

LANHAM ACT SURVEYS: 2004

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TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	THE YEAR IN REVIEW: 2004	
	A. GENERICNESS SURVEYS	4
	B. DESCRIPTIVENESS/ SUGGESTIVENESS SURVEYS	6
	C. SECONDARY MEANING SURVEYS	6
	D. LIKELIHOOD OF CONFUSION SURVEYS	7
	E. FALSE ADVERTISING SURVEYS	14
	F. FAME/DILUTION SURVEYS	15
	G. COPYRIGHT SURVEYS	15
	H. PATENT SURVEYS	16
	I. <i>DAUBERT</i> /ADMISSIBILITY ISSUES	17
	J. PROCEDURAL ISSUES	20
III.	BIBLIOGRAPHY—LANHAM ACT SURVEYS: 2004—BY CIRCUIT	23
IV.	BIBLIOGRAPHY—LANHAM ACT SURVEYS: 2004—BY ISSUE	28
V.	BIOGRAPHICAL INFORMATION	35

I. INTRODUCTION

This paper is the annual follow-up to five previous papers:¹ (1) “Lanham Act Related Surveys: The Year In Review & Emerging Issues” published in the 1999 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner, (2) “Lanham Act Surveys: 2000” published in the 2000 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases for the Experienced Practitioner, (3) “Lanham Act Surveys: 2001” published in the 2001 Practising Law Institute handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases, (4) “Lanham Act Surveys: 2002” published in the 2002 Practising Law Institute handbook Strategies for Litigating Copyright, Trademark & Unfair Competition Cases, and (5) “Lanham Act Surveys: 2003 published in American Intellectual Property Law Association annual proceedings.

The following provides short excerpts of a number of selected opinions referencing survey evidence published in opinions from mid-2003 through mid-2004, which might be of interest to the Lanham Act litigator.² The bibliographies to this paper provide citations, by circuit and by survey issue, for all identified opinions published during this time period in which survey evidence was referenced.³

¹ Copies of the previous papers published by the Practising Law Institute (PLI) are available from the PLI or Westlaw. The previous paper published in the Proceedings of the American Intellectual Property Law Association (AIPLA) is available from the AIPLA. A compilation of all these papers is available at the Members Only section of INTA.org. Copies of these papers are also available from the author.

² The time periods covered in the previous papers were January 1998 through mid-1999, mid-1999 through mid-2000, mid-2000 through mid-2001, mid-2001 through mid-2002, and mid-2002 through mid-2003, respectively.

³ The reader may also be interested in “Survey Evidence—Successful Challenges Since *Daubert*,” published in the 2003 International Trademark Association 125th Annual Meeting proceedings and also available from the author.

II. THE YEAR IN REVIEW: 2004

A. GENERICNESS SURVEYS⁴

Ty, Inc. v. Softbelly's, Inc., 353 F.3d 528, 530-531 (7th Cir. 2003)

...A survey by [Plaintiff's Expert]...found that 60 percent of the respondents thought "Beanies" [was] a brand name...If 60 percent of the relevant consuming public thinks "Beanies" [is] a brand name, as many of 40 percent may think it generic...the legal test of genericness is "primary significance,"...and [Plaintiff's Expert's] results are evidence that the primary significance of "Beanies" is still as the name of [Plaintiff's] brand.

...A linguist testified that 98 percent of the references in news articles to the word "Beanie" were to [Plaintiff's] products and that dictionaries do not list it as a generic (lower-case) word.

...A statistician sampled eBay and Yahoo auctions and found that more than 80 percent of all references to "beanie(s)" were to [Plaintiff's] products.

...In a phone survey conducted in 1999, more than 60 percent of the respondents identified "Beanies" as relating to [Plaintiff] or Beanie Babies...

The Steak N Shake Company v. The Burger King Corporation, 323 F. Supp. 2d 983, 989, 993 (E.D. Mo. 2004)

[Plaintiff] presented survey evidence...to evaluate and quantify the level of consumer recognition of the term "steakburger."...The [survey respondents] were read a list of items and asked whether they most often identified certain listed items as something that comes from more than one company or something that comes from only one company...

...

I do not agree with [Plaintiffs] argument that the [Plaintiff's Experts'] surveys show the non-genericness of the term "steakburger."... At most, the [Plaintiff's First Expert's] study is directed at consumer awareness of the term and consumer familiarity with Steak n Shake, which advertises heavily that it is "Famous for Steakburgers."

...[Plaintiff's First Expert] asked whether respondents "most often" associated the term with one company or more than one company. "Steakburger" was highly associated with Steak n Shake in the markets tested, but this fails to advance an understanding of the public perception of what a steakburger is...

Big Island Candies, Inc. v. The Cookie Corner, 269 F. Supp. 2d 1236, 1250-1251 (D. Haw. 2003)

In the [Plaintiff's survey], respondents were first shown a picture of a BIC Cookie wrapped in cellophane printed with the word "Big Island Candies." They were then asked if they had seen the BIC Cookie before. If they stated that they

⁴ Opinions in this and following sections are ordered by circuit, then chronologically from oldest to newest.

had, they were asked, "Who makes this product?" In response to that question, 16.9% to 29.4% of respondents answered "BIC."...

It is true that relevant survey data or statistics of some sort might assist this court...As [Plaintiff] contends, "the most important type of evidence used in evaluating genericness is consumer surveys."...

Unfortunately...the [Plaintiff's] Survey is of no help to it on the present motion. First, the [Plaintiff's] Survey does not test for genericness. The survey asked the "Who are you?" question. That method cannot possibly test whether respondents view the BIC Cookie as answering the question "Who are you?" (rather than answering the question "What are you?"). The question is not which source consumers most often associate with the BIC Cookie, but whether the BIC Cookie design's primary significance to the consumer is that of source identification...

Second, no attempt was made to test consumers' perceptions of the BIC Cookie design rather than the BIC Cookie packaging (or the combination of the BIC Cookie design and packaging). Survey respondents were never shown a plain BIC Cookie. Rather, the only way in which respondents saw the BIC Cookie was when it was wrapped in cellophane printed with the words "Big Island Candies."...

Finally, the court notes that [Plaintiff] misunderstands what percentage of respondents must respond in a certain way to establish nongenericness... [Plaintiff] suggests that, if more than 15% of survey respondents identified [Plaintiff] after viewing the BIC Cookie, that percentage was "sufficient to support a summary judgment finding of distinctiveness, so it is more than sufficient to show that the dress is not generic."...That argument is incorrect because (1) the type of survey used to test for genericness differs from the type of survey used to test for distinctiveness, and (2) for a genericness survey, "majority usage controls."...For a term to be held nongeneric, the seller must prove that the "primary significance of the term in the minds of the consuming public is not the product but the producer."...

Jacob Zimmerman v. National Association of Realtors, 2004 T.T.A.B. LEXIS 180, *31-*32, *37-*39 (T.T.A.B. 2004)

...the parties to these proceedings have each proffered a survey...on the question of genericness...

...petitioner points to a...survey [which] targeted individuals who had consulted a real estate agent in the past year or were planning to do so in the coming year, or were planning to buy, sell or rent real estate in the next year. Of the ninety-six individuals surveyed, only ten percent said that "Realtor" was a brand name.

By contrast, respondent's telephone survey targeted real estate brokers and agents. Respondent argues that real estate professionals make up the proper survey universe, as they are actually the purchasers or prospective purchasers of membership in respondent and the services provided by respondent...

...

Accordingly, given...the deficiencies of petitioner's survey, we accord it very little weight on the question of whether prospective purchasers of a real estate professional's service would view the term "Realtor" as indicating the services were being offered by a real estate association member (even if the association were unknown).

...

We need not agree with respondent that real estate professionals are the sole group with whose perceptions we should be concerned in order to accord substantial weight to the results of the [Respondent's Expert's] survey. For given the circumstances of the use of these collective service marks, we agree with respondent's fallback position that real estate professionals make up a significant subgroup of relevant consumers...

B. DESCRIPTIVENESS/SUGGESTIVENESS SURVEYS

Harland A. Macia, III, d/b/a/ Catamount Software v. Microsoft Corporation, 2004 U.S. Dist. LEXIS 19278, *9, *16-*17 (D. Vt. 2004)

...[Plaintiff] offered a survey...designed to test whether "PocketMoney" is a descriptive or a suggestive mark...[Plaintiff's Expert] selected as its universe...all individuals aged eighteen or older...[Plaintiff's Expert] assumed that many individuals could be within the class of potential consumers of PDA products even if they were not currently aware of this...

...

The survey conducted by [Plaintiff's Expert] also provides some support for the conclusion that "PocketMoney" is suggestive. The survey does not provide strong evidence because it sampled the views of the general public rather than those known to be likely to purchase software for PDAs...Thus, the survey provides a small amount of additional evidence that Catamount's mark is suggestive.

C. SECONDARY MEANING SURVEYS

The Straumann Company v. Lifecore Biomedical Incorporated, 278 F. Supp. 2d 130, 137-138 (D. Mass. 2003)

...[Plaintiff] has produced a consumer survey...in support of its position that its implant has acquired secondary meaning...That survey does not support [Plaintiff's] claims.

...

...the study does not filter out the non-functional features from those that are functional to evaluate which features consumers use to identify the source of the product...

...

[Plaintiff's] study on secondary meaning also suffers from an additional flaw which would lead me to exclude it from the jury's consideration. The initial

questions asked of the respondents were: "*What company* do you think puts out these products? If you do not know, please feel free to say so."...These questions presume the existence of the key element in a secondary meaning inquiry, namely the association of the design with a *single* source...Hence, the [Plaintiff's] study would not be helpful to a jury attempting to determine whether consumers associate the product features at issue with a single manufacturer, because the survey suggested to the respondents that the products *did* come from a single manufacturer...

March Madness Athletic Association, L.L.C. v. Netfire, Inc., 310 F. Supp. 2d 786, 803-804 (N.D. Tex. 2003)

...Plaintiff conducted a Teflon [type] survey, and concluded that the primary significance of March madness...is as a trade name relating to basketball...

The survey was a double-blind...[telephone] survey...based on a list of randomly generated residential phone numbers from the continental United States. The 'next birthday technique' was used to randomly select the actual respondent to the survey within each residence which was called...within the relevant sample of persons who knew March madness was related to basketball, over 60% classified it as a trade name. Based on this evidence, the Court finds that March madness has acquired secondary meaning as a trade name.

In re Ivanko Barbell Company, 2004 T.T.A.B. LEXIS 345, *24-*25 (T.T.A.B. 2004). This disposition is not citable as a precedent of the T.T.A.B.

While the survey is evidence that a very small group of potential purchasers (owners, presidents, vice-presidents, and general managers of health/racquet and fitness clubs) may recognize the applicant's design as a trademark...we have little, if any, evidence of whether the broader group of prospective purchasers would recognize applicant's design as a trademark. We note that applicant's goods are identified as barbell plates without any limitation as to prospective purchasers...

D. LIKELIHOOD OF CONFUSION SURVEYS

Anheuser Busch, Inc. v. Caught-on-Bleu, Inc., 2003 U.S. Dist. LEXIS 18010, 121-123 (D. N.H. 2003)

[Plaintiff] has submitted a survey which found "a substantial likelihood of source confusion" between [Plaintiff] and [Defendant] based on the use of the Billy Budd mark. The survey...revealed that a total of twenty-four percent of consumers who were shown a tap handle identical to that distributed with the kegs of [Defendant's] product believed that [Plaintiff] put out the product or was affiliated or connected with, or had given permission to, whomever did...Each [respondent] was shown either a tap handle identical in all respects to that which

had been distributed with the kegs of [Defendant's] product, or one identical in all respects except the insertion of the word "Boy" for "Budd."...

...

[Defendant] attempts to challenge [Plaintiff's Expert's] conclusion with the testimony of its own expert...The fact that [Defendant] has procured an expert affidavit which purports to contradict that of [Plaintiff's] expert, however, does not necessarily render summary judgment inappropriate...

...

[Defendant's expert] also calls [Plaintiff's] survey "problematic" because the interviews occurred in the "artificial environment" of a shopping mall, rather than in a bar, restaurant, or store. [Defendant's Expert] opines that in such a "realistic purchase environment, the chances that a beer purchaser would be confused between Billy Budd and Budweiser are quite remote." As an initial matter, this testimony is insufficient to defeat summary judgment because it lacks any foundation, i.e., [Defendant's expert] does not present the conflicting results of a consumer study which was actually conducted in a bar, restaurant, or other beer retail outlet or provide any other basis for his opinion. Furthermore, [Defendant's Expert's] testimony runs afoul of settled law that mall-intercept surveys of the kind conducted by [Plaintiff's Expert] are acceptable proof of actual confusion...

Malaco Leaf, AB v. Promotion in Motion, Inc., 287 F. Supp. 2d 355, 375 (S.D.N.Y. 2003)

The [Plaintiff's] Survey also tested for consumer confusion in the marketplace regarding the parties' packaging trade dress...[Plaintiff's Expert's] description of the survey results goes on to conclude that, "in total,...10% of the respondents said that the similarity of [the parties'] packages was the basis for their belief that the Famous Squish candy was 'put out' or made by the same company as Original Swedish Fish candy or that it had obtained an approval or permission from Original Swedish Fish."...

...this...conclusion of a 10% consumer confusion over packaging overstates the point since the underlying data show only a 9.5% confusion level which was rounded upward by [Plaintiff's] expert to 10%...Even assuming that the [Plaintiff's] Survey was conducted within the bounds of acceptable testing methodology...the survey's report that only 9.5% of respondents expressed confusion over the parties' packaging trade dress is too low to sustain [Plaintiff's] contention of actual confusion...

Medical Economics Company, Inc. v. Prescribing Reference, Inc., 294 F. Supp. 2d 456, 461 (S.D.N.Y. 2003)

...[Defendant's Expert] admits that while his survey shows some "confusion," it does not show what caused that confusion because he did not test causation...In addition, the [Defendant's] survey failed to use any controls...Although the results of [Defendant's] survey shows some confusion or some likelihood of confusion, it does not show that this

confusion exists because the respondents are confused by the titles of the publications at issue...

1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc., 309 F. Supp. 2d 467, 499-500 (S.D.N.Y. 2003)

Plaintiff's survey statistics rely on numerous leading questions that suggested their own answers,...and that are therefore entitled to little weight in assessing consumer confusion...

Even if [the survey] questions are disregarded, the survey is burdened by other flaws. To have substantial probative value, Plaintiff's survey must examine the impression of a junior mark on a potential consumer... Plaintiff's expert... testified...that in the survey he did not show respondents an example of a SaveNow pop-up advertisement [and] also did not ask whether survey respondents had ever seen a SaveNow pop-up ad,...did not attempt to distinguish between SaveNow pop-up ads and other pop-up ads,...and did not determine whether differences between SaveNow ads and other pop-up ads might have affected users' perceptions of the advertisements provided by SaveNow...

... Accordingly, [Plaintiff's] survey, as designed and carried out, is not dispositive of whether pop-up advertisements generated by the SaveNow software has caused actual confusion among SaveNow users, and is not evidence of actual confusion.

Empresa Cubana del Tabaco d.b.a. Cubatabaco v. Culbro Corporation, 2004 U.S. Dist. LEXIS 4935. *128-*129 (S.D.N.Y. 2004)

The 2000 survey conducted by [Plaintiff's] expert also demonstrated a significant degree of confusion among consumers...approximately 15% of all premium cigar consumers were confused...

...
Figures comparable to those in the 2000 survey have been found probative of a likelihood of confusion...

New Colt Holding Corp. v. RJG Holdings of Florida, Inc., 312 F. Supp. 2d 195, 224 (D. Conn. 2004)

...participation in the administration of the survey by those with knowledge of the litigation and the use of leading questions raise the risk of insincerity in responses and cast doubt on the trustworthiness of the survey... The questions challenged as leading clearly are both in form and in context (i.e. considering the preceding questions). Furthermore, [Plaintiff's Expert] and his son should not have administered the survey.

WE Media, Inc. v. Cablevision Systems Corp., 2004 U.S. App. LEXIS 7379, *7 (2d Cir. 2004)

..."[Plaintiff's] strongest evidence purporting to show actual confusion would be [Plaintiff's Expert's] Report concluding that one-third of his respondents believed [Defendant] and [Plaintiff] to be affiliated."...However, the district court found that flaws in methodology meant that the Report carried little probative weight...We agree...The district court also declined to infer the possibility of confusion from the United States Patent and Trademark Office's refusal to register [Defendant's] mark. Therefore, the district court concluded that this element did not support [Plaintiff].

Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477, 487-488 (5th Cir. 2004)

...In assessing the validity of a survey, we look to two factors: first, the manner of conducting the survey, including especially the adequacy of the universe; and second, the way in which participants are questioned...

...In an infringement action, "the appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer's good or services."...The universe in [Plaintiff's] survey consisted entirely of persons who purchased Kirby vacuum cleaners through [Plaintiff]. This group is uniquely familiar with [Plaintiff's] marketing and distribution techniques. Thus, the survey says nothing about the ad's effect on the class of potential consumers of new Kirby vacuum cleaners, a class that includes a large proportion of persons who have not yet purchased a Kirby...

In any event, flaws in the questions asked prevent the survey from proving confusion even among potential consumers...first, the surveyors asked whether [Defendant] "is in any way affiliated with, connected with, sponsored by, associated with or authorized by" Kirby. The use of the phrase "in any way" prodded survey participants to search for any connection, no matter how attenuated, between the two companies. Second, the survey question suggested a connection between [Defendant] and Kirby instead of permitting participants to make their own associations. A survey question that begs its answer by suggesting a link between plaintiff and defendant cannot be a true indicator of the likelihood of consumer confusion...

Wells Fargo & Co. v. WhenU.Com, Inc. 293 F. Supp. 2d 734, 765-768 (E.D. Mich. 2003)

...It is clear from a review of...the most critical factors that [Plaintiffs' Expert's] surveys do not provide reliable evidence of likelihood of confusion...

...
"To have substantial probative value, a survey...must...be designed to examine the impression presented to the consumer by the accused product..."

...
...at a minimum, survey respondents should have been shown the item that is said to be infringing or confusing...

Identification of the proper universe is recognized as a critical element in the development of a survey...

In this case, the relevant universe consists of people who are likely to bank or look for a mortgage online...

Because [Plaintiffs' Expert] failed to survey the appropriate universe of people, the results of his 1-800 [contacts] and Gator surveys cannot be extrapolated to this case regardless of whether those respondents were demographically representative of the general population of Internet users...Only a fraction of Internet users bank and obtain mortgages online; therefore, there is no way to know whether any of the Gator and 1-800 [contacts] respondents were users or potential users of plaintiffs' websites...

...

A survey is not reliable if it suggests to the respondents an answer that would not otherwise have occurred to them. More specifically, "it is improper to suggest a business relationship where the respondent may previously have had no thought of any such connection."...

...The Court cannot find [Plaintiffs' Expert's] conclusions on this subject reliable, because the survey questionnaire repeatedly suggested to respondents a link between pop-up ads and websites...

[Plaintiffs' Expert's] surveys suffered from numerous other flaws, including the use of an Internet Panel...and the failure to use control questions to generate an error rate...Of even greater significance, [Plaintiffs' Expert] failed to employ an experimental design that established causation...

...

...Plaintiffs have...not established any likelihood of confusion in defendant's "use" of their marks...

Frank M. Sullivan III v. CBS Corporation, 2004 U.S. App. LEXIS 20062, *16-*17 (7th Cir. 2004)

...[Plaintiff] had ample opportunity to conduct his own survey, but he chose not to...

[Plaintiff] was not required to conduct his own survey, but he presented no other evidence of actual confusion or likelihood of confusion...with one exception. That exception is a presentation showing the results of searches conducted on two automated search engines. The search engines retrieved web sites related to both the [Plaintiff] and the [Defendant]. This does not mean, however, that the search engine was "confused" as to the source of the sites...But those results just take us back to the same point about confusion: would a consumer, looking at the different web-sites, think that [Defendant] and the [Plaintiff] were somehow from the same source?...

Gateway, Inc. v. Companion Products, Inc., 2003 U.S. Dist. LEXIS 21461, *41 & n.4, *42, *43 & n.7, *47-*48 (D. S.D. 2003)

[In Plaintiff's survey] the participants were randomly divided into two groups. The test cell was exposed to a photograph of Cody Cow wrapped around a computer monitor; the control cell saw a photo of the tiger stretch pet wrapped around a monitor. The surveys were otherwise conducted identically... The exposure to the photograph mimicked the overall commercial impression consumers would receive in the marketplace. It also resembled how consumers would view Cody Cow in advertising materials...

...

... While allowing the survey participants to look at the photograph, the person conducting the survey stated:

Here is a picture of a product that is used to decorate or personalize a computer monitor. As you can see from the picture, it stretches to fit around the screen. Please take a look at this as you would if you saw it on somebody's computer or if you were shopping for personal computer accessories either on the internet or in a computer store. Take as much time as you normally would when looking at something like this or when shopping for such products. Let me know when you are finished.

...

Participants were first asked, "Based on what you just saw, do you or do you not have a belief as to who or what company or companies makes or puts out the product in the picture that I just showed you?" Those who had a belief were asked "Who or what companies do you believe makes the product in the picture that I showed you?" They were also asked whether they knew of other products made by whomever made the product in the picture, what those products were, and whether they believed that whoever made the pictured product is or is not related to, sponsored by, or associated with any other source or company. After each question, they were asked to explain why they came to that conclusion...

...

...[Plaintiff's Expert] subtracted the percentage of people who identified [Plaintiff] in the control group from the percentage of people who named [Plaintiff] in the test group. This resulted in the adjusted likelihood of confusion...

...

Displaying Cody Cow in the post-sale context, moreover, does not invalidate the survey since the Lanham Act protects post-sale as well as point-of-sale confusion...

Edge Wireless, LLC v. U.S. Cellular Corporation, 2004 U.S. Dist. LEXIS 15297, *15-*16, *45, *47 (D. Or. 2004)

...Plaintiff did not conduct a consumer survey to assess whether a likelihood of confusion would occur between easyedge SM and edgeWIRELESS® or plaintiff's rate plan marks. Instead, plaintiff obtained the

services of...a brand marketing consultant with over twenty years experience in advertising...

...

...Specifically, [Plaintiff's Expert] was asked to address three questions:

1. Does plaintiff have a viable brand in the marketplace?
2. If easyedge SM was introduced into plaintiff's markets, would there be a likelihood of confusion?
3. If so, what would be the likely effect on plaintiff?

...

...Plaintiff's expert report does not alter the court's conclusion that no confusion is likely to occur...

...[Plaintiff's Expert] did not base his opinion on survey evidence, marketing research, or other empirical data...Instead, [Plaintiff's Expert] testified that his conclusion was "an educated estimate based on my experience."...

...

...I do not find that the lack of survey evidence warrants a presumption that the results would have been unfavorable to plaintiff...

Duke University v. Haggard Clothing Co., 2003 T.T.A.B. LEXIS 408, *9-*10 (T.T.A.B. 2003). This disposition is not citable as a disposition of the T.T.A.B.

...applicant argues that the survey was unfair because the shirts on which the marks were shown to the survey respondents were identical to shirts on which opposer's mark is actually used...This argument conveniently overlooks the fact that as identified in the application, applicant's goods encompass the goods on which opposer has used its mark...Because applicant shows its mark in typed format in the application, applicant would be free to adopt any style of lettering it chooses, so the fact that the shirts used in the survey present the marks in block letters does not invalidate the results of the survey. Similarly, in view of the absence in the application of restrictions or limitations as to the types of shirts, for example, the channels of trade through which they will move, and the purchasers applicant plans to target with its advertising for its goods, opposer was under no obligation to use only high-end items of apparel or to choose only well off, sophisticated consumers for its survey.

Longevity Network, Ltd. v. Joel D. Wallach, 2004 T.T.A.B. LEXIS 171, *24-*25 (T.T.A.B. 2004). This disposition is not citable as a disposition of the T.T.A.B.

...Respondent objects to this testimony on numerous grounds including that [Petitioner's Expert] is unqualified to render an expert opinion, the methodology of the survey is flawed, and the results are unreliable. We agree with respondent to the extent that we can give the survey little, if any, weight. [Petitioner's Expert] "works almost exclusively as a distributor for [Petitioner]."...He has "a two-year degree from what was called [H]eald Business College" and he has taken a course in Probability in Statistics...The witness

indicated that he had no training or background in developing consumer surveys in likelihood of confusion cases...

The "survey" petitioner has submitted was really an Internet poll... Participants were instructed that: "If you don't know an answer to a question you are better off just taking your best guess and quickly moving on."...Anyone who visited the witness's website could take the test and there was no attempt made to exclude participants who were not potential purchasers of nutritional supplements...

...Because of the lack of screening of participants and the vagueness of the question, among other things, this survey offers little support for petitioner.

E. FALSE ADVERTISING SURVEYS

Malaco Leaf, AB v. Promotion in Motion, Inc., 287 F. Supp. 2d 355, 379 (S.D.N.Y. 2003)

...When an advertisement is not literally false, but rather is ambiguous or implicitly false, a plaintiff can only establish a claim of false advertising through a survey...[Plaintiff] fails to present this Court with any survey...Accordingly, defendant's motion for summary judgment on [Plaintiff's] false advertising claim is granted.

Pharmacia Corporation v. GlaxoSmithKline Consumer Healthcare, L.P., 292 F. Supp. 2d 594, 604 n.5, 605 n.8 (D. N.J. 2003)

...[Plaintiff's Expert]...testified that he did not have access to any other commercials comparing NicoDerm to another product, so he could not have used one [a comparative commercial as a control] even if he had thought it appropriate...The Court disregards this excuse. [Defendant's Expert] testified that experts conducting consumer surveys often create new ads or alter existing ones...If [Plaintiff] wishes the Court to credit its survey evidence, that evidence must conform to generally accepted survey principles. Nothing prevented [Plaintiff] from designing its own mock comparative commercial for the purposes of [its] Survey.

...

[Plaintiff] attempts to salvage the [Plaintiff's Expert's] Survey by claiming that [Plaintiff's Expert's] control question is a sufficient safeguard against any "noise."...As noted *supra*, however, the control question only weeds out the "yea-sayers." It does not protect the survey from the bias brought by consumers' pre-existing beliefs about comparative commercials.

American Italian Pasta Company v. New World Pasta Company, 371 F.3d 387, 393-394 (8th Cir. 2004)

...In its survey, [Defendant] asked consumers if the phrase "America's Favorite Pasta" conveyed a meaning. According to [Defendant], thirty-three percent of those surveyed allegedly perceived the phrase "America's Favorite

Pasta" to mean [Plaintiff's] is the number one brand. Fifty percent of those surveyed allegedly perceived the phrase "America's Favorite Pasta" to mean [Plaintiff's] is a national brand.

The Seventh Circuit confronted a similar question in *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883 (7th Cir [2000])...Having concluded the phrase "1st Choice of Doctors" conveyed more doctors prefer this product over its rivals, the Seventh Circuit considered whether a consumer survey can assign a different meaning to a phrase...Mead Johnson's survey indicated consumers perceived the phrase "1st Choice of Doctors" to mean a majority of doctors. Concluding the district court erred in using the survey to assign such a meaning, the Seventh Circuit noted, "never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held."...While acknowledging dictionaries are surveys by people who devote their entire lives to discovering the usage of words, the Seventh Circuit cogitated "it would be a bad idea to replace the work of these professionals with the first impressions of people on the street."...

We agree with the Seventh Circuit. To allow a consumer survey to determine a claim's benchmark would subject any advertisement or promotional statement to numerous variables, often unpredictable, and would introduce even more uncertainty into the market place...

F. FAME/DILUTION SURVEYS

Louis Vuitton Malletier v. Dooney & Bourke, Inc., 2004 U.S. Dist. LEXIS 17295, *88-*89, *92 (S.D.N.Y. 2004)

...[Plaintiff's Expert] found that [Defendant's] It-bags "cause dilution by blurring at [twenty-three] percent..."

This finding merits little weight for several reasons. *First*, screening questions used in this study rely on respondents' understanding of [an] ambiguous word...*Second*, the study lacks objectivity. Having failed to obtain satisfactory responses (*i.e.*, no dilution) from his first fifty-eight respondents, [Plaintiff's Expert] terminated the original survey and started over...*Third*, [Plaintiff's Expert] expanded the scope of "dilution" (by blurring) under the FTDA beyond "distinctiveness,"...by asking questions relating to "desirability."...Because desirability is unrelated to a mark's ability to identify and distinguish [Plaintiff's] handbags, inclusion of these questions was erroneous...

G. COPYRIGHT SURVEYS

Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792, 801 (9th Cir. 2003)

...In support of this argument, [Plaintiff] offered into evidence a survey in which they presented individuals from the general public in a shopping mall with color photocopies of [Defendant's] photographs and asked them what meaning

they perceived. Relying on this survey, [Plaintiff] asserts that only some individuals may perceive parodic character.

The issue of whether a work is a parody is a question of law, not a matter of public majority opinion...

We decline to consider [Plaintiff's] survey in assessing whether [Defendant's] work can be reasonably perceived as a parody. Parody is an objectively defined rhetorical device. Further, because parody is "a form of social and literary criticism," it has "socially significant value as free speech under the *First Amendment*."...While individuals may disagree on the success or extent of a parody, parodic elements in a work will often justify fair use protection...Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the *Copyright Act*...

H. PATENT SURVEYS

Spotless Enterprises, Inc. v. A&E Products Group L.P., 294 F. Supp. 2d 322, 347 (E.D. N.Y. 2003)

[Plaintiff] introduced survey evidence that purportedly shows that purchasers of the hangers erroneously identified the [Defendant's] hanger as being the same as the design depicted in the '246 design patent. In the survey, six buyers for garment manufacturers were shown a drawing from the '246 design patent and were then shown a collection of hangers including [Defendant's] hanger with a size cap and asked, "Do you think any of these hangers are the same as the hanger in the drawing?" However, the survey is severely flawed and does not assist in the infringement determination because all the hangers shown in the survey, other than the [Defendant's] hanger, did not have upswept arms. As such, the only hanger remotely related to the dominant feature of the patent (the upswept arms), was the [Defendant's] hanger. (For example, the survey did not include a non-[Defendant] design with upswept arms that would not infringe upon the '246 design patent such as any of the alternative designs proposed by [Plaintiff] in Exhibit 1473.) Moreover, as explained above, the confusion must be related to the ornamental aspects of the design. Accordingly, the survey is not probative of confusion...

Puritan-Bennett Corp. v. Penox Technologies, Inc., 2004 U.S. Dist. LEXIS 6896, *76-*77 (S.D. Ind. 2004)

...[Plaintiff's] survey purports to find the approximately 62% of patients who use portable oxygen units would consider the ESCORT's design similar to that of the '056 patent. However, the hypothetical "ordinary observer" in the *Gorham* test both speaks to "purchasers" and must be "objective."...[Plaintiff] admits that the "purchaser" of the portable oxygen units in question is not the patient...The purchaser of portable oxygen units is the medical equipment

distributor...[Plaintiff] admits that physicians and medical equipment distributors were their first targets when it introduced [its oxygen tank] because those groups made the purchasing decision...It follows then that any survey of “ordinary observers’ in this case must include medical equipment distributors, at the least, and possibly, hospitals and physicians, at best, to ensure that all relevant purchasers’ views are considered. [Plaintiff’s] survey simply misses these key “ordinary observer” groups, and as a result, is not nearly broad enough to create an issue of fact on infringement.

I. *DAUBERT*/ADMISSIBILITY ISSUES⁵

Deere & Company v. MTD Holdings Inc., 2004 U.S. Dist. LEXIS 2550, *2 n.1 (S.D.N.Y. 2004)

Defendant...submitted a motion in limine to exclude all evidence relating to the purported consumer survey conducted by [Plaintiff’s Expert], including his expert report and related testimony...Defendant argues that Plaintiff’s consumer survey should be excluded under *Rule 403 of the Federal Rules Evidence* because it is so flawed in methodology that any probative value the survey may have is substantially outweighed by its prejudicial effect...The Court has considered Defendant’s arguments regarding the alleged flaws in the [Plaintiff’s Expert’s] survey in its determination of the summary judgment motions. However, the Court will not at this time address whether or not [Plaintiff’s Expert’s] report and related testimony concerning the survey results should be excluded at trial. Regardless, if any errors are present in the methodology used in conducting this survey, such errors generally go to the weight of the evidence, not its admissibility...

MasterCard International Incorporated v. First National Bank of Omaha, Inc., 2004 U.S. Dist. LEXIS 2485, *27-*30 (S.D.N.Y. 2004)

The Survey conducted by [Defendant’s Expert] is flawed to the point that its probative value is substantially outweighed by the Survey’s potential for unfair prejudice and confusion, and the likelihood that it will mislead the jury...

...the number of respondents surveyed is too small to provide meaningful results in this instance...just 27 individuals [in] the test cell...and 25 individuals [in] the control group...

... It is unclear whether, and to what extent, the Survey reached the decision-makers whose potential confusion is relevant to this litigation.

⁵ For a review of cases in which successful *Daubert*/Admissibility issues were raised see Gerald L. Ford, “Survey Evidence – Successful Challenges Since *Daubert*,” and for a review of unsuccessful *Daubert*/Admissibility challenges see Dale M. Cendali and Laura E. Golub, “The Admissibility of Survey Evidence After *Daubert*,” both published in 2003 in the International Trademark Association 125th Annual Meeting proceedings. Also see G. Kip Edwards, “Lanham Act Surveys After *Daubert*: Lessons Learned So Far” published in the 2001 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases; G. Kip Edwards, “Making and Defending *Daubert* Motions—Maximizing Your Chances of Success” published in the 2002 Practising Law Institute handbook Litigating Copyright, Trademark & Unfair Competition Cases; and Richard J. Leighton, “Using *Daubert-Kumho* Gatekeeping to Admit and Exclude Surveys in Lanham Act Advertising and Trademark Cases,” 92 TMR 743 (2002).

In addition, bank employees deciding which smart card programs are appropriate for their institutions will do so with far more information than was provided in the Survey and with far more care than the Survey's respondents...

...The Survey is excluded pursuant to *Rules 403 and 702 of the Federal Rules of Evidence*.

Citizens Financial Group, Inc. v. The Citizens National Bank of Evans City, 2003 U.S. Dist. LEXIS 25977, *7, *9-*11, *13-*15 (W.D. Pa. 2003)

Pursuant to *Daubert*, [Plaintiff] seeks to exclude [Defendant's] likelihood of confusion survey...

...[Plaintiff's] main objection is that the study is conducted in an improper universe and, ...when conducting a survey in a trademark case the first crucial step is determining the proper universe...the propriety of a survey can turn on the geographical area covered...The burden of proving that the universe is proper is on the proponent of the survey...

In reverse confusion cases, like this one, the appropriate universe is the "senior user's customer base."...

...While it is true that the appropriate universe consists of individuals who have access to both litigants and are a customer or a potential customer, when conducting a survey in a reverse confusion case, the universe is further limited to the senior user's "customer base."...

...

Even assuming, *arguendo*, that the study was conducted in the proper universe, the survey would have necessarily excluded those individuals that were likely to be customers or potential customers of [Senior User]. As mentioned previously, ...relevant factors used to assess reliability and trustworthiness of a survey are whether the sample chosen was representative of that universe and whether the questions asked of the interviewees were framed in a clear, precise and nonleading manner...Here, screener question A asked the following question: "But first, do you live or work in this general area or are you just visiting?" ..."General area" and "just visiting" were not defined by the study. This is not a clear and precise question. Furthermore, if the individual answered "just visiting," then the interview was terminated without any further questioning and the individual was excluded from the questionnaire...many of the individuals that should have been included in the proper universe...would have been automatically excluded from the survey. Therefore, because of the location of the study and the screener question asked, few (if any) participants were likely to be part of [Senior User's] customer base. Consequently, the failure to conduct the survey within [Senior User's] customer base and then to exclude those individuals who may potentially come from within the customer base is fatal.

...Although I recognize that no survey is beyond criticism and there is no perfect survey, the problems with the [Senior User's] Survey are so fundamental and basic that the survey is stripped of any significant probative value. Therefore, I am convinced that the...survey is not simply ill-tailored (so as to go to the

weight), but is fatally flawed due to an irrelevant and improper universe, such that it must be excluded from evidence at trial.

Citizens Financial Group, Inc. v. Citizens National Bank of Evans City, 2004 U.S. App. LEXIS 18999, *26-*27 (3d Cir. 2004)

[Defendant's] argument that any problems of [Defendant's Expert's] survey should have affected only its evidentiary weight but not its admissibility is also unpersuasive. The District Court excluded the survey because [Defendant's Expert's] methodology was fundamentally flawed and because the danger of undue prejudice far outweighed the limited probative value of the survey, especially for a jury. The courts have held generally that mere technical unreliability goes to the weight accorded a survey, not its admissibility...The Court in this case concluded that [Defendant's Expert's] survey did not suffer from mere technical flaws, but from fatal flaws.

Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477, 488 (5th Cir. 2004)

Usually, methodological flaws in a survey bear on the weight the survey should receive, not the survey's admissibility...[Plaintiff] argues that its presentation of survey evidence precludes summary judgment because a court may not weigh evidence or make credibility determinations when reviewing a motion for summary judgment...In some cases, however, serious flaws in a survey will make any reliance on that survey unreasonable...Otherwise, any survey, no matter how tendentious, would force the parties to trial. Thus, although minor methodological flaws will affect weight rather than admissibility, a survey can be "so badly flawed that it cannot be used to demonstrate the existence of a question of fact on the likelihood of consumer confusion."...

No reasonable jury could view the proffered survey as evidence of confusion among relevant consumers...

Wells Fargo & Co. v. WhenU.com, Inc., 293 F. Supp. 2d 734, 765 (E.D. Mich. 2003)

Under *Daubert v. Merrell Dow Pharmaceuticals*...the Court must ensure that expert testimony "is not only relevant, but reliable."...[Plaintiff's Expert] failed to satisfy fundamental principles of survey research in seven major ways:

- (a) The surveys did not sample the appropriate universe of respondents;
- (b) The surveys did not use any demonstrative stimuli or otherwise replicate actual market conditions;
- (c) The survey questionnaires were biased and leading;
- (d) [Plaintiff's Expert] drew unwarranted inferences and failed to take into account obvious alternative explanations;
- (e) The surveys did not ask the kind of control questions needed to generate an error rate;
- (f) The surveys were not administered properly, including the use of a panel of regular survey respondents;

(g) The surveys did not employ a design that established causation, rendering the surveys results uninterpretable...

Northwest Airlines, Inc. v. NWA Federal Credit Union, 2004 U.S. Dist LEXIS 17766, *8-*10 (D. Minn. 2004)

Subject to proper foundation being laid, and in light of the Federal Rules of Evidence and *Daubert*, the Court finds that [Plaintiff's Expert] is a qualified survey expert. [Plaintiff's Expert] is a trained social scientist with 20 years of experience in the marketing communications industry. [Plaintiff's Expert] serves as president of [his company] where he designs, administers, and analyzes market research for companies. In addition, [Plaintiff's Expert] has experience providing testimony at trials and depositions in this district.

...

While the Court does not accept the [Defendant's] invitation to reject [Plaintiff's Expert's] consumer survey, the Court does not agree with all aspects of the methodology of the survey or the interpretation given to the survey results by [Plaintiff's Expert]. In particular, the Court finds that the format of the questions, if not leading, certainly suggested to the respondents the "correct" answer to some of the questions being asked. The Court also finds that some of the questions asked had little probative value...In light of these findings, the Court will give the survey results and their interpretation less weight when considering the issues before it on the motions for summary judgment.

Playboy Enterprises, Inc. v. Netscape Communications Corporation, 354 F.3d 1020, 1026-1027 (9th Cir. 2004)

Defendants criticize [Plaintiff's Expert's] procedures and conclusions... Their critique of [Plaintiff's Expert] methods and interpretations formed the basis of a motion to exclude his expert testimony and report before the district court. The district court denied that motion, however, and allowed the introduction of the evidence.

Defendants may have valid criticism of [Plaintiff's Expert's] methods and conclusions, and their critique may justify reducing the weight eventually afforded [Plaintiff's Expert's] expert report...

Because actual confusion is at the heart of the likelihood of confusion analysis...[Plaintiff's Expert's] report alone probably precludes summary judgment.

J. PROCEDURAL ISSUES

Cartier, Inc. v. Four Star Jewelry Creations, Inc., 2003 U.S. Dist. LEXIS 16887, *3, *6, *9 (S.D.N.Y. 2003)

...[Plaintiff]...asked for all expert reports from cases in which [Defendant's Expert] testified in the last five years. In response to this request,

[the company employing Defendant's Expert] concedes that it has the expert reports but objects to producing them for plaintiffs.

The issue before the court is whether plaintiffs are entitled to the [Defendant's Expert's] reports prepared in cases in which [Defendant's Expert] testified in the last five years...

...
...plaintiffs' request for [Defendant's Expert's] expert reports from all cases in which he was an expert in the last five years is beyond the scope of *Rule 26*.

...
...The plain language of *Rule 26* directs parties to provide a *list* of cases, not the *expert reports* relied upon in those cases...

Malaco Leaf, AB v. Promotion in Motion, Inc., 287 F. Supp. 2d 355, 376 (S.D.N.Y. 2003)

...This Court declines to consider any survey or expert report, including the Pilot Survey, offered to defendants for the first time on a summary judgment motion and inexplicably not produced during discovery...

Duke University v. Haggard Clothing Co., 2003 T.T.A.B. LEXIS 408, *4, *6-*8 (T.T.A.B. 2003).
This disposition is not citable as a precedent of the T.T.A.B.

The issue is whether opposer's survey and the testimony that explains it were proper rebuttal as responsive to applicant's asserted defenses, or, as applicant asserts, this testimony and these exhibits could only have been presented as part of opposer's case in chief.

The survey was designed to determine whether the third-party uses shown by applicant during its testimony period have diluted the fame of opposer's "DUKE" mark for clothing, and whether, as applicant argues its testimony and evidence shows, such third-party uses of similar marks have created a marketplace in which confusion between opposer's mark and the mark applicant seeks to register would not be likely.

...
There is no question that [Opposer's Expert's] testimony and the survey he conducted would have been appropriate to present as part of opposer's case in chief. Neither party contests this fact. Applicant argues that once opposer failed to conduct and introduce the survey during its testimony period, however, opposer could not thereafter introduce it...

After careful consideration of the arguments of both parties, we have decided to consider this testimony and evidence because it is proper rebuttal under the circumstances presented by this case. During its initial testimony period, opposer had the burden of establishing its standing; of establishing its ownership of the marks with which it contends applicant's mark would be likely to cause confusion; of establishing use of these marks before applicant filed the application to register the mark it seeks to register; and of establishing a prima facie case of likelihood of confusion based on the similarity of the marks and the relationship

between opposer's goods and the goods with which applicant intends to use the mark it seeks to register.

...opposer was not required to anticipate or guess what grounds of defense might be raised by applicant, or to counter those grounds of defense prior to their assertion. Dilution was not raised by applicant as a defense in its answer to the Notice of Opposition. When applicant presented testimony concerning the alleged dilution of opposer's marks, opposer properly rebutted the dilution defense asserted by applicant with three depositions, one of which is the deposition of [Opposer's Expert] to which applicant objects. Under these circumstances, his testimony and the exhibits to it are admissible as rebuttal testimony.

Kevin T. McCarney dba Poquito Mas v. Una Mas, Inc., 2004 T.T.A.B. LEXIS 51, *19 (T.T.A.B. 2004). This disposition is not citable as a precedent of the T.T.A.B.

Another issue concerns a survey that applicant introduced to show that there was no likelihood of confusion. Opposer objects to the survey on the ground that applicant has not shown that the survey's designer...is an expert. In addition, even if the survey is admitted into evidence, opposer argues that it includes many flaws and should be given little or no weight...

We start by noting that opposer's objection should have been raised earlier. Opposer did not raise these objections to the survey in his opening brief, and for that reason, opposer's objection to the survey will not be sustained.

III. BIBLIOGRAPHY

LANHAM ACT SURVEYS: 2004 BY CIRCUIT

This appendix contains citations, by circuit, for all identified opinions published from mid-2003 through mid-2004, in which survey evidence was referenced.

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LANHAM ACT SURVEYS: 2004
BY ISSUE

This appendix contains citations, by issue, for all identified opinions published from mid-2003 through mid-2004, in which survey evidence was referenced.

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Dr. Ford is a partner in the marketing research and consulting firm of Ford Bubala & Associates, located in Huntington Beach, California. As a partner in Ford Bubala & Associates, he has been engaged in commercial marketing research and consulting for the past twenty-nine years. He is also an emeritus faculty member of the School of Business Administration, California State University, Long Beach, where he held a full-time teaching position for twenty-five years.

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He has spoken at meetings of the Marketing Research Association, the American Marketing Association, the American Intellectual Property Law Association, the American Bar Association, the Practising Law Institute, the Intellectual Property Institute of Canada, and the International Trademark Association.

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Dr. Ford is also a member of the Editorial Board of The Trademark Reporter? .