

Floyd Mandell Quoted by *Law360* on the Reliability of Consumer Surveys in Trademark Disputes

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Intellectual Property Litigation Partner Floyd Mandell, co-chair of Katten's Trademark/Copyright/Privacy Group, was quoted by *Law360* in an article about judicial skepticism surrounding the use of consumer surveys as "likelihood-of-confusion factors" in trademark disputes and the proposed alternative that could improve the reliability of such surveys.

The article states that several notable judges, including retired Seventh Circuit Judge Richard Posner and Justices Sonia Sotomayor and Samuel Alito, have been wary of consumer surveys when leveraged in trademark disputes, with Justice Sotomayor raising concerns that "cleverly designed surveys" could "artificially prompt" confusion among consumers.

Due to these sentiments, a group of legal and neuroscience scholars now say they have found a way to improve the reliability of consumer surveys by using scans to measure brain activity when individuals are repeatedly shown products that appear similar or have similar packaging.

However, consumer surveys are still common factors in trademark litigation. In his own practice, Floyd emphasized that part of his due diligence before commissioning a survey includes researching the individual who will conduct it and whether that individual has faced criticism, as well as how a particular judge or district treats surveys.

"If you've got a very credible confusion survey, sometimes that's going to be the difference between winning and losing," Floyd said. "Now, again, it depends on the judge."

"Can Brain Scans Build On Consumer Surveys In IP Disputes?" *Law360*, January 30, 2024

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