### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>About the Author</td>
<td>xiii</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>xv</td>
</tr>
<tr>
<td>Preface</td>
<td>xvii</td>
</tr>
<tr>
<td><strong>PART I: Pre-Survey Considerations</strong></td>
<td>1</td>
</tr>
<tr>
<td><strong>CHAPTER 1</strong></td>
<td></td>
</tr>
<tr>
<td>Legal Issues That Can Be Examined via Surveys</td>
<td>3</td>
</tr>
<tr>
<td><em>Jacob Jacoby and Lynda Zadra-Symes</em></td>
<td></td>
</tr>
<tr>
<td>1.01 Chapter Overview</td>
<td>3</td>
</tr>
<tr>
<td>1.02 Definitional Issues</td>
<td>3</td>
</tr>
<tr>
<td>1.03 The Rationale Underlying the Use of Social Science Surveys in Trademark Litigation</td>
<td>5</td>
</tr>
<tr>
<td>1.04 The Frequency and Fate of Surveys Proffered in Trademark Litigation</td>
<td>7</td>
</tr>
<tr>
<td>1.05 Deciding Which Legal Issue(s) to Address</td>
<td>7</td>
</tr>
<tr>
<td>1.10 Trademark Issues That Can Be Addressed by Surveys</td>
<td>9</td>
</tr>
<tr>
<td>1.11 Genericism</td>
<td>10</td>
</tr>
<tr>
<td>1.12 Functionality</td>
<td>13</td>
</tr>
<tr>
<td>1.13 Secondary Meaning</td>
<td>14</td>
</tr>
<tr>
<td>1.14 Likelihood of Confusion</td>
<td>23</td>
</tr>
<tr>
<td>1.15 Strength of a Mark</td>
<td>26</td>
</tr>
<tr>
<td>1.16 Dilution</td>
<td>28</td>
</tr>
<tr>
<td>1.17 Similarity</td>
<td>32</td>
</tr>
<tr>
<td>1.18 Proposed Remedies</td>
<td>36</td>
</tr>
<tr>
<td>1.20 Other Intellectual Property Issues That Can Be Addressed by Surveys</td>
<td>44</td>
</tr>
<tr>
<td>1.21 Advertising Issues</td>
<td>44</td>
</tr>
<tr>
<td>1.22 Patent Issues</td>
<td>49</td>
</tr>
<tr>
<td>1.23 Copyright Issues</td>
<td>53</td>
</tr>
</tbody>
</table>
CHAPTER 2
Selecting a Survey Expert
Jacob Jacoby, Robert L. Raskopf, and Claudia Bogdanos

2.01 Opening Comments 57
2.02 What Disqualifies Someone from Serving as an Expert? 59
2.03 What Qualifies Someone to Serve as an Expert? 60
2.04 Courts and Counsel as Gatekeepers 62
2.10 Selecting a Survey Researcher 64
2.20 Evaluating the Researcher’s Qualifications as a Scientist 66
   2.21 Does the Proffered Expert Possess Appropriate Credentials? 67
   2.22 Do the Individual’s Qualifications as a Scientist “Fit” the Matter? 71
   2.23 Does the Individual Have Achievements as a Scientist Outside the Litigation Context? 73
2.30 Evaluating the Researcher’s Qualifications as a Trademark-Survey Researcher 84
   2.31 What Is the Person’s Knowledge of Trademark-Survey Practice and Standards? 85
   2.32 What Is the Person’s Prior Experience in Trademark Cases? 86
2.40 What to Make of the Fact That an Expert Has Been Criticized 87
   2.41 Was the Criticism an Accurate Representation of the Underlying Facts? 88
   2.42 Does the Criticism Involve an Issue Where Courts Disagree among Themselves? 90
   2.43 What Was the State of Case Law Prior to the Expert Being Criticized? 91
   2.44 In Light of the Applicable Law and Subsequent Case Law, Is the Criticism Reasonable and Correct? 91
   2.45 Was the Criticism Trivial or Important and Dispositive? 92
   2.46 Is the Criticism More Appropriately Levied at the Lawyers than at the Expert? 93
   2.47 Was the Criticism Likely to Foster or Decrease the Proffering of Junk Science? 95
2.48 Perspective and Proportionality 95
2.50 What to Make of an Expert’s Fees? 97
PART II: Designing, Conducting and Reporting Surveys

CHAPTER 3

The Marketplace

3.10 Marketplace Analysis Is Critical for Designing Trademark Surveys

3.10.1 Regarding Genericism
3.10.2 Regarding Strength of Mark and Secondary Meaning
3.10.3 Regarding Similarity
3.10.4 Regarding Likely Confusion
3.10.5 Regarding Fame and Dilution
3.10.6 Regarding Damages
3.10.7 Regarding Disparagement

3.11 Who Should Conduct the Marketplace Analysis?

3.12 What Marketplace Factors Should Be Considered?

3.12.1 Proximity
3.12.2 Point-of-Sale versus Postsale Confusion
3.12.3 Consumers Are Not Tabulae Rasae
3.12.4 Basic Components of the Marketplace

3.20 Who? Who Else?

3.21 The Litigants
3.22 The Relevant Consumers

3.30 What? What Else?

3.31 Products and Services at a Generic Level
3.32 Source-Specific Products, Services, Organizations, and Individuals
3.33 Communications Regarding Products and Services
3.34 Controls, Comparison Products, and Communications

3.40 Where? Where Else?

3.41 Geographic Locale
3.42 Brick and Mortar versus Virtual; Retailing versus E-tailing
3.43 Points in the Distribution Channel
## CHAPTER 5
### The Universe

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.10 What Is a Universe?</td>
<td>267</td>
</tr>
<tr>
<td>5.20 How Important Is the Universe?</td>
<td>269</td>
</tr>
<tr>
<td>5.30 Universe Definitions</td>
<td>271</td>
</tr>
<tr>
<td>5.31 Are Universe Definitions Optional?</td>
<td>271</td>
</tr>
<tr>
<td>5.32 Who Defines the Universe?</td>
<td>272</td>
</tr>
<tr>
<td>5.33 Can More than One Consumer Universe Be Relevant?</td>
<td>273</td>
</tr>
<tr>
<td>5.34 Universe Definitions Are Generally Multidimensional</td>
<td>275</td>
</tr>
<tr>
<td>5.40 Defining Universes for Assessing Specific Legal Issues</td>
<td>276</td>
</tr>
<tr>
<td>5.41 Genericism</td>
<td>277</td>
</tr>
<tr>
<td>5.42 Strength</td>
<td>278</td>
</tr>
<tr>
<td>5.43 Similarity</td>
<td>279</td>
</tr>
<tr>
<td>5.44 Secondary Meaning/Acquired Distinctiveness</td>
<td>280</td>
</tr>
<tr>
<td>5.45 Likely Confusion</td>
<td>284</td>
</tr>
<tr>
<td>5.46 Dilution</td>
<td>294</td>
</tr>
<tr>
<td>5.47 Materiality</td>
<td>298</td>
</tr>
<tr>
<td>5.48 Damages</td>
<td>298</td>
</tr>
<tr>
<td>5.49 Advertising Claims</td>
<td>298</td>
</tr>
<tr>
<td>5.50 Respondent and Market Issues in Defining Universes</td>
<td>298</td>
</tr>
<tr>
<td>5.51 Basic Consumer Roles</td>
<td>298</td>
</tr>
<tr>
<td>5.52 Buyer Categories</td>
<td>303</td>
</tr>
<tr>
<td>5.53 Nonconsumers and Nonpurchasers of the Goods and Services at Issue</td>
<td>309</td>
</tr>
<tr>
<td>5.54 Purchasers, Past versus Prospective</td>
<td>314</td>
</tr>
<tr>
<td>5.55 The Inappropriateness of Target Market Definitions</td>
<td>318</td>
</tr>
<tr>
<td>5.56 Marketplace Considerations</td>
<td>319</td>
</tr>
<tr>
<td>5.60 Common Problems in Defining Universes</td>
<td>333</td>
</tr>
<tr>
<td>5.61 Universes That Are Too Broad</td>
<td>338</td>
</tr>
<tr>
<td>5.62 Universes That Are Too Narrow</td>
<td>346</td>
</tr>
<tr>
<td>5.63 Legitimate Reasons for Narrowing a Universe</td>
<td>354</td>
</tr>
<tr>
<td>5.64 Universes That Are Simultaneously Too Broad and Too Narrow</td>
<td>356</td>
</tr>
<tr>
<td>5.65 Umbrella Universes</td>
<td>358</td>
</tr>
<tr>
<td>5.66 A Comment on Judicial Nitpicking</td>
<td>359</td>
</tr>
<tr>
<td>5.70 Universes Other than People</td>
<td>360</td>
</tr>
<tr>
<td>5.71 The Universe of Stimuli</td>
<td>360</td>
</tr>
</tbody>
</table>
5.72 The Universe of Settings 361
5.73 Universes of Other Facets of the Empirical System 362
5.80 Flawed Universes May Be Admitted and Given Weight 362

CHAPTER 6
Sampling from Universes 365

6.10 Overview 365
6.20 Basic Sampling Plans 372
   6.21 Probability Sampling 372
   6.22 Nonprobability Sampling 382
   6.23 Mixed (Probability and Nonprobability) Sampling 386
6.30 Critical Considerations Pertaining to Sampling 387
   6.31 Descriptive versus Causal Research: The Important Distinction between Random Selection and Random Assignment 387
   6.32 Sample Size 389
   6.33 Response Rate 399
   6.34 Sampling Error as a Proportion of Total Survey Error 405
   6.35 Comparing Findings from Probability and Nonprobability Surveys 408
6.40 Sampling Plans in Practice 413
   6.41 Sampling Plans Normally Used by Practitioners and Scholars 414
   6.42 Sampling and Mode of Survey Administration 417
6.50 Case Law Commentary on Sampling 428
   6.51 Probability versus Nonprobability Samples 428
   6.52 Sample Size 439
   6.53 Sample Representativeness 453
   6.54 Jury Instructions on Sampling 455
6.60 Sampling Other Facets of the Assessment Context 457
   6.61 Sampling Interviewers 457
   6.62 Sampling Stimuli 458
   6.63 Sampling Testing Sites 463
   6.64 Sampling Testing Times 471
6.70 A Real-World Perspective 472

Appendix 6A: Overview of the In-Home Probability Sampling Design used in National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc. 475
CHAPTER 7
Settings, Stimuli, and Tasks 479

7.01 Chapter Introduction 479
7.10 Settings 480
7.20 Stimuli 483
   7.21 Test Stimuli 484
   7.28 Distracter or Filler Stimuli 500
   7.29 Comparison Stimuli 501
7.30 Control Stimuli 502
   7.31 Basic Considerations in Selecting and/or Devising Controls 505
   7.35 Controls for Testing Advertising 528
7.40 Variations in Presenting Stimuli 536
   7.41 When Presenting Plaintiff’s and Defendant’s Stimuli to the Same Respondent 537
   7.42 When Presenting Test and Other (Control, Comparison, or Distracter) Stimuli 546
   7.43 A Potential Bias When Using Simultaneous Arrays to Test Likely Confusion 550
7.50 Commonly Used Protocols for Testing Selected Trademark Concepts 554
   7.51 Testing Genericism 554
   7.52 Testing Secondary Meaning 558
   7.53 Testing Likelihood of Confusion 559
   7.54 Testing Dilution 564
7.60 Fundamental Respondent Tasks 564
   7.61 Experiencing Stimuli 565
   7.62 Reacting to Stimuli 574

CHAPTER 8
The Questionnaire 579

8.01 Overview 579
   8.02 Survey Questions as a Component of Total Survey Error 581
   8.05 The Strength and Frailty of Verbal Report Data 582
8.10 Components of Questionnaires 594
   8.11 Functions of Trademark Survey Questionnaires 596
   8.12 Screener Questionnaires 599
   8.13 Main Questionnaire 615
   8.14 Interview Schedules 618
9.29 The Advantages and Disadvantages of Telephone Administration 802
9.30 Interviewer Considerations for In-Person and Phone Administration 805
9.31 The Scientific Requirement for Standardization 805
9.32 The Judiciary's Requirement for Objectivity 807
9.33 Those Who May and May Not Serve as Interviewers 808
9.34 Supervising and Training Interviewers 811
9.35 Interviewer Error and Bias 819
9.36 Minimizing Interviewer Error and Bias 819
9.39 Interviewer Administration Advantages and Disadvantages 827
9.40 Mail Administration 829
9.49 Advantages and Disadvantages of Mail Administration 830
9.50 Internet (Online) Administration 831
9.51 Direct-to-Respondent 832
9.52 Internet Panels 833
9.55 Court Response to Internet Surveys 836
9.59 Advantages and Disadvantages of Online Administration 840
9.60 Mixed-Mode Administration 848
9.61 Phone Followed by In-Person Administration 849
9.62 Phone Followed by Online Administration 849
9.63 Phone Combined with Online Administration 849
9.64 Landline Phone Combined with Wireless Phone Administration 850
9.65 Online Administration Supplemented by In-Person Interviews 850
9.66 Phone-Mail-Phone Administration 850
9.70 Respondent Considerations 851
9.71 Reaching Different Types of Consumers 851
9.72 Ensuring Confidentiality 855
9.73 Providing Incentives 860
9.80 Pretesting and Piloting 862
9.90 Concluding Comments 863

CHAPTER 10
Cleaning, Aggregating, Analyzing, Evaluating, and Reporting Data 865

10.01 Handling, Evaluating, and Reporting the Incoming Data 865
10.10 Data Cleaning 865
CONTENTS

10.11 Check-in and Editing 866
10.12 Quality Assurance Checks 867
10.13 Validation 869
10.14 The Effective or Usable Sample 871
10.15 Removing Personally Identifiable Information 872
10.20 Data Tabulation 872
  10.21 Tabulating Closed-Ended Data 873
  10.22 Tabulating Open-Ended Data: Coding and Categorizing 873
  10.23 The Data Matrix and Codebook 884
10.24 Response Rates 886
10.30 Data Analysis 887
  10.31 Size of Effect versus Statistical Significance of the Effect 887
  10.32 Weighting the Data 888
  10.33 Using Controls to Adjust for “Noise” 889
10.40 Evaluating the Findings 890
  10.41 Percentages and Net Percentages 891
  10.42 Confidence Intervals 892
  10.43 Adding Percentages to Arrive at “Overall Likely Confusion” 897
  10.44 Percentages Based on Small Samples 898
  10.45 Interpreting Multiple Tests of Statistical Significance 900
  10.46 Consider Obvious Alternative Explanations 901
  10.47 Considering Appreciable Differences across Testing Venues 908
  10.48 Considering Answers to “Why?” Questions 909
11.49 Interpreting Control Percentages 910
10.50 Reporting the Findings 911
  10.51 General Guidelines 911
  10.52 Fully Report What Was Done 919
  10.53 A Checklist for Expert Reports 928
  10.54 Accurately and Fairly Report What Was Done 929
  10.55 A Perspective for Evaluating Survey Evidence 934

Table of Cases 937
Index 973