# PS XI: Surveying the Field

# A Gold Standard for Survey Evidence

## Tuesday September 25, 4 p.m.

*With thanks to Anne Marie Verschuur, Nicole Walder and*

*AIPPI organizing team*

# Invited panel members

**Dr. Ruth M. Corbin, CorbinPartners Inc. and Osgoode Hall Law School** (Moderator)

**Justice Henry Carr, UK High Court, United Kingdom**

**Judge Li Jian, Supreme People's Court of China, China,**

**Mr. Ricardo Nunes Ferreira, EUIPO, Spain**

**Dr. Almut Pflüger, Pflüger Rechtsforschung, Germany**

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# Panel Challenges – enhanced by your questions and input

1. Meaning, feasibility of a "gold standard" for AIPPI advancement?

2. Components of a Gold Standard?

3. Are representative samples even achievable?  Time to complement surveys with other methods?

4. Percentage threshholds for confusion? reputation? distinctiveness?

5. ADR for expert disputes (mediated hot-tubbing)?

6. Judges and experts getting along

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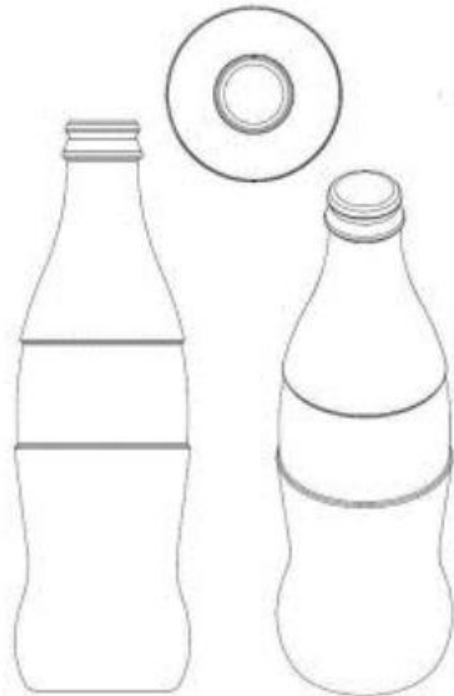
# e.g. Coca Cola

# e.g. Nivea

# e.g. Enterprise vs Europcar

# Basic First Question

***Is there a well-defined "gold standard" criterion for guidance to experts and use by judges? Is it feasible for AIPPI to envision a "gold standard" resolution?***

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# Question 2 - Brass Tacks for a Gold Standard

***What are the most important do's and don't's for preparation and presentation of survey evidence?***

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## Almut Pflüger on Do's and Don't's of Survey Research

1. Appropriate survey method (face to face? telephone? Internet? mail?)

2. Correctly defined universe or relevant public (how narrow can it be?)

3. Representative sample (how feasible?)

4. Sufficient sample size

5. Coherent unbiased questionnaire

6. Independent, well-reputed research institute quality interviewing

# Question 3 - Getting real about representative samples

*People aren't answering phones, some people don't shop in shopping malls, paid volunteers comprise Internet panels. How should these limitations be addressed? Is it time to complement surveys with other evidence?*

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# Question 4 - How much is enough?

*What percentage confusion is sufficient to prove confusion?   What percentage reputation is sufficient to establish reputation in passing off cases?  What percentage distinctiveness is sufficient to overcome genericism?*

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# Question 5  -   Is the truth always the truth?

*Can a gold standard exist when experts disagree*

*so vehemently about opposing evidence?*

*Should expert disagreements be reduced by ADR*

*outside the courtroom?*

# Question 6 - On the fragile relationship between judges and experts

*Experts and judges are both represented on the panel. What has been your greatest frustration in dealing with each other?*

## Leading Edge Issues and Published Analysis (Corbin)

*Masterpiece* shock-waves: Scientific surveys or judicial discretion?  (*Admiral Nelson* restores normalcy)

Tripartite test for survey evidence

"The Moron in a Hurry:   a Creature of Law or Science?" in *Annual Review of Civil Litigation,* 2015

Definition of "average consumer"
*(*reference *supra)*

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# Leading Edge Issues and Published Analysis, cont'd

- Debated expert objectivity

"Breaking the Expert Evidence Logjam:   Experts weigh in", *Annual Review of Civil Litigation,* Editors:  Justices Archibald and Scott,  Toronto:  Carswell, September 2016

- Expert hot-tubbing:  keeping bun-fights out of court

"The Hot-tub Alternative to Adversarial Expert Evidence," *Advocates Journal*, Spring 2014

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# Your questions and input

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# *Panel wrap-up:  Advice for AIPPI resolution*

# Thanks for your interest!