of the trademark, the prevalence and market share of the goods or services on which the trademark is used, the distinctive character,

¹⁷² İmirlioğlu, p. 202; Kale, p. 206. For a decision in this regard, see Ankara 3rd Civil Court of Intellectual and Industrial Rights, 19.01.2021, 2020/194, 2021/22, Lexpera, Access Date: 12.09.2024.

¹⁷³ 19/06/2014, C-217/13 and C-218/13, Oberbank et al., EU:C:2014:2012, § 48-49. “[I]t is not possible to give a precise percentage in advance according to the survey results, and the assessment must be made according to the concrete characteristics of each case. The only criterion that can be used in each case is that the sign has started to be perceived as a sign indicating a commercial source by “a significant part of the relevant public”, İstanbul 1st Intellectual and Industrial Rights Civil Court, 06.04.2023, 2018/558, 2023/99, Lexpera, Access Date: 12.09.2024.

¹⁷⁴ OLG Hamburg, GRUR-RR 2006, 321 - Prismenpackung.

¹⁷⁵ BGH, GRUR 2007, 888 - Euro Telekom.

¹⁷⁶ Pflüger/Dobel, Rn. 128 and the decisions cited in the relevant section.

¹⁷⁷ Some of the relevant regulations: IPC Art. 6/4, 6/5, 7/2-c, 25/1; TRIPS Art. 16/2, 16/3. The gap in definition has been filled by doctrine and judicial decisions. Arkan, p. 93; Kaya, pp. 134-135; İmirlioğlu, pp. 213-214. For the established definition of well-known trademarks, see Court of Cassation, 11th Division, 13.03.1998, 1997/5467, 1998/1704, Lexpera, Access Date: 15.09.2024. For various definitions of well-known trademarks, see Yasaman/Yasaman, p. 1037 ff.

¹⁷⁸ Yasaman, Hamdi. “Tanınmış Marka Kriterleri ve İspatı Sorunu”, *Prof. Dr. Hüseyin Ülgen’e Armağan, Vol. 1*, İstanbul, 2007, pp. 1189-1204, p. 1190; Arkan, p. 105; Dirikkan, pp. 87-88.

¹⁷⁹ WIPO, 2000, <https://www.wipo.int/edocs/pubdocs/en/marks/833/pub833.pdf>, Access Date: 10.09.2024.

¹⁸⁰ TÜRKPATENT. <https://webim.turkpatent.gov.tr/file/0431c6ab-660d-4355-ba8b-63b3f610b716?download>, Access Date: 10.09.2024.

public opinion surveys and the characteristics of the company that owns the trademark are some of them. Since what is sought to be determined with the criterion set forth in terms of well-known trademark is the recognition¹⁸¹, it should be determined “*in whose eyes*” and “*at what level*” this recognition should be. Therefore, it must first be recognized in the relevant sector or the public in which the trademark is used.¹⁸²

The relevant sector/public includes consumers, persons involved in the distribution channels and marketing of the relevant goods or services, and economic circles engaged in activities related. In other words, the target audience of the trademark is important. Some trademarks, due to the nature of the product, are of interest to the wider community, while some products appeal to specific individuals. For example, brands of food, beverages, or cleaning products intended to meet daily needs appeal to the whole society. On the other hand, professional tools and equipment for medical doctors, tools used by veterinarians, brushes, paints, etc. are only relevant to some professional groups.¹⁸³

Another consideration is the level of well-knownness in the relevant public. In addition to the “*relevant public*” criterion for well-knownness, the criterion of being known by a “*significant part*” of the relevant public has also been accepted. The CJEU has stated that it is not necessary for the trademark to be well-known in the whole of the relevant Member State, instead it is sufficient to be well-known in the significant part of the consumers to whom the trademark is directed.¹⁸⁴ Court of Cassation, also, decided that the well-knownness should be sought in a significant part.¹⁸⁵ Similar determination has been made in the Preamble of Article 6/5 of the IPC.¹⁸⁶

There is no predetermined rate threshold, and all the circumstances of the particular case are determinative.¹⁸⁷ Various opinions have been put forward in the doctrine and judicial decisions regarding the level of well-knownness.¹⁸⁸ For example, in the Avon decision, the German Federal Court took 80% well-knownness as a basis¹⁸⁹, in the DIMPLE decision, 30-40% was deemed sufficient due to the type of goods, high prices and the special shape of the bottle.¹⁹⁰

¹⁸¹ Knaak, p. 5.

¹⁸² Yasaman/Yasaman, p. 1029 ff.; Büyükkılıç, p. 207.

¹⁸³ Yasaman/Yasaman, p. 1030.

¹⁸⁴ 14/09/1999, C- 375/97, Chevvy, ECLI:EU:C:1999:408, § 17.

¹⁸⁵ For a decision in this regard, see Court of Cassation, 11th Division, 06.02.2012, 2010/9324, 2012/1409, Lexpera, Access Date: 15.09.2024.

¹⁸⁶ Draft Industrial Property Law (1/699) and Industry, Trade, Energy, Natural Resources, Information and Technology Commission Report, p. 12, <https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d26/c030/tbmm26030043ss0341.pdf>, Access Date: 20.09.2024.

¹⁸⁷ EUIPO, Trade Mark Guidelines, p. 1266; Pflüger/Dobel, Rn. 120. Other decisions 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 24; BGH, GRUR 2003, 428 - BIG BERTHA; BGH, GRUR 2004, 151 - Farbmarkenverletzung. In Switzerland, two thirds of the respondents are accepted in surveys (BGE 128 III 441, 447). However, in a later case, also concerning a well-known trademark, a reference value above 50% was assumed in any case (BGE 130 III 267).

¹⁸⁸ Yasaman/Yasaman, p. 1030 ff.; Dirikkan, p. 112 ff.; Büyükkılıç, p. 215 ff.

¹⁸⁹ BGH, NJW 1991, 3218 - Avon.

¹⁹⁰ BGH, GRUR 1985, 550 - DIMPLE.

In Turkish law, the Court of Cassation stated that the recognition rate of the trademark “*EVET HAYIR ERKAN YOLAÇ*” reached 77-78%, that it is well-known in its sector and that it meets the criteria of well-known.¹⁹¹ In another decision, the trademark “*BURÇAK*” found as a well-known trademark with a recognition rate of 20% in unaided recognition, which refers to the spontaneous recollection of a product, brand, or service without assistance, and 98% in assisted recognition, which is achieved through a question in which the name of the trademark is mentioned.¹⁹²

Courts require tangible evidence for well-knownness.¹⁹³ It is accepted in comparative law and Turkish doctrine that the most effective and reliable evidence is survey.¹⁹⁴ One of the well-known trademark criteria of TÜRKPATENT is the results of public opinion polls. Again, the EUIPO Trademark Guidelines include opinion polls and market surveys as one of the means of proof for well-known trademarks.¹⁹⁵

In Turkish law, the approach in practice regarding well-knownness is to reach a conclusion based on the opinion of one or a few persons in the expert committee without surveying well-knownness. However, the extent to which a trademark is recognized by the public should be examined not by the opinion of one or two individuals, but by conducting a much more comprehensive survey.¹⁹⁶ Even if the survey and/or other individual evidence obtained are insufficient to establish the recognition, the evidence should be evaluated together, and thus, the necessary facts can be determined.¹⁹⁷

It is controversial whether proof of well-knownness is necessary for trademarks such as Apple and Mercedes, which are not in doubt as to whether they are well-known.¹⁹⁸ The EUIPO Guidelines state that the well-knownness of a trademark cannot be accepted as a well-known fact.¹⁹⁹ In our opinion, it cannot be argued that there is no need to prove the well-knownness of such a trademark based on the provision of Article 187/2 of the CCP, which states that facts that are publicly known are not disputed and therefore do not need to be proved. However, in this case, it is also unnecessary to conduct a survey.²⁰⁰ It should be possible for the court to decide by examining other criteria regarding the proof of well-knownness.

¹⁹¹ Court of Cassation, 11th Division, 17.01.2011, 2009/7181, 2011/138, Lexpera, Access Date: 15.09.2024.

¹⁹² Court of Cassation, 11th Division, 22.04.2011, 2012/6065, 2013/7886, Lexpera, Access Date: 15.09.2024.

¹⁹³ Two decisions; Ankara 2nd Civil Court for Intellectual and Industrial Rights, 21.04.2021, 2020/83, 2021/162, Lexpera, Access Date: 15.09.2024; Ankara 1st Civil Court of Intellectual and Industrial Rights, 16.11.2021, 2021/27, 2021/372, Lexpera, Access Date: 15.09.2024. Whether a trademark is well-known or not should not be determined based on assumptions, but concrete recognition and the level of recognition should be determined. Yasaman/Yasaman, p. 1067.

¹⁹⁴ Dirikkan, p. 135; Çolak, pp. 475-476; Kale, p. 209; Yasaman/Yasaman, p. 1025; Büyükkılıç, p. 665.

¹⁹⁵ EUIPO, Trade Mark Guidelines, p. 1280.

¹⁹⁶ Çolak, p. 476; Büyükkılıç, p. 233-234; Ünlüönen/Battal/Yaylı/Yüksel, p. 6. The well-known mark is protected against dilution, which occurs when the use of a similar mark weakens the distinctiveness of the original mark. Surveys can help to show whether consumers perceive the new mark as diluting the distinctiveness of the well-known mark. Çolak, p. 476; Büyükkılıç, p. 688, 694.

¹⁹⁷ See 08/11/2017, T-754/16, CC (fig./O (fig.)), ECLI:EU:T:2017:786, § 103; EUIPO, 30.4.2019 - R 1429/2018-5, GRUR-RS 2019, 61145, § 46.

¹⁹⁸ Yasaman, p. 1197 ff.; Dirikkan, p. 134; Büyükkılıç, pp. 668-669.

¹⁹⁹ EUIPO, Trade Mark Guidelines, p. 1279.

²⁰⁰ Stiel, p. 17.

3. Likelihood of Confusion

Likelihood of confusion arises, as a rule, where both the trademarks and the goods or services concerned are identical or similar. Article 11/4 of the IPC states that classes are not absolute by stating that “[g]oods or services shall not be presumed as being similar on the ground that they are in the same class and goods or services shall not be regarded as being dissimilar on the ground that they are in different classes.” In other words, although the classification notifications issued by the TÜRKPATENT are taken into consideration by the courts, they are not binding.²⁰¹ The similarity between trademarks that may confuse may be visual, auditory, or conceptual (semantic). The presence of one of these in a particular case may be sufficient to find likelihood of confusion, or the presence of several of them together may be required.²⁰²

There are three types of likelihood of confusion. In the case of direct confusion, the signs are directly confused. Indirect confusion is when the consumer distinguishes between the signs but concludes that the goods or services in question originate from the same enterprise due to the similarity between the signs. In the broad sense (by association), although the signs and businesses are distinguished from each other, it is assumed that there are special economic links or close organizational relations between the businesses.²⁰³

When preparing the questionnaire, it should be determined which type of likelihood of confusion is sought to be determined, because the required conditions may change. For example, a question that only addresses the determination of direct confusion is insufficient to reveal potential confusion in a broader sense.²⁰⁴

Some principles are considered in the assessment of likelihood of confusion. Holistic evaluation means the evaluation of visual, auditory, or semantic similarity in terms of the impression left by considering all the elements of the signs as a whole.²⁰⁵ As a result of this principle, it is not possible to divide the trademark into its elements and evaluate each element separately. Another principle is the consideration of the average consumer and their level of attention. In IPC Art.7/2-b, the target group in case of confusion is determined by saying “*on the part of the public*.”²⁰⁶ However, this term should be considered according to the characteristics of the particular case. As stated in the doctrine, this corresponds to the “*average consumer*”. The average consumer is the consumer group addressed by the good or service, and it is accepted that this group has an average level of attention and is not an expert.²⁰⁷ However, it is also possible for the average consumer to be a special buyer or an expert buyer group

²⁰¹ Çolak, p. 284.

²⁰² Çolak, p. 312 ff.; İmirlioğlu, p. 170 ff.

²⁰³ Pflüger/Dobel, Rn. 102-109; Küçükali, pp. 65-69.

²⁰⁴ OLG München, WRP 2015, 276 - Apotheken-A.

²⁰⁵ Epçeli, Sevgi. *Marka Hukukunda Karıştırılma İhtimali*, Legal Yayıncılık, İstanbul, 2006, p. 121; Arkan, p. 99; Kaya, pp. 257-260; Tekinalp, § 26, N. 34; TÜRKPATENT, Trademark Examination Guide, p. 605 ff.

²⁰⁶ Same phares is used in the Article 6/1 of IPC.

²⁰⁷ Kaya, p. 270 ff.; Tekinalp, § 26, N. 34; Çolak, p. 324; Epçeli, p. 46; Dirikkan, p. 188; TÜRKPATENT, Trademark Examination Guide, pp. 451-453. Court of Cassation, 11th Division, 25.11.2015, 2015/6244, 2015/12509, Lexpera, Access Date: 18.09.2024. In a CJEU decisions, the average consumer is considered as “*a well-informed, reasonably observant, reasonably careful, reasonably experienced and prudent person*”, CJEU, 498/07; CJEU, T-559/13, Çolak, p. 324.

depending on the goods or services for which likelihood of confusion is assessed. For example, chemists and pharmacists are special buyer groups for pharmaceutical trademarks. In doctrine and practice, evaluations are made in accordance with these different situations.²⁰⁸

There are two views that try to explain the nature of likelihood of confusion: the normative view, which adopts the ideal consumer understanding, and the factual view, which considers the actual consumer understanding as determinative.²⁰⁹ Namely, whether the likelihood of confusion is a question of fact or a question of law.²¹⁰ One focus on ideal consumer, rather than the actual consumer. The other focus on empirical works. The normative view recognizes likelihood of confusion as a legal concept and argues that its existence cannot be determined through demographic expert opinions alone.²¹¹ This does not exclude the possibility of resorting to a likelihood of confusion survey. In other words, according to this view, surveys are worthy of consideration, but they are not decisive. On the other hand, according to the factual view, surveys are statistically reliable materials that is more decisive.

A legal survey that is scientifically designed and properly conducted enables judges to make a well-founded decision by knowing what the public thinks about the relevant subject of investigation, without having to make purely normative assumptions about what the public can expect.²¹²

Even if not all of the average consumer group is exposed to the risk of confusion, the fact that some of them are under this risk is sufficient for the acceptance of the likelihood of confusion.²¹³ There is no fixed rate threshold for a portion of the average consumer in determining the likelihood of confusion. If a normative standard is applied in determining the likelihood of confusion, it is not necessary to set a threshold since the actual consumer perception is not considered. On the other hand, if consumer perception is empirically determined, it is reasonable to determine the portion of average consumers who are at risk of confusion.²¹⁴

In Turkish law, the likelihood of confusion is considered a purely legal concept.²¹⁵ Namely, a distant approach to expert examination. Therefore, unless for a class a technical

²⁰⁸ Cengiz, Dilek. *Türk Hukukunda İktibas veya İltibas Suretiyle Marka Hukukuna Tecavüz*, Beta Yayıncılık, İstanbul, 1995, p. 31; Küçükali, p. 119; Yasaman/Yasaman, p. 1637.

²⁰⁹ In a civil proceeding, the fact-law distinction is particularly important at two points. These are whether they fall within the scope of appellate review (BGH, GRUR 2016, 197 - Bounty; GRUR 2016, 1301 - Kinderstube; GRUR 2017, 730 - Sierpinski-Dreieck) and the availability of expert evidence. For detailed explanations, see Ulbrich, Sebastian. *Irreführungs- und Verwechslungsgefahr im Lauterkeits- und Markenrecht Empirische oder normative Feststellung?*, Inaugural-Dissertation, Aschaffenburg, 2005, p. 132; Kale, pp. 211-214.

²¹⁰ See Becker, p. 61 ff.; Dobel, p. 63 ff. The normative approach predominates in the important decision of the CJEU. CJEU, GRUR Int. 1998, 795- Gut Springheide. For an analysis of the judgment, see Ulbrich, p. 45.

²¹¹ Knaak, p. 84. Sample cases; see BGH, GRUR 2005, 61- CompuNet/ComNet II; BGH, GRUR 1998, 830 - Les-Paul-Gitarren; BGE 126 III 315.

²¹² CJEU, GRUR 2010, 1098 - Calvin Klein; CJEU, GRUR Int 2009, 911 - WATERFORD STELLENBOSCH; BGH, GRUR 1998, 927 - COMPO-SANA; BGH, GRUR 1964, 376 - Eppelinsprung; BGH, GRUR 1958, 81 - Thymopect.

²¹³ Arkan, p. 99; Küçükali, p. 125; Çolak, p. 402. Court of Cassation, 11th Division, 07.06.2006, 2006/11-338, 2006/338, Lexpera, Access Date: 18.09.2024.

²¹⁴ Ulbrich, p. 6; Stiel, p. 133.

²¹⁵ Çolak, p. 437 and 442; Kale, p. 216.

examination is required, the likelihood of confusion is examined by the judge himself, and when a technical examination is required, expert examination is possible.²¹⁶ Accordingly, the judge evaluates whether there is a likelihood of confusion according to the understanding of an (ideal) consumer with an average level of knowledge and attention; instead of assessing actual confusion. The existence of the possibility (danger) of confusion is sufficient.²¹⁷

When assessing the average consumer perception, it may be helpful for judge to know the real opinion of the public. However, in classical expert examination, determinations are generally made in a subjective and unscientific manner.²¹⁸ Determining whether consumers confuse similar trademarks is an issue that requires technical knowledge and social research. In this context, surveys should be used to determine the average consumer perception in a scientific and objective manner.²¹⁹

4. Genericness

If the trademark becomes a common name for the relevant goods and services due to the conduct of the trademark owner, the cancellation of the trademark may be requested according to IPC Art.26/1-b.²²⁰ In this scenario, the trademark right is revoked with prospective effect. The loss of distinctiveness of a trademark and its transformation into a generic name requires that the monopoly provided at the beginning is lifted and it is now open to the use of everyone.²²¹ It is necessary to carefully examine whether the trademark has ceased to be distinctive, whether it has lost its ability to indicate the source, and ultimately whether this sign is still perceived as a trademark or as a common name of a good or service.²²²

For a trademark to be canceled under IPC Art. 26/1-b, it must be perceived as generic name by the public. A narrow circle is not enough, it must become a generic to the majority of the relevant public, and it must become a generic broadly, including those who trade in this product. It is not enough for the trademark to become a household name only for the end consumer, but also, depending on the characteristics of the relevant market, the perception of those engaged in trade, such as sellers, is also important.²²³

The perception of becoming a generic can be determined through a survey to be conducted in the relevant public. Therefore, consumer surveys should be considered as

²¹⁶ Kale, pp. 215-216. In Turkish law, it was generally accepted that expert examination should be applied. However, a decision of the Court of Cassation reversed this practice. Thus, it has been accepted that the examination regarding the possibility of confusion is a legal issue and the expert's vote and opinion cannot be applied. Çolak, pp. 437-442. Court of Cassation, General Assembly of Civil Chambers, 08.06.2016, 2014/11-696, 2016/778, Lexpera, Access Date: 18.09.2024.

²¹⁷ Knaak, p. 89; Arkan, p. 98; Tekinalp, § 26, N. 22. Court of Cassation, General Assembly of Civil Chambers, 02.07.2008, 2008/11-465, 2008/470, Lexpera, Access Date: 18.09.2024.

²¹⁸ Ünlüönen/Battal/Yaylı/Yüksel, pp. 8-11. Court of Cassation, 11th Division, 03.05.2023, 2021/8572, 2023/2670, Lexpera, Access Date: 18.09.2024.

²¹⁹ Cengiz, pp. 33-34; Küçükali, pp. 143-144.

²²⁰ Bilge, Mehmet Emin. "Markanın Yaygın Bir Ad Haline Gelmesi", *BATİDER*, Vol. 23, No. 1, 2005, pp. 125-151, p. 127 ff.; Kaya, p. 653; Yasaman/Yusufoğlu, pp. 2642-2643.

²²¹ Arkan, p. 81; Bilge, p. 131; Yasaman/Yusufoğlu, p. 2645.

²²² Çolak, p. 1285.

²²³ EUIPO, Trade Mark Guidelines, pp. 1480-1481; Çolak, p. 1285; Bilge, pp. 128-129; Yasaman/Yusufoğlu, p. 2646.

important evidence in the examination to be conducted by the court. In a decision of the CJEU, it is stated that the necessity of a survey to determine the perception of end-users is important.²²⁴ The German Federal Court, on the other hand, ruled that as long as a not insignificant part of the relevant public sees in the name of origin a sign of the geographical origin of the goods or services, the name of origin will not become generic. The 10% of the relevant public that adopts the designation of origin was found sufficient to reject the transformation of the designation of origin into a generic sign.²²⁵

C. Admissibility and Evidential Value of Survey Evidence

All the evidence types that are admissible in trial law are also admissible in trademark law. In addition to the evidence listed in the Code of Civil Procedure (CCP), the use of some means of evidence that may be considered specific to trademark law, in trademark cases may be necessary for a fair proceeding.²²⁶ Survey evidence is one of the most important evidence specific to trademark law.

In Turkish law, evidence is divided into two: discretionary and conclusive evidence. There are two types of conclusive evidence accepted by the CCP; these are promissory notes and oaths.²²⁷ The quality of a piece of evidence being conclusive can only be granted to it by law.²²⁸ All evidence other than conclusive are discretionary evidence, if they have the qualification of evidence and can be characterized as such. The discretionary evidence listed in the law are document (excluding deed and judgment), witnesses, expert report, and discovery. However, the discretionary evidence does not consist of those explicitly enumerated in the law (CCP Art. 192). The survey is discretionary evidence according to the system of evidence adopted in Turkish law. Additionally, a survey should be accepted as direct evidence, not circumstantial evidence because it directly reveals the perception, which is one of the important indicators in the resolution of the dispute in terms of trademark law.²²⁹

1. The Importance of the Distinction between Factual and Legal Matters for Trademark Law

The distinction between fact and law²³⁰ is of particular importance in trademark proceedings, as in civil proceedings. Primarily, it is important in terms of determining the subject matter of the evidence. This is because the subject matter of evidence is material facts (Art. 187/1 CCP). It is also important for the right to appeal and the scope and limit of the appellate review. Appellate review is limited to the review of legality. While the Court of

²²⁴ C-409/12, Kornspitz, ECLI:EU:C:2014:130, § 15.

²²⁵ BGH GRUR 1979, 716 - Kontinent Möbel.

²²⁶ Kale, p. 183. Such as obtaining IT expert reports regarding the contents of web pages to prove use. Kale, pp. 188-189.

²²⁷ Or a final judgment of court which regulated separately.

²²⁸ Atalı, Murat/Ermenek, İbrahim/Erdoğan, Ersin. *Medeni Usûl Hukuku*, 6th ed., Yetkin Yayınları, Ankara, 2023, p. 491.

²²⁹ EUIPO, Trade Mark Guidelines, p. 195 and 736; 24/09/2019, T-492/18, Scanner Pro, ECLI:EU:T:2019:667, § 54.

²³⁰ Toraman, Barış. *Medeni Usul Hukukunda Bilirkişi İncelemesi*, Yetkin Yayınları, Ankara, 2017, p. 144 ff.

Cassation cannot intervene in the assessment of facts, it can review the legal interpretations and assessments.²³¹

This distinction is greatly emphasized regarding the prohibition of use an expert on legal matters in Turkish law. The expert should not be entrusted with the task of investigating the legal rules to be applied to the facts in dispute, nor with the task of evaluating the legal problem arising in terms of this factual issue. As a result, although the judge cannot use expert opinion in legal matters, he/she may use expert report evidence in case evaluations that require special and technical knowledge.²³²

Fact or law distinction should also be addressed in terms of the areas of surveys use in Trademark law. Whether the sign is recognized²³³ and whether it has become distinctive as a result of use is accepted as a matter of fact. Similarly, the claim of non-use (and proof of use) is also a matter of fact.²³⁴ Regarding the likelihood of confusion, although the issue is controversial, the dominant opinion argues that it is a matter of law.²³⁵ However, in trademark law, which is a highly technical field, it should be possible to consult an expert in matters that are considered “law” according to the particular case.²³⁶

2. Expert Report

In cases where special or technical knowledge other than legal knowledge is required for dispute resolution, the person who provides this information is called an expert, and the report prepared by this person is called an expert report. It is this expert report that is evidence in the sense of civil procedural law.²³⁷

Expert can only be consulted in cases where special or technical information is conveyed to the court, the conclusion to be reached by applying this information to the facts is conveyed to the court, and a factual determination is made using this information.²³⁸ In Turkish law, the use of experts in legal matters is expressly prohibited (CCP Art. 266; Expertise Law Art. 3). Parties must declare at the beginning of the case that they will prove a fact they assert using an expert report. Even in cases where the principle of preparation of the case by the parties applies, the judge may seek an expert report ex officio, even if the parties have not requested it (Art. 266 CCP).²³⁹

²³¹ Toraman, p. 149; Kale, p. 211.

²³² Toraman, p. 149.

²³³ Kaya, p. 319; Çolak, p. 213.

²³⁴ Kaya, p. 430.

²³⁵ See supra note 215 and In U.S. law, see supra note 75.

²³⁶ Kale, p. 214.

²³⁷ Tanrıver, Süha. *Hukukumuzda Bilirkişilik*, 2nd ed., Yetkin Yayınları, Ankara, 2024, p. 8; Zora, Fatih. *Anglo Amerikan Hukuku ile Karşılaştırmalı Olarak Medeni Usul Hukukunda Bilirkişilik*, Adalet Yayınevi, Ankara, 2022, p. 21; Atalı/Ermenek/Erdoğan, p. 528; Toraman, p. 78 ff.

²³⁸ Erdoğan, Ersin/Üçüncü, Sümeyye Hilal. “Bilirkişilik Kurumu Ve Bilirkişi Raporunun Delil Değerine İlişkin Bazı Sorunlar”, *Hacettepe Hukuk Fakültesi Dergisi*, Vol. 10, No. 1, 2020, pp. 354-387, p. 360; Atalı/Ermenek/Erdoğan, p. 529.

²³⁹ Regarding the ex officio use of survey evidence, see. Becker, p. 216 ff.

In Turkish law, a survey can be characterized as an expert report or expert opinion, which is discretionary evidence when used in a trial.²⁴⁰ This is because the persons participating in the survey are the subjects of information that need to be interrogated for a representative survey. An expert is confronted with a particular public opinion, which he/she must assess on an objective basis.²⁴¹ Here, the status of the expert is like an expert who conducts a laboratory examination on the durability of an object and gives an expert opinion. It is more correct to adopt that the survey is an expert report or expert opinion due to the features we will explain below, rather than other discretionary evidence that is not regulated by the law.²⁴² Considering the common classification, in terms of the use of the survey in trademark law disputes, the activity of the expert can be characterized as conveying the conclusion to the court by applying special or technical knowledge to the facts.

The preparation, implementation and interpretation of a survey requires specialized and technical knowledge.²⁴³ In trademark law disputes, it is necessary to reveal the “*perception*” that needs to be determined and will be effective in dispute resolution. In cases such as distinctiveness through use and recognition, it may be necessary to include the opinion of a large consumer group to reach special or technical information. In these cases, instead of reflecting the opinion of the relevant group directly, including the opinions of the expert or expert committee in that group may cause misleading results.²⁴⁴ The opinions of the relevant public should be determined through a survey that meets the methodological requirements and then interpreted in a scientific manner and the report prepared should be submitted to the court.

Regarding the appointment of experts, it is debatable whether the role of expert can also be assigned to a research institute (private law legal entity).²⁴⁵ But under Art. 2 of the Expertise Law, both real persons and private law legal entities can be experts. The Department of Expert published the “Procedures and Principles Regarding the Provision of Expert Services by Private Law Legal Entities”.²⁴⁶ This ensures legal entities with technical facilities and equipment to be appointed as experts.²⁴⁷ The subject of our study is one of the areas in which private law legal

²⁴⁰ In its 1977 report, the German Civil Procedure Law Commission rejected the idea of regulating “public opinion surveys” as independent evidence. Instead, the Commission recommended applying the provisions regarding evidence presented by experts to public opinion surveys, given their “proximity to expert evidence.” The concrete proposal was to apply the rules on expert evidence to evidence based on surveys conducted on groups of people selected according to demographic or other scientific principles. Becker, pp. 4-5.

²⁴¹ Stiel, p. 279. Here, it can be evaluated whether the judge can use his personal knowledge (e.g., because he belongs to the relevant public) about the perception of the relevant group. See Erdoğan/Üçüncü, pp. 367-370.

²⁴² Azaklı Arslan, Betül. *Sınai Mülkiyet Hukukunda Tespiti Davası ve Delillerin Tespiti*, Ankara Hacı Bayram Veli Üniversitesi Lisansüstü Eğitim Enstitüsü, Unpublished Dissertation, Ankara, 2024, p. 119.

²⁴³ The difficulty in developing a survey lies in explaining the answers given by consumers who are not trained in law in a way that allows legal conclusions to be drawn. Dobel, p. 107.

²⁴⁴ Azaklı Arslan, p. 119.

²⁴⁵ Lindacher, pp. 242-243; Stiel, p. 273 ff.; Dobel, p. 89. Tanrıver, pp. 63-64; Toraman, pp. 413-417; Zora, pp. 25-26. For some alternative opinions, such as appointing the director of a legal entity as a real person instead of the institution itself, or an expert being assigned and hiring a subcontractor; see Pflüger, p. 997; Lindacher, p. 243; Stiel, pp. 273-274; Dobel, p. 89. Zora, p. 26.

²⁴⁶ For the relevant procedures and principles, see <https://bilirkisilik.adalet.gov.tr/Resimler/SayfaDokuman/23082024232233Özel%20Hukuk%20Tüzel%20Kişileri%20Bilirkisilik%20Hizmeti%20Vermesine%20İlişkin%20Usul%20ve%20Esaslar.pdf>, Access Date: 25.09.2024.

²⁴⁷ Toraman, pp. 413-414.

entities should be able to operate. Because most of the survey work beyond the capabilities of a real person.

The scope of duty of an expert is determined by the court appointing it. By taking the opinion of the parties²⁴⁸, the court determines the limits of the subject of examination, the questions that the expert must answer, and the period for submission of the report (Art. 273/1 CCP). With the appointment decision, the expert is informed of the important aspects of the survey methodology. While the determination of the relevant public is court's task²⁴⁹, the formulation of the questions requires expertise and is one of the duties of the expert.

The judge free assessment of evidence the expert report, which includes the preparation, application and interpretation of the survey.²⁵⁰ Although special or technical knowledge of the expert is needed, the authority to decide on the dispute belongs to the judge. The expert report on the survey must be evaluated within the overall picture of the concrete circumstances and other evidence. A judgment cannot be made solely based on the data contained in the expert report.²⁵¹ The judge should also evaluate other factors that are important for the resolution of the dispute (e.g. the duration, degree, and geographical area of use of the trademark in terms of recognition, promotions, and advertisements related to the trademark, the economic value of the trademark, the prevalence and market share of the goods or services on which the trademark is used, the distinctive character of the trademark, etc.).²⁵² Therefore, a judge can decide contrary to the findings in the expert report by clearly setting forth the grounds. The evaluation of the expert report should not be haphazard.²⁵³ The judge should evaluate the competence of the expert, the consistency of the special or technical information presented and the conclusion reached based on auditable criteria.²⁵⁴ In case of any doubt, the judge can ask new questions and obtain an additional report, ask the expert to make oral explanations at the hearing, or order a new expert report (Art. 281/2-3 CCP).

For an expert report to be considered as evidence, several procedural and substantive criteria must be met. The expert report should not be limited to the presentation of data; the data should be interpreted and explained by the expert. However, since the legal evaluation is the responsibility of the court, the expert should refrain from making legal evaluations. Furthermore, to review the evidential value of the expert report, the methodology must be explained in a comprehensive and detailed manner.²⁵⁵ This will enable the parties, as well as the court, to review the survey methodology.

²⁴⁸ In order to guarantee the right to be heard, the parties should be given the opportunity to comment before the questionnaire is administered. Pflüger/Dobel, Rn. 145.

²⁴⁹ Knaak, p. 5; Becker, p. 192.

²⁵⁰ EUIPO, Beschluss des Präsidiums, p. 2-3; IGE, Richtlinien in Markensachen, p. 230; Dobel, p. 101.

²⁵¹ The court can never "*place itself in the hands of the expert*" or "*blindly*" accept their conclusions. Becker, pp. 215-216.

²⁵² Azaklı Arslan, p. 120.

²⁵³ Tanrıver, pp. 149-150; Erdoğan/Üçüncü, p. 377.

²⁵⁴ Erdoğan/Üçüncü, p. 377; Azaklı Arslan, p. 120.

²⁵⁵ Pflüger/Dobel, Rn. 129.

3. Expert Opinion

Under Turkish Civil Code Art. 1, the judge may benefit from scientific opinions. Parties can submit to the court the opinion of an expert on a fact related to the case or on a legal characterization (CCP Art. 293). In terms of an expert's opinion on a material fact, a binary distinction must be made. If the opposing party accepts the expert's opinion, an evidential agreement (arbitrator-expert contract) is formed between the parties, and the court is bound by this opinion.²⁵⁶ If the opposing party does not accept the expert's opinion, it is only accepted as the relevant party's statements regarding the expert's report that was consulted during the litigation.²⁵⁷ The court is required to take these opinions into account. The judge will evaluate the expert opinions and will make it clear why he/she takes the expert opinion into consideration and why he/she does not.²⁵⁸

The parties may submit results of the survey not only to support their claims, but also as a counter-survey to the survey that forms the basis of an expert report, or to draw attention to errors in the preparation, implementation and interpretation of the survey.²⁵⁹ The court is obliged to check whether the survey complies with the methodological criteria set out in section 1 in this study. The court must consider the results of the survey if they meet these criteria. If errors or inconsistencies are detected in the survey, the report will not be taken into consideration.²⁶⁰ Additionally, there may be discrepancies between the findings of an expert report and the conclusions reached through a submitted expert opinion. In such cases, the court should request either a supplemental report from the same expert or a new report from a different expert.²⁶¹

The impartiality of the expert/research institute cannot be questioned merely because it was commissioned by one of the parties.²⁶² The probative value of expert opinions arises on a case-by-case basis, considering all circumstances, including impartiality.

The cost of the survey is high for the party submitting it. If the party submitting expert opinion based on the survey wins the case, it is not possible to collect the survey costs from the other party. This is because it is not a cost within the scope of the trial expenses regulated under Article 323 of the CCP. It is a matter of strengthening or completing the claim or defense of the party submitting the expert opinion. In cases where the survey is used as an expert report, the party who bears the burden of proof shall bear the costs of this study. However, at the end of

²⁵⁶ In this case, the existence of an evidentiary agreement renders it unnecessary for the court to consult an expert. Kaplan, Mikail Bora. "Medenî Usûl Hukukunda Bilirkişi Raporu ile Uzman Görüşü Arasındaki Çelişkinin Giderilmesi", *TAÜHFD*, Vol. 4, No. 2, 2022, pp. 557-585, pp. 563-564.

²⁵⁷ Kaplan, p. 564.

²⁵⁸ Atalı/Emrenek/Erdoğan, pp. 543-544; Kaplan, p. 569.

²⁵⁹ It may also be within the scope of interim injunctions. Knaak, p. 7; Stiel, p. 243; Pflüger/Dobel, Rn. 151-152.

²⁶⁰ Stiel, p. 280; Kale, p. 185.

²⁶¹ Toraman, pp. 665-666. For the relevant decisions, see Court of Cassation, 6th Division, 22.02.2023, 2022/1824, 2023/713, Lexpera, Access Date: 23.10.2024; Court of Cassation, 11th Division, 02.11.2023, 2022/1434, 2023/6403, Lexpera, Access Date: 23.10.2024. For a proposed method to resolve discrepancies between expert opinions and expert reports, see Kaplan, p. 572 ff.

²⁶² IGE, Richtlinien in Markensachen, p. 230; Becker, p. 224 ff.; Pflüger/Dobel, Rn. 149. For a decision to this effect, see BGE 148 III 409, 414.

the trial, the losing party bears the costs of this survey.²⁶³ This is because the fees and expenses paid to the expert appointed by court are within the scope of trial expenses (CCP Art. 323/1-e).

CONCLUSION

Legal research employing survey methods integrates scientific research with legal analysis. The methodological criteria that a scientifically designed and properly executed legal survey must meet should be evaluated on a case-by-case basis. Courts and institutions do not directly adopt the data obtained from a survey. The processes of interpreting and reporting the data arising from the survey's research approaches and methods are thoroughly examined. In this way, a court can make reasoned decisions on what to accept or not accept, concerning the specific trademark dispute.

The comparative analysis of survey evidence in trademark law in the U.S. and Turkey discussed in this study reveals significant differences in legal regulations, judicial decisions, and the practical use of empirical data in litigation.

In the U.S., the use of survey evidence is deeply embedded in the fabric of trademark litigation. Rooted in the Lanham Act, American trademark law acknowledges the centrality of consumer perception in determining key issues such as likelihood of confusion, secondary meaning, genericness, trade dress infringement, dilution, and famous marks. Surveys are not merely supplementary evidence but often play a pivotal role in shaping judicial outcomes.

The American legal system has developed robust mechanisms to ensure the reliability and admissibility of survey evidence. Under the Federal Rules of Evidence, particularly Rules 702 and 703, surveys are considered expert testimony and are subjected to rigorous scrutiny to assess their methodological soundness and relevance. The Daubert standard also empowers judges to act as “*gatekeepers*” by filtering out unreliable or scientifically unsound evidence. This meticulous approach enhances the accuracy and fairness of judicial decisions by ensuring that surveys admitted as evidence reliably reflect consumer perceptions.

Moreover, American courts have established clear methodological criteria for admissible surveys. These include defining an appropriate universe of participants that accurately represents the relevant consumer group, employing reliable sampling techniques, designing unbiased and clear questions, and administering the survey to avoid influencing respondents' answers. Surveys should be conducted under conditions that closely simulate the actual marketplace, and data collection methods must be standardized. The process should ensure confidentiality to prevent response bias, and results must be analyzed using sound statistical principles. When surveys meet these rigorous methodological standards, they carry significant evidential value and can be decisive in the outcome of a case. Methodological flaws can justify the exclusion of survey evidence; however, most courts treat these errors as issues that impact the weight of the evidence rather than its admissibility.

The widespread use of survey evidence in the United States reflects a judicial philosophy that values empirical data and acknowledges the limitations of normative

²⁶³ Kale, p. 188.

assessment in measuring consumer perceptions. This empirical approach contributes to a more objective and evidence-based adjudication process, mitigating subjective judgments and potential biases. Additionally, as courts can base their decisions on measurable data rather than speculative assessments, it promotes the development of legal standards and consistency in rulings.

In contrast, Turkish trademark law takes a different approach to survey evidence. Although the IPC acknowledges the importance of the relevant public's perception on issues such as distinctiveness and well-known status, the practical use of surveys in litigation is limited. Instead of surveys, subjective expert reports and opinions are preferred. An evaluation caught between the subjective assessment of an expert and the subjective assessment of the judge does not yield accurate results. Therefore, in our opinion, a change in perspective is required in Turkish law.

This article shows that Turkish trademark law could benefit from a more comprehensive integration of survey evidence into the proceedings. By setting standards in terms of survey methodology, courts can obtain direct and measurable information on the perception of the relevant public. This empirical evidence can enhance the objectivity of judicial decisions and contribute to the development of more consistent and transparent judicial processes.

In Turkish law, survey is discretionary evidence and should be accepted as a direct means of proof. Because it is discretionary evidence, instead of directly adopting the survey data, it should be evaluated within the framework of other criteria related to the relevant subject matter and the circumstances of the particular case. It can be considered as an expert report or expert opinion. This is because the preparation, implementation and interpretation of a survey requires special and technical knowledge. Surveys are reliable evidence to reveal the perception that needs to be determined in trademark law disputes and that will be effective in the resolution of the dispute. Instead of directly reflecting the opinion of the relevant audience through a survey, including the opinions of the expert or the expert panel in that audience may lead to misleading results. For this reason, it is the most appropriate solution to present the survey results to the court as an expert report or expert opinion in a way that is suitable for control.

In our opinion, there is no need for a separate legal regulation for surveys. This evidence should be accepted as an expert report or expert opinion in judicial decisions and doctrine. Related provisions of the CCP should be applied to the survey evidence (Art. 266-287 and Art. 293). Although there is no need for a legal regulation at this point, there is a need for a guideline on methodological requirements like in the other jurisdictions. It would be appropriate for the TÜRKPATENT to prepare a guideline on the methodological requirements and areas of use of survey evidence. Such guidelines would provide a framework for practitioners, administrative bodies and courts. Additionally, it is crucial for TÜRKPATENT to collaborate with national and international institutions to identify "*best practices*" for the use of surveys in trademark law.

Under Turkish law, real persons and private law legal entities may be appointed as experts. Preparation, implementation and interpretation of a survey can be a task that is beyond the means of a real person. The procedures and principles announced by the Department of

Expertise provide a solid basis for the widespread use of survey evidence in Turkish law by allowing legal entity experts.

As in the example of the US and Germany, the establishment of specialized institutes for the preparation, implementation, and evaluation of surveys should be legally and economically encouraged. Accreditation programs should be developed for experts conducting surveys in the legal context. These experts should receive training on survey methodologies, ethical considerations, and their role in presenting findings to courts. Accredited experts will enhance the reliability and evidentiary value of survey-based reports.

Judges' familiarity with empirical methods and their attitudes toward such approaches influence how they interpret survey results. In Turkish law, judges are generally less accustomed to statistical evidence, which may lead them to scrutinize methodologies more rigorously or undervalue survey findings. Additionally, the contentious history of expert evidence in Turkish legal practice can pose challenges to the acceptance of survey evidence. However the high professional standards of judges in intellectual and industrial property courts represent a significant advantage for Turkish law. Similarly, in the United States, the admissibility of survey evidence is subject to strict scrutiny under the Federal Rules of Evidence and Daubert standard. Although U.S. judges are more familiar with empirical evidence, inconsistencies in survey design or execution can still diminish evidentiary weight.

In both jurisdictions, enhancing judicial familiarity with survey methodologies through specialized training can improve the evaluation and application of survey evidence in legal practice. Judges should receive specialized training on evaluating survey evidence, including understanding methodologies, assessing their adequacy, and identifying potential flaws. In-service training programs on this subject can help identify practical challenges and propose solutions, thereby improving the application of survey evidence in legal practice.

It is also important to encourage academic studies on the areas where the survey method can be applied in trademark law, the standards to be established, and its role in judicial proceedings. While there are only limited studies in Turkish law on this subject, comparative law offers numerous works examining various aspects of the issue, particularly in the U.S. context. In American trademark law, surveys are extensively studied and applied, providing a wealth of empirical research that explores their utility. Academic research in this field would inherently have a multidisciplinary nature, encompassing both intellectual property law and civil procedural law.

In Turkish law, survey evidence has recently started to be included as “*concrete evidence*” in the decisions of the first-instance courts. To establish a comprehensive policy regarding survey evidence, practices from the US, Germany, and Switzerland should be considered as benchmarks. This is because surveys will definitely take place in Turkish trademark law as evidence that is either widely used or approached cautiously.

As global markets integrate, the consistent use of empirical methods like surveys is vital for ensuring fairness in trademark disputes. Consequently, clear guidelines for survey standards

will enhance the reliability of evidence, foster business confidence, and strengthen intellectual property protection across borders.

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