

# Legal Research: A Credentials Overview

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# 1. The case for survey research

Counterfeiting and passing off have long been a fact of marketing life in Asia. Companies and brands are, however, stepping up efforts to protect their intellectual property (IP) rights. Many are going to court to seek injunctions and damages against those that are thought to be ignoring those rights.

Another trend has been the use of survey research evidence in cases to reliably assess elements such as “good will” (what marketers would call “brand equity”) and the extent of confusion — aspects that were once argued in court without the benefit of independent survey research data.

**Asian Strategies has been involved in several legal cases as expert witnesses and witnesses of fact. So far, we have enjoyed an excellent record of judgments or settlements in our clients’ (both complainants and defendants) favour.**

We have done this by designing and delivering compelling survey research that is robust enough to stand trial in a court of law. We have also demonstrated in court the flaws in the opposing party’s survey methodology.

**Our particular expertise is in conducting surveys on behalf of law firms whose clients are involved in “passing off” cases.** This usually involves us proving the likelihood of confusion in the production and marketing of a product. Pages 8-9 contain some examples of cases we worked on in the past.



## 1.1 Choosing a research partner

Courts in Asia are now ruling on more IP and trademark related cases and research is bound to become more widely used. In spite of this, many research agencies are reluctant to become involved. This could be for fear of offending potential clients by being seen to take sides. Some international research agencies have a policy of not getting involved for this reason.

Far more likely, however, is because they find the courtroom to be an intimidating and unfamiliar arena. Researchers are far more comfortable in a collaborative client-agency environment, not in a High Court where opposing lawyers are vociferously attacking the integrity of the researcher and his/her data and conclusions. **Legal research has to be meticulously planned, rigorously executed and clearly presented.** Many researchers are uncomfortable — and unfamiliar — with such high levels of scrutiny, especially when their audiences are usually marketing executives, not judges.

### Getting it wrong in court

Judges are tough critics of shoddy or biased research. In Malaysia in 2008, a survey was rejected in a passing-off case (Sanbos (Malaysia) Sdn Bhd- vs -Tiong Mak Liquor Trading (M) Sdn Bhd). The survey research report was deemed to be of no probative value because:

- The research methodology and full results were not fully disclosed
- The questions were considered leading
- Some questions asked participants to speculate in areas in which they were not qualified
- The instructions to interviewers were not published, and so on...

In other words, many researchers are not cut out for legal research. Questionnaire design, sampling, interviewing, validation, data processing, analysis and reporting have to be done to a standard of execution and record-keeping far higher than is expected in commercial research (where compromises are often made for reasons of budget and timing). For legal cases, textbook research design rules. Commercial clients may not generally care much about universes, sampling frames, response rates and sampling error calculations, but legal professionals do.

**Legal research is a highly specialised field that does not sit well with many mainstream research agencies.** Asian Strategies is not a mainstream research agency, and legal research is a niche in which we have a lot of experience and success.





## 2. Conducting survey research in legal cases

Legal research demands rigour and awareness from its practitioners. Failure to meet the necessary standards can result in rejection of the data and conclusions, and embarrassment for both client and researcher.

In 1984 the High Court of Malaya, quoting a British precedent – *Imperial Group Plc v Philip Morris Ltd* [1984] R.P.C 293 – held that the following guidelines must be followed before market survey evidence is admissible:

1. The interviewees must be selected so as to represent a relevant cross-section of the public
2. The size must be statistically significant
3. The survey must be conducted fairly
4. All the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved
5. The totality of answers given must be disclosed and made available to the defendant
6. The questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put
7. The exact answers and not some abbreviated form must be recorded
8. The instructions to the interviewers as to how to carry out the survey must be disclosed, and where the answers are coded for computer input, the coding instructions must be disclosed.

All these principles are enshrined in the Code of Conduct of the Market Research Society (Singapore), but are often neglected in the process of conducting customary commercial research. Reports to be used as affidavits in court must not only meet the highest standards of research, but must also have all the necessary evidence to demonstrate it. **We know this, because we have done it before.**

## 2.1 Research process and considerations

When conducting legal research, there is a clear standard to which researchers must adhere. This has proven to be the standard that is most likely to stand up in court, and is something that we have championed over the years (see section 3.1). Specifically:

- **Methodology:** invariably ‘quantitative’ research is required. In court, numbers count for more than ‘qualitative’ feelings. Intercept surveying is typically used, often covering a range of locations to demonstrate representativeness. All efforts must be taken to avoid any biases (or, for that matter, any features that may be open to question or attack by prosecuting lawyers)
- **Sampling:** typically quota samples of defined populations are used, appropriate to the product in question. N=400 interview samples are the norm
- **Questionnaire design:** experience has revealed that courts find difficulty with anything other than the most straightforward approaches; this applies in particular to questionnaire design. The standard approach is:
  - To use clear pictures of the items under question
  - To keep questions short, not leading, and unambiguously clear (e.g. Do you know what this is a picture of? Who would manufacture it? Are you aware of any other products like this?)
  - Questions should reflect the issues of the case and the multi-factor test guidelines
  - Capturing of detailed demographic data is important in order to verify a sample’s representativeness
  - The questionnaire should allow space for verbatims, or “word-of-mouth” support for statistics
- **Documentation:** all aspects of the survey must be documented as scientific support for the data. This includes research objectives, briefing instructions, sampling plan, fieldwork directions, the questionnaire rationale, supervisor and interviewer debriefing, and data processing procedures
- **Analysis:** conclusions should be presented in a simple and easily understood way, and should be supported by tables and charts where necessary. Data must display statistical validity, with error margins and confidence limits demonstrated. Expert conclusions need to be drawn, from a professional market researcher’s viewpoint, and analysis must express an “expert witness” character



**Shari Seidman Diamond** is the Howard J. Trienens Professor of Law and a research professor at the American Bar Foundation.

An attorney and social psychologist, she is one of the foremost empirical researchers on jury process and legal decision-making, including the use of science by the courts. She has authored or co-authored more than a hundred publications in law reviews and behavioural science journals.

For more information, see Shari Seidman Diamond’s (2011) “Reference Guide on Survey Research” in the Reference Manual on Scientific Evidence, pp. 225-271.





## 3. Why choose Asian Strategies?

Asian Strategies has been involved in several legal cases as expert witnesses and witnesses of fact. So far, we have enjoyed an excellent record of judgments or settlements in our clients' (both complainants and defendants) favour. We have done this by designing and delivering compelling survey research that is robust enough to stand trial in a court of law.

### 3.1 About Asian Strategies

Asian Strategies is a research and planning agency. We have been in business since 1991 — for more than two decades, we have been pioneering the profession in Singapore. We are founding members of the Market Research Society (Singapore), and our researchers have been on the committee since its inception. We also run the MRSS Professional Standards Committee, and have served as the national representative for ESOMAR (the World Association of Global Research Professionals). We are champions of research best practices for Singapore and the region. This means that we help to set industry standards; we don't just follow them.

### 3.2 Our area of expertise: “passing off” cases

We have enjoyed success in conducting surveys on behalf of law firms whose clients are involved in “passing off” cases. This usually involves us proving the likelihood of confusion in the production and marketing of a product. We have worked on cases that represent various levels of confusion:

- “Passing off” cases, which lead to consumers mistaking one brand/product for another (e.g. straight counterfeiting or copying of a product/brand)
- Cases where the brand, whilst apparently not the same product, has such strength that it appears like a brand extension, or part of major brand portfolio (i.e. it is believed that they come from the same source)
- Cases where the products are not the same product, but possible similarities suggest the alleged infringer has been authorised, sponsored or approved by the original company

We have included some examples of cases we worked on below.

#### Passing off Electro-Relaxologist as Electro-Reflexologist

*Oto Bodycare v. Hiew Keat Foong*



In 2004 we were commissioned to assess the likelihood of confusion between OTO’s foot reflexology machine and its new competitor by HL. We had to show that the similarities in form factor, packaging, and terminology were close enough to confuse consumers. After surveying n=400 recent purchasers of OTO’s machine, we found that consumers had difficulty differentiating the products. For example, 45% of them thought the products were from the same company and 70% thought the terms “electro-reflexologist” and “electro-relaxologist” were the same.

The evidence of confusion was strong enough to convince the court that there was infringement and/or passing off, and they issued an injunction to restrain HL from infringing OTO’s trademark and passing off the electro-relaxologist as theirs.

#### Passing off Passion as Ferrero Rocher

*Ferrero S.P.A. v. Meng Chong Foodstuffs Pte Ltd*



Ferrero S.P.A. commissioned us in 2009 to conduct research demonstrating significant potential confusion between the two chocolate products. The case was settled in favour of our client.



## Exposing flaws in survey evidence by Tatler magazine

*CR Media Pte Ltd v. Communication Management: Prestige Magazine v. Tatler Magazine*



Asian Strategies assisted in a well-publicised case in Singapore involving two high society publications. We appeared as an expert witness for the publishers of Prestige magazine, pointing out numerous flaws in a survey conducted by a global research company and subsequently published by Tatler.

We found the readership survey to be deeply flawed and, therefore, unfair to our client. Tatler declined to produce an independent expert in survey research to refute the assertions that the survey was biased. On the last day of the case in the High Court, the defendant settled in favour of our client.

## Proving goodwill for Pos Ad

*OMG Holdings Pte Ltd v. Pos Ad Sdn Bhd*



We were commissioned by the defendants (Pos Ad) to design and execute a survey to establish the extent of their “goodwill,” i.e. the awareness of the company and corporate image/reputation in Malaysia amongst advertisers. Our survey assisted our client in their defence. We showed not only awareness of Pos Ad, but also evidence of overwhelmingly positive corporate reputation.

The court found the plaintiff’s position untenable and denied the Plaintiff’s plea for an injunction.

## Confusing Clinique Suisse with Clinique

*Clinique Laboratories LLC v. Clinique Suisse Pte Ltd*



Clinique Laboratories commissioned us in 2010 to demonstrate potential confusion in their trademarks. Asian Strategies set up a street intercept survey where n=408 (all female, aged 18-49) of Clinique or other premier skincare consumers were tested for confusion between the products.

Even among discerning consumers in Clinique’s target audience, the similarity between the Clinique and Clinique Suisse products caused confusion. We found that 46% of the respondents thought the products were from the same company or were unsure. The court ruled in our client’s favour and ordered costs to be paid to the plaintiff.

### 3.3 Our lead consultant: Greg Coops

Greg Coops started his market research career at AC Nielsen in Sydney in the seventies before joining Frank Small & Associates (now TNS) working in Australia and South East Asia. In 1985, he set up his own company, Consensus-MBL, in Indonesia. In 1987, he became a founding partner in MBL Asia-Pacific, which was also subsequently sold to TNS, having opened MBL offices in Hong Kong, Taiwan, Bangkok and Manila. In 1991 he returned to Singapore and started Asian Strategies.

He has personally conducted over 900 research projects for over 300 clients across more than 25 countries covering both quantitative and qualitative methodologies. He has moderated and observed over 2,500 focus group discussions. He has designed and conducted quantitative surveys for multinational and local companies, government authorities and advertising agencies, and has worked on public policy research and political polling.

Clients include the World Health Organisation, Athens Organising Committee (2004 Olympic Games), London 2012 (public opinion polling for the 2012 Olympic Games bid), and the International Committee for the Red Cross (consultant for Greenberg Research on the 'People on War' project which surveyed 20,000 individuals globally who had experienced conflict — the raw data for this study was archived at SIDOS, Swiss Information and Data Archive Services for the Social Sciences).

He is also a consultant to Booz Allen Hamilton and advises on research for BP, Diageo, Singapore Exchange (SGX), SingTel, Standard Chartered Bank and the British Tourist Authority.

Greg has been a member of ESOMAR (the World Association of Global Research Professionals) since 1988, appointed a National Representative for ESOMAR in 2010–2015 for Singapore and has served on ESOMAR conference programme committees in Asia and USA. He's also a founding member of the Market Research Society (Singapore) and has been on the MRSS Committee since its inception in 2000 and a member of QRCA (Qualitative Research Consultants Association) in the USA.

He has been Chairman of the MRSS Professional Standards Committee since 2006. He also serves as liaison between ESOMAR / MRSS and the government on matters of Data Protection and Data Privacy in Singapore. He has also developed MRSS's Fair Data principles and Mark in collaboration with MRS UK, which have been adopted by MRSS individual and corporate members.

**Legal research experience:** Greg has appeared as an expert witness in five cases in the High Court in Singapore in the conduct and use of survey research, and on the subject of confusion in trademark disputes.



#### **GREG COOPS**

Managing Director  
Asian Strategies Pte Ltd (Singapore)

**Nationality:** Australian

**Degree:** B.Comm (Marketing)  
University of NSW





## 4. Fees and timing

### Fees

Ballpark fees for engaging our company would be:

- Preliminary opinion/briefing meeting: **S\$2,000** (absorbed if client proceeds with the survey);
- Pilot survey: **S\$6-10,000** (optional if the case looks solid and timing is tight);
- Main survey (n=400): **S\$30-40,000**.

Consultation in preparation of affidavits and court time is charged at S\$2,500 per day. This would also include assistance in reviewing and immunising against any survey evidence produced by the opposition legal team or expert witnesses.

### Timing

A survey on confusion, for example, involving 400 consumers would take approximately 4-6 weeks from commissioning through to design, execution and preparation of a final report. It might be possible to "fast track" it but getting the survey and questionnaire design, sampling, translations, etc., right does take time.

A sample size of n=400 based on a probability sample is recommended as the courts want statistically reliable surveys.

# We look forward to working with you.

For further information, please contact Greg Coops or Annie Low.

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