

The New Role of Surveys in Assessing Damages in Patent Infringement Cases



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Background:

Federal courts are moving toward assessing damages in patent infringement cases with the (newer) key criterion of consumer demand generated by the patents at issue rather than the traditional Entire Market Value Rule (EMVR).

Damages based on EMVR have been set aside in such cases as *Cornell Univ. v. Hewlett-Packard Co.* and *Lucent Technologies Inc. v. Gateway Inc.* Numerous legal authorities have discussed how decisions by Circuit Judge Randall Rader, among others, are modifying the entire market value rule toward considerations of consumer demand.

In *Cornell University*, for example, the trial judge excluded an economist's testimony because "despite the court's repeated exhortations to supply economic proof linking any proposed entire market value royalty base to the market and consumer demand, [the expert] simply could not identify any reliable evidence to support his position."

This emerging trend suggests integrating the expertise of economists with that of survey experts in supporting or defending a damage claim in a patent infringement case.

Based on my work in helping to rebut damage claims against such technology clients as Apple, Amazon and Dell, I suggest several guidelines for the use of surveys in damage claims based on patent infringement.

The first is: Accurately define the place of the patent-in-suit in the final product. I've rebutted where surveys claiming damages for software patents that have presented concepts to consumers that "over-reach" what the patent actually contributes.

Every survey requires asking unbiased questions of a relevant population but that's just the basics. A very recent decision (April 2011) in the E.D. of Texas illustrates my first point where in *Fractus, S. A., v. Samsung Electronics*, two consumer surveys were excluded because they over-reached, that is, measured reaction to the product, an antenna, as a whole instead of focusing the survey on the specific technology in the patent-at-issue.

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Second: Any survey on consumer demand will be subject to searching scrutiny by a rebuttal expert. This is important for patent attorneys to appreciate as they may not be as well versed in the “battle of the survey experts” as are trademark attorneys. Working toward a “bullet-proof” survey calls for a researcher who is highly experienced in litigation surveys.

Third: As in all surveys for litigation, the patent infringement survey is most open to criticism if it fails to accurately determine the relevant population. Survey experts need to be careful about defining the relevant population. For example, in a recent patent case I participated in for the defendants, the plaintiff’s expert queried *retail* consumers but failed to appreciate that the defendant’s principal customers were *businesses*: the purchasers were chief information or chief technology officers.

The survey experts in patent infringement litigation should be well versed in advanced statistical analysis, especially conjoint analysis, which examines how purchasers or decision-makers “trade off” various product attributes.

Step One

Experts should also be prepared to address the possibility that a given attribute or feature should not be assumed *a priori* to be a decision driver. In cases where the opposing attorney’s expert may challenge the very inclusion of a given feature in a survey, it may be advisable to utilize “heuristic methods” as a first step.

Heuristic methods, a decision shortcut: particularly suited to conservative models
A decision-centered approach yields a conservative estimate of patent value because only respondents who identify a given attribute as important and measure it in a way material to the patent will contribute to the calculated value. Heuristic methods ask about actual behavior, as opposed to hypothetical choices. Thus, if respondents qualified for the survey based on their reported purchases or interest in a particular product category, this approach may have more face validity.

Step Two

Conjoint analysis, a 30-year-old statistical technique which results in hard data and has been used successfully in damages cases, including

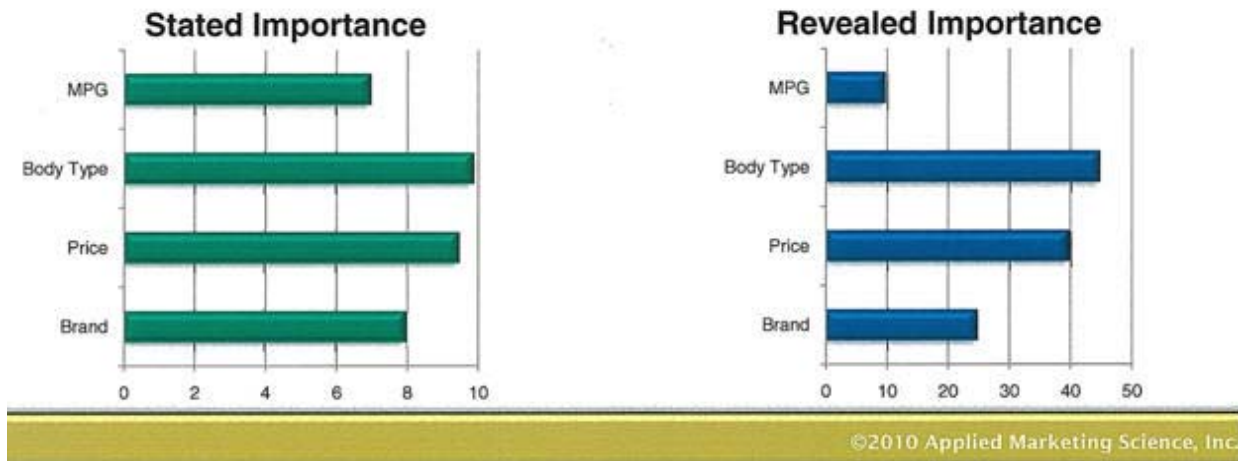
- *Tivo v. EchoStar*, in Eastern District of Texas
- *Barbara Schwab et al. v. Philip Morris USA*, in Eastern District of N.Y.
- *U-Haul Int’l v. Jartran Inc.*, in District of Arizona
- *Robert Kearns v. Ford Motor Co*, in Eastern District of Michigan

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- Continental Airlines v. American Airlines, in Central District of California
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What is so useful about it?

- Conjoint Analysis forces people to make trade-offs
 - This gives much better data than simply asking people the importance of each component of the product
 - The results are better in that they predict future outcomes more accurately, and there are greater (and more believable) differences between features in their importance to buyers



From a recent patent infringement damages survey that I rebutted: "... on average virtually all of the features studied for the various devices were rated as important based on the monadic rating scales."

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Conjoint: How a consumer selects 'packages'

	Dodge	Ford	Ford
Brand	Dodge	Ford	Ford
Cab Type	Regular Cab (B-Cab)	Regular Cab (B-Cab)	Regular Cab (B-Cab)
Engine	4.6L V8 Gasoline, 305 hp, 325 ft-lbs torque	5.7L V8 Gasoline, 375 hp, 395 ft-lbs torque	4.6L V8 Diesel, 300 hp, 480 ft-lbs torque
Total Combined MPG	21 mpg	26 mpg	21 mpg
Payload	1,750 lbs	2,750 lbs	2,750 lbs
Towing	12,500 lbs	10,000 lbs	10,000 lbs
Total Price	\$26,000	\$27,350	\$20,500

Submit Choice

20 or fewer choices to go

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Another example of a conjoint task for respondents

If you were in the market to purchase a PC today, and if these were your only alternatives, which would you choose?

<p>Dell 4 GHz processor 3 GB RAM 21-inch display \$1,099</p> <input type="radio"/>	<p>HP 3 GHz processor 2 GB RAM 19-inch display \$899</p> <input type="radio"/>	<p>Sony 2 GHz processor 1 GB RAM 17-inch display \$699</p> <input type="radio"/>	<p>None: If these were my only choices, I'd defer my purchase.</p> <input type="radio"/>
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Source: Research Publishers LLC

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A more complex conjoint for a business-to-business audience

1. Should temperature be included?

If two widgets were acceptable in all other ways, how important would this difference be to you?

Not Important — Somewhat Important — Very Important — Extremely Important

45 C
—instead of—
125 C

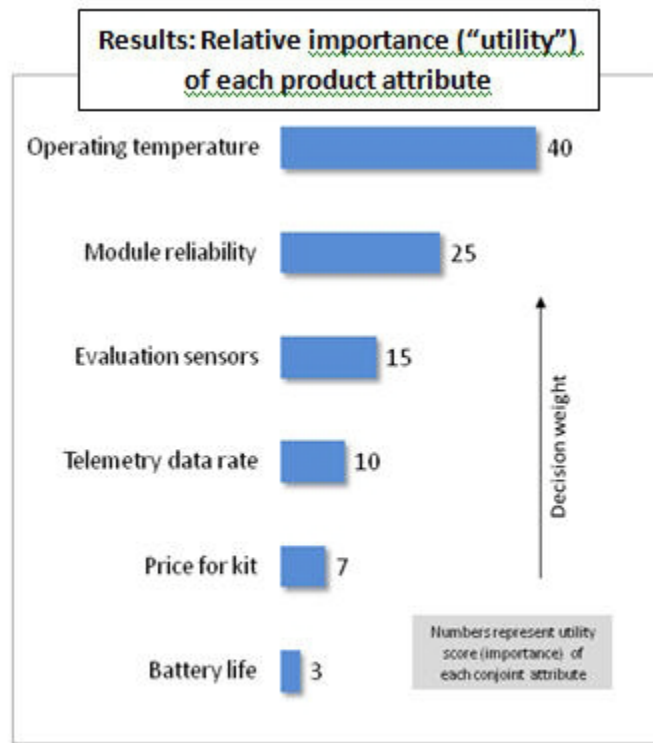
2. The Conjoint

If these widgets were identical in all other ways, which would you prefer?

Temperature 125 C Price \$400,000 Telemetry rate 250 mbs Battery life 48 hours	or	Temperature 85 C Price \$200,000 Telemetry rate 100 mbs Battery life 20 hours
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Strongly Prefer Left — Somewhat Prefer Left — Indifferent — Somewhat Prefer Right — Strongly Prefer Right

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Source: disguised Gelb study

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The success rate of different methods of learning customer needs

Method	% of successful applications
The estimates of company's employees	55%
Open-ended questions in the questionnaire	66%
Benchmark (learning from competitors)	67%
Focus group estimates	70%
Observing the customer when using product	72%
Using rating scale or constant sum direct evaluations	75%
Conjoint Analysis	85%

Source: Prof. James C. Anderson, Northwestern University, based on an analysis of 331 studies

In this presentation, I've outlined three general guidelines for the new world of surveys in patent litigation, especially those involving technology, and shown what I consider to be the best path to measuring consumer demand for the patent-at-issue. Naturally, in any specific case, the requirements may vary to some degree from these concepts.

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About Gelb

Feeling pressure to increase volume and grow revenues? Gelb Consulting Group, Inc. is a strategic marketing firm that merges analysis, strategy and technology to help clients build and sustain revenue growth.

Gelb is here to help you understand the complexities of your market to develop and implement the right strategies. We use advanced research techniques to understand your market, strategic decision frameworks to determine the best deployment of your resources, and technology to monitor your successes.

For over 40 years, we have worked with marketing leaders on:

- Strategic Marketing
- Brand Building
- Customer Experience Management
- Go to Market
- Product Innovation
- Trademark/Trade Dress Protection