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The Role of Consumer Surveys in Proving Patent Infringement Damages

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"Determining a fair and reasonable royalty is often . . . a difficult chore, seeming often to involve more the talents of a conjurer than those of a judge."[1]

Over the past few years, the Federal Circuit has increased its scrutiny of damage awards in patent infringement cases—a trend illustrated by its recent decision in *Uniloc USA, Inc. v. Microsoft Corp.* As the Federal Circuit has explained, damage awards in patent infringement cases must be supported by sound economic theory and tied to the patented invention's "footprint in the marketplace."[2] In addition, where a patent covers only one feature of an accused product, a patent holder wishing to present evidence regarding the overall profitability of the accused product must demonstrate that the patented feature creates consumer demand for the product or its components. A well-crafted consumer survey can provide powerful evidence of an invention's value in the marketplace. While consumer surveys have long been used in trademark, false advertising, and antitrust cases, the use of such surveys in patent cases is a relatively recent phenomenon. Counsel responsible for managing patent litigation should understand both the potential role of survey evidence and the common pitfalls associated with the use of such evidence at trial.

The Role of Consumer Surveys at Trial

A patent holder prevailing in an infringement action is entitled to "in no event less than a reasonable royalty for the use made of the invention by the infringer."[3] In most patent infringement cases, damages evidence focuses on proving a royalty that reasonably approximates what the parties would have agreed to during a hypothetical negotiation occurring at the time the infringement began. A "reasonable royalty" consists of two elements: a royalty base, which reflects the revenue pool implicated by an infringement, and a royalty rate—applied to the base—representing the percentage of the revenue pool to which the patent holder is entitled. The reasonable royalty analysis—both as to the royalty base and the royalty rate—must be targeted to compensation for the economic harm caused by infringement of the patented invention. As the Federal Circuit explained in *ResQNet.com, Inc. v. Lansa, Inc.*,[4] expert testimony as to a reasonable royalty "must carefully tie proof of damages to the claimed invention's footprint in the marketplace."

– Determining the Royalty Base

Consumer survey evidence can help define an appropriate reasonable royalty base. This is especially true where parties dispute the extent to which a patented feature is actually used by consumers. For example, in *i4i Limited Partnership v. Microsoft Corp.*,[5] the patent holder claimed that Microsoft's ubiquitous

Word software program infringed its patent relating to XML custom formatting. There was no dispute that Microsoft's Word program had the capability to perform custom XML formatting, but the parties vigorously disputed the extent to which this capability was actually used by consumers. At trial, the patent holder presented survey evidence demonstrating that this patented feature was used by approximately two percent of all businesses owning Microsoft Word.[6] The patent holder's damages expert then applied this percentage of allegedly infringing use to Microsoft's overall sales of the Word program to determine the base to which a reasonable royalty rate would be applied. The jury's $240 million damage award reflected this royalty base.[7] On appeal, the Federal Circuit affirmed the jury's damage award and rejected Microsoft's challenge to admission of the survey evidence, finding that the survey and its results were sufficiently reliable to pass muster under *Daubert*.[8]

– Applying the Entire Market Value Rule

In cases where a patent covers only one feature of an accused product, consumer survey evidence can also demonstrate whether an appropriate reasonable royalty base includes revenue earned through the sale of the accused product as a whole. As the Federal Circuit explained in *Uniloc USA, Inc. v. Microsoft Corp.*, "the entire market value rule allows a patentee to assess damages based on the entire market value of the accused product only where the patented feature creates the 'basis for consumer demand' or 'substantially creates the value of the component parts.'"[9] Thus, a patent holder seeking to apply the entire market value rule must show not only the existence of consumer demand for an accused product, but also an evidentiary link between such demand and the patented feature. A properly conducted consumer survey can persuasively demonstrate or refute this evidentiary link.

For example, in *Cornell University v. Hewlett-Packard Co.*,[10] the patent holder alleged that Hewlett-Packard had included an infringing component within a processor that was in turn incorporated into the building blocks of Hewlett-Packard's computer workstation. The Federal Circuit's Judge Rader, sitting by designation in the district court, rejected the patent holder's reasonable royalty claim and slashed the jury's $186 million damage award, noting that the patent holder had failed to present real-world evidence of consumer demand for the patented component. But Judge Rader noted that a patent holder may collect royalties on some part of a system that encompasses more than the claimed invention "when defendant's real world earnings derive from real world systems sales generated by demand for the claimed invention."[11] Surveys directed at assessing why consumers make their purchasing decisions, and whether the patented feature at issue creates demand for the product as a whole, can demonstrate—or refute—the causal link necessary to allow reference to the overall profitability of an accused product as part of a reasonable royalty base.

Of course, not all evidence of consumer attitudes is created equal. In *IP Innovation v. Red Hat*,[12] Judge Rader, again sitting by designation in the district court, excluded testimony by the patent holder's damages expert regarding whether the claimed invention—desktop switching features on a computer— served as a basis for consumer demand for the Linux operating system. To support his opinion that the patented switching feature was essential to consumer demand for Linux, the patent holder's expert relied on statements collected from an on-line user forum for a third-party product. Judge Rader rejected this evidence, noting that the claimed invention was a relatively small component of the accused operating system and the feature represented only one of "over a thousand" components included in the accused system.[13] According to Judge Rader, the selected consumer statements lacked "a relationship to the actual claimed technology" and did not reflect an accurate economic measurement of the contribution of the patented feature to the demand for the entire system.[14] Leaving aside concerns regarding the reliability of such user forum statements, Judge Rader stressed that proper evidence of consumer demand must demonstrate "some plausible economic connection" between the patented feature and consumer demand.[15]

Similarly, in *Schindler Elevator Corp. v. Otis Elevator Co.*,[16] the district court excluded the patent holder's claim for damages based on the entire market value rule,finding that the patent holder failed to provide a sound economic connection between demand for the accused system and the specific patented feature. In that case, the patent holder's damages expert sought to rely upon statements from customers who had purchased the accused elevator system which incorporated the patented "seamless entry" feature. In excluding the expert's testimony, the court explained that although the customer statements demonstrated that the patented feature was desirable to purchasers, they did not establish that the entire system's value substantially derived from that single feature.[17] The district court also found fault with the lack of quantifiable consumer evidence, noting that "[n]one of the evidence provided to the Court includes any sort of statistical or regression analysis. None of it consists of consumer surveys or even interviews asking customers why they selected the patent holder to provide their elevator installations."[18]

– Determining a Reasonable Royalty Rate

Consumer surveys can also provide highly persuasive evidence supporting determination of a reasonable royalty rate. The so-called *Georgia-Pacific* factors which govern calculation of a reasonable royalty rate expressly allow for consideration of several factors impacted by consumer attitudes and behaviors. Consistent with the Federal Circuit's recent focus on economic support for damage awards, parties involved in patent litigation are increasingly using consumer survey evidence to support their analyses under the *Georgia-Pacific* factors.

Depending upon the circumstances of a particular case, consumer survey evidence may be used to demonstrate a number of *Georgia-Pacific* factors including:

- Effect of selling the patented specialty in promoting the sale of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales (*Georgia-Pacific* factor 6);
- Established profitability of the products made under the patent, its commercial success and its current popularity (*Georgia-Pacific* factor 8);
- The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefit of those who have used the invention (*Georgia-Pacific* factor 10);
- The extent to which the infringer has made use of the invention and the value of such use (*Georgia-Pacific* factor 11); and
- The portion of realizable profit attributable to the invention as distinguished from non-patented elements, significant features/improvements added by the infringer; the manufacturing process or business risks (*Georgia-Pacific* factor 13).

Unlike anecdotal assessments, survey evidence can provide an important quantitative input into the assessment of the "value" obtained through the use of a patented invention.

For example, in *Lucent Technologies v. Gateway*,[19] the Federal Circuit reversed a $358 million damage award, noting that the royalty analysis of the patent holder's damages expert improperly relied on licenses that were too vague and "radically different from the hypothetical agreement under consideration." The Federal Circuit held that use of the entire market value rule was inappropriate in the absence of evidence showing the patented date-picker feature was a basis of consumer demand for the accused Gateway computer products. The Federal Circuit observed that the record was devoid of any data showing evidence of usage–how often consumers used the patented date-picker feature–evidence that could have helped determine whether the invention was more valuable than a comparable invention used less frequently.[20] The court further found that there was no evidence showing how many Microsoft Outlook customers had ever used the patented feature or how often they did so.[21]

As in cases addressing survey evidence offered to establish an appropriate reasonable royalty base, survey evidence offered to support a royalty rate must be tied to the patented technology at issue. For example, in *Fractus S.A. v. Samsung Electronics*, the district court excluded evidence of a consumer survey intended to demonstrate the value to consumers of internal antennas in cell phones instead of external antennas.[22] The patent holder's expert opined that the survey demonstrated that an internal cell phone antenna contributes "between $16.02 and $29.96 to the value of a cell phone" and that "over 90% of respondents prefer an internal cell phone antenna versus an external antenna."[23] The district court excluded this survey evidence, noting that the survey was not tied to the alleged advantages of the patented technology–smaller antenna size and multiband functionality–and therefore did not measure how consumers value the purported advantages of the patent holder's technology.[24]

Types of Survey Analyses

Consumer surveys come in all shapes and sizes. Among the primary benefits of consumer surveys in patent cases is the ability to tailor the survey to quantitatively test specific propositions relevant to a given case. Unlike reliance on existent consumer evidence, a survey can be crafted to provide quantitative evidence that directly ties to the incremental value of a patent feature. Depending upon the specific issues involved, there are a number of available consumer survey models that may be particularly appropriate in assessing damages in patent cases.

– Choice Modeling

Choice modeling is a survey methodology that presents respondents with one or more groups of products from which to choose; each product having a different set of product features–most often including the specific product feature claimed in the patent and a price for the overall product. Survey respondents are asked to identify the product that would be their first choice (and respondents may also be asked to identify runner-up choices). This type of survey allows a relative comparison of consumer preferences for various product features and combinations.

Choice modeling is particularly useful in determining consumers' willingness to pay for incremental improvements to a product incorporating several features and in quantifying the value consumers place on a given product feature. For example, choice modeling can be used to determine the relative importance of the patented technology in the context of all other technologies in the infringing product. Survey data describing the patented technology's relative importance can then be used to support an opinion as to the patented technology's relative value as it relates to the entire value of the product. The survey can also be crafted to identify respondents' choices as they relate to the next best alternative–if one exists–which is relevant in the context of an apportionment analysis (the value of the patented technology over the next best alternative).

– Conjoint Analysis

Conjoint analysis is closely related to choice modeling in that survey respondents are provided with a group of products with differing features. But, as opposed to forcing respondents to make choices between products, respondents are asked to rank the products within the group, or to place various product features on a scale in order of importance. Conjoint analysis presents survey respondents with greater flexibility in identifying their product choice than choice modeling. However, depending upon the specific features at issue, conjoint analysis surveys may not differentiate between product features as effectively as choice modeling.

– **Direct Queries**

A wide variety of direct queries can also be used to specifically ask respondents about the extent to which there is demand for a patented feature and the relative strength of any such demand. Such surveys might include open-ended questions about the specific attributes associated with an accused product, pose yes/no questions, allow multiple choices, or ask respondents to rank or rate attributes or product choices. Although direct queries specifically addressing attitudes relating to the patented technology may be more straightforward than choice modeling or conjoint analysis, direct queries must be carefully crafted to avoid potential bias.

For example, a consumer survey commissioned by the patent holder in *Lucent Technologies v. Microsoft Corp.*,[25] sought to assess consumer usage of a patented drop-down calendar feature in Microsoft Outlook. Many of the survey questions asked highly targeted questions of respondents (such as whether and how they used Microsoft Outlook's calendar features), but in most cases did not force the respondents to make a choice between features or rank their usage against other features included in Microsoft Outlook. Microsoft criticized this survey, arguing that the questions were leading and failed to allow respondents a full range of potential responses.[26] Lucent argued the questions were randomized to limit bias, and that its use of exhaustive options (*i.e.*, "don't know/no opinion") did in fact cover all possible alternatives.[27] Although at the time of this article the district court has not yet addressed objections to the methodology used in Lucent's survey, these arguments are illustrative of disputes over methodology that commonly arise in cases involving consumer surveys.

Presenting Consumer Survey Evidence at Trial

The general admissibility of consumer survey evidence is well established.[28] Consumer survey evidence is regularly used in connection with a wide variety of cases, including those involving trademark, false advertising, and antitrust disputes. Consumer surveys are, however, frequently challenged on a variety of technical grounds. The established rule in most circuits is that such technical challenges go to the weight and not the admissibility of survey evidence.[29] For example, the Fourth Circuit has explained "while technical deficiencies can reduce a survey's weight, they will not prevent the survey from being admitted into evidence."[30] The Ninth Circuit has similarly held that "issues of methodology, survey design, reliability, critique of conclusions and the like go to the weight of the survey rather than its admissibility."[31]

In most instances, evidence of consumer survey results is presented at trial by a qualified survey expert directly involved in design of the survey instrument, implementation of the survey, and analysis of survey data. There is, however, no guarantee that a survey expert will make it to the witness stand. In patent cases, consumer survey evidence is most often used to support–or refute–opinions regarding damages. Accordingly, trial courts may choose to exclude direct testimony by the survey expert and, instead, allow the party's damages expert to present evidence of the survey.

Where a damages expert relies on survey data for his or her damages opinions, counsel should take steps to ensure that the expert is familiar with details necessary to ensure the validity and reliability of survey data. The risk of failing to do so is illustrated by *The Braun Corp. v. Vantage Mobility International, LLC*.[32] In that case, the district court struck portions of testimony by the defendant's damages expert relating to a histogram derived from consumer survey. The district court explained that because the damages expert's report failed to disclose details of the underlying survey, the expert had failed to establish the validity and reliability of underlying survey data.[33]

Regardless of how survey evidence is presented at trial, proponents of survey evidence should carefully consider how such evidence might be used against the proffering party. For example, in *Lear Automotive v. Johnson Controls*,[34] the defendant provided its expert with a survey directed to assess the frequency with which purchasers of accused garage door systems utilized a patented feature. The defendant's damages expert relied on the survey to opine that the defendant would have only agreed to a "modest" royalty rate for the patented feature. Lacking better evidence, the patent holder relied on the same survey to meet its burden of proof for demonstrating direct infringement that at least one user had used the infringing feature. The defendant was left in the awkward position of arguing that the survey data that it supplied to its own expert–and that its expert had relied upon in determining a reasonable royalty–was inadmissible hearsay and not sufficiently reliable to support the patent holder's infringement claims.[35] Not surprisingly, the district court rejected this claim, finding the data was admissible as an adoptive admission.[36]

Avoiding Common Challenges to Consumer Surveys

While consumer surveys can provide highly persuasive evidence in patent cases, common pitfalls await those who are unfamiliar with survey methodology. As described above, serious flaws in survey design and implementation can lead to exclusion of survey evidence. Moreover, surveys conducted for litigation purposes often differ substantially from those a company may conduct for non-litigation marketing purposes. A basic understanding of survey methodology can help in-house counsel effectively limit the impact of such challenges and maximize the positive impact of consumer survey evidence at trial.

– **Clearly Define the Survey Objectives.**

Surveys conducted for marketing purposes outside of a litigation context are often constructed to gather information on a variety of topics. When commissioning a survey for evidentiary purposes, however, it is important to carefully define the survey objectives and tailor survey questions to squarely address those objectives.

If the goal of a survey is to determine whether a given feature drives consumer demand for a product, questions about product usage will likely not generate relevant data. Moreover, including unnecessary questions in the survey may generate confusing or unhelpful data.

– **Direct the Survey to the Specific Patented Technology.**

Like any other evidence, admissible survey evidence must address a legally relevant topic. Consumer survey evidence is frequently challenged on the ground that it does not specifically address the issues in dispute. Two recent patent cases from the Eastern District of Texas illustrate this type of challenge. In *Fractus, S.A. v. Samsung Electronics*, the district court excluded testimony regarding a survey "intended to determine the value to consumers of 'incorporating internal antennas in cell phones in the place of external antennas.'"[37] Significantly, however, the patent-in-suit did not claim all internal cell phone antennas, but rather a single antennae type which offered claimed advantages of multi-band functionality and reduced size. Because the survey was not directed to the specific features claimed in the patent, the court found that the survey failed to measure the value of patented technology. Similarly, in *LaserDynamics v. Quanta Computer*,[38] the district court excluded expert testimony regarding a survey of royalty rates in the computer component industry, because the survey was not limited to comparable technologies.

– **Properly Define the Survey Population.**

A primary benefit of a properly conducted survey is that data collected from a limited number of survey participants can validly be applied to a larger population. A properly designed survey should ensure that survey participants are selected from a population that includes all persons whose perceptions or attitudes the survey is intended to represent. For example, if the goal of a survey is to determine attitudes of businesses that actually purchase an accused product, the population will likely be *over inclusive* if it includes non-business purchasers, and *under inclusive* if it fails to include certain types of business purchasers.

Disputes over the definition of an appropriate survey population are another frequent source of challenges to survey evidence. For example, in *Hodgdon Powder Co. v. Alliant Techsystems*,[39] the survey population consisted of the plaintiff's customers–a small target population that was disproportionately familiar with the plaintiff's products. The district court excluded the survey noting that the sample set was too narrow and should have included purchasers of competing products across the entire industry. Likewise, surveys based on populations that are too broad may be similarly limited in probative value. In *Leelanau Wine Cellars v. Black & Red*,[40] the Sixth Circuit criticized a survey conducted by the plaintiff in shopping malls because it queried an overbroad target population. While the plaintiff sold products through a variety of channels, the defendant sold its allegedly infringing product only through a specific narrow trade channel.[41] Although the district court did not exclude the survey, it gave the survey minimal weight, noting that the universe of respondents was overbroad and was not specifically designed to include potential purchasers of the product at issue. The Sixth Circuit affirmed the district court's decision noting that the trial court had broad discretion to limit the evidentiary weight given to a survey based on methodological errors.[42]

A survey's scope can also present challenges if the survey population has a potential interest in the outcome of the survey. For example, in *United States v. Southern Indiana Gas & Electric Co.*,[43] the defendant failed to exclude respondents with a potential interest in the outcome of the survey. The survey results were ultimately excluded as hearsay because they lacked "circumstantial guarantees of trustworthiness."

– **Utilize Procedures to Ensure a Fair Sample of the Population.**

In most cases, it is impractical to survey an entire target population. Accordingly, consumer surveys often apply some type of sampling. A properly conducted survey should generally utilize procedures to ensure that the chosen sample accurately reflects a cross-section of the total population. Some survey methods–such as telephone surveys–allow for true random sampling. If a chosen survey methodology does not allow for true random selection–such as is the case with the commonly-used mall intercept study–surveys will generally use various quotas (such as age and gender) to ensure that survey participants reflect a reasonable cross section of the target population.

– **Determine an Appropriate Mode of Data Collection for the Survey.**

Survey data can be collected in numerous ways, including in-person interviews, telephone surveys, mail surveys, and Internet surveys. The choice of data collection can directly impact the evidentiary impact of the survey, as well as its cost. Although Internet surveys have become increasingly prevalent based on ease-of-use and low cost, a key limitation is that the target population is limited to computer users.

– **Use Clear, Precise and Unbiased Questions.**

Although this may seem obvious, structuring questions to meet this goal can often be a difficult task. Even well-intentioned survey experts may draft survey questions in a less-than-straightforward manner.

– **Employ Appropriate Controls to Ensure the Objectivity of the Survey.**

Courts may exclude survey data in which attorneys have undue influence.[44] For example, in *United States v. Southern Indiana Gas & Electric Co.*, defense counsel in a Clean Air Act violation case submitted a survey of other similarly-situated companies in order to illustrate maintenance practices in the industry. Defense

counsel sent a letter to the CEOs of each company shortly before theyreceived the survey, ostensibly to encourage participation in the questionnaire.[45] The court excluded the survey, finding it inherently trustworthy, and noting that it was "troubled" by the fact that counsel sent letters–that "could be interpreted as pressure or guidance"–to each of the survey participants only three days prior to receipt.[46] While some attorney involvement in the survey design is necessary to ensure that the relevant questions and survey population are queried, surveys should be designed to eliminate potential bias. Attorneys should be excluded from direct participation in the interview and results tabulation process.

– **Conduct a Post-Survey Validation of Data.**

Unlike many surveys conducted for internal marketing purposes, surveys commissioned for litigation purposes should in most cases involve independent validation of survey data. This generally consists of engaging an independent survey firm to randomly contact a subset of survey participants to confirm their participation in the survey.

– **Employ Procedures to Ensure that Survey Methodology and Data are Properly Recorded.**

Once survey data is collected, the data is recorded, often coded, and then tabulated to allow for a quantitative presentation. Procedures for data handling should in most cases include checks for reliability and accuracy. One common area for potential dispute is the coding of open-ended or narrative responses. Utilizing clear rules for the coding of such responses will help to avoid potential disputes over data accuracy.

Surveys commissioned for litigation purposes are generally conducted by outside experts. Retaining a survey expert with extensive practical experience should help to minimize the risk of a successful challenge. A survey expert with experience in patent litigation can also play a key role in effectively presenting survey results at trial. In many cases, however, in-house and outside counsel must apply their knowledge of the survey goals, accused product, and product market to act as final checks on the work of their outside survey expert. Ensuring that counsel are familiar with these basic concepts of survey methodology will help to minimize the risk that consumer survey results will be successfully challenged, and will help to ensure that survey results can be presented with maximum effect.

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[1] *ResQNet.com v. Lansa*, 594 F.3d 860 (Fed. Cir. 2010)

[2] *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011) (citing *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010)).

[3] 35 U.S.C. § 284.

[4] *ResQNet.com, Inc.*, 594 F.3d at 869.

[5] *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831 (Fed. Cir. 2010).

[6] *Id.* at 855.

[7] *Id.* at 856-58.

[8] *Id.* at 856. The Federal Circuit noted that "[b]oth of i4i's experts . . . opined that the survey dramatically underestimated the amount of infringing use. Given the survey's conservative assumptions, the district court did not abuse its discretion in admitting the survey. Further, the survey was properly admitted over Microsoft's hearsay objection under Fed. R. Evid. 703, since the survey was used to estimate the amount of infringing use, a key number in i4i's damage calculation. Given the survey's importance, evidence about its methodology and findings could certainly help the jury evaluate the expert testimony." *Id.*

[9] *Uniloc USA, Inc.*, 632 F.3d at 1318.

[10] *Cornell Univ. v. Hewlett-Packard Co.*, 609 F.Supp.2d 279 (N.D.N.Y. Mar. 2009).

[11] *Id.* at 288.

[12] *IP Innovation v. Red Hat*, 705 F.Supp.2d 687 (E.D. Tex. Mar. 2010).

[13] *Id.* at 690.

[14] *Id.*

[15] *Id.*

[16] *Schindler Elevator Corp. v. Otis Elevator Co.*, No. 06-CV-05377, Rulings on Motions in Limine at 4-7 (S.D.N.Y. June 23, 2011).

[17] *Id.* at 5-6.

[18] *Id.* at 5.

[19] *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327-28 (Fed. Cir. 2009).

[20] *Id.* at 1333-34.

[21] *Id.* at 1334-35. As discussed above, depending upon the specific damage theory asserted, these issues could also be relevant to determination of an appropriate reasonable royalty base.

[22] *Fractus, SA. v. Samsung Elecs. Co.*, No. 09-CV-00203, Order at 1 (E.D. Tex. Apr. 29, 2011).

[23] *Id.* at 2.

[24] *Id.*

[25] *Lucent Techs., Inc. v. Microsoft Corp.*, No. 07-CV-02000, Declaration of E. Deborah Jay, Ph.D. (S.D. Cal. Dec. 13, 2010).

[26] *Lucent Techs., Inc. v. Microsoft Corp.*, No. 07-CV-02000, Lucent's Opposition to Microsoft's Pre-Verdict Motion for Judgment as a Matter of Law at 5-7 (S.D. Cal. Jul. 27, 2011).

[27] *Id.*

[28] *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 123 (4th Cir. 2011).

[29] *Id.*

[30] *Id.* (citing 6 McCarthy on Trademark, § 32:170).

[31] *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001).

[32] *The Braun Corp. v. Vantage Mobility Int'l, LLC*, No. 06-CV-00050, 2010 BL 317293 (N.D. Ind. Jun. 21, 2010).

[33] *Id.* at *21.

[34] *Lear Auto. Dearborn, Inc. v. Johnson Controls, Inc.*, No. 04-CV-07346, 2011 BL 30230 (E.D. Mich. Feb. 7, 2011)

[35] *Id.* at *23.

[36] *Id.* at *25.

[37] *Fractus, SA. v. Samsung Elecs. Co.*, No. 09-CV-00203, Order at 1 (E.D. Tex. Apr. 29, 2011).

[38] *LaserDynamics, Inc. v. Quanta Computer, Inc.*, No. 06-CV-00348, 2011 BL 275489 (E.D. Tex. Jan. 7, 2011).

[39] *Hodgdon Powder Co. v. Alliant Techsystems*, 512 F.Supp.2d 1178, 1181-82 (D. Kan. 2007),

[40] *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 517-18 (6th Cir. 2007).

[41] *Id.* at 518.

[42] *Id.* at 518-519.

[43] *U.S. v. S. Ind. Gas & Elec. Co.*, 258 F.Supp.2d 884, 895 (S.D. Ind. 2003).

[44] *Id.*

[45] *Id.* at 894.

[46] *Id.*