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INTERNET SURVEYS FOR TRADEMARK LITIGATION: READY OR NOT, HERE THEY COME

By *Gabriel M. Gelb** and *Betsy D. Gelb***

I. INTRODUCTION

The use of survey research in intellectual property litigation has followed the prevalent practices employed in commercial surveys over the years, making it relevant that the most rapidly developing trend in commercial market research is the adoption of Internet (online) surveys. It is not clear, however, that the usefulness of this survey method in litigation has been adequately recognized. In discussions of survey methods for trademark and related intellectual property issues, the focus continues to be the long-established methods of telephone and face-to-face shopping mall surveys. For example, in the July-August 2002, issue of *The Trademark Reporter*, an author discusses four traditional survey methods and comments that "... Internet interviewing raises serious problems in self-selection, and thus will not be considered further in this article."¹

The discussion presented here, appearing more than five years later, proceeds from the belief that attorneys involved in trademark litigation need to know more about Internet surveys.² In that five-year period, they have become an accepted method by which to conduct surveys to be presented as evidence in intellectual property lawsuits. In 10 recent federal court cases, no online survey was faulted for its data collection method. However, this data collection method, like others, has its imperfections. As a judge quoted with approval by McCarthy commented, no survey is

* Senior consultant, Gelb Consulting Group Inc., Houston; Associate Member, International Trademark Association. As an expert witness or consultant, he has conducted or critiqued surveys as evidence in intellectual property litigation in 24 states.

** Larry J. Sachnowitz Professor of Marketing & Entrepreneurship in the C. T. Bauer College of Business, University of Houston. She is director of Bauer College doctoral programs, has taught doctoral seminars focusing on academic research since 1986, and has consulted on surveys in intellectual property litigation.

1. Michael Rappeport, *Litigation Surveys—Social "Science" as Evidence*, 92 TMR 978 (2002).

2. While this discussion uses "Internet" and "web" interchangeably, since at present most Internet surveys are conducted via the World Wide Web, it should be noted that currently some commercial surveys are conducted via Personal Digital Assistants, and the number may increase.

perfect.³ It should thus be no surprise that no data collection method is ideal for every legal application.

Selection of the best method in a given case follows consideration of two principal issues: reaching the relevant population and evoking responses that are unbiased and meaningful. All else being equal, for example, populations of computer buyers or software users, or financial analysts on four continents, make an Internet survey immediately attractive; a population of respondents over 70 in rural areas makes it less attractive. However, independent of population characteristics, obtaining meaningful answers to specific questions may take precedence over an “ideal” sample. If imitation of a design on cowboy boots has prompted a suit for trade dress infringement, as actually occurred in 2004, the priority may be a mall research facility where respondents can pick up and handle the test boots.

In this article, a brief historical perspective will introduce the use of survey research in intellectual property litigation, followed by examination of the growth of Internet research in the commercial world (market research) and in the realm of public affairs (public opinion research). Then to enable the reader to assess the likelihood that the increase in the use of such surveys in the commercial world and in public opinion polling foretells similar dominance in trademark cases, the reasons for that increase will be outlined. Following that explanation, the types of Internet surveys will be presented, because clearly some types are more suitable than others to be employed as evidence in intellectual property cases. The strengths and weaknesses of Internet research for such litigation are then discussed. A final section reviews cases in which these surveys have been employed in federal courts and offers conclusions related to the use of Internet surveys in trademark litigation.

A. Historical Perspective

The U.S. Census of 1790 was the first formal survey, but the explosive growth of the industry came after World War II when increased manufacturing capacity created a need for manufacturers to understand consumer behavior.⁴ At that time, however, as Diamond has pointed out, courts were not quick to appreciate the value of consumer opinions and “forty years ago the question of whether surveys constituted acceptable evidence was

3. 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 32:170 at 32-325 (4th ed. 2006).

4. Council of American Survey Research Organizations (CASRO) has prepared *A Brief History of the Survey Research Industry in America Offering Frequently Asked Questions About Research* (2001), available at www.casro.org/media/History%20of%20Research.pdf.

still unsettled.”⁵ However, she notes, the wide use of surveys was foreshadowed in *Triangle Publications*. Called on to determine whether a manufacturer of girdles labeled MISS SEVENTEEN infringed on the trademark of the magazine *Seventeen*, Judge Frank suggested that, in the absence of a test of the reactions of “numerous girls and women,” the trial court judge’s finding as to what was likely to confuse was “nothing but a surmise, a conjecture, a guess,” noting that “neither the trial court judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl.”⁶

Judge Frank’s wry comment provides the most cogent argument for including the responses of a relevant population in disputes over trademark and trade dress infringement. The same argument often applies to the need for surveys in such issues as false advertising, right of publicity, libel and slander, each of which involves assessing the perceptions of one or more segments of a population.

Of course, the use of surveys for such assessment and other related purposes has increased greatly since 1948. One milestone was the U.S. Supreme Court’s *Daubert* decision, which has been interpreted as directing that economists’ estimates of damages must be based on accurate market data. That requirement brought a perceived need to add market research to the calculation of damages.⁷

Until the start of the 21st century, surveys for litigation were conducted principally in either of two formats, both still common—by telephone or by face-to-face interviewing in a shopping mall. In the latter case, an interviewer stops shoppers and rather than question them on the spot, often asks them to come to a facility leased by the interviewing firm, where they can look at one or more products, packages, or logo displays and answer questions. Also, some surveys, but fewer, have been conducted by mail or via population-specific personal interviews, such as at trade shows, to reach business audiences. A telephone survey of a broad population has historically been accorded the most weight because it could employ a probability sample based on random digit dialing; in other words, all telephone households could potentially be included in a survey. Mall surveys were accepted even though they employed non-random samples, when they were deemed

5. Shari Seidman Diamond, *Reference Guide on Survey Research*, in *Reference Manual on Scientific Evidence*, 2d ed. (2004).

6. *Triangle Publications, Inc. v. Rohrlisch*, 167 F.2d 969, 976, 77 U.S.P.Q. 196, 201-02 (2d Cir. 1948) (Frank, J., dissenting).

7. *Daubert v. Merrill Dow Pharms, Inc.*, 509 US 579 (1993). Interpretation of the application of *Daubert* to economists’ testimony is offered by Robert G. Badal and Edward J. Suzewski, *Economic Testimony Under Fire*, ABA Journal, 2001, at 56.

necessary for the display of visual stimuli such as trademarks, products, and packaging. Dual mode surveys also have had their place, as when a researcher mails photos to potential respondents and then interviews them by telephone.

B. Growth of Online Surveys

Today, residents are much more difficult to reach via telephone, due in part to explosive utilization of cell phones, since they are excluded from the databases of firms that sell lists of available numbers to research organizations for random digit dialing. Increasing use of voicemail, Caller ID and call blocking also make it far more difficult to reach landline telephone subscribers. In general, as noted in a leading marketing research textbook, “The public is not enamored of marketing research, and often groups it with direct marketing as an invasion of privacy (or at least an interruption of dinner).”⁸

These factors have led to significantly decreased response rates via telephone. A 50% decline in participation in telephone surveys among adults aged 18-34 from 2000 to 2006 has been reported by the Pew Research Center for People and the Press; the rate dropped from 31% to 20%.⁹ Consequently, in reporting on a study of Internet survey methodology, a professor of political science at Stanford University stated that because of the “deteriorating” quality of phone samples, researchers should recognize the obvious motivational issue: “. . . sample selection is primarily determined by who *chooses* [italics in original] to respond, not the random selection mechanism.”¹⁰

In recognition that online research has no greater “self-selection” issues than does its telephone counterpart, and possibly fewer, use of web-based surveys has zoomed upward as Internet usage has expanded. These surveys involve, in the general case, an email request to respondents to click on a link in the email invitation and then participate in the survey that comes up on the screen. Alternatively, they may entail a “clickable” hyperlink from any web page. The survey will have been programmed using software that presents initial questions, and then displays

8. Donald R. Lehmann, Sunil Gupta, and Joel H. Stickel, *Marketing Research* (1998), at 12.

9. The report, *The Cell Phone Challenge to Survey Research* (May 15, 2006), notes the decline in use of landlines and increase in cell phones, whose numbers are not included in the databases offered by suppliers of random digit telephone numbers to companies who do telephone interviewing. It is available at <http://people-press.org/reports/display.php3?ReportID=276>.

10. Douglas Rivers makes this observation in *Sample Matching: Representative Sampling from Internet Panels*, referencing the 2005 California special election, available at http://www.polimetrix.com/documents/Polimetrix_Whitepaper_Sample_Matching.pdf.

succeeding questions based in part on answers a respondent has given previously (a procedure known as “branching.”) Often, the questions displayed include a word or phrase provided by the respondent in a previous answer (known as “piping.”)

Branching and piping mean that no two respondents may see exactly the same questionnaire, offering a researcher designing an Internet survey the same degree of customization permitted by computer-aided telephone interview (CATI) surveys. Also, the screen may display pictures, in color, of products, advertisements or packages. Because most Americans (and as of June, 2007, 68% of those with incomes greater than \$50,000) now have broadband connections to the Internet at home,¹¹ audio and movie stimuli, e.g., a television advertisement or film trailer, can also be used in Internet questionnaires when appropriate.

At the researcher’s discretion, survey programs can be directed to prevent a respondent from going back to an earlier question to change his or her answers based on second thoughts or additional knowledge acquired from a subsequent question. Also, programs require that each question be answered before a respondent can move on to the next question. To prevent a respondent from submitting more than one set of responses, an email invitation to participate can contain a unique identifier number so that when the individual responds, that number cannot be used again.

Given that most Americans have transacted business on the web (e.g., shopped, checked bank balances, and read news); it is not surprising that for many, completing an Internet survey seems to them the easiest way to answer questions. An online survey of 247 research companies in the United States and Europe in March 2006, concludes: “Online research continues its headlong march to become one of the most dominant (if not the most dominant) data collection methodologies worldwide . . . research over the Internet appears well-set to take a third of the survey research market in a very short space of time.”¹² Similarly, the Council of American Survey Research Organizations (CASRO) reported in its 2006 financial survey that revenue from research projects primarily using the Internet exceeded revenue from those conducted by phone by almost \$100 million.¹³

11. See www.leichtmanresearch.com/research/notes06_2007.pdf.

12. Cambiar, a consulting firm, is the publisher of *The Online Research Industry: An Update on Current Practices and Trends* (2006). Results of this study are described at <http://www.gmi-mr.com/press/release.php?p=2006-07-11>.

13. Infosurv, “Online Research Surpasses Phone Surveys,” available at http://www.prweb.com/releases/online_survey/market_research/prweb506653.htm (last visited Aug. 13, 2007).

From less than 10% in 2000, online data collection has captured 35% of the research industry in 2006, according to the magazine *Advertising Age*. The same article quoted the executive vice president of Synovate, a research firm: “The migration from mail and face-to-face to phone research as a mainstream data-capture platform took more than 10 years. The move to online from phone is taking half that.”¹⁴

Clearly, some organizations moved faster than others in the shift to Internet surveys; in 2001, the consumer products giant Procter & Gamble, conducting 6,000 surveys worldwide, reported it would conduct half of its U.S. surveys online.¹⁵ More broadly, a 2006 Research Industry Trends report stated, “In this 2006 study, the Internet has pulled well ahead of CATI [computer-aided telephone interviewing] as the primary method of data-collection for both providers and clients. More than half of those on the academic or client side now rely on the Internet as their primary data collection modality.”¹⁶

In the public policy arena, the Cooperative Congressional Election Study polled, online, 24,000 Americans who voted in 2006. The organization noted that “[an] Internet-based survey compiled by researchers at 30 universities produced a sample that almost perfectly matched the national House election results. . . .”¹⁷

As illustrated above, telephone surveys, formerly seen as the best way to achieve a random probability sample, are no longer able to deliver satisfactory response rates. One has to question the extent to which those who remain willing and able to respond to a telephone survey are representative of the broader population, who appear to be neither willing nor able to do so. In many cases their willingness has been eroded by sales presentations masquerading as surveys and their ability reduced by their exclusion from random digit databases when they use only a cell phone. Pertinent to the issue of willingness to respond is a study in which potential survey respondents, all Internet users, were telephoned, and then given a choice of how they would like to respond to a survey—

14. Bradley Johnson, *Online Methods Upend Consumer Survey Business*, *Advertising Age* (July 17, 2006).

15. Christopher T. Heun, *Procter & Gamble Readies Online Market-Research Push*, *Information Week* (October 15, 2001), <http://www.informationweek.com/story/showArticle.jhtml?articleID=6507502>.

16. This report is a joint effort of GreenBook, Rockhopper Research, and Dialtek; the quoted material is on p. 31 (2006) or is available at www.mrweb.com/drno/news5912.htm (last visited August 21, 2007).

17. Alan Abramowitz and Bill Bishop, *The Myth of the Middle*, available at www.washingtonpost.com (February 28, 2007).

phone or web—the sponsor reported that 88% chose the Internet option.¹⁸

Actually, telephone surveys were not always held in high esteem. The 1966 *Journal of Advertising Research* contained a quote from the Advertising Research Foundation's director of technical services, as follows: "Telephones have limitations as a research tool—particularly for consumer research. Telephone surveys can be easy to conduct and supervise, provide quick answers, yield high response and cost little. . . . [But] the researcher needs to consider whether telephones can reach the population he wishes to contact." James Spaeth, ARF president, brought this quote to light as he noted in a 1999 conference that the same comment applies today to online research.¹⁹

It is reasonable, of course, to ask who is using the Internet if those individuals will constitute the population from which a sample is drawn in a survey for a trademark case. The Pew Research Center conducted a survey in February-March, 2007, and reported that among all U.S. adults, 71% use the Internet, with no difference between men and women. Internet usage drops off to 32% for adults over 65 and to 60% for adults in rural areas. As one would expect, income and educational level also affect the level of usage.²⁰ Thus, if the population of concern is low-income, rural, or very elderly, the Internet is probably not an appropriate data collection mode.

II. ONLINE SURVEYS AND THEIR RELEVANCE FOR INTELLECTUAL PROPERTY LITIGATION

In the past, as noted earlier, federal courts have taken the position that survey methods employed in commercial research can be accepted in surveys for litigation. There is no reason to assume that the same attitude will not be taken for online surveys in the general case. However, there are three types of Internet surveys, and it appears that only two will be accepted as evidence in intellectual property litigation.

18. John Allison and Chris O'Konis, *If Given the Choice*, Quirk's Marketing Research Review, available at <http://qmrr.com/articles/a2002/20020702.aspx?searchID=1610407&sort=9>.

19. James Spaeth, *At the Dawn of a New Day*, presentation at the Online Research Workshop sponsored by the Advertising Research Foundation (1999).

20. Pew makes these data available at www.pewinternet.org/trends/User_Demo_6.15.07.htm; similar results were reported by Scott Fricker, Mirta Galesic, Roger Tourangeau, and Ting Yan, *An Experimental Comparison of Web and Telephone Surveys*, *Public Opinion Quarterly*, vol. 69 (Fall, 2005), 270-392. The authors randomly assigned respondents to telephone or web surveys and reported that those taking their survey on the web were likelier to give correct answers to cognitively demanding knowledge questions.

Internet (online) surveys can be categorized into three formats:

- Entertainment surveys
- General panel surveys
- Closed-population surveys

The first type of Internet survey, the *entertainment survey*, is mainly conducted by media or any commercial website operator seeking to promote involvement with their audiences. These surveys are posted on a website, such as CNN, which asks its online audience about interesting issues of the day and then reports results. Business media also solicit online answers about business issues for instant display or later publication. Of course, since one cannot know the demographics of these respondents and multiple votes are permitted, they are not generally considered a relevant population for a legal survey.

One attempt was made to introduce such a survey into evidence in the well-publicized case where the maker of SPLENDA NO CALORIE SWEETNER was accused of false advertising. This case featured a battle of surveys, one of which was an AOL poll that asked, "Do you think that Splenda's claim 'made from sugar . . . tastes like sugar' is misleading?" That survey was ruled inadmissible for two principal reasons. First, it could not be shown that the respondents represented a relevant population. Second, the question itself was biased.²¹ Another survey presented in the Splenda case will be discussed later in this article, but it should be noted that the inadmissibility of the Internet survey was not due to data-gathering method but to the two other factors.

The second online type is the widely used *general panel model*. Large and small vendor companies offer panels of possibly three million or more U.S. households that have agreed to take part in online surveys for small gifts, a chance at a larger gift (via a drawing,) accumulating "points," or for other motivations such as curiosity or boredom. These panel providers collect respondents in various ways, but any participant has agreed to be contacted with an invitation to respond to surveys, while understanding that such participation is entirely voluntary.

The third method is called the *closed population panel*. It includes members of trade or professional associations, or members who share a common characteristic of interest. An example is Epocrates, which markets Personal Digital Assistants that can be loaded with free medical reference, prescribing application, and drug-related software to physicians, who are then

21. Merisant Co. v. McNeil Nutritionals LLC, 2007 U.S. Dist. LEXIS 27681 (E.D. Pa. April 12, 2004).

asked if they want to participate in market research for honoraria. Those who agree have their email addresses available for online surveys. Epocrates reports that 145,000 physicians and 415,000 other allied healthcare professionals have “opted-in” to their panels. Numerous other physician panels exist as well, because the American Medical Association licenses its membership list to database warehouses that in turn license physician information to survey companies. Such arrangements are increasingly common because of the revenue stream they represent for associations.

In some cases, closed population panels offer the optimal target population because their participants have been “prequalified” for participation by virtue of specific characteristics. The panel may already exist, or may be assembled by a researcher from trade association lists or similar sources. It may also be generated “on the fly” by displaying “opt-in” invitations on pertinent websites, or by sending mail invitations for web-based participation to a membership list for which email contact is not available or appropriate. An analogy that may help in distinguishing between a general population panel and a closed population panel is the difference between a shotgun and a rifle.

It is important to remember that under the provisions of the CAN-SPAM act, unsolicited email, even a survey invitation, to a person with whom the sender does not have a pre-existing business relationship is considered “spam” and may be blocked by the Internet Service Provider or a consumer’s email application. Thus, if a researcher needed to interview members of a professional society who had agreed to receive email concerning the affairs of the society, a survey invitation utilizing those email addresses would be inappropriate unless the society members had previously agreed to receive survey invitations, or the survey directly concerned the society. On the other hand, direct mail, a notice on the society’s website or newsletter, and/or a telephone call could be used to invite participants to a web survey; survey research invitations are exempt from the National Do-Not-Call Registry as established by the FCC under the Telephone Consumer Protection Act.

If no appropriate closed panel option exists, a researcher may call on one of the general population panel providers to help screen a large sample to identify and recruit qualified participants. Such providers are well aware of the importance of “blinding” the inclusion criteria so that screening questions do not in themselves reveal the “right answer.” For example, instead of asking each member of a general panel only, “Have you bought milk in the last week?” and then invite those answering “yes” to participate, the appropriate screening question would be, “In the last week, which of the following, if any, have you purchased?” followed by a list of several items. Such an approach does not signal a focus on milk in

a survey, although only those who check that purchase will be included as members of the relevant population on that topic.

According to a RAND publication on web surveys written for government agencies, "Subpopulations that represent only a small fraction of the general population . . . usually cannot be reached efficiently with traditional survey modes. However, the subpopulations of interest may be easily found in the prerecruited panels of commercial Web survey companies."²²

A. Strengths and Weaknesses of Internet Surveys

Five primary advantages can be listed for Internet surveys, as compared to survey interviews by telephone, mail or in person.

- Respondents can answer questions in an online survey at their convenience, increasing the likelihood that they will give more thought to the issue at hand, or at least they will be less distracted by household events. In a telephone survey, the interviewer moves quickly to achieve a quota. Further, one can argue that because most people in the United States process information more effectively visually than aurally, Internet communication (reading/seeing) is superior to telephone communication (listening/hearing).
- Pictures, sound and video clips can be included in the survey, thus obviating the need for mall surveys, while at the same time offering a geographically broader and more diverse population.
- The ability to screen large populations quickly makes it easier to reach low incidence populations through specialized panels or subsets of larger panels.
- The method is faster and cheaper than its traditional mall or telephone counterparts. Since results are digitized, they are tabulated in real time; it is not unusual for survey results to be known two or three days after an online survey has been launched.
- Web-based data collection eliminates the potential of interviewers biasing answers and possibly acting in a fraudulent manner.

This final point is important. Interviewers at mall facilities and phone banks cannot avoid the introduction of a human (and therefore non-standard) filter between the respondent and researcher. These include the fact that each interviewer reads questions differently over the phone, and respondents may infer

22. Matthias Schonlau, Ronald D. Fricker Jr., and Marc N. Elliott, *Conducting Research Surveys via E-Mail and the Web*, at 77 (The Rand Corporation), available at www.rand.org/pubs/monograph_reports/MR1480.

the “right” answer from an accent, an inflection, or even the gender of the interviewer.

Also, in some cases, fraudulent behavior has been detected on the part of low-paid, non-professional interviewers, particularly in mall intercepts. In the *Splenda* case mentioned earlier in the context of “entertainment” Internet surveys, a mall intercept survey was also conducted, employing face-to-face interviews in 23 malls in various states. While it might appear that data gathered in person would be the most reliable, this survey leads to a contrary conclusion. Of the 750 completed interviews, “the results of 115 were rendered void and were not included in the final sample.”²³

The disadvantages of Internet surveys include:

- Lack of standardization in the way online panel providers recruit and verify the identity of participants can raise concerns, although some work hard to verify that a respondent is who he or she professes to be. Utilizing a company that is a CASRO member, has a verifiable research industry history (e.g., references from major corporations) and routinely “cleans” and validates its panel increases the defensibility of a survey.
- Given that rewards or a chance for rewards can be offered for participation, all general panels contain a certain number of “professional survey takers.” To minimize this source of potential bias, screening questions for individual projects should be “blinded” as described above, and even qualifying criteria that the panel provider has previously “verified” should be re-asked to minimize the possibility that another household member is responding.
- The typical online survey requires English reading and writing/keyboarding skills, though surveys can be administered in other languages if need be. Reputable web survey providers do have a telephone or “live help” option available if participants have technical difficulties while completing the survey, but those lacking the sophistication to take the survey are less likely even to try.
- Online respondents can more easily misstate their age and gender because no interviewer hears their voices. Again, using a panel or data source that validates members through other means than their web responses is important.
- Some respondents answering open-ended questions may not type in as complete an answer as a telephone or face-

23. *Merisant*, 2007 U.S. Dist. LEXIS 27681.

to-face interviewer might obtain. Human interviewers can be given instructions to “probe,” for example, when a respondent who identifies a given mark with one source is asked, “Why do you say that?” and the respondent replies simply, “It looks like that brand.” The next question should be “In what way does it look like that brand?” The best alternative in an Internet survey is simply to ask a more elaborate question such as: “Why do you say that? Please provide as much detail as possible.”

B. Comparability of Survey Results to Those Obtained by Other Methods

Attorneys may question whether the results of Internet surveys are as valid as the results from surveys using more traditional data-gathering methods. At the 2002 annual conference of the American Association for Public Opinion Research, two Ohio State University professors and the research firm Harris Interactive reported the results of a study focusing on measurement reliability. They tracked 3,238 respondents in a two-wave study and found, “. . . high levels of reliability and validity [that] give us much greater confidence that the data collected from Web-based surveys can be at least as good as data obtained in other research modalities, if not better.”²⁴

Three years later, ACNielsen, the world’s largest research company, noted that geographic limitations were a thing of the past: “online research is available in over 200 countries.” It advised companies wedded to telephone research to conduct a parallel test online, and it reported that their firm had conducted such a test for a large apple juice producer. According to Nielsen’s vice president-international research, “As a result of the test, the manufacturer decided to switch their U&A (usage and attitudes) tracking to online data collection and has saved almost 25% of the annual project cost, while at the same time getting faster results.”²⁵

III. INTERNET SURVEYS IN COURT

It would be naïve to expect the enthusiasm for Internet surveys in the commercial world to be matched in the world in

24. AAPOR, the American Association for Public Opinion Research, lists among its Standards and Best Practices on its website a paper entitled *Interviewer Falsification in Survey Research*, www.aapor.org/standards.asp.

25. Bruce Paul, *Are Online Surveys as Accurate as Offline Surveys?* ACNielsen Trends & Insights, available at www2.acnielsen.com/pubs/2005_q1_ap_surveys.shtml (last visited August 21, 2007).

intellectual property litigation. As noted in a rare academic law journal article addressing this issue: “The use and acceptance of online and computer-based surveys is not currently well received by the courts, but this should change due to the major advantages that online surveys offer to trademark litigants: advantages including more efficient, accurate and trustworthy results that far outweigh any perceived disadvantages a court may put forth in finding such surveys inadmissible.”²⁶

Actually, it is not clear currently that the “not well received” assumption is accurate. To our knowledge, Internet surveys have been introduced into evidence without anyone’s raising an eyebrow. Without expressing any opinion of the desirability of online surveys, the authors of this article asked a university law center librarian to find as many judicial opinions as possible in trademark, deceptive advertising, and similar cases involving online surveys; the result was a set of ten, none with anything in the written opinion that questioned use of the Internet as an appropriate survey method. The librarian’s search²⁷ found opinions written in the Southern District of New York²⁸ and the Districts of Delaware,²⁹ Nevada,³⁰ Central District of California,³¹ Western District of Texas,³² Northern District of Illinois,³³ Western District of Washington,³⁴ and Eastern District of Pennsylvania.³⁵ Among them, these cases involved trademark, trade dress, and copyright infringement; trademark dilution; and false advertising.

26. Robert H. T. Hornburg, *Trademark Surveys: Development of Computer-Based Survey Methods*, The John Marshall Review of Intellectual Property, vol. 14 (2005).

27. The search, not constrained to a specific time period, was in the LexisNexis Federal and State Trademark Cases database, specifying online or Internet survey.

28. The three cases are as follows: 1-800 Contacts, Inc. v. WhenU.com, 2003 U. S. Dist. LEXIS 22932 (S.D.N.Y. Dec. 22, 2003); MasterCard International, Inc. v. First National Bank of Omaha, Inc., 2004 U.S. Dist. LEXIS 2485 (S.D.N.Y. Feb. 23, 2004); Empresa Cubana Del Tabaco v. Culbro Corporation, 2004 U.S. Dist. LEXIS 4935 (S.D.N.Y. March 26, 2004).

29. AstraZeneca LP v. TAP Pharmaceutical Products, Inc., 2006 U.S. Dist. LEXIS 57410 (Del., June 23, 2006).

30. R&R Partners, Inc. v. Dorothy Tovar, 2006 U.S. Dist. LEXIS 60251 (Nev., August 9, 2006).

31. Internet Specialties West, Inc. v. ISPWest, 2006 U.S. Dist. LEXIS 96361 (C.D. Cal., August 1, 2006).

32. Kinetic Concepts, Inc. v. BlueSky Medical Corp, 2006 U.S. Dist. LEXIS 60187 (W.D. Tex., August 11, 2006).

33. Best Vacuum, Inc. v. Ian Design, Inc., 2006 U.S. Dist. LEXIS 87260 (N.D. Ill., November 21, 2006).

34. Richard Bach v. Forever Living Products U.S., Inc., 2007 U.S. Dist. LEXIS 8424 (W.D. Wash., Feb. 6, 2007).

35. Merisant Co. v. McNeil Nutritionals LLC, 2007 U.S. Dist. LEXIS 27681 (E.D. Pa., April 12, 2004).

In addition, the senior author, an expert witness, has conducted six online surveys in intellectual property lawsuits, and none has been seriously attacked on the basis of the data collection method. Because these cases are ongoing, or were settled, they would not have appeared in the LexisNexis database searched by the librarian.

- In one of the six cases, a consumer panel provider had previously identified a subset of individuals with particular medical conditions and screened that subset to identify those who were members of the relevant population for a pharmaceutical product.
- In another case, the issue was trade dress infringement for a [branded] piece of equipment purchased by a particular set of business buyers. To address whether the appearance of the equipment had secondary meaning, a two-stage process included telephoning the members of a relevant industry association to generate a sampling frame of up-to-date email addresses. The subsequent online survey displayed back-and-front color photos of the original and a control brand, unlabeled, with questions for each asking whether the respondent saw them as single-sourced and could name the brand and tell why he or she gave that response. After learning of the results of this survey and also a likelihood of confusion survey by another expert, the jury determined that trade dress infringement had taken place.
- In 2005, a national insurance company sued a Louisiana company for trademark infringement and dilution. A key issue was whether the plaintiff's policyholders were confused by the defendant's similar-sounding name. The plaintiff used the email addresses of its policyholders to conduct an online survey; results showed that a significant portion of the plaintiff's customers thought they were buying insurance from the defendant's company. The case was settled before trial.
- In a 2007 case not yet tried, the owner of a trademark for a childcare center sued a childcare center in another state for trademark infringement. One issue was the service area of each center. Since the defendant center had the email addresses of its parents—a closed population panel—an online survey was conducted and showed the very limited geographic scope of the defendant center, a finding useful to their case.

In all the cases discussed above in which the senior author participated, the opponents' arguments included relevant population, claims of biased questions, size of sample, and so on.

These are the typical objections raised by those questioning the credibility of any survey introduced by an opponent, regardless of method. However, there were no successful challenges to any of these surveys based on the online nature of the data collection method.

Certainly, certain circumstances can make Internet surveys literally the only way to ascertain the perceptions of a relevant population. In 2005, a computer manufacturer was served with a trademark infringement lawsuit. The plaintiff filed on a Thursday and a preliminary injunction hearing was set for the following Tuesday. In the intervening three-day period an online survey was launched, and the results showed that the plaintiff's product had little secondary meaning among computer users. The judge declined to issue an injunction. In this case, an online survey offered the only opportunity to present the perceptions of the relevant population. (The manufacturer prefers not to be identified.)

Other situations may arise that make an Internet survey less desirable. An example is the cost of collecting up-to-date email addresses when they are not easily available. The issue of when to utilize an online survey, and when not to do so, should be discussed with a professional researcher with extensive experience in intellectual property litigation.

However, given their widespread utilization, the authors believe that online surveys should certainly be considered by litigators for their many advantages. As noted at the outset of this discussion, the principal reservation concerning their use, a qualm about self-selection by respondents, applies to telephone surveys as well. Since no survey method is "perfect," the real-world data collection issues are the following:

- Who comprises the relevant population?
- How are its members best reached?
- How are they best recruited?
- How can meaningful, objective questions best be asked and answered?

In all cases, the issues of population selection, inclusiveness, representativeness, reproducibility and minimal bias, as outlined above, should be considered in choosing the data-collection method.

As suggested by the discussion presented here, in-person data collection at a mall research center may be appropriate for special purposes such as when a consumer needs to touch a product or package, but this method makes it difficult to assemble a nationally representative sample. Some items might be mailed, but then time becomes a factor. Telephone interviews are appropriate when the stimuli need to be heard and not seen (*e.g.*, if a radio spot

was the subject), or when truly unaided feedback is needed, *e.g.*, “When you think of famous golf courses, what names come to mind?” In-person, telephone or mail data collection should be used for low-income, very elderly, and/or some rural populations (groups who may have limited access or ability to use the Internet). However, Internet surveys, in the authors’ opinion, merit serious consideration when none of the foregoing indications for other methods exist. Attorneys should not be hesitant to employ this method when appropriate.
