International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

Beyond Judicial Intuition: Consumer Perception Surveys as Evidence in Indian Trademark Law- A Comparative Study of the United States and India

Urvashi Maan[1], Dr. Pushpanjali Sood[2]

[1]LLM Student, Masters of Law, University Institute of Law, Chandigarh University, Mohali, Punjab, India
[2]Associate Professor, University Institute of Law, Chandigarh University, Mohali, Punjab, India

Abstract
The focus of trademark law is on consumer understanding and recognition of signs in the marketplace. Judicial tests and documentary evidence are generally used to assess deceptive similarity, distinctiveness and reputation in India, which may not necessarily be the same as what is perceived by consumers. This paper discusses the sparse application of consumer surveys in Indian trademark matters and compares the same with consumer surveys adopted in the Lanham Act in United States, especially Teflon and Eveready format. It suggests that consumer surveys are not mandatory, but can be helpful in consumer understanding disputes. The paper also points out some of the practical difficulties of their application in India and suggests a balanced approach to make surveys reliable, neutral and pertinent to the issues before the court.

Keywords: consumer perception; survey evidence; likelihood of confusion; well-known trademarks; Teflon survey; Eveready survey; Trade Marks Act, 1999.

1. Introduction

Trademark law protects more than words, logos or packaging as abstract objects. Its normative justification lies substantially in the relationship between a sign and the commercial source that consumers understand it to indicate. A mark may be distinctive because consumers associate it with one undertaking; a similar mark may be objectionable because it is likely to confuse consumers; and a reputed mark may attract protection because recognition extends beyond the goods for which it is registered. Each proposition is ultimately about marketplace perception. The evidentiary question is therefore unavoidable: how should a court determine what consumers perceive?[1]

Indian courts have developed durable doctrinal tools, including the test of an average person of imperfect recollection, comparison of marks as a whole, consideration of the nature of goods and purchasers, and assessment of surrounding circumstances. In *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd*., the Supreme Court emphasised a multifactor approach to deceptive similarity, especially where medicinal products are concerned. These principles sensibly resist a purely mechanical comparison of marks.

[1] The Trade Marks Act, 1999 (Act 47 of 1999), ss. 2(1) (z g), 11, 29.

Nevertheless, the court's legally constructed consumer remains a hypothetical figure. In a case where the decisive issue is whether consumers recognise a term as a brand, associate a sign with a particular source, or infer commercial affiliation from similar branding, direct empirical evidence may help test assumptions made in litigation.[2]

The United States offers a useful comparative lens. The Lanham Act expressly addresses likelihood of confusion and dilution, while American courts have developed survey formats suited to recurring questions. The Teflon survey is commonly associated with distinguishing brand names from generic product names. The Eveready format is used to investigate whether consumers encountering a challenged mark are likely to assume an association with the senior mark's owner. These are not statutory tests, nor are they universally appropriate. They are evidentiary techniques shaped by case law and expert practice.

This paper does not claim that Indian courts never consider consumer evidence, nor that survey evidence is automatically superior to judicial evaluation. Its narrower argument is that Indian trademark litigation would benefit from clearer principles for deciding when empirical perception evidence is useful, how it should be tested, and what weight it should receive. The absence of a settled framework risks two opposite errors: treating intuition as a sufficient substitute for evidence, or treating a survey percentage as if it mechanically determines a legal conclusion.[3]

2. Research Questions and Methodology

The paper asks three questions. First, how do Indian trademark doctrines translate consumer perception into legal findings? Second, what do the Teflon and Eveready approaches reveal about the use and limits of surveys in the United States? Third, what safeguards could help Indian courts assess survey evidence without importing foreign procedure wholesale?

The research adopts a doctrinal and comparative methodology. It analyses statutory provisions, selected Indian and United States decisions, and scholarship on trademark surveys and consumer cognition. It is not an empirical audit of all Indian trademark judgments. Accordingly, statements about the relative visibility of survey evidence are framed as a doctrinal observation rather than a quantified claim about the entire case law. The comparison is functional: it considers what each system asks evidence to prove and how the reliability of that evidence can be evaluated.

3. Indian Trademark Law and the Consumer-Perception Problem

The Trade Marks Act, 1999 provides several settings in which perception matters. Section 11 addresses relative grounds for refusal, including likelihood of confusion or association with an earlier mark. Section 29 governs infringement and includes circumstances in which use of an identical or similar mark is likely to cause confusion or association. Section 2(1)(zg) defines a "well-known trade mark" by reference to recognition among a substantial segment of the relevant public. These provisions do not prescribe consumer surveys as a mandatory form of proof. They leave courts to assess the totality of relevant circumstances.[4]

The Supreme Court's decisions illustrate both the strength and the limitations of this approach. In Amritdhara Pharmacy v. Satya Deo Gupta, the Court assessed the marks from the perspective of an ordinary purchaser with imperfect recollection. In Cadila, the Court identified relevant considerations such

[2] *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, (2001) 5 SCC 73.
[3] *Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd.*, (2018) 2 SCC 1.
[4] *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366 (7th Cir. 1976).

as the nature of the marks, the nature of the goods, the class of purchasers, the mode of purchase and surrounding circumstances. The test is contextual rather than purely visual. In *Satyam Infoway Ltd. v. Sifynet Solutions (P) Ltd*., the Court recognised the role of goodwill and confusion in passing off involving internet domain names. These cases establish that the consumer's likely understanding is central, but they do not create a general protocol for empirical proof of that understanding.[5]

The same problem appears in claims of reputation and well-known status. In Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd., the Supreme Court stressed the need for evidence of reputation in India at the relevant time and declined to treat global recognition as automatically establishing the requisite domestic goodwill. The decision illustrates an important evidentiary principle: fame is not simply asserted; it must be demonstrated in the legally relevant market and period. Sales, advertising, media coverage and distribution data can be highly probative, but they are indirect indicators of recognition. They may show exposure without necessarily proving that consumers recognise a mark as indicating a single source.[6]

The Indian framework is not inherently hostile to empirical evidence. The difficulty is that courts do not operate under a well-developed, widely articulated set of standards for survey design, admissibility, disclosure or weight. A court may accept that consumer perception is the legal issue yet resolve it primarily through judicial comparison, commercial documents and inferences from the parties' conduct. Such evidence may be entirely adequate in obvious cases. In borderline cases, however, it may leave a gap between the legal question and the proof offered.7

Judicial intuition should not be caricatured as personal whim. Judges bring experience of language, commerce and ordinary purchasing behaviour, and legal tests necessarily require evaluative judgment. But intuition has limits. A judge's own familiarity with a brand, urban consumer experience or linguistic background may not represent the relevant purchasing public. The problem becomes more acute where consumers are regionally diverse, goods are purchased online, marks appear in multiple scripts, or the market contains distinct groups with different levels of attention. Empirical evidence can expose these differences rather than erase them.[8]

4. United States Practice: The Lanham Act, Teflon and Eveready

Section 32 of the Lanham Act addresses infringement of registered marks, while section 43(a) addresses, among other matters, false designations and uses likely to cause confusion as to affiliation, connection, origin, sponsorship or approval. Section 43(c), as amended by the Trademark Dilution Revision Act of 2006, provides a federal cause of action for dilution of qualifying famous marks. The statutory framework does not make a particular survey format mandatory. Rather, surveys have become a recurring form of evidence because the legal issues frequently concern consumers' beliefs.[9]

The Teflon format is associated with *E.I. du Pont de Nemours & Co. v. Yoshida International*, Inc. The core question is whether respondents understand a term as a brand name or as the common name of a

[5] Barton Beebe, Roy Germano, Christopher Jon Sprigman and Joel H. Steckel, "Consumer Uncertainty in Trademark Law: An Experimental Investigation" 72 *Emory Law Journal* 489 (2023).
[6] Robert H. Thornburg, "Trademark Surveys: Development of Computer-Based Survey Methods" 4 *Journal of Marshall Review of Intellectual Property Law* 91 (2004).
7Kimberlee Weatherall, "The Consumer as the Empirical Measure of Trade Mark Law" 80 *Modern Law Review* 57–88 (2017).
[8] Aqa Raza and Ghayur Alam, "Theoretical Underpinnings of Trademark Law: Decisions of the Supreme Court of India" 27(5) *Journal of Intellectual Property Rights* 351–366 (2022).
[9] Eashan Ghosh, "What Should It Take To Be Well-Known? Fashioning An Evidence-For-Benefits Matrix for 'Well-Known Marks' Under Indian Trademark Law" 21(5–6) *Journal of Intellectual Property Rights* 327–336 (2016).

product category. A typical format first explains the difference between brand names and common names, tests whether respondents understand that distinction, and then asks them to classify the disputed term and suitable controls. It is especially relevant to genericness, which is conceptually different from likelihood of confusion. The method seeks to measure whether a term functions as a source identifier in the minds of the relevant public rather than merely naming the product.[10]

American practice also shows why survey evidence needs scrutiny. Surveys can be affected by the respondent universe, wording, order effects, the stimulus presented, interviewer influence, non-response, control selection and the treatment of ambiguous answers. A survey may produce a precise percentage while measuring the wrong construct. A high association rate, for example, does not necessarily establish legally actionable confusion if respondents merely recognise a common word or identify a broad product category. Conversely, a low measured rate may result from an unrealistic stimulus or an unrepresentative sample. Survey results are evidence, not verdicts.[11]

Recent scholarship has also questioned whether traditional formats adequately capture the strength of consumer belief. Beebe, Germano, Sprigman and Steckel's experimental study of Teflon, Eveready and Squirt formats argues that conventional designs may overlook the degree of certainty with which respondents hold a belief. This critique is significant for India: adoption should not mean importing a survey label and accepting the resulting number. A credible system must ask whether the method measures the legal question, whether uncertainty is disclosed, and whether the findings survive adversarial examination.[12]

5. Why Empirical Perception Tests Remain Underdeveloped in India

Several interacting factors help explain why consumer surveys have not become a routine or standardised feature of Indian trademark adjudication.[13]

First, doctrinal familiarity favours judicially administered tests. The "average consumer" and "imperfect recollection" formulations are embedded in Indian precedent and can be applied without specialist evidence. In urgent interim injunction proceedings, judges may be asked to decide on a limited record and may consider a survey impractical. The resulting preference for familiar methods is understandable, but familiarity should not be mistaken for empirical validation.

Second, survey design can be expensive. A properly conducted survey requires a defensible sample, trained fieldwork, a neutral questionnaire, control stimuli, transparent coding and expert interpretation. The cost may be disproportionate in disputes involving small enterprises or modest commercial stakes. If surveys are available only to well-resourced litigants, their introduction could deepen procedural inequality. A policy of routine mandatory surveys would therefore be undesirable.

Third, there is a risk of expert manipulation. A party selects the question, population, stimuli and analytical approach, and may have incentives to frame the survey in a favourable way. Courts may be wary of evidence that appears scientific but embeds assumptions in the questionnaire. That concern is real. However, the appropriate response is scrutiny and disclosure rather than categorical distrust. Other forms of commercial evidence are also generated by interested parties and must be assessed for reliability.

[10] Federal Rule of Evidence 702, United States, as amended effective December 1, 2023.
[11] The Trade Marks Rules, 2017, r. 124.
[12] *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, (2001) 5 SCC 73.
[13] *Amritdhara Pharmacy v. Satya Deo Gupta*, AIR 1963 SC 449.

Fourth, India's consumer markets are heterogeneous. Relevant purchasers may vary by language, geography, literacy, product price, purchasing channel and familiarity with the goods. A national sample may obscure a relevant regional market; an online panel may exclude consumers with limited internet access; and a survey in one language may fail to capture phonetic or semantic associations in another. Survey methodology must therefore be adapted to the market rather than borrowed unchanged from United States litigation.[14]

Fifth, reported judgments do not always explain in detail why a survey was absent, rejected or assigned little weight. Absence from a judgment does not prove that surveys were never tendered or considered. It does, however, make it difficult for practitioners to predict what courts would regard as adequate. A clearer jurisprudence on relevance, methodological reliability and probative weight would reduce uncertainty for litigants and judges.[15]

Finally, there is a conceptual danger in over-quantification. Likelihood of confusion is a legal conclusion informed by several factors, not merely a poll result. A survey cannot independently decide the relevant class of consumers, the legal significance of confusion, the balance of equities or the appropriate remedy. Empirical methods should inform judicial judgment, not replace it.

6. A Framework for Indian Courts

A workable Indian framework should be permissive, proportionate and transparent. It should not require a survey in every infringement, passing-off or well-known-mark dispute. Instead, courts should consider whether the central factual issue is one for which reliable consumer evidence is likely to add material value.[16]

6.1 Identify the proposition to be tested

The party relying on a survey should state precisely what proposition it addresses: genericness, acquired distinctiveness, source recognition, association, likelihood of confusion, or actual confusion. These are not interchangeable. A survey showing recognition of a brand does not automatically prove that the mark is well-known within the meaning of the statute, and a survey showing association does not necessarily establish confusion about commercial source.[17]

6.2 Define the relevant consumer universe

The sample should reflect the relevant purchasers or public for the goods or services in issue. The survey report should explain geography, age or other eligibility criteria where relevant, purchasing experience, sample size, recruitment method and limitations. The selection should be justified by the market evidence and the legal issue, not by convenience alone. Where different consumer groups matter, the expert should explain whether separate analysis is warranted.[18]

6.3 Use neutral questions and appropriate controls

Question wording should avoid suggesting the desired answer. Open-ended questions are often useful before prompted questions. Control questions or stimuli may help estimate background recognition and

[14] 15 U.S.C. § 1125(c)(2)(A) (2024).
[15] *E.I. du Pont de Nemours & Co. v. Yoshida International, Inc.*, 393 F. Supp. 502 (E.D.N.Y. 1975).
[16] Barton Beebe, Roy Germano, Christopher Jon Sprigman and Joel H. Steckel, "Consumer Uncertainty in Trademark Law: An Experimental Investigation" 72 *Emory Law Journal* 489 (2023).
[17] Robert H. Thornburg, "Trademark Surveys: Development of Computer-Based Survey Methods" 4 *Journal of Marshall Review of Intellectual Property Law* 91 (2004).
[18] Aqa Raza and Ghayur Alam, "Theoretical Underpinnings of Trademark Law: Decisions of the Supreme Court of India" 27(5*) Journal of Intellectual Property Rights* 351–366 (2022).

reduce the risk that respondents simply react to a familiar word or image. The report should explain why the chosen format is appropriate and why plausible alternatives were rejected. Teflon and Eveready should be treated as methodological options, not magic words that guarantee reliability.

6.4 Disclose methodology and uncertainty

The expert should disclose the questionnaire, instructions, stimuli, sampling procedure, field dates, coding rules, exclusions, raw or appropriately anonymised data, and analytical methods, subject to proportionate privacy safeguards. The report should identify margins of error where statistically meaningful, non-response and other limitations, and the possibility of alternative interpretations. As recent research on consumer uncertainty suggests, a finding that respondents selected an answer is not identical to proof that they hold a strong or behaviourally meaningful belief.

6.5 Permit adversarial testing

The opposing party should be able to challenge the survey's relevance and reliability, including through cross-examination where appropriate. Courts should distinguish methodological defects that undermine the survey's foundation from minor imperfections that affect weight. A survey should not be rejected merely because it is imperfect; nor should it be accepted merely because it is presented by an expert. The reasons for assigning weight should be stated in the judgment.

6.6 Keep the survey within its evidentiary role

A court should evaluate survey findings alongside the marks themselves, the goods or services, channels of trade, purchaser sophistication, price, evidence of actual confusion, intent where relevant, sales and advertising records, and the legal standard applicable to the claim. The result should not be determined by a numerical threshold imported from another jurisdiction. Different legal questions require different proof, and the significance of a percentage depends on the survey's design and context.

6.7 Make the approach proportionate

In a clear case of near identity involving closely related goods, a survey may add little. In a dispute over whether a common word has become distinctive, whether an unfamiliar mark has acquired recognition, or whether consumers infer sponsorship across product categories, it may add substantial value. Courts could use case-management directions to decide early whether survey evidence is necessary, set disclosure timelines and limit disproportionate expenditure. This approach would protect access to justice while improving the quality of evidence in cases where perception is genuinely contested.

7. Comparative Lessons and Cautions

The principal lesson from United States practice is institutional rather than merely technical. Surveys are useful when courts recognise the difference between a legal standard and the factual propositions that support it. Teflon illustrates that genericness requires evidence about how consumers classify a term. Eveready illustrates that confusion evidence must be designed around how consumers encounter the challenged mark. Both show the value of matching method to question.

India should not copy United States practice wholesale. The Lanham Act's statutory structure, litigation costs, expert-evidence practices and market conditions differ from India's. Indian courts must account for multilingual markets, varying literacy and purchasing habits, and the procedural realities of interim relief. Nor should survey evidence become a prerequisite for proving reputation or confusion. A claimant may establish a proposition through compelling documentary, testimonial or circumstantial evidence. The point is to create a reliable option where the dispute turns on consumer perception and existing evidence leaves genuine uncertainty.

A further caution comes from the scholarship on the empirical measure of trademark law. Consumer response is central to trademark doctrine, but law and social science do not always align neatly. Survey respondents answer questions in an artificial setting; real consumers encounter products with varying attention and commercial context. The survey instrument may also simplify a nuanced mental association into a binary response. Courts should therefore avoid both extremes: uncritical faith in numerical evidence and unexamined reliance on judicial intuition.

The most defensible approach is pluralistic. Courts should state the inference they are drawing from the evidence and distinguish direct evidence of perception from proxies such as advertising expenditure, sales volume, registrations or press coverage. These proxies remain important, but their limits should be acknowledged. A more explicit evidentiary framework would make judicial reasoning more transparent, help parties plan their cases and encourage higher-quality expert practice.

8. Conclusion

Consumer perception is not peripheral to trademark law; it is often the factual core of distinctiveness, confusion and reputation. Indian courts have developed sophisticated doctrinal tests to assess these questions, but doctrinal sophistication does not eliminate the potential value of empirical evidence. The United States Teflon and Eveready formats demonstrate how surveys can be tailored to distinct questions, while the controversies surrounding survey methodology demonstrate why results must be critically examined.

The reform proposed here is modest. Indian courts should not be directed to rely on surveys in every case, and no percentage should automatically determine infringement or well-known status. Instead, courts should develop a transparent, proportionate framework for relevance, survey design, disclosure, challenge and weight. Parties should identify the proposition being tested, justify the consumer universe and method, disclose limitations and make the survey available for adversarial scrutiny. Judges should assess the findings with all other evidence and explain the role the survey played in the ultimate legal conclusion.

This approach would not replace judicial intuition; it would discipline it. Where intuition is sound, empirical evidence may corroborate it. Where assumptions about consumers are uncertain, reliable surveys may test them. The objective is not to turn trademark litigation into a contest of percentages, but to ensure that conclusions about consumers are supported, as far as practicable, by evidence about consumers themselves.