
How To Interpret A Contract?

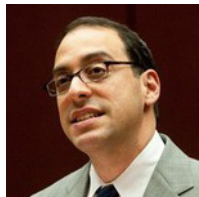
Ask Those Who'd Sign It

by Omri Ben-Shahar, Lior Strahilevitz, Duo Jiang, Kristina Shampanier and Rebecca Kirk Fair

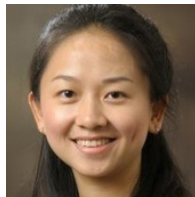
Law360 (March 21, 2018, 12:14 PM EDT)



Omri Ben-Shahar



Lior Strahilevitz



Duo Jiang



Kristina Shampanier



Rebecca Kirk Fair

Surveys have become an accepted method of evaluating consumer perceptions in a wide range of cases. However, when it comes to interpreting contracts, it is often the judge or jury who are tasked with interpreting the text.

For example, a California appellate panel recently disagreed with the lower court's interpretation of a contract between Los Angeles County Metropolitan Transit Authority and a contractor, reversing a \$93 million judgment. Judges and juries interpret contract clauses based on their view of a contract's plain meaning, precedents construing similar language, interpretive canons and perhaps common sense or extrinsic evidence. But courts generally do not have the benefit of survey evidence, which could inform judges what ordinary consumers who read the contract understand it to mean.

In a newly published article in *New York University Law Review*, two of us have proposed an alternative approach.¹ We suggest surveying consumers similar to those bound by the contract in question to determine which meaning of a disputed term is embraced by a clear majority. If no clear winner emerges, the term at issue would be considered ambiguous.

Using the techniques that experts already employ in trademark, false advertising, patent and other litigation — such as large sample sizes, control groups and random variations in the prompts that respondents see — allows researchers to determine

whether phrasing the term in different ways might have altered the consensus consumer interpretation. The same approach could also help draft unambiguous contracts and pretest them to avoid potential lawsuits.

Rationales for Using Surveys in Contract Disputes

Recent high-profile patent litigation involving Apple Inc. and Samsung Electronics Co. Ltd. relied heavily upon surveys to provide evidence concerning the drivers of consumer demand.² In unfair competition cases, surveys are often employed to evaluate the extent, if any, of consumer confusion driven by the advertised claims at issue.³

Indeed, surveys are such an essential type of evidence that failure to conduct them properly may be fatal to a claimant's case. Recently, a new trial was ordered in the Black & Decker \$54 million trade dress infringement case due to deeply flawed survey evidence.⁴

Similarly, rigorously-designed surveys could provide a scientifically sound resolution to contract disputes by determining how relevant agents understand the contract's language:

- First, survey evidence can best accomplish the goal of contract interpretation — to align the legal interpretation with the meaning that the intended audience of the contract assigns to it. Consumer, employment and insurance contracts are often written for laypeople, not experts, and their interpretation is supposed to reflect a lay understanding. A commercial contract, in contrast, is written for merchants; its interpretation intends to uncover the sector meaning, sometimes traced by merchants' testimonies. By surveying disinterested individuals who are similar to the intended audience of the contract at issue, we are able to get closer to solving interpretation disputes in an unbiased manner.
- Second, survey evidence can provide reliable results based on large representative samples. It is already widely accepted in interpreting precontractual statements such as advertised messages and descriptions of products. It should be equally reliable in interpreting contractual communications — namely, the promises made in the contract.
- Third, survey evidence can absolve the court from the agonizing law/fact dichotomy that besets contract interpretation doctrine. In consumer contracts, for instance, courts will no longer need to speculate about how consumers understand the relevant language, but would instead rely on reliable results based on large representative samples.

Three Examples of Survey Use in Contract Interpretations

The following examples illustrate how surveys could help with contract interpretation.⁵ By comparing and contrasting survey results with court decisions, we aim to show the advantages of surveys over traditional methods that are currently used by many courts.

Gmail/Yahoo privacy policies: Survey brings clarity to two contradictory court decisions

In *re* Google Inc. Gmail Litigation and *In re* Yahoo Mail Litigation, Google Inc. and Yahoo! Inc. were sued, in the same district court, over their practices of automatically scanning the contents of users' emails to show them personalized ads.⁶ The same judge found that the Yahoo policy put users on notice, but that the Gmail policy did not.

That might have been a sensible conclusion based on a review of the two different sets of text. Yet a subsequent survey/experiment conducted for academic purposes found no difference in consumer perception of the key portions of the two policies.⁷

In the study, respondents who were randomly assigned to the "Gmail group" read the following text, adapted from the Gmail privacy policy: "[email provider] reserves the right to prescreen, review, flag, filter, modify, refuse or remove any or all content from any service. For some services, [email provider] may provide tools to filter out explicit sexual content."

Respondents randomly assigned to the "Yahoo group" encountered the text, adapted from the Yahoo privacy policy: "[email provider's] automated systems analyze your content (including emails) to provide you personally relevant product features, such as customized search results, tailored advertising and spam and malware detection."

Respondents were asked to evaluate whether the policy permitted automated monitoring of the content of emails for the purpose of showing consumers personalized advertisements. Both groups of respondents thought that, while the email monitoring practices were intrusive, the policies did disclose that the email provider was performing content analysis to display personalized ads — by wide margins.

Reactions to the differing texts were not statistically significantly different between the two groups, even among respondents who read policy language carefully. Thus, while the judge found that one of these policies was ambiguous and the other was not, in fact, they were equally unambiguous based on a representative sample of email users nationwide.

Homeowner's insurance: Surveys at drafting stage may help avoid subsequent litigation

In *State Farm Fire & Casualty Co. v. Moore*, Rebecca Moore's neighbors paid her to care for their son at her house. When the child was injured accidentally while Moore was preparing a meal for both the boy and Moore's own child, the parents of the injured boy sued her.⁸

Moore asked State Farm to cover her under her homeowners' insurance policy, but State Farm refused, based on the policy's business pursuits exclusion. That clause stated that "[t]his policy does not apply to bodily injury or property damage arising out of business pursuits of any insured except activities therein which are ordinarily incident to nonbusiness pursuits." The trial court in Illinois granted summary judgment in State Farm's favor but the appellate court reversed it. The policy exclusion clause was the focus of this litigation and the courts disagreed over its meaning.

In a survey, respondents were randomly assigned to read either the original version of the policy clause or a shortened version designed to reduce ambiguity: "This policy does not apply to bodily injury arising out of business pursuits of the homeowner." 47

percent of respondents who read the original policy believed that the injury was not covered and 34 percent believed that it was. To the extent these results represent too small a majority to override the interpretation-against-the-drafter rule, the insurance company rightfully lost. But the survey also showed that 58 percent of respondents who read the shortened policy favored the insurer's no-coverage position, compared with 28 percent who sided with the policyholder.

Therefore, had State Farm followed our suggested approach — conducting a similar survey when drafting the insurance policy and then adopting simpler text based on the results — it might have won its subsequent case.

Aviation insurance policy: Survey supports appellate court's decision

In *Vargas v. Insurance Company of North America*,⁹ an airplane crash occurred in international waters as the plane was flying from New York to Puerto Rico. The key question was whether the crash should be covered by insurance that applied “only to occurrences, accidents or losses which happen ... within the United States of America, its territories or possessions, Canada or Mexico.” The trial court ruled that the crash would not be covered, but the Second Circuit reversed that decision.

In a survey of 1,000 respondents, 51 percent believed that the crash was “probably” or “definitely” not covered, while only 26 percent believed that the crash was “probably” or “definitely” covered. The insurer's interpretation was a clear majority winner, supporting the decision of the trial court. If such evidence had been presented, the Second Circuit might not have reversed.

Conclusion

Surveys and related methods are revolutionizing many social and economic institutions — from product ratings to Facebook “likes” and from classroom instruction to litigation evidence presented. It is time to introduce surveys to contract disputes as well and to move modern contract law in this promising direction.

Omri Ben-Shahar is the Leo and Eileen Herzel Professor of Law and the Kearney Director of the Coase-Sandor Institute for Law and Economics at The University of Chicago. Lior Strahilevitz is the Sidley Austin Professor of Law at The University of Chicago. Duo Jiang is an associate in Analysis Group's Washington, D.C. office. Kristina Shampanier is a vice president in Analysis Group's Boston office. Rebecca Kirk Fair is a managing principal in Analysis Group's Boston office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Endnotes

- 1 Ben-Shahar, Omri and Lior Jacob Strahilevitz. "Interpreting Contracts via Surveys and Experiments." *NYU Law Review* 92, No.6 (2017): 1753–1827. Available at: <http://ssrn.com/abstract=2905873> or <http://dx.doi.org/10.2139/ssrn.2905873>.
- 2 Isaacson, Bruce. "Apple v. Samsung: The Next Round of Survey Evidence." MMR Strategy Group, May 12, 2014. Available at: <http://mmrstrategy.com/apple-v-samsung-the-next-round-of-survey-evidence-2/>.
- 3 See, e.g., *Aviva Sports Inc. v. Fingerhut Direct Marketing Inc.*, 829 F. Supp. 2d 802 (D. Minn. 2011); *Millennium Laboratories Inc. v. Ameritox Ltd.*, 924 F. Supp. 2d 594 (D. Md. 2013).
- 4 McCarthy, J. Thomas. *McCarthy on Trademarks and Unfair Competition*, 4th edition (Thomson Reuters, 2016), § 32:195 ("plaintiff's failure to present a consumer survey creates the perception that it is 'less than deadly serious about [] its case'"); Edelman, Sandra. "Failure to Conduct a Survey in Trademark Infringement Cases: A Critique of the Adverse Inference." *Trademark Rep.* 90 (2000): 746, at 747 ("survey evidence has become de rigueur in trademark infringement cases"; "many courts will draw an adverse inference against a plaintiff ... if a survey is not introduced"); Dalton, Joshua M. and Ilisa Horowitz. "Funny When You Think About It: Double Entendres and Trademark Protectibility." *Journal of the Patent and Trademark Office Society* 88 (2006): 649, at 652 ("surveys are 'all but indispensable' in trademark litigation"); *Vision Sports Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989) ("An expert survey of purchasers can provide the most persuasive evidence of secondary meaning").
- 5 Our NYU Law Review article provides several more instructive cases and experiments.
- 6 *In re Google Inc. Gmail Litigation*, Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Case No. 13-MD-02430-LHK, Sep. 26, 2013, available at 2013 WL 5423918; *In re Yahoo Mail Litigation*, 7 F. Supp.3d 1016 (N.D. Cal. 2014).
- 7 Strahilevitz, Lior Jacob and Kugler, Matthew B. "Is Privacy Policy Language Irrelevant to Consumers?." *The Journal of Legal Studies* 45, No. S2 (2016): S69–S95. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838449.
- 8 *State Farm Fire & Casualty Co. v. Moore*, 430 N.E.2d 641 (Ill. App. 1981).
- 9 *Vargas v. Insurance Co. of North America*, 651 F.2d 838 (2nd Cir. 1981).

All content © 2003 – 2018, Portfolio Media, Inc.