TRADEMARK LITIGATION: A NEW LOOK AT THE USE OF SOCIAL SCIENCE EVIDENCE

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The link between social science and law is deep-rooted. For many years, social scientists, including psychologists, sociologists, and anthropologists have been interested in topics pertaining to the legal system.[1] In addition, the law has had a long-standing interest in the social sciences. [2]

Nonetheless, the relationship between social science and law has been generally characterized as one of conflict and mutual misunderstanding.[3] Social scientists have conducted studies on various aspects of the legal system but without a clear understanding of how their results could or should be utilized by the law; furthermore, the design and conclusions of these studies are typically naive from a legal perspective.[4] Also, although statutes, regulations, and court decisions are invariably based upon social science assumptions of human nature, the legal system has often considered the social sciences in a simplistic and inappropriate manner.[5]

Within the past decade, though, "social science-and-law" has emerged as a vital and important academic discipline, ideally representing a true integration of the two fields.[6] A basic goal of this discipline is to avoid the naivety and simplicity that has marred past research in the area.[7] Perhaps not surprisingly, much of the early work in social science-and-law concen-

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1. The literature dealing with law-and-psychology has expanded greatly within the past ten years. *See* C. BARTOL, PSYCHOLOGY AND AMERICAN LAW (1983); PSYCHOLOGY AND THE LAW (G. Bermant, C. Nemeth, & N. Vidmar 1976); NEW DIRECTIONS IN PSYCHOLEGAL RESEARCH (P. Lipsitt & B. Sales 1980); PSYCHOLOGY AND LAW (D. Muller, D. Blackmun, & A. Chapman 1984); PSYCHOLOGY & THE LEGAL PROCESS (B. Sales 1977); JUSTICE AND THE INDIVIDUAL IN SOCIETY (J. Tapp & F. Levine 1977); L. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM (1987).

2. Over three quarters of a century has now passed since a United States court first invoked social science research to support its holding. Muller v. Oregon, 208 U.S. 412 (1908).

3. J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT (2d ed. 1980). *See also* I. HOROWITZ & T. WILLGING, THE PSYCHOLOGY OF LAW (1981); D. ROBINSON, PSYCHOLOGY AND LAW (1980); D. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE (1986); A. SMITH, COGNITIVE STYLES IN LAW SCHOOLS (1979); Loh, *Uses and Limits of Statistics and Social Science in the Judicial Process*, SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 18-42 (L. Abt & I. Stuart 1979).

4. *See* J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (1985).

5. *Id.*

6. L. WRIGHTSMAN, *supra* note 1.

7. *See generally* Saks, *The Law Does Not Live By Eyewitness Testimony Alone*, 10 LAW & HUMAN BEHAVIOR 279 (1986). Based upon the growing and respected literature, as well as its increased recognition within universities such as through joint J.D.-Ph.D. programs, social science-and-law is now becoming firmly established.

trated on the criminal justice system.[8] Along with the general fields of psychiatry[9] and mental health,[10] the criminal justice area dominates the discipline with research being conducted on topics such as law enforcement,[11] juries,[12] eyewitness testimony,[13] courtroom dynamics,[14] expert witnesses,[15] criminal behavior,[16] juvenile delinquency,[17] and incarceration.[18] Needless to say, there are many areas of inquiry, particularly within non-criminal areas, that remain virtually unexplored within social science-and-law.[19]

Indeed, as was lamented in a recent editorial in *Law and Human Behavior*,[20] much of the vast area of civil law has been ignored by researchers. In this editorial, a plea was put out for social science academics to get involved in other areas of law. This Note, then, serves the function not only of providing information for legal practitioners, but also advances social science-and-law as an academic discipline by expanding its scope to the specific field of trademark law. Certainly, surveys, as a form of self-report measurement, constitute a primary means of social science data collection.[21] In the following pages, this Note will explore the utilization of social science surveys in

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8. *See* K. ELLISON & R. BUCKHOUT, PSYCHOLOGY AND CRIMINAL JUSTICE (1981); M. GREENBERG & R. RUBACK, SOCIAL PSYCHOLOGY OF THE CRIMINAL JUSTICE SYSTEM (1982); THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL APPROACH (V. Konecni & E. Ebbesen 1982); L. PARKER, LEGAL PSYCHOLOGY (1980); THE CRIMINAL JUSTICE SYSTEM (B. Sales 1977); PSYCHOLOGY OF CRIME & CRIMINAL JUSTICE (H. Toch 1979).

9. *See* FORENSIC PSYCHIATRY AND PSYCHOLOGY (W. Curran, A. McGarry, & S. Shah 1986); PSYCHOLOGY, PSYCHIATRY, AND THE LAW (C. Ewing 1985); CRITICAL ISSUES IN AMERICAN PSYCHIATRY AND THE LAW (R. Rosner 2d ed. 1985).

10. *See* LAW AND THE MENTAL HEALTH PROFESSIONS (W. Barton & C. Sanborn 1978); THE MENTALLY DISABLED AND THE LAW (S. Brakel, J. Parry, & B. Weiner 3d ed. 1985); COMMUNITY MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM (J. Monahan 1976); LAW & MENTAL HEALTH (D. Weisstub 1984); D. WEXLER, MENTAL HEALTH LAW (1981).

11. *See, e.g.*, E. GREEN, PSYCHOLOGY FOR LAW ENFORCEMENT (1976); R. WICKS, APPLIED PSYCHOLOGY FOR LAW ENFORCEMENT & CORRECTIONS OFFICERS (1974).

12. *See, e.g.*, V. HANS & N. VIDMAR, JUDGING THE JURY (1986); Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAV. SCI. 275 (1983).

13. *See, e.g.*, E. LOFTUS, EYEWITNESS TESTIMONY (1979); A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979); Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOLOGY 90 (1977).

14. *See, e.g.*, THE PSYCHOLOGY OF EVIDENCE & TRIAL PROCEDURE (S. Kassin & L. Wrightsman 1985); J. RYAN, A. ASHMAN, B. SALES, & S. SHANE-DUBOW, AMERICAN TRIAL JUDGES (1980); M. SAKS & R. HASTIE, SOCIAL PSYCHOLOGY IN COURT (1978); THE TRIAL PROCESS (B. Sales 1981).

15. *See, e.g.*, THE ROLE OF THE FORENSIC PSYCHOLOGIST (G. Cooke 1980); M. NIETZEL & R. DILLEHAY, PSYCHOLOGICAL CONSULTATION IN THE COURTROOM (1986).

16. *See, e.g.*, M. FELDMAN, CRIMINAL BEHAVIOUR: A PSYCHOLOGICAL ANALYSIS (1977). For older examples of the application of psychology to criminality, see D. ABRAHAMSEN, THE PSYCHOLOGY OF CRIME (1960); CRIMINAL PSYCHOLOGY (R. Nice 1962).

17. *See, e.g.*, L. EMPEY, AMERICAN DELINQUENCY, ITS MEANING AND CONSTRUCTION (1982).

18. *See, e.g.*, E. FERSCH, PSYCHOLOGY AND PSYCHIATRY IN COURTS AND CORRECTIONS (1980); R. WICKS, CORRECTIONAL PSYCHOLOGY (1974).

19. Saks, *supra* note 7. *But see* Davis, *"There is a Book Out. . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (application of "psychological parent" theory to family law).

20. *Id.*

21. It is also of interest to note that surveys may not just reflect attitudes, but the direction of causality may also be reversed. Indeed, on a broad cultural level, surveys may affect social attitudes rather than merely be reflective of them. Marsh, *Do Polls Affect What People Think?*, in 2 SURVEYING SUBJECTIVE PHENOMENA 565 (C. Turner & E. Martin eds. 1984).

establishing facts in trademark litigation. After presenting some background information along with an analysis of alternative methodologies, this Note will discuss various issues pertaining to trademark surveys: admissibility and evidentiary weight, psychometric concerns, and judicial acceptance. It is hoped that from this discussion, a greater appreciation will be gained for the value and complexity of the use of social science in trademark litigation.

SOCIAL SCIENCE AND TRADEMARK LAW

General Background

Surveys have been relevant in many areas of litigation[22] including criminal[23] and constitutional law.[24] In the trademark area,[25] social science surveys, generally pertaining to the state of mind of prospective purchasers, have been offered as evidence of the existence of secondary meaning[26] or consumer confusion.[27] Surveys have also been used specifically to assess whether a brand name has become generic.[28] Finally, parties have attempted to introduce survey evidence in support of[29] or in opposition to[30] an application for federal trademark registration. It has been stated that the evaluation of survey evidence is one of the most controversial and difficult problems confronting the Trademark Trial and Appeal Board and other ju-

22. Roper, *Public Opinion Surveys in Legal Proceedings*. 51 A.B.A. J. 44 (1965).

23. *E.g.*, People v. Nelson, 88 Ill. App. 3d 196, 43 Ill. Dec. 476, 410 N.E.2d 476 (1980); Commonwealth v. Trainor, 374 Mass. 796, 374 N.E.2d 1216 (1978); Carlock v. State, 609 S.W.2d 787 (Tex. Crim. 1980) (surveys of public attitude towards pornography in obscenity prosecution); United States v. Eagle, 586 F.2d 1193 (8th Cir. 1978), United States v. Mandel, 431 F. Supp. 90 (D. Md. 1977); Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685, *cert. denied*, 459 U.S. 981 (1983), *reh'g denied*, 459 U.S. 1138 (1983) (jury surveys to support motion for change of venue). *See also* Annotation, *Admissibility, in Criminal Case, of Statistical or Mathematical Evidence for Purpose of Showing Probabilities*, 36 A.L.R.3d 1194 (1971).

24. Otero v. Mesa County Valley School District No. 51, 408 F. Supp. 162 (D. Colo. 1975) (discrimination case); Allen v. Morton, 333 F. Supp. 1088 (D.D.C. 1971) (public opinion survey in injunction action to remove Christmas creche on federal parkland).

25. A trademark is "any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." 15 U.S.C. § 1127 (1983).

26. *E.g.*, Laskowitz v. Marie Designer, Inc., 119 F. Supp. 541 (C.D. Cal. 1954); In re Levi Strauss & Co., 165 U.S. Pat. Q. 348 (Trademark & Pat. App. Bd. 1970); Marcalus Mfg. Co. v. Watson, 156 F. Supp. 161 (D.D.C. 1957), *aff'd* 103 App. D.C. 299, 258 F.2d 151; *see also* Lumsford, *The Mechanics of Proof of Secondary Meaning*, 60 TRADEMARK REP. 263, 264 (1969).

27. *E.g.*, Sears, Roebuck & Co. v. Allstate Driving School, 301 F. Supp. 4 (S.D.N.Y. 1969); Standard Oil Co. v. Standard Oil Co., 252 F.2d 65 (10th Cir. 1958); Quaker Oats Co. v. General Mills, 134 F.2d 429 (7th Cir. 1943) (no confusion between "Oaties" and "Wheaties"); Metropolitan Opera Association v. Pilot Radio Corporation, 189 Misc. 505, 68 N.Y.S.2d 789 (1947) (likelihood of confusion between "Metropolitan Symphony Orchestra" and "Metropolitan Opera"); Pro-Phy-Lac-Tic Brush Co. v. Hudson Products, Inc., 86 F. Supp. 859 (D.N.J. 1949) (no confusion between "Perma-Grip" and "Poli-Grip" toothbrushes).

28. *E.g.*, King-Seeley Thermos Co. v. Aladdin Industries, Inc., 321 F.2d 577 (2d Cir. 1963) ("thermos"); Donald F. Duncan, Inc. v. Royal Topps Mfg. Co., 343 F.2d 655 (7th Cir. 1965) ("yo-yo"); Stix Products, Inc. v. United Merchants & Mfrs., Inc., 295 F. Supp. 479 (D.N.Y. 1968). In the survey introduced in E.I.DuPont de Nemours & Co. v. Yoshida International, Inc., 393 F. Supp. 502 (E.D.N.Y. 1975), respondents were asked about purported trademarks such as STP, Thermos, Teflon, Jell-o, and Coke.

29. Lever Brothers Co. v. Butler Mfg. Co., 111 F.2d 910 (C.C.P.A. 1940); Proctor & Gamble Co. v. Sweets Laboratories, 137 F.2d 365 (C.C.P.A. 1943); S.C. Johnson & Son v. Gold Seal Co., 40 TRADEMARK REP. 347 (1950), *aff'd*, 90 U.S. Pat. Q. 373.

30. Coca-Cola Co. v. Victor Syrup Corp., 218 F.2d 596 (C.C.P.A. 1954).

dicial entities dealing with trademark cases.[31] Nevertheless, surveys, as a means of assessing consumers' state of mind, have played an essential role in aiding courts to make factual findings under the appropriate legal test.

The various legal tests in trademark law all essentially require the trier of fact to assess the mental state of some segment of the consuming public. Specifically, the legal test in cases of trademark infringement is "likelihood of confusion," i.e., whether two trademarks are similar enough to cause confusion among reasonably careful people.[32] Another legal test involves "secondary meaning;" the Lanham Act[33] denies the registration of a trademark if it is merely descriptive of the goods it identifies.[34] Descriptive terms, then, cannot receive trademark protection unless they have acquired secondary meaning, that is, have become associated by the public specifically with that product.[35] In order to establish secondary meaning, it must be shown "that the primary significance of the term in the minds of the consuming public is not the product, but the producer."[36]

It should be noted that with both of these tests — whether one trademark infringes upon another and the test for whether a generic or descriptive term has acquired secondary meaning — is an associative one and the determination is one of fact.[37] Judge Learned Hand articulated this point in the seminal case of *Bayer Co. v. United Drug Co.*[38] In addition, illustrating the modern interdisciplinary texture of trademark law, contemporary marketing[39] and communication theory[40] are both consistent with the notion that questions of trademark infringement and secondary meaning are based upon how the messages are interpreted by the consumer, not how they were intended to be interpreted by the producer.

One final background note, in trademark infringement litigation, it is not necessary that the public actually be deceived. There need only be a tendency to deceive.[41] Although actual confusion is generally relevant only to the question of damages,[42] "[t]here can be no more positive proof of likelihood of confusion than evidence of actual confusion."[43] Proof of secon-

31. Skyrock, *Survey Evidence in Contested Trademark Cases*, 57 TRADEMARK REP. 377, 378 (1967); *see also* Abramson v. Coro, 240 F.2d 854, 857 (5th Cir. 1957).

32. Bonynge, *Trademark Surveys and Techniques and Their Use in Litigation*, 48 A.B.A. J. 329 (1962); *see also* Fletcher, *Techniques for Proving Likelihood of Confusion*, in CURRENT DEVELOPMENTS IN TRADEMARK LAW & UNFAIR COMPETITION 1980 (A. Greenbaum 1980).

33. 15 U.S.C. §§ 1051-1127 (1983).

34. 15 U.S.C. § 1052(2)(e) (1983). A descriptive term "identifies a characteristic or quality of an article or service" such as its color, function, or ingredients. Vision Center v. Opticks, 596 F.2d 111, 115 (5th Cir. 1979).

35. Volkswagenwerk Altiengesellschaft v. Rickard, 492 F.2d 474, 477 (5th Cir. 1974).

36. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 113 (1938).

37. Bernacchi, *Trademark Meaning and Non-Partisan Survey Research: A Marriage of Necessity*, 30 ADMIN. L. REV. 447, 448 (1978).

38. 272 F. 505 (S.D.N.Y. 1921).

39. *See* E. MCCARTHY, BASIC MARKETING 26-62 (4th ed. 1971).

40. *See* Weiss, *Effects of Mass Media on Communication*, in 5 HANDBOOK OF SOCIAL PSYCHOLOGY 77 (G. Lindzey & E. Aronson 3d ed. 1969).

41. 15 U.S.C. § 1052(d) (1983).

42. Shaw v. Pilling, 175 Pa. St. 78, 34 A. 446 (1896). "Moreover, reason tells us that while very little proof of actual confusion would be necessary to prove the likelihood of confusion, an almost overwhelming amount of proof would be necessary to refute such proof." World Carpets v. Dick Littrell's New World Carpets, 438 F.2d 482, 489 (5th Cir. 1971).

43. Standard Oil Co. v. Standard Oil Co., 252 F.2d 65, 74 (10th Cir. 1958).

dary meaning is often difficult,[44] inasmuch as there are no precise guidelines and there is no single factor which is determinative.[45] Each case is decided on the facts relating to the impact which the term has had on the public consciousness.[46]

Alternative Methods to Surveys

Courts have historically been inconsistent concerning the question of whether a professional social science survey or some other methodology should be employed in a trademark case to assess consumers' perceptions. In *Triangle Publications v. Rohrlich*,[47] the issue was whether the manufacturer of "Miss Seventeen" girdles was infringing the trademark of *Seventeen Magazine*.[48] The majority of the court relied upon the method of judicial notice.[49] Judge Frank, in dissent, criticized this use of judicial notice and substituted for it a "judicial survey" which he himself conducted.[50]

The "face validity" approach employed by the majority essentially presumed that judicial notice is taken or a presumption is given[51] merely because of the appearance of a trademark[52] or its marketplace usage.[53] Thus, the question of likelihood of confusion was decided without a requirement for empirical proof or further inquiry.[54] While this face validity methodology certainly permits an expeditious resolution of the determination of infringements, the danger in accepting this approach is that it vests complete discretionary power in the hands of the judiciary for determining consumer state of mind.[55]

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44. "[R]eliable evidence of actual instances of confusion is practically almost impossible to secure." Harold F. Ritchie v. Chesebrough-Pond's, 281 F.2d 755, 761 (2d Cir. 1960), quoting Miles Shoes v. R.H.Macy, 199 F.2d 602, 603 (2d Cir. 1952), *cert. denied*, 345 U.S. 909 (1953).

45. *See* J. GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.09[1], at 2-75 (1984). In addition, although the Lanham Act speaks in terms of "likelihood of confusion," it is certainly proper for the trier of fact to infer from the absence of actual confusion that there was also no likelihood of confusion. Affiliated Hospital Products, Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188 (2d Cir. 1975).

46. Ralston Purina Co. v. Thomas J. Lipton, Inc., 341 F. Supp. 129 (S.D.N.Y. 1972).

47. 167 F.2d 969 (2d Cir. 1948).

48. *Id.*

49. *Id.* In other words, a majority of the court simply took judicial notice that consumer confusion was likely to occur.

50. The court explained:

> As neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl, our judicial notice apparatus will not work well unless we feed it with information directly obtained from "teen-agers" or from their female relatives accustomed to shop for them. Competently to inform ourselves, we should have a staff of investigators like those supplied to administrative agencies. As we have no such staff, I have questioned some adolescent girls and their mothers and sisters, persons I have chosen at random. I have been told uniformly by my questioners that no one could reasonably believe any relation existed between plaintiff's magazine and defendant's girdles.

Id. at 976.

51. Bernacchi, *supra* note 37, at 449-54.

52. Holeinone, Inc. v. International Hole-In-One Club, Inc., 341 F. Supp. 1241 (S.D. Tex. 1971).

53. *See, e.g.*, North American Aircoach Systems, Inc. v. North American Aviation, Inc., 231 F.2d 205, 208 (9th Cir. 1955); Coca-Cola v. Pace, 283 F. Supp. 291 (E.D. Ky. 1968); Capital Tie Rack v. Tie Rak Stores, 150 U.S. Pat. Q. 357 (N.D. Ill. 1966).

54. Bernacchi, *supra* note 37, at 449.

55. Judges and jurors, without special training in the social sciences, are in a difficult position to evaluate social science data and inferences. Loh, *supra* note 3, at 34.

The implication of this perspective is that secondary meaning is determined by how the judiciary, rather than the public at large, perceives the trademark.[56] The need for a more scientific test of consumer state of mind than mere judicial hunches was noted as early as 1930.[57] But as recently as 1963, the Trademark Trial and Appeal Board still seemed to prefer the judicial notice approach to scientific surveys.[58]

Another method relied upon by early courts was testimony by experts concerning consumer confusion,[59] but the use of this type of evidence is rare today.[60] Previously, courts had also determined secondary meaning or consumer confusion by the "parade method,"[61] that is, by presenting actual witnesses to testify about their own individual perceptions, attitudes, and confusion. Even dealer and employer testimony was solicited.[62] Because these witnesses were specifically solicited for their testimony in a non-random fashion, the inherent bias and unreliability of such evidence is apparent.[63] The courts, however, seemed to place great weight on this method of showing consumer confusion because of the supposed "difficulty of securing such testimony."[64]

Prior to the development of survey research as an established area within the social sciences, psychologists attempted to aid the courts by providing them with the results of controlled experiments.[65] The early work by Professor Paynter of Columbia University is illustrative of a landmark attempt to integrate issues of trademark confusion into a coherent scientific area.[66] Paynter's research basically consisted of exposing subjects to trademarks which varied in degree of similarity and which were presented on flashcards.[67] But this type of evidence was either not admitted by the courts

56. *Id.* Note also that this face validity or judicial notice methodology is not consistent with the standard set forth by Judge Hand in Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y. 1921); *see supra* notes 37-38 and accompanying text.

57. It has been observed that

> [t]he unscientific procedural methods employed in determining infringement are probably more responsible for the chaotic condition of the law than the substantive rules themselves.... the results of the courts would be more certain and predictable if the technique that has been developed in the conduct of market analyses was applied in determining whether two brands conflict. Whether the purchaser is likely to be misled is better ascertained in the marketplace than in the courtroom. There is a need for a more objective determination.

Handler & Pickett, *Trademarks and Trade Names*, 30 COLUM. L. REV. 759 n.85 (1930).

58. ". . . consumer reaction surveys are generally accorded but little, if any, probative value, and are more often than not completely disregarded in favor of the independent judgement of [the] tribunal whose duty it is to determine the question involved." National Biscuit Co. v. Princeton Mining Co., 137 U.S. Pat. Q. 251 (Trademark Trial & App. Bd. 1963).

59. Gorham Co. v. White, 14 Wall. 511 (1871). *See also* Karst, *Legislative Facts in Constitutional Adjudication*, THE SUPREME COURT REVIEW 110 (P. Kurland 1960) (criticism on the use of experts).

60. Bonynge, *supra* note 32, at 329.

61. Bernacchi, *supra* note 37, at 454.

62. Steem-Elec. v. Herzfeld-Phillipson Co., 118 F.2d 122 (7th Cir. 1940); Coca-Cola Co. v. Gabril, 152 U.S. Pat. Q. 207 (Ill. Cir. Ct. 1966). In Levi Strauss v. Blue Bell, Inc., 216 U.S. Pat. Q. 606, 609 (N.D. Cal. 1982) both Levi's and Wranglers retailers were called to testify.

63. Bernacchi, *supra* note 37, at 454.

64. *E.g.*, Photoplay v. LaVerne, 269 F. 730, 733 (C.C.A.3 1921).

65. Bonynge, *supra* note 32, at 330.

66. *Id.*

67. Paynter, *A Psychological Study of Confusion Between Word Trade-marks*, 11 BULL. U.S.

or was accorded little weight.[68]

Even when surveys were admitted in early trademark cases, courts seemed to prefer that the survey results be complemented by live witnesses. For example, in *Oneida, Ltd. v. National Silver Co.*,[69] both sides introduced survey evidence. The plaintiff, however, apparently used the surveys primarily to identify live witnesses that could testify. Indeed, the court was pleased with the plaintiff's strategy and chided the defendant: "The defendant did not attempt to fortify its survey through any such witnesses."[70] It is clear that the courts had not yet begun to trust surveys to stand on their own to establish the mental state of the relevant consumer class. On the other hand, courts have long recognized the value of surveys for identifying consumers who experienced actual confusion;[71] and again, damages can be bolstered by the identification of specific consumers who have actually been confused.[72] But this is where a clear conflict between social science and law may emerge. While the law wants to identify social science respondents so as to later validate their responses or to compel their testimony, the ethical codes of social scientists[73] stress confidentiality and anonymity of research subjects.[74]

As pointed out by Bernacchi,[75] there are two general classes of measurement or "decoding":[76] direct and indirect. The direct measurement is primary data collected from the apparent or likely receiver of the trademark communication or from the user of the good or service. In addition, a number of indirect empirical methods have been used to assess the constructs at issue in trademark litigation. For example, secondary meaning has been assessed by advertising expenditures,[77] sales volume,[78] and exclusive

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TRADEMARK ASSOC. (1921). Today, this research would undoubtedly be conducted with a tachistoscope. *See generally* H. GLEITMAN, PSYCHOLOGY (1984).

68. Coca-Cola v. Chero-Cola Co., 273 F. 755 (C.A.D.C. 1921).

69. 25 N.Y.S.2d 271 (Sup. Ct. 1940).

70. *Id.*

71. Bonynge, *supra* note 32, at 332.

72. *See, e.g.*, Sweet Sixteen Co. v. Sweet "16" Shop, 15 F.2d 920 (8th Cir. 1926); Admiral Corp. v. Penco, 203 F.2d 517 (2d Cir. 1953).

73. *E.g.*, the American Psychological Association.

74. Sorensen, *Survey Research Execution in Trademark Litigation: Does Practice Make Perfection?*, 73 TRADEMARK REP. 349, 361 (1983). Furthermore, "[c]ross-examination of selected interviewees is likely to be misleading. It may lend the aura of reliability to an incompetent survey, or it may destroy confidence in a survey which deserves better." Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322, 337 (1960).

75. Bernacchi, *supra* note 37, at 448.

76. This term relates to consumers' processing and interpretation of information. Decoding can be contrasted with "encoding" which refers to the producers' intentions in the communication. *See* E. MCCARTHY, *supra* note 39; Weiss, *supra* note 40.

77. Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403 (S.D.N.Y. 1974); National Automobile Club v. National Auto Club, 365 F. Supp. 879 (S.D.N.Y. 1974); Multiple Listing Service v. Metro-Multi List, 223 Ga. 837, 159 S.E.2d 52 (1968); Car-Freshner Corp. v. Turtle Wax, Inc., 268 F. Supp. 162 (S.D.N.Y. 1967); General Shoe Corp. v. Rosen, 111 F.2d 95 (4th Cir. 1940); Filter Dynamics International v. Astron Battery, Inc., 311 N.E.2d 286 (Ill. App. 1974). *See generally* Annotation, *The Doctrine of Secondary Meaning in the Law of Trademarks and of Unfair Competition*, 150 A.L.R. 1067 (1944).

78. Jiffy, Inc. v. Jordan Indus., Inc., 481 F.2d 1323 (C.C.P.A. 1973); HMH Publishing Co., Inc. v. Brincat, 504 F.2d 713 (9th Cir. 1974); Wisconsin Elec. Co. v. Dunmore Co., 35 F.2d 555 (6th Cir. 1929), *cert. denied*, 282 U.S. 813 (1931); Collins v. Metro-Goldwyn Pictures Corp., 25 F. Supp. 781 (D.C. 1938); Goodyear Tire & Rubber Co. v. H. Rosenthal Co., 246 F. Supp. 724 (D. Minn. 1965).

use duration.[79]

THE ADMISSIBILITY OF TRADEMARK SURVEYS

Despite the shortcomings of non-survey methods such as the parade method and expert testimony, courts have nevertheless been historically reluctant to admit survey evidence in trademark cases, claiming a violation of the hearsay rule.[80] In 1951, in an action brought by the State of New York to determine the right of Franklin National Bank to use the word "savings" in its advertising, the defendant submitted a survey which had been conducted by the Psychology Department of Hofstra College.[81] In allowing the survey over hearsay objections, the court explained that a party endeavoring to establish the public state of mind on a subject should be allowed to offer survey evidence if the alternative is "calling as witnesses so many of the public as to render the task impracticable."[82]

Similarly, in the widely cited "Bireley's" case,[83] the Third Circuit admitted a survey over strenuous objections by the defendant on the grounds of hearsay.[84] It is of interest to note that in the "Bireley's" case, the government conducted a survey to show that the public falsely believed that Bireley's Orange Beverage was in fact nutritious orange juice. The population that the government sampled was mothers and expectant mothers in hospitals and baby clinics.[85] This was "about as slanted a survey as could be imagined," but it was admitted nevertheless, and as a result the "Bireley's" case serves as an ironic landmark for the admissibility of trademark surveys.[86]

The hearsay rule[87] may still apply if the people who actually conducted the surveys are not available for cross-examination in either trial or deposition.[88] Also, mere opinion of retailers, independent of any survey, as to the

79. Sterling Prods. Corp. v. Sterling Prods., Inc., 45 F. Supp. 960 (S.D.N.Y. 1942); Allen v. Barr, 93 F. Supp. 589 (E.D. Mich. 1950); Continental Motors Corp. v. Continental Aviation Corp., 375 F.2d 857 (5th Cir. 1967).

80. *E.g.*, Elgin National Watch Co. v. Elgin Clock Co., 26 F.2d 376 (D. Del. 1928).

81. People v. Franklin National Bank of Franklin Square, 105 N.Y.S.2d 81 (1951).

82. *Id.* In Standard Oil Co. v. Standard Oil Co., the judge overruled a hearsay objection to the offered survey:

> The persons who did the interviewing testified as to the results of their surveys. Their testimony was offered solely to show what they found. Only the credibility of the persons who took the statements was involved and they were before the court. The technical adequacy of the surveys was a matter of the weight to be attached to them.

252 F.2d at 75 (10th Cir. 1958).

83. United States v. 88 Cases, 187 F.2d 967 (3d Cir. 1951).

84. The court was explicit in rejecting the hearsay argument:

> The hearsay objection is unfounded. For the statements of the persons interviewed were not offered for the truthfulness of their assertions as to the composition of the beverage. They were not offered to prove that Bireley's Orange Beverage is or is not orange juice. They were offered solely to show as a fact the reaction of ordinary householders and others of the public generally when shown a bottle of Bireley's Orange Beverage.

Id.

85. Waterbury, *Opinion Surveys in Civil Litigation*, 44 TRADEMARK REP. 343 (1954).

86. Bonynge, *supra* note 32, at 331.

87. *See* Fed. R. Evid. 802 ("hearsay is not admissible. . .").

88. Sears, Roebuck & Co. v. All States Life Insurance Co., 246 F.2d 161 (5th Cir. 1957) (judge refused to allow interviewers to testify); Ralston Purina Co. v. Quaker Oats Co., 169 U.S. Pat. Q. 508 (Trademark Trial & App. Bd. 1971) (no testimony from interviewers).

mental state of consumers may be inadmissible as hearsay.[89] Courts are more likely to allow survey evidence over a hearsay exception if the interviewers themselves testified rather than an "expert" who at the most only supervised the survey project.[90] Furthermore, failure to put interviewers on the stand may suggest that the survey was not conducted properly.[91]

The Judicial Conference of the United States has noted that surveys and polls are admissible as evidence.[92] Courts now routinely assume that surveys escape the hearsay objection because they are used to show a belief or state of mind and not the truth of what is believed.[93] In *Zippo Manufacturing Co. v. Rogers Imports, Inc.*,[94] the surveys were held admissible under at least two theories.[95] First, the surveys came under the state of mind exception to the hearsay rule.[96] Second, the balance between the need for the survey information and its circumstantial guarantees of trustworthiness justified the admission of the surveys.[97] A main evidentiary problem is that the interviews may not be sincere, a danger that is minimized because "members of the public who are asked questions about things in which they have no interest have no reason to falsify their feelings."[98]

Even after trademark surveys were being routinely admitted over the hearsay exception, courts were slow to fully appreciate the distinctions between good and bad surveys. One early example of a court's methodological sensitivities is found in *Rhodes Pharmacal Co. v. Federal Trade Commission*[99] where it was stated that "[o]bviously, the value of a survey depends upon the manner in which it was conducted—whether the techniques used were slanted or fair."[100] In the following section, factors will be identified which contribute to surveys being good or bad.

METHODOLOGICAL ISSUES IN TRADEMARK SURVEYS

It should be emphasized that, within the social sciences, surveys have a much broader scope beyond trademark law and certainly beyond the legal system altogether. The field of survey research is well established in several

89. Esquire Sportswear Mfg. Co. v. Genesco, Inc., 141 U.S. Pat. Q. 400 (Trademark Trial & App. Bd. 1964).

90. Bonynge, *supra* note 32, at 334; *see also* General Dry Batteries, Inc. v. Ray-O-Vac Co., 45 TRADEMARK REP. 588 (Com. Pats. 1955).

91. Wembley, Inc. v. Diplomat Tie Co., 216 F. Supp. 565 (D. Md. 1964); *see also* General Time Corp. v. General Dynamics Corp., 141 U.S. Pat. Q. 746 (Trademark & Pat. App. Bd. 1964).

92. Judicial Conf. of the U.S., *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).

93. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE (2d ed. 1982).

94. 216 F. Supp. 670, 684 (S.D.N.Y. 1963).

95. *Id.*

96. Fed. R. Evid. 803(3). *See also* 17A Ariz. Rev. Stat. Ann., Ariz. R. Evid. 803(3) (1986).

97. *Id.*

98. Zippo Manufacturing Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 684 (S.D.N.Y. 1963). The *Zippo* court indicated that

> [t]he alternatives of having a much smaller section of the public testify ... or using expert witnesses to testify to the state of the public mind are clearly not as valuable because the inferences which can be drawn from such testimony to the public state of mind are not as strong or as direct as the justifiable inferences from a scientific survey.

Id.

99. 208 F.2d 382 (7th Cir. 1953), *reversed on other grounds*, 348 U.S. 940 (1955).

100. *Id.* at 387.

of the social sciences, most notably psychology, sociology, and political science.[101]

Indeed, social science surveys constitute a multi-billion dollar industry.[102] Although they do not always approach the relevant issues from the same perspective,[103] legal practitioners and social scientists share strong concerns about the survey research methodology. In general, a primary problem is converting respondents' verbal reports into valid, quantifiable data.[104]

Survey Questions

With respect to the importance of the survey question itself, Schuman and Kalton observed that "[t]he fundamental unit of meaning in a survey is the single question."[105] Thus, the wording of the actual survey questions is critical.[106] Designing questions to measure secondary meaning is a difficult undertaking, fraught with uncertainty, and it is likely to be less than entirely successful.[107] For example, a small change in the wording of almost any question can alter the distribution of responses to it.[108]

It is of interest to note that although social scientists have amassed a great body of empirical studies dealing with methodological issues in survey research, courts have been slow to appreciate the complexities of the problems and the contributions of social science.[109] For example, regarding specific aspects of question design, empirical research has demonstrated that subjects' responses will vary greatly if the questions are leading or unstruc-

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101. *See generally* E. BABBIE, SURVEY RESEARCH METHODS (1973); C. BACKSTROM & G. HURSH-CESAR, SURVEY RESEARCH (2d ed. 1981).

102. 1 SURVEYING SUBJECTIVE PHENOMENA 1-94, 341-352 (C. Turner & E. Martin 1984).

103. *See supra* notes 1-19 and accompanying text.

104. Ericsson & Simon, *Verbal Reports as Data*, 87 PSYCHOLOGICAL REV. 215 (1980).

105. Schuman & Kalton, *Survey Methods*, 1 HANDBOOK OF SOCIAL PSYCHOLOGY 635, 642 (G. Lindzey & E. Aronson 4th ed. 1985). These authors continued their astute analysis as follows:

> There are smaller units, to be sure, individual words being the most obvious. . . . But the discrete question plays a role in survey research analogous to that of atoms in chemistry — it is the distinctive unit of interaction in the course of a survey and the necessary building block in any analysis of data. To carry the analogy further, words, phrases, and similar constituents of questions might be regarded as the subatomic particles of the survey process, while the sets of questions and responses that we call scales function at the molecular level.

Id. at 642.

106. Cantril, *Do Different Polls Get the Same Results?*, 9 PUB. OPINION Q. 61 (1945); Duncan & Schuman, *Effects of Question Wording and Context: An Experiment with Religious Indicators*, 75 J. AM. STATIST. ASSOC. 269 (1980).

107. Palladino, *Techniques for Ascertaining If There is Secondary Meaning*, 73 TRADEMARK REP. 391, 404 (1983).

108. C. TURNER & E. MARTIN, *supra* note 102, at 130; *see also* Bishop, Tuchfarber, & Oldendick, *Changes in the Structure of American Political Attitudes*, 22 AM. J. POL. SCI. 187 (1978).

109. The apparent ignorance of the legal system with respect to question wording is perhaps surprising, particularly when considering that more than 25 years ago, Professor Hans Zeisel observed that

> [l]awyers know that there is more than one way of posing a question and that the response in each case may be different. Such differences may result from the phrasing of the individual questions, from their sequence, or from the questioning situation.

Zeisel, *supra* note 74, at 342. And especially if the subject matter is sensitive or particularly personal, response bias could be a major problem. Barton, *Asking the Embarrassing Question*, 22 PUB. OPINION Q. 67 (1958).

tured.[110] Another social science finding that has been largely ignored by trademark litigators is that if a question does not include a "don't know" alternative, many respondents will not admit not knowing, though they would if the option were provided.[111] In addition, the alternative of "other" is often used improperly.[112] In order to counteract the problem of demand characteristics in survey research,[113] that is, to prevent subjects from finding out what the true purpose of the research is, "filler items" are often used.[114]

With respect to surveys assessing likelihood of confusion between two trademarks, questions such as "what else do you suppose the producer of this product makes?" have been common. In fact, this methodology for assessing likelihood of confusion is the most widespread of any.[115] Such questions were admitted with approval in many key likelihood-of-confusion cases.[116]

In a dispute between Wuv's and Love's Restaurants, the research methodology involved respondents being asked the question "What company or person do you believe owns or operates this restaurant?" while being shown a photograph of a Wuv's restaurant; the Ninth Circuit approved this question.[117] However, the question "Do you believe that this restaurant is connected with or related to any other restaurants?" was found to be "leading and unnecessarily suggestive."[118] The court explained that the question deliberately planted in respondents' minds a suggestion that Wuv's restaurants might be connected with another commercial entity, and also specifically identified that entity as a "restaurant."[119]

Review of the various court decisions regarding question wording in trademark cases reveals little uniformity of thought. In the "Squirt/Quirst" case,[120] subjects were asked "Do you think Squirt and Quirst are put out by the same company or by different companies?"[121] The court allowed the question despite some possible ambiguity stemming from the fact that in one

110. Lipton, *supra* note 13.

111. H. SCHUMAN & S. PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS IN QUESTION FORM, WORDING, AND CONTEXT (1981).

112. Lindzey & Guest, *To Repeat — Check Lists Can be Dangerous*, 15 PUB. OPINION Q. 355 (1951).

113. In the context of survey research, a demand characteristic is any aspect of the survey environment or the survey itself that leads the respondent to make some interpretation of the purpose of the study. "Should the subject behave in accordance with the perceived purpose, the demand characteristic can be a source of experimental bias." R. YAREMKO, H. HARARI, R. HARRISON, & E. LYNN, REFERENCE HANDBOOK OF RESEARCH AND STATISTICAL METHODS IN PSYCHOLOGY 57 (1982).

114. *Id.*

115. Boal, *Techniques for Ascertaining Likelihood of Confusion and the Meaning of Advertising Communications*, 73 TRADEMARK REP. 405, 416 (1983).

116. Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir. 1976); James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266 (7th Cir. 1976).

117. Wuv's International, Inc. v. Love's Enterprises, Inc., 208 U.S. Pat. Q. 736 (D. Colo. 1980). A 9% rate of confusion was shown with this question.

118. *Id.* at 755.

119. *Id.* It is a basic maxim of questionnaire design that questions should not suggest an answer or presume by their wording that people know or should know the answers. Sorensen, *supra* note 74, at 358.

120. Squirtco v. Seven-Up Co., 628 F.2d 1086 (8th Cir. 1980).

121. *Id.* at 1090.

market area both products were actually bottled by the same company.[122]

In another case, respondents were shown cans of "Style" and of "Style and Set Hair Spray" and asked whether they ". . .thought the products were made by the same or different companies."[123] The question was permitted. In contrast, based largely on the following question, the results of a survey were held to be "of little probative value" on the ground of being elicited by leading questions: "Do you think that there may or may not be a business connection between Beneficial Capital Corporation and the Beneficial Finance System Companies?"[124]

The propriety of a question often cannot be determined in isolation. The question "What brand do you think of when you hear this slogan?" was held to be slanted where previous questions had already mentioned the critical brand name.[125] In a case involving alleged infringement of the Cadillac automobile trademark by Cadillac boats,[126] the survey question "Will you please name anything else you think is put out by the same concern?" was subsequently labeled as a "classic leading question."[127]

As a further illustration of the problems of question wording, the court was troubled by the following question asked in a survey by a party trying to prove no likelihood of confusion: "Does the commercial give you the impression that any other restaurant chains actually endorse the Big Bite sandwich?"[128] Similarly, the following question was found to be improperly leading because it presented respondents with the alleged connection rather than permitting them to make their own associations: "To the best of your knowledge, was the Donkey Kong game made with the approval or under the authority of the people who produce the King Kong movies?"[129] In *Esquire Sportswear Mfg. Co. v. Genesco, Inc.*,[130] the bias in the procedure was perhaps obvious even to the layperson. There, a questionnaire was directed to sympathetic retailers, telling them about the pending litigation, and asking them to respond to questions like: "Would it be your opinion that the use of the name 'Sleex' upon girdles for women would import a derogatory effect to slacks sold under the identical trademark for men so that men would not buy the slacks merchandised under that name?" It is of interest to note, though, that in the *Esquire* case, the Trademark Trial and Appeal Board found a likelihood of confusion notwithstanding the deficient survey evidence.[131]

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122. *Id.* Aside from being packaged by the same bottler, the products were manufactured by competing corporations: Squirt by Squirtco and Quirst by the Seven-Up Company.

123. La Maur, Inc. v. Revlon, Inc., 245 F. Supp. 445, 450 (D. Minn. 1965).

124. Beneficial Corp. v. Beneficial Capital Corp., 529 F. Supp. 445, 450 (S.D.N.Y. 1982).

125. Ralston Purina Co. v. Quaker Oats Co., 169 U.S. Pat. Q. 508 (Trademark & Pat. App. Bd. 1971). Similarly, the court in American Footwear Corp. v. General Footwear Co. Ltd., 199 U.S. Pat. Q. 531, 536-37 (S.D.N.Y. 1978), *modified*, 609 F.2d 655 (2d Cir. 1979), *cert. denied*, 455 U.S. 951 (1980), was concerned with the overly leading questions.

126. General Motors Corp. v. Cadillac Marine & Boat Co., 226 F. Supp. 716, 736 (W.D. Mich. 1964).

127. Robin & Barnaby, *Trademark Surveys—Heads You Lose, Tails They Win*, 73 TRADEMARK REP. 436, 444 (1983).

128. Wendy's International, Inc. v. Big Bite, Inc., 576 F. Supp. 816 (S.D. Ohio 1983).

129. Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112 (2d Cir. 1984).

130. 141 U.S. Pat. Q. 400 (Trademark Trial & App. Bd. 1964).

131. *Id.*

In *Sears, Roebuck & Co. v. Allstate Life Insurance Co.*,[132] it was not the wording of the questions per se, but the sequence of questions that was found to color the results. At issue was the alleged confusion between "Allstate" and "All States Life Insurance."[133] The court, with justification, criticized the survey for "not fairly presenting the name All States."[134]

As a whole, the approach of the courts in analyzing survey questions has been shallow and inconsistent. For example, courts generally have not seemed cognizant of the principle that the integrity of survey questions cannot be adequately assessed in isolation, but must be considered within the total context of the entire survey. Indeed, basic empirical research has indicated that the responses to questions can differ depending on where they are placed within the survey.[135]

Sampling Issues

Proper sampling methods[136] are of critical importance in survey design.[137] But sampling issues are best considered within a broader methodological context. Ideally, "sampling design and question construction should proceed hand in hand, both guided by the problem to be investigated."[138]

Technically, a survey need not involve sampling, but most surveys are based on samples because, practically speaking, there is no other way of conducting them.[139] Unless the universe (or "population") to be sampled is very small,[140] any competent trademark survey will utilize either a quota sample or a probability sample.[141]

The scientific rationale behind statistical sampling is to generalize from the particular to the whole.[142] Great care must be given to establishing the

132. 246 F.2d 161 (5th Cir. 1957).

133. Note the following sequence: (1) What does "Allstate" mean to you? (2) If you wanted Allstate insurance, where would you go? (3) Have you ever heard of All States Life Insurance Company? (4) Who would you say owns All States Life Insurance Company? Sears, Roebuck & Co. v. All States Life Insurance Co., 246 F.2d 161, 171-72 (5th Cir. 1957).

134. Zeisel, *supra* note 74, at 343.

135. Schuman, Kalton, & Ludwig, *Context and Continuity in Survey Questionnaires*, 47 PUB. OPINION Q. 112 (1983).

136. A sample is a subset of people selected from a population. "Sampling bias" refers to nonrepresentativeness of data that results when the data are based on an inadequate sample. Y. YAREMKO, H. HARARI, R. HARRISON, & E. LYNN, *supra* note 113, at 209.

137. F. YATES, SAMPLING METHODS FOR CENSUSES AND SURVEYS (4th ed. 1981); *see also* W. COCHRAN, SAMPLING TECHNIQUES (1953); I. HESS, SAMPLING FOR SOCIAL RESEARCH SURVEYS, 1947-1980 (1985); R. JAEGER, SAMPLING IN EDUCATION AND THE SOCIAL SCIENCES (1984).

138. Schuman & Kalton, *supra* note 105, at 640.

139. Zeisel, *supra* note 74, at 326. In Loctite Corp. v. National Starch & Chemical Corp., 211 U.S. Pat. Q. 237 (S.D.N.Y. 1981), the court ruled that the universe of actual and potential purchasers of glue is the entire adult population of the United States.

140. In this case, the entire population is sampled. Thus, the sample equals the universe and no problems of sampling can exist. It is still possible, though, that the universe may be misidentified.

141. Basically, a quota sample is one that is not selected from a known definable population but which is accumulated in the search for individuals who possess certain personal characteristics or behavioral attributes. On the other hand, in a probability sample, every member of the population has a known, though not necessarily equal, chance of being included in the sample and thus the sample is "a microcosm of the larger population in all respects qualified by a predictable sampling error." Sorensen, *supra* note 74, at 355.

142. As such, statistical sampling "attempts to solve a class of problems treated in philosophy by

population boundaries since this may well determine the nature of the survey's outcome.[143] The survey "may identify the proper universe and yet fail to sample adequately from it."[144]

The size of the sample can affect its precision. But to determine with equal accuracy the average age of the population of New York City and of Peoria, Illinois, samples of equal size will be needed.[145] Due to the inherently imprecise nature of sampling and statistics, there can never be perfect accuracy but, as Professor Ziesel has indicated, "the law is accustomed to dealing with less than perfect evidence."[146]

A first step in designing a survey is to determine the universe to be studied.[147] A universe for a trademark litigation is generally described in terms of relevance,[148] accessibility,[149] identifiability,[150] submissibility,[151] and validity.[152] Once the universe is selected, a sample to be surveyed is selected from that universe. The universe may be limited in various ways including geographically or according to buying habits (e.g., purchasers of children's shirts[153]). A survey of the wrong universe will be of little probative value in litigation.[154] Regarding sampling, one of the major limitations of surveys is non-responses. There are some indications that the general non-response rate has been increasing in the last two decades.[155] Another limitation of surveys concerns the "informed consent" requirement. Because of ethical requirements to inform subjects about the nature of the research prior to their participation, subjects may either decline to participate (thus diluting the sample) or their responses may be contaminated by the information given to them in order to obtain their consent.[156]

There is also general sociological research suggesting that responses are affected by social class[157] and the educational level of the respondents.[158]

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inductive logic." Sprowls, *The Admissibility of Sample Data into a Court of Law: A Case History*, 4 UCLA L. REV. 222, 223-24 (1957).

143. *Id.*

144. Note, *Opinion Polls and the Law of Evidence*, 62 VA. L. REV. 1101, 1125 (1976).

145. Zeisel, *supra* note 74, at 329.

146. *Id.*

147. Note, *Public Opinion Surveys as Evidence: The Pollsters Go To Court*, 66 HARV. L. REV. 498 (1953).

148. For example, does the universe constitute people whose attitudes and behaviors are in dispute in the litigation? Sorensen, *supra* note 74, at 354.

149. An "accessible universe" is one in which the universe members can be listed or arranged in such a manner that they are susceptible to sampling and later inclusion in a survey. Sorensen, *supra* note 74, at 354.

150. An "identifiable universe" is one in which the universe members can be identified by certain salient characteristics. Ideally, the inclusion in a survey of people with these characteristics should not signal to them the purpose of the survey. Sorensen, *supra* note 74, at 354.

151. A universe is "submissible" to the extent that its members permit themselves to be interviewed in sufficient numbers to assure a meaningful interview completion rate. Sorensen, *supra* note 74, at 354.

152. The "validity of a universe" is an elusive concept, but can refer to the extent to which the universe members will tell the truth in the survey. Sorensen, *supra* note 74, at 354.

153. *Levi Strauss & Co. v. Blue Bell, Inc.*, 208 U.S. Pat. Q. 473 (N.D. Cal. 1980).

154. J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 32.47 (1973).

155. Steeh, *Trends in Nonresponse Rates, 1952-1979*, 45 PUB. OPINION Q. 40 (1983).

156. *See* Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 AM. SOC. REV. 144 (1978).

157. Lenski & Leggett, *Caste, Class, and Deference in the Research Interview*, 65 AM. J. SOC. 463 (1960).

Aside from being good demographic predictors, age and sex[159] can also act as contaminating confounding[160] variables.[161] Regarding other characteristics of the respondents, researchers have presented evidence suggesting that people who lack confidence in responding to surveys, lack confidence in their opinions as a general personality trait.[162] Courts have not expressed much awareness of these factors.

In a case involving alleged infringement of the "Cabbage Patch" doll trademark, the court found that a shopping mall survey of persons planning on buying gifts for girls under 12 years of age covered too broad a universe.[163] The court believed that the universe should have been prospective purchasers of Cabbage Patch dolls.[164] The court in *Universal City Studios v. Nintendo Co.*[165] held that the survey should have covered people contemplating a purchase, not those who had already made a purchase.[166] In *Amstar Corp. v. Domino's Pizza*,[167] the court attacked the surveys of both parties, finding that the universe in each survey failed to include a fair sampling of purchasers most likely to partake of the other party's product.[168]

In *American Basketball Association v. AMF Voit, Inc.*,[169] the district court held that a universe of young men aged 12 to 23 who had played basketball within the prior year was a universe too narrow to allow the survey to be given substantial weight.[170] On the other hand, in a case involving a dispute between the Nova television series and Nova Magazine,[171] the dis-

158. Jackman, *Education and Prejudice or Education and Response Set?*, 38 AM. SOC. R. 327 (1973); *see also* Martin, *The Effects of Item Contiguity and Probing on Measures of Anomia*, 43 SOC. PSYCHOLOGY Q. 116 (1980).

159. Predictors can include age and sex of both the interviewer and the respondent as well as interactions among all of these variables.

160. A confounding variable is an extraneous variable that varies systematically (and unbeknownst to the investigator) with the variables under consideration. Confounding variables can destroy the internal validity of a study. Y. YAREMKO, H. HARARI, R. HARRISON, & E. LYNN, *supra* note 113, at 37.

161. Benny, Riesman, & Star, *Age and Sex in the Interview*, 62 AM. J. SOC. 143 (1956).

162. B. DUNCAN & O. DUNCAN, SEX TYPING AND SOCIAL ROLES 19 (1978).

163. Original Appalachian Artworks v. Blue Box Factory (USA) Ltd., 577 F. Supp. 625 (S.D.N.Y. 1983).

164. *Id.*

165. 746 F.2d 112 (2d Cir. 1984).

166. *Id.*

167. 615 F.2d 252 (5th Cir. 1980).

168. The court stated that the appropriate universe should include a fair sampling of those purchasers most likely to partake in the alleged infringer's goods or services. The court's analysis of this issue is illuminating:

> Of the ten cities in which the [Domino's Pizza] survey was conducted, eight had no "Domino's Pizza" outlets, and the outlets in the remaining two had been open for less than three months. Additionally, the persons interviewed consisted entirely of women found at home during six daylight hours who identified themselves as the member of the household primarily responsible for grocery buying. As plaintiff's [Domino] sugar is sold primarily in grocery stores, participants in the [Domino's Pizza] survey would have been repeatedly exposed to plaintiff's [Domino Sugar] mark, but would have had little, if any, exposure to the defendant's [Domino's Pizza] mark. Furthermore, the survey neglected completely defendant's primary customers — young, single, male college students.

Id. at 264.

169. 358 F. Supp. 981 (S.D.N.Y. 1973), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

170. *Id.*

171. WGBH Educational Foundation, Inc. v. Penthouse International, Ltd., 453 F. Supp. 1347 (S.D.N.Y. 1978).

trict court criticized a survey because the universe tested was too broad, and accordingly, the court reduced the evidentiary weight given to the data.[172] Similarly, in *American Luggage Works v. United States Trunk Co.*,[173] the court criticized the sampling and found the survey inadmissible where the universe was luggage dealers in New York and Boston and the sample was merely selected from Yellow Pages listings.[174]

It is important to distinguish between intended and actual consumers.[175] Demand characteristics can readily arise if the universe of actual purchasers is very narrow, such as for a very specialized product. Certainly, it is best for respondents not to know why they were chosen to be interviewed.[176] Theorists, though, are not in complete agreement regarding the importance of sampling. Bonynge downplayed the importance of a careful delineation of a population sample and asserted that, unlike a political poll where absolute numbers are critical, it is not important in a likelihood of confusion survey.[177]

A contrary view is presented by Monahan and Walker who stressed the importance of clearly defining the scope of the universe in trademark surveys.[178] As an exemplar, Monahan and Walker argued that in *Processed Plastic Co. v. Warner Communications*,[179] surveying only children six to twelve years old as to their ability to distinguish between brands of toy cars was inappropriate because parents and grandparents of young children are often the actual purchasers of the toys.[180]

External Validity and Demand Characteristics

Social scientists have been aware for a long time of the importance of the social context of surveys. For example, one early study found that when church-goers were questioned in a public setting about card playing, their views were negative, but when interviewed in a private setting, their attitudes were positive.[181] This general finding has proven to be robust throughout the years and has been replicated in a variety of contexts.[182] Indeed, social desirability is generally considered to be a major source of response bias in

172. *Id.*

173. 158 F. Supp. 50 (D. Mass. 1957), *aff'd*, Hawley Products Co. v. United States Trunk Co., 259 F.2d 69 (1st Cir. 1958).

174. *Id.* at 51-54.

175. Bernacchi, *supra* note 37, at 457.

176. Sorensen, *supra* note 74, at 358.

177. Here the issue is whether a substantial number of people are likely to be confused. Whether this figure may be 49 percent of those questioned on the survey, or 52.3 percent, may be interesting but not important.
Bonynge, *supra* note 32, at 334.

178. J. MONAHAN & L. WALKER, *supra* note 4, at 147.

179. 675 F.2d 852 (7th Cir. 1982).

180. Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

181. Schanck, *A Study of a Community and its Groups and Institutions Conceived of as Behaviors of Individuals*, 43 PSYCHOLOGICAL MONOGRAPHS 1, 103 (1932).

182. Hyman, *Inconsistencies As a Problem in Attitude Measurement*, 5 J. SOC. ISSUES 38 (1949); *see also* Cannell, Miller, & Oksenberg, *Research on Interviewing Techniques*, in SOCIOLOGICAL METHODOLOGY 1981 (S. Leinhardt 1981).

survey research.[183]

A basic tenet of social science is that research should be conducted in a situation that resembles as closely as possible the situation to which it is hoped to be generalized.[184] In *Pro-Phy-Lac-Tic Brush Co. v. Hudson Products*,[185] the court observed that the plaintiff had introduced results intended to show that actual confusion existed, but that the survey had not been conducted in a manner simulating actual purchase conditions.[186]

Applying this principle to the context of trademark surveys, it can be assumed that the survey's validity will be related to how closely the survey environment resembles the environment in which the consumer actually makes a buying decision. In other words, if the legal issue is whether there is confusion between two trademarks for laundry soap, the survey testing for confusion should be conducted not only with prospective laundry soap purchasers, but physically in a market area where such products are actually sold.[187]

On this point, the court in *Zippo Manufacturing Company v. Rogers Imports*[188] concluded that although the store may be the best place to measure state of mind at time of purchase, it would be virtually impossible to obtain a representative national sample if surveys had to be conducted in stores.[189] Similarly, in an early federal case, consumer reactions in San Francisco were held not relevant to the universe of consumers in San Jose.[190] In the Domino's Pizza/Domino Sugar litigation,[191] the trial court discounted the survey introduced by Domino's Pizza because it was conducted on the premises of Domino's Pizza outlets and therefore did not examine a proper survey universe.[192] Finally, in *Aerojet-General Corp. v. Cincinnati Screen Process*,[193] the court disapproved a survey conducted after consumers

183. Social desirability is an item characteristic that produces a response set based on the subject's perception of what response is socially desirable. DeMaio, *Social Desirability and Survey Measurement: A Review*, in 2 SURVEYING SUBJECTIVE PHENOMENA 257 (C. Turner & E. Martin 1984). *See also* C. SELLTIZ, L. WRIGHTSMAN, & S. COOK, RESEARCH METHODS IN SOCIAL RELATIONS (3d ed. 1976) (generally speaking, this source of bias refers to the tendency of respondents to give a favorable picture of oneself, rather than to answer truthfully).

184. Aronson & Carlsmith, *Experimentation in Social Psychology*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY (G. Lindzey & E. Aronson 3d. 1969).

185. 86 F. Supp. 859 (D.N.J. 1949).

186. *Id.*

187. La Maur, Inc. v. Revlon, Inc., 245 F. Supp. 839 (D. Minn. 1965); *but see* Marcalus Mfg. Co. v. Watson, 156 F. Supp. 161 (D.D.C. 1957), *aff'd*, 103 App. D.C. 299, 258 F.2d 151 (1958).

188. 216 F. Supp. 670 (S.D.N.Y. 1963).

189. The *Zippo* court continued:

> An interview at the respondent's home is probative of his state of mind at the time of his purchase, although the deviation from the actual purchase situation should be considered in weighing the force of this evidence.

216 F. Supp. 670, 685 (S.D.N.Y. 1963).

190. Lerner Stores Corp. v. Lerner, 162 F.2d 160 (9th Cir. 1947). Of course, this represents not only a problem of external validity because of the dissimilarity between the consumer (San Jose) and survey (San Francisco) environments, but also a sampling problem in that San Jose and San Francisco consumers themselves may be dissimilar on the relevant dimensions. *See also* Deere & Co. v. Farmhand, Inc., 217 U.S. Pat. Q. 252 (S.D. Iowa 1982) (national universe was too broad); Jockey International, Inc. v. Burkhard, 185 U.S. Pat. Q. 201 (1975) (sampling at only one site inadequate).

191. Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d. 252, 264 (5th Cir. 1980).

192. Robin & Barnaby, *supra* note 127, at 444. Again, the interrelationship between representativeness of the survey environment and the survey sample is evident.

193. 172 U.S. Pat. Q. 114 (D. Ohio 1971).

purchased the product at issue stating that the legal issue is confusion before, not after, purchase.[194]

Related to this issue of where and how the survey is conducted, social science evidence indicates that the mode of survey administration can affect responses.[195] In addition, the same survey given face to face rather than by telephone will likely yield different results.[196] Again, although the issues of demand characteristics and external validity are critical to the use of surveys in trademark litigation, they have rarely been discussed in this context. The court in *American Luggage Works v. United States Trunk Co.*,[197] though, provided a rare example of a court appreciating that the mere fact of being asked a question as part of a survey can be inherently biasing.[198]

Because a survey is calling direct attention to what may under normal buying conditions escape consideration it could be argued that confusion would be less pronounced in the artificial survey situation.[199] Nevertheless, one legal scholar has indicated that "[t]he requirement that the survey have a market place context does not necessarily dictate that interviews take place at the actual point of purchase."[200]

Threshold Levels

Kitch and Perlman noted that scientific surveys have been increasingly utilized in trademark litigation and that their probative value obviously depends upon the objectivity of the sampling technique.[201] As the direct evidence becomes more scientific, however, the courts "must confront the difficult question of what percentage of the appropriate class of consumers must have formed the association in order to support a finding of secondary meaning."[202]

In *Zippo*,[203] the court held that survey evidence showing that 25 percent of those questioned connected plaintiff's mark with a single source was insufficient proof of secondary meaning.[204] Another survey which showed

194. *Id.*

195. S. SUDMAN & N. BRADBURN, RESPONSE EFFECTS IN SURVEYS (1974).

196. R. GROVES & R. KAHN, SURVEYS BY TELEPHONE (1979).

197. 158 F. Supp. 50 (D. Mass. 1957).

198. [U]nder the substantive law the issue is not whether the goods would be confused by the actual observer (trained or untrained, professional or lay), but the issue is whether the goods would be confused by a prospective purchaser at the time he considered making the purchase. If the interviewee is not in a buying mood but is just in a friendly mood answering a pollster, his degree of attention is quite different from what it would be had he his wallet in his hand. Many men do not take the same trouble to avoid confusion when they are responding to sociological investigators as when they spend their cash.

Id. This dictum suggests that surveys over-predict confusion since the respondent is less motivated to avoid confusion during a survey than during an actual purchasing decision.

199. American Luggage Works v. United States Trunk Co., 158 F. Supp. 50 (D. Mass. 1957).

200. J. MCCARTHY, *supra* note 154, at § 32.48 (1973).

201. E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS (2d ed. 1979).

202. Would 100% be required? Would 25% be sufficient? What if 55% of the consumers associated the mark with producer X but 25% associated the mark with producer Y in a case where both claim secondary meaning?

KITCH & PERLMAN, *supra* note 201, at 294.

203. Zippo Manufacturing Co. v. Rogers Imports, 216 F. Supp. 670 (S.D.N.Y. 1963).

204. *Id.*

that 10 percent of the sample gave trademark significance to a descriptive term was similarly held to be insufficient proof of secondary meaning in the term.[205] On the other hand, a mail survey of 2,000 "housewives" which revealed that 52 percent of the respondents associated a blue cornflower design with Corningware products, was held sufficient, along with other evidence, to prove secondary meaning in the design.[206]

Courts have generally provided "little guidance" on what level of association or confusion is sufficient.[207] Indeed, "[a] review of the cases where survey evidence was offered to show likelihood of confusion reveals that the courts have adopted disparate percentage figures as sufficient proof of a likelihood of confusion."[208] For example, in *Sears, Roebuck & Co. v. Johnson*,[209] the court, in support of finding confusion likely, relied heavily on survey results which showed that 74 percent of those sampled were confused. But in *Sears, Roebuck & Co. v. Allstate Driving School*,[210] the fact that the survey showed that 82 percent of the interviewees who had an opinion were confused was insufficient to show likelihood of confusion due to the purported inadequacy in the design and execution of the survey.[211] Some courts, though, have accepted low percentages as indicative of likelihood of confusion. In *Humble Oil & Refining Co. v. American Oil Co.*,[212] a finding of only 11 percent confusion in a survey was sufficient. The court reasoned that even eleven percent of millions of potential buyers constitutes a large number of actual consumers.[213] On the other hand, the court in *Henri's Food Products Co., Inc. v. Kraft, Inc.*,[214] found that a 7.6 percent confusion rate was too low to support a finding of infringement.[215] It is apparent that the courts are not sure whether a "substantial" number of confused prospective purchasers is to be measured in terms of percentage of people confused or in terms of actual number of confused persons.[216]

Regarding the necessary threshold level needed to determine whether a trademark has become generic, one court relied on a survey which showed that about 75 percent used the term "Thermos" as a generic name.[217] In another case, a court found a trademark not to be generic where survey evidence showed that 69 percent to 84 percent of those questioned regarded "Contact" as a trademark indicating a specific source of adhesive paper.[218]

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205. Roselux Chemical Co. v. Parsons Ammonia Co., 299 F.2d 855 (C.C.P.A. 1962).

206. Federal Glass Co. v. Corning Glass Works, 162 U.S. Pat. Q. 279 (Trademark & Pat. App. Bd. 1969).

207. Palladino, *supra* note 107, at 404; *see also* Monahan & Walker, *supra* note 180.

208. J. MCCARTHY, *supra* note 154, at § 32:54(B).

209. 219 F.2d 590 (3d Cir. 1955).

210. 301 F. Supp. 4 (E.D.N.Y. 1969).

211. *Id.*

212. 405 F.2d 803 (8th Cir. 1969), *cert. denied*, 395 U.S. 905 (1969).

213. *Id.* at 817. The court seems to have adopted a threshold test based upon absolute number of consumers confused rather than percentage confused.

214. 717 F.2d 352 (7th Cir. 1983).

215. *Id.*

216. J. MCCARTHY, *supra* note 154, at § 32:54(B).

217. King-Seeley Thermos Co. v. Aladdin Industries, Inc., 321 F.2d 577 (2d Cir. 1963), *affirming*, American Thermos Products Co. v. Aladdin Industries, Inc., 207 F. Supp. 9 (D. Conn. 1962), *vacated and remanded*, 418 F.2d 31 (2d Cir. 1969), *modified*, 320 F. Supp. 1156 (1970).

218. Stix Products, Inc. v. United Merchants & Mfrs. Inc., 295 F. Supp. 479 (S.D.N.Y. 1968).

There has been inconsistency in the courts with respect to how much knowledge and sophistication are required of the universe of consumers to be sampled.[219] When the likely consumers of a product or service are particularly sophisticated, some courts have determined that likelihood of confusion should be assessed based on whether similarly sophisticated consumers would be confused.[220] The approach of requiring a higher threshold of confusion has been utilized with respect to pacemakers,[221] farm equipment,[222] and tubing supplies.[223] Other courts have insisted that both ignorant and intelligent consumers be considered,[224] or have pointed out that even sophisticated consumers can be confused.[225] Perhaps the best approach considers the sophistication of the buyer as only one factor in determining likelihood of confusion.[226] Of course, directly related to the issue of the sophistication of consumers is the problem of survey respondents simply not understanding the questions.[227]

Factors Pertaining to the Interviewers

Within the field of social science survey research, much attention is given to the critical importance of careful, systematic training of interviewers.[228] In contrast, the surveys conducted for the parties in *Oneida, Ltd. v. National Silver Co.*[229] were conducted by college women with presumably no previous training or experience in survey work.[230] Similarly, in *Standard Oil Co. v. Standard Oil Co.*,[231] the defense expert criticized the plaintiff's survey because the interviewers were college students with no training or experience in survey research and because they were unaware of the purpose of the survey.[232] In *Sears, Roebuck & Co. v. Allstate Driving School*,[233] the survey

219. Comment, *Appellate Review of Lanham Act Violations: Is Likelihood of Confusion a Question of Law or Fact?*, 38 SW. L.J. 743, 748-49 (1984).

220. *E.g.*, Cardiac Pacemakers, Inc. v. Coratomic, Inc., 535 F. Supp. 280 (D. Minn. 1982), *aff'd*, 702 F.2d 671 (8th Cir. 1983); F.S. Services, Inc. v. Custom Farm Services, Inc., 325 F. Supp. 153 (N.D. Ill. 1970), *aff'd*, 471 F.2d 671 (7th Cir. 1972).

221. *E.g.*, Cardiac Pacemakers, Inc. v. Coratomic, Inc., 535 F. Supp. 280 (D. Minn. 1982), *aff'd*, 702 F.2d 671 (8th Cir. 1983).

222. F.S. Services, Inc. v. Custom Farm Services, Inc., 325 F. Supp. 153 (N.D. Ill. 1970), *aff'd*, 471 F.2d 671 (7th Cir. 1972).

223. Alpha Industries, Inc. v. Alpha Steel Tube & Shapes, 616 F.2d 440 (9th Cir. 1980). Note that the issue of sophistication of consumers is a factor related to sampling, but usually pertains to the nature of the product itself.

224. Wells Fargo & Co. v. Wells Fargo Express Co., 358 F. Supp. 1065, 1091 (D.Nev. 1973), *vacated and remanded*, 556 F.2d 406 (9th Cir. 1977).

225. Communications Satellite Corp. v. Comcet, Inc., 429 F.2d 1245, 1252 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970); Carlisle Chemical Works, Inc. v. Hardman & Holden, Ltd., 434 F.2d 1403 (C.C.P.A. 1970); Rexall Drug & Chemical Co. v. Rohm & Haas Co., 427 F.2d 782, 783 (C.C.P.A. 1970).

226. Comment, *supra* note 219, at 750; *see also* DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 26 (2d Cir. 1982).

227. Belson, *Respondent Understanding of Survey Questions*, 3 POLLS 1 (1968); *see also supra* notes 105-135 and accompanying text.

228. Cannell, Miller, & Oksenberg, *supra* note 182.

229. 25 N.Y.S.2d 271 (Sup. Ct. 1940).

230. *Id. See also* General Motors Corp. v. Cadillac Marine & Boat Co., 226 F. Supp. 716, 734 (W.D. Mich. 1964).

231. 141 F. Supp. 876 (D. Wyo. 1956), *aff'd*, 252 F.2d 65 (10th Cir. 1958).

232. *Id.* at 881. As with any social science methodological techniques, double-blind studies should be employed whenever possible. That is, in order to minimize additional sources of bias,

was disapproved because it was done by low-paid, part-time non-professional investigators who may have exercised poor judgment in interpreting ambiguous responses.[234]

Related to the issue of interviewer training is interviewer bias. In *Proctor & Gamble Co. v. Sweets Labs*,[235] survey interviews were accorded little weight because the interview was like a radio quiz program and answers might have been given to please the interviewer.[236] Similarly, in *Exxon Corp. v. Xoil Energy Resources, Inc.*,[237] the court placed no weight on the survey in part because it was conducted by untrained and presumably non-independent individuals.[238]

There also exists a wide scope of empirical social science research showing how various characteristics and behaviors of survey interviewers affect responses.[239] Specific characteristics of the interviewer have been shown to have an effect on survey responses.[240] Even subtle behaviors of the interviewer, such as voice intonation, can be determinative.[241] The overriding concern here is that interviewers may be biased or have a vested interest in the outcome of the survey.[242]

Perhaps more fundamentally, a survey must be standardized in that all respondents are asked the identical questions in the exact same manner. To this end, "[i]nterviewers, being human beings, require careful, programmed instruction for respondent selection and interview procedures."[243] For example, if respondents fail to understand a question, the interviewer should not "explain" it to them.[244]

Methodological Variations

In an approach characterized as "genius,"[245] researchers gave soft-drink coupons to grocery store shoppers. After each coupon redemption, the shopper was asked to identify the soft drink purchased. Only 4.3 percent

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neither the respondents nor the interviewers should be cognizant of the actual purpose of the research. Courts have rarely mentioned the issue of whether a survey is conducted in a double-blind fashion. *See, e.g.*, Scotch Whiskey Assn. v. Consolidated Distilled Products, Inc., 210 U.S. Pat. Q. 639, 643 (N.D. Ill. 1981) (double-blind procedure praised); Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983) (lack of double-blind criticized).

233. 301 F. Supp. 4 (E.D.N.Y. 1969).

234. *Id.*

235. 137 F.2d 365 (C.C.P.A. 1943).

236. *Id.*

237. 552 F. Supp. 1008 (S.D.N.Y. 1981).

238. *Id.*

239. Lenski & Leggett, *Caste, Class, and Deference in the Research Interview*, 65 AM. J. SOC. 463 (1960); Jackman, *supra* note 158.

240. Schaeffer, *Evaluating Race-of-Interviewer Effects in a National Survey*, 8 SOC. METHODS & RES. 400 (1980); *see also* Hatchett & Schuman, *White Respondents and Race-of-Interviewer Effects*, 39 PUB. OPINION Q. 523 (1975-76); Schuman & Converse, *The Effects of Black and White Interviewers on Black Responses in 1968*, 35 PUB. OPINION Q. 44 (1971).

241. Barath & Cannell, *Effect of Inteviewer's Voice Intonation*, 40 PUB. OPINION Q. 370 (1976); Blair, *More on the Effects of Interviewer's Voice Intonation*, 41 PUB. OPINION Q. 544 (1977-78).

242. Bailar, Bailey & Stevens, *Measures of Interviewer Bias and Variance*, 14 J. MARKETING RES. 337 (1977).

243. Sorensen, *supra* note 74, at 359.

244. *Id.* at 358.

245. Boal, *supra* note 115, at 409.

confused the two products at issue, Squirt and Quirst.[246] On appeal, the Eighth Circuit characterized the coupon methodology as "without legal precedent."[247] The courts' rulings notwithstanding, this methodology does appear to be a measure of actual confusion, not likelihood of confusion.[248]

Courts have struggled with the issue of how much or what type of stimulus material should be presented to the respondents. In *Huntington National Mattress Co. v. Celanese Corporation of America*,[249] the plaintiff attempted to show a likelihood of confusion by conducting a newspaper "complete this sentence" contest. The Trademark Trial and Appeal Board rejected this methodology as being unscientific.[250]

Regarding other examples, in *American Luggage Works, Inc. v. United States Trunk Co.*,[251] an issue arose as to whether the photographs which were shown to respondents and which failed to show the tags on the luggage invalidated the surveys.[252] In *Zippo*,[253] an objection was raised to the fact that respondents were shown a Rogers lighter without a Rogers display card that always accompanies the lighter at point of purchase.[254] In the Cabbage Patch doll case,[255] a survey question about the source of the defendant's unpackaged doll was ruled irrelevant because in actual purchasing conditions, consumers see the doll in distinctive packaging.[256] As one commentator has noted, if the test is likelihood of consumer confusion, there can be little justification for masking or hiding "clues" that the typical purchasing consumer would normally have available for guidance.[257]

Some trademark surveys have taken the form of an association test. Historically, such surveys were routinely approved by courts.[258] But in *Amstar Corp. v. Domino's Pizza*,[259] a case involving possible confusion between Domino's Pizza and Domino's Sugar, heads of households were shown an actual Domino's pizza box and asked if they believed that the maker of Domino's pizza made any other product; "sugar" was a frequent response.[260] This methodology was held to be "a mere word-association test

246. Squirtco v. Seven-Up Co., 207 U.S. Pat. Q. 12 (E.D. Mo. 1979).
247. 628 F.2d 1086, 1089 n.3 (8th Cir. 1980).
248. Boal, *supra* note 115, at 409.
249. 129 U.S. Pat. Q. 428 (Trademark Trial & App. Bd. 1961), *aff'd*, 201 F. Supp. 938 (D. Md. 1957).
250. *Id.*
251. 158 F. Supp. 50, 53 (D. Mass. 1957).
252. *Id.*
253. Zippo Mfg. Co. v. Rogers Imports, 216 F. Supp. 670, 685 (S.D.N.Y. 1963).
254. *Id.*
255. Original Appalachian Artworks, Inc. v. Blue Box Factory (USA) Ltd., 577 F. Supp. 625 (S.D.N.Y. 1983).
256. *Id.*
257. Boal, *supra* note 115, at 411.
258. In Exxon Corp. v. Texas Motor Exchange of Houston, Inc., 628 F.2d 500 (5th Cir. 1980), the issue was possible confusion between "Exxon" and "Texon." In this case, respondents were shown a photograph of a Texon sign and were asked what company comes to mind. The *Exxon* court approved the survey, though, because it "probed what there was about the sign that elicited the response. The format . . . was designed to ensure a valid opinion pole." *See also* Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803 (8th Cir. 1969) (attempting to show association of Esso with Standard Oil); John Walker & Sons, Ltd. v. Bethea, 305 F. Supp. 1302 (D.S.C. 1969) (Johnny Walker Motel vs. Johnnie Walker Scotch).
259. 615 F.2d 252 (5th Cir. 1980).
260. *Id.* at 264.

entitled to little weight."[261] The *Amstar* case appears to represent the modern trend in rejecting simplistic associational surveys, reversing the trend of older cases which accepted these surveys.[262]

In some cases, in order to directly assess likelihood of confusion with the trademark per se, researchers have attempted to isolate the trademark from the source name. For example, in *Harlequin Enterprises Ltd. v. Gulf & Western Corp.*,[263] the interviewees were shown "dummy" copies of as yet unpublished "Harlequin Presents" titles with the Harlequin name and colophon masked.[264] But in a suit involving alleged infringement of the American Basketball Association's red, white, and blue basketball,[265] the court rejected the ABA's survey in part because the ball shown to interviewees had no logo, even though "deleting the ABA logo was necessary to determine whether or not the color combination was an indicia of origin."[266]

DESIGN, USE, AND JUDICIAL ACCEPTANCE OF SURVEYS

Practicalities Within the Adversary System

As the discussion in the preceding section has demonstrated, there is voluminous case authority relating to trademark surveys. Nevertheless, trademark litigators do not find much guidance in this case law.[267] Because every case turns on its own facts, "no survey can be designed blindly or in reliance on precedent (much of which appears to be of doubtful merit anyway)."[268] One commentator has observed that "[t]oo often, the cases reveal an unwarranted hypercritical attitude towards surveys. The criteria set for a 'proper' survey frequently appear to be impossible to meet."[269]

It is apparent that social scientists may be unaccustomed to having their research subjected to the scrutiny of the adversary system. Professor Bernacchi outlined several characteristics of a good trademark survey including the fact that all procedural and substantive aspects of the survey development, management, and analysis be subject to adversary challenge by both parties.[270] But Bernacchi also suggested the use of an independent ex-

261. *Id. See also* Holiday Inns, Inc. v. Holiday Out in America, 481 F.2d 445 (5th Cir. 1973).

262. The trend of rejecting associational tests is evident in other cases involving likelihood of confusion. WGBH Educational Foundation, Inc. v. Penthouse International, Ltd., 453 F. Supp. 1347 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 610 (2d Cir. 1979) (survey testing confusion between Nova Magazine and the Nova television program); E.I. Dupont de Nemours & Co., Inc. v. Yoshida International, Inc., 393 F. Supp. 502 (E.D.N.Y. 1975) ("Teflon" vs. "Eflon"); American Footwear Corp. v. General Footwear Co., 609 F.2d 655, 661 (2d Cir. 1979) (Bionic Woman television program vs. Bionic Boots).

263. 503 F. Supp. 647, 650 (S.D.N.Y. 1980), *aff'd*, 644 F.2d 946 (2d Cir. 1981).

264. *Id.* This is known as "creating a prop" for a survey. Palladino, *supra* note 107, at 396.

265. American Basketball Association v. AMF Voit, Inc., 358 F. Supp. 981 (S.D.N.Y. 1973), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973).

266. Palladino, *supra* note 107, at 396.

267. *See* Monahan & Walker, *supra* note 180, at 516-17, for a discussion of social science evidence as "social authority" from the perspective of precedential value. Social authority is viewed as essentially a hybrid between "law" and "fact." *See also* Monahan & Walker, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

268. Boal, *supra* note 115, at 426.

269. J. MCCARTHY, *supra* note 154, at § 32.55.

270. Bernacchi, *supra* note 37, at 456.

pert, rather than a partisan one, to handle all aspects of the survey.[271]

Another unresolved issue in this regard is the legal status of a trademark survey in terms of precedent. For example, when an appellate court approves or disapproves a survey methodology in a trademark case, does this ruling have precedential value for future litigators? In other words, does an appellate court ruling about social science have the same effect as a purely legal holding?[272] This issue has relevance for all legal uses of social science evidence, including the trademark area. For example, after the decision in *Levi Strauss & Co. v. Blue Bell, Inc.*[273] concerning a trademark dispute involving pocket tabs on Levi's and Wrangler clothing, could another trademark litigator in the Ninth Circuit rely on the social science holdings, specifically by modeling its survey after the Wrangler survey approved by the court?[274]

It has been suggested that "the results of any survey research are open to — even invite — challenge. . . ."[275] Because of this, proposals have been offered to have parties agree on a format or submit a proposed survey to the court before the survey is conducted; in practice, though, this advice is rarely heeded.[276] One solution might be to submit the questions and methodology to the court for approval prior to taking the survey. If the court approves, its results should be given some probative value.[277] The advantages of a pre-screening are: an agreement on survey ground rules between parties might be secured (even through compromise); the court undoubtedly would be more conversant with the survey's rationale and methodology; and the results would not be subject to challenge on the basis of an omission or flaw that could have been avoided.[278]

If a survey is planned during the course of the litigation, the court should explore the possibility of having the survey conducted by an impartial expert pursuant to stipulation of the parties. At that time, such technical requirements as sample size and question wording could also be stipulated. If this should not prove feasible, a litigant intending to offer a survey as evidence could at least be required to notify their opponents so as to give them an opportunity to become an observer in its development.[279]

The court in *American Luggage Works*[280] discussed a survey being approved at a pre-trial conference on grounds of convenience and economy.[281] It has been recommended, however, that participation in such a procedure

271. *Id.* at 455-58. "Since the development of a [survey] instrument is recognized as requiring a high degree of artistic talent and scientific knowledge, the expert should be totally responsible for both the form and order of the questions asked." *Id.* at 456-57.

272. *See* Monahan & Walker, *supra* note 180.

273. Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352 (9th Cir. 1985).

274. Prof. Sorensen has pointed out that "[m]arket research is not always susceptible to precedent. . . ." Sorensen, *supra* note 74, at 353.

275. Harlequin Enterprises Ltd. v. Gulf & Western Corp., 503 F. Supp. 647, 650 (S.D.N.Y. 1980).

276. Palladino, *supra* note 107, at 391-92.

277. "Of course, such a pre-screening offers no indication as to the weight a court will give to a survey." Robin & Barnaby, *supra* note 127, at 440-41.

278. Sorensen, *supra* note 74.

279. Zeisel, *supra* note 74, at 345-46.

280. 158 F. Supp. 50 (D. Mass. 1957), *aff'd*, 259 F.2d 69 (1st Cir. 1958).

281. *Id.*

should not be made compulsory.[282] In view of the principle of liberal discovery under the Federal Rules of Civil Procedure[283] and comparable state rules,[284] the idea of a detailed pre-trial conference has considerable appeal.

Burdens of Proof

In 1960, the Judicial Conference of the United States adopted a report of the Judicial Conference Study Group on Procedure in Protracted Litigation[285] which included suggested guidelines for the use of survey evidence in court.[286] With respect to the evidentiary foundation, the report stated that "[t]he offeror [of the survey] has the burden of establishing that a proffered poll was conducted in accordance with established principles of survey research."[287]

It is fairly well accepted that the burden lies on the offeror to show that the sample was selected in a scientifically acceptable manner and that the conclusions are statistically acceptable.[288] Furthermore, "[u]nless the matter is stipulated, an expert will be needed to provide a foundation for admission of samples and polls."[289] It should be noted, though, that it has not been uncommon for appellate courts to overrule the trial court with regards to the admissibility of a trademark survey.[290]

Clearly, a litigant may choose not to conduct a "methodologically pure" survey for a variety of reasons. Some "excuses" are undoubtedly more acceptable than others. A court will probably decline to excuse a deficiency which is predicated upon a claim of "inconvenience or expense in the design of a survey."[291] For example, in one case the Trademark Trial and Appeal Board rejected a survey which was limited to a sample of a universe restricted to the cities of Binghamton, New York and Tucson, Arizona. The Board found that the universe was selected for "convenience rather than any

282. Judicial Conference of the U.S., *supra* note 92.

283. *See* Fed. R. Civ. P. 26-37.

284. *E.g.*, Ariz. R. Civ. P. 26-37.

285. Judicial Conference of the U.S., *supra* note 92, at 429.

286. *See* Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 716 F.2d 854 (11th Cir. 1983), where the court explicitly chided the plaintiff for not following the Report's guidelines.

287. Judicial Conference of the U.S., *supra* note 92, at 429. The Committee went on to give examples of the specific methodological aspects that the offeror has the burden to prove:

> that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognized as experts; the data gathered was accurately reported; the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys; the sample design and the interviews were conducted independently of the attorneys; and the interviewers, trained in this field, had no knowledge of the litigation or the purposes for which the survey was to be used. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey.

Id.

288. J. WEINSTEIN & M. BERGER, 5 WEINSTEIN'S EVIDENCE § 901(B)(9)[03] (1986).

289. *Id.*

290. Anti-Monopoly, Inc. v. General Mills Fun Group, 611 F.2d 296 (9th Cir. 1979).

291. Reiner, *The Universe and Sample: How Good Is Good Enough?*, 73 TRADEMARK REP. 366, 372 (1973).

scientific and methodological reasons."[292]

Weight of Survey Evidence

In terms of substantive guidelines for the evidentiary admission of survey evidence, it has been suggested that the results of an opinion poll be admitted only if the judge determines that (1) the survey is relevant, (2) the universe and sample are appropriate, and (3) the data are convincing.[293] Furthermore, in early cases, it was not uncommon for a court to admit survey evidence, but then to disregard it completely.[294] One problem in conducting a survey "in every case is that even a favorable survey is rarely, if ever, . . . determinative since a court can always find a reason for discounting or disregarding its results."[295]

In fact, it is not uncommon for methodological flaws in a survey to affect the weight rather than the admissibility of survey evidence.[296] A court, sitting without a jury, may indeed admit a survey "even if it has no confidence in its probative value."[297] Where the survey covered a universe slightly too broad, this flaw went to the weight, not to the admissibility of the survey.[298]

CONCLUSION

Over the past fifty years, there has been a growing acceptance of trademark surveys among both the bench and the bar, corresponding to the gradual acceptance of the social sciences generally within the law. In fact, when considering that such surveys were once purely inadmissible, it is perhaps remarkable that the failure of a trademark owner to run a survey now gives rise to an adverse inference.[299] For example, in *Mushroom Makers, Inc. v. R. G. Barry Corporation*,[300] the defendant did not introduce any survey evidence, prompting the judge to comment that "[t]his omission is underscored

292. Ralston Purina Co. v. Quaker Oats Co., 169 U.S. Pat. Q. 508, 509 (Trademark & Pat. App. Bd. 1971).

293. Note, *Opinion Polls and the Law of Evidence*, 62 VA. L. REV. 1101, 1132 (1976).

294. Admiral Corp. v. Penco, Inc., 106 F. Supp. 1015 (D.N.Y. 1952), *aff'd*, 203 F.2d 517 (2d Cir. 1953). "As efforts are made to improve the quality of survey questions, judges and attorneys alike will do well to remember that secondary meaning is an issue which should turn on all the evidence in a case and not on the survey alone." Palladino, *supra* note 107, at 404. One commentator has recently observed that even today the majority of surveys are admitted but are accorded little weight. Jacoby, *Survey and Field Experimental Evidence*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 177 (S. Kassin & L. Wrightsman 1985).

295. Robin & Barnaby, *supra* note 127, at 440.

296. Sunbeam Corp. v. Sunbeam Furniture Corp., 134 F. Supp. 614 (D.C. Ill. 1955). Survey evidence has often been received grudgingly by the courts and sometimes given little weight because of deficiencies in the manner of conducting the survey. "An improperly conducted survey (e.g., slanted questions) may be excludable as 'irrelevant' of the true state of mind of potential purchasers . . . Various deficiences in the mechanics of surveys have been criticized by the courts, leading them to give a survey little weight as evidence." J. MCCARTHY, *supra* note 154, at § 32.50.

297. Zeisel, *supra* note 74, at 340; *see also* United States v. J. I. Case Co., 101 F. Supp. 856, 868 (D. Minn. 1951).

298. Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 930-31 (7th Cir. 1984). Similarly, the court in Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 844 (11th Cir. 1983), held that technical deficiencies in the survey affect the weight, not admissibility.

299. Robin & Barnaby, *supra* note 127, at 436.

300. 441 F. Supp. 1220 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 44 (2d Cir. 1978).

[given] that defendant is a substantial corporation with the means to have undertaken either a survey or an investigation to establish instances of actual consumer confusion."[301] The same judge, in *Information Clearing House, Inc. v. Find Magazine*,[302] stated that "[i]t is also significant that plaintiff, though possessed of the financial means, did not undertake a survey of public consumer reaction to the products under actual market conditions."[303]

This, then, is the "trademark attorney's dilemma."[304] If a survey is not conducted, a court may use that failure as a reason for an adverse decision. If, on the other hand, a survey is conducted, there is the risk that the results will not be consistent with the offeror's legal position.[305]

Finally, considering all the various problems and sources of bias in trademark surveys, it has been rather pessimistically observed that "it is virtually impossible to organize and conduct a completely objective and impartial survey which would establish either actual confusion or a likelihood thereof."[306] Regarding judicial attitudes towards trademark surveys, McCarthy's views are striking:

> A skeptic would classify the survey cases into two categories: a survey is accepted and relied upon when the judge has already made up his mind in favor of the results; and a survey is rejected and torn apart when the judge subjectively disagrees with the survey results.[307]

In the final analysis, the proponent of a trademark survey must balance the costs of procurring a methodologically pure instrument administered in an ideal manner with the potential benefits which include the financial value of being successful in the litigation.

301. *Id.* at 1231.
302. 492 F. Supp. 147 (S.D.N.Y. 1980).
303. *Id.* at 160. Similarly, in Springs Mills, Inc. v. Ultracashmere House, Ltd., 532 F. Supp. 1203, 1218 (S.D.N.Y. 1982), *rev'd*, 689 F.2d 1127 (2d Cir. 1982), the court emphasized that the plaintiff failed to present survey evidence.
304. Robin & Barnaby, *supra* note 127, at 440.
305. *Id.*
306. Shyrock, *supra* note 31, at 379.
307. J. MCCARTHY, *supra* note 154, at § 32.55.