

**Judge, Juror and Arbitrator
Perceptions
In
Trademark Cases**



**By
Richard Waites, J.D., Ph.D.
Jim Emshoff, Ph.D.**

The Advocates

Jury Consultants and Trial Consultants

www.theadvocates.com

Judge, Juror and Arbitrator Perceptions in Trademark Cases

By
Dr. Richard Waites
Attorney* and Chief Trial Psychologist

Dr. Jim Emshoff
Senior Trial Consultant

“ Jurors are uniquely qualified to say whether two trademarks are similar and whether the allegedly infringing trademark causes confusion for people about the plaintiff's trademark.”

“Make it a life-rule to give your best to whatever passes through your hands. Stamp it with your manhood. Let superiority be your trademark...”



Orison Swett Marden (1850-1924)
Founder of Success Magazine

Intellectual property cases offer challenges to trial attorneys. The stakes are high for their clients and there is a great deal of pressure to win the case. Business people are at the heart of the internal decision-making process and they tend to be risk averse. Faced with high stakes, risk averse clients, and decisions that may ultimately be made by a disinterested judge, jury or arbitration panel, intellectual property attorneys are constantly looking for ways to outperform the opposition and gain the most powerful advantage in the courtroom.

Intellectual Property Trials Generally

Experienced intellectual property trial lawyers have learned that the trial team must work its way through the mountain of complexities in the case only to find themselves faced with ways to simplify the case and persuade a judge and jury. An example is the relatively simple case of a copyright infringement claim brought against the Baltimore Ravens by a fan, who was a security guard named Bouchat.

* Board Certified – Civil Trial.

Bouchat had designed a suggested logo with a raven holding a shield and faxed it to the team's home office. Shortly thereafter, the team revealed its new logo which looked "strikingly similar" to the one that Bouchat had sent in. However, the Ravens disputed that they had used his design idea.

The case proceeded to a jury trial after the trial judge ruled that there was sufficient evidence to raise a fact issue. Many months of intense legal research and technical study ensued in which the opposing trial teams fought over every legal and technical detail they discovered. In the end, however, a jury decided that the case was simple. After looking at the timing of events and the similarity of the design, the jury decided that someone with the Ravens' organization had, indeed, copied Bouchat's design.

Whether a case involves unauthorized disclosure of trade secrets, antitrust violations, copyright or patent infringement, unlawful use of trademarks, or any other type of intellectual property claim, most jurors work hard to try to understand the details. However, jurors' greatest interest lies in the simple human story that is at the center of every controversy. They want to know and understand the meaning that is at the core of the case. As has often been stated, "Inside every complex case is a simple story struggling to get out."

Trademark Infringement Cases

In trademark infringement cases, the issues for a jury are fairly straightforward. Jurors are uniquely qualified to say whether two trademarks are similar and whether the allegedly

infringing trademark causes confusion for people about the plaintiff's trademark. After all, in most cases, they are the ultimate consumer.

However, as you know from our previous discussions about jury decision making, everything is evidence. Jurors make decisions about who they believe and who they like which affect how they filter the evidence. If they believe, for example, that the plaintiff trademark holder is trying to gain a competitive advantage over a small start-up company without justification, they will make decisions which they feel are fair and equitable. On the other hand, they are sophisticated enough to know when a defendant is trying to be a parasite and create income for itself based upon the plaintiff's good reputation in the marketplace. They intuitively know when a defendant is trying to cause delivery confusion in order to siphon off some of the plaintiff's business.

During the trial, jurors are working hard to identify good and bad character as well as good and bad behavior. Therefore, framing the issues is critical at trial.

The issue of whether to conduct public surveys to determine whether there might be confusion (or lack of it) in the use of a trademark is often an academic exercise which is the subject of pretrial disputes. However, when it comes to the consideration of evidence at trial by decision makers, judges, jurors and arbitrators have a natural curiosity about what other people think. Many times they will confuse their own perceptions with those of other people, but on the whole courtroom decision makers and arbitrators want as much evidence as they can get to help them arrive at a decision that makes them feel comfortable.

Simplifying the Case

Perhaps the greatest challenge for any intellectual property lawyer is to find a way to simplify the case for the judge, jury or arbitration panel. All courtroom decision makers, no matter how educated and sophisticated they are, believe that at the heart of every complex situation is a simple story waiting to be discovered.

They believe that the meaning of the case, its essence, lies in the human story at the core of the case. They are willing to undergo the mental gyrations necessary to learn the technical details, but they are focused on the core of truth in the case, rather than the facts.

Your chances of success will be enhanced when you utilize simple persuasive tools to help judges, jurors and arbitrators learn the necessary details more easily, while at the same time not losing sight of the essential themes and story of the case.

There are many visual tools and storytelling techniques that will make learning about the case easier for the fact finders and, yet, also promote a persuasive story presentation.

About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

Dr. Jim Emshoff has taught university level psychology for many years and is a senior **trial consultant** with **The Advocates**.

The Advocates' clients include major law firms and corporations all over the United States (www.theadvocates.com).

The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The trial consultants and jury consultants with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [*Courtroom Psychology and Trial Advocacy*](#), published by American Lawyer Media.

For questions about the subject of this article, the authors can be reached by email at rwaites@theadvocates.com or jemshoff@theadvocates.com or toll-free at 1.877.621.1098.

THE ADVOCATES
TRIAL & ADVOCACY SCIENCES