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A COMPARATIVE EMPIRICAL ANALYSIS OF ONLINE VERSUS MALL AND PHONE METHODOLOGIES FOR TRADEMARK SURVEYS

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I. INTRODUCTION

Surveys are commonly offered by trademark litigants as evidence regarding likelihood of confusion, secondary meaning, genericness, or likelihood of dilution.[1] While survey evidence is not required, courts often expect plaintiffs to present a survey and have been less likely to grant injunctive relief in the absence of survey evidence, some even drawing an inference of non-confusion.[2] Plaintiffs' need for a survey is particularly great in cases of dissimilar marks or goods.[3] Defendants frequently desire to offer their own survey evidence, which can be more compelling than merely offering a critique of a plaintiff's survey.[4]

The proponent of a survey bears the burden of establishing that the survey was conducted in accordance with accepted principles of survey research and is sufficiently reliable to be

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1. 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §32:158 (4th ed. 2007) [hereinafter McCarthy]; Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 452 F. Supp. 2d 772, 777-8 (W.D. Mich. 2006).

2. *See* Sandra Edelman, *Failure to Conduct a Survey in Trademark Infringement Cases: A Critique of the Adverse Inference*, 90 TMR 746, 748-754 (2000) (discussing cases where courts have commented negatively on the absence of survey evidence); *see also* Dan Sarel & Howard Marmorstein, *The Effect of Consumer Surveys and Actual Confusion Evidence in Trademark Litigation: An Empirical Assessment*, 99 TMR 1416 (2009) (reviewing trademark cases litigated between 2001 and 2006 and finding that injunctions were granted in 76% of cases in which a confusion survey was accepted in comparison to 51.8% for cases in which no survey was presented).

3. *Id.* at 1432-33 (injunctions were granted in 61.5% of cases involving dissimilar marks and 85.7% of cases involving dissimilar goods where a survey was accepted as compared with 4% for dissimilar marks cases and 27.3% of dissimilar goods cases where no survey was presented).

4. *See*, *e.g.*, CytoSport, Inc. v. Vital Pharmaceuticals, Inc., No. 2:08-CV-02632-FCD-GGH, 2009 WL 1444535, at *35, n.10 (E.D. Cal. May 6, 2009) (commenting in issuing preliminary injunction that defendant hired its own survey expert but consciously chose not to perform a competing survey despite adequate time to do so).

admitted into evidence.[5] The case law is full of instances where parties invested significant time and resources in developing survey evidence that was given little or no weight by the court because of perceived flaws in the survey's design, methodology, or execution.[6]

For many years, courts have generally accepted properly designed mall-intercept surveys (in which potential respondents are intercepted, screened, and interviewed in a shopping mall) and telephone surveys.[7] Mall-intercept surveys, however, can be both time consuming and expensive; also, they can potentially suffer from additional drawbacks, including geographic and demographic limitations on who can be interviewed and difficulties in locating low-incidence populations. Telephone surveys have also become more difficult and expensive to execute properly, as response rates have dwindled and mobile phone use has become widespread.

The question most frequently asked today by trademark attorneys who are interested in survey research is whether, and in what context, online surveys are appropriate and reliable for use as evidence in trademark disputes. Trademark litigants are both drawn to the online survey for its many benefits—including affordability, speed, and ability to track results in real-time—and repelled by the online survey's lack of a clear, proven track record in the opinions of federal courts. Much has already been written about the theoretical and practical advantages and drawbacks of online interviewing in the context of trademark litigation.[8] There has been sparse opportunity, however, for a comparative empirical analysis of the procedural and substantive results of trademark studies conducted online versus using more traditionally accepted methodologies. While many survey researchers have had frequent occasion to conduct online surveys, it is rare to have the opportunity to conduct a trademark-related survey using both an

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5. *Leelanau Wine Cellars*, 452 F. Supp. 2d at 778; National Football League Properties, Inc. v. New Jersey Giants, Inc., 637 F. Supp. 507 (D.N.J. 1986).

6. *See infra* note 25 for instances of rejected surveys; *see also* Sarel & Marmorstein, *supra* note 2 (finding that plaintiffs prevailed in only 5.6% of trademark cases between 2001 and 2006 in which plaintiff's survey was rejected).

7. 5 McCarthy, *supra* note 1, §§ 32:164, 32:165.

8. *See, e.g.,* Bruce Isaacson et al., *Why Online Consumer Surveys Can Be A Smart Choice In Intellectual Property Cases*, 26 No. 3 Intell. Prop. L. 1 (Spring 2008); Alex Simonson, *Online Interviewing For Use in Lanham Act Litigation*, 14 No. 2 Intell. Prop. Strategist 3 (Nov. 2007); Gabriel M. Gelb & Betsy D. Gelb, *Internet Surveys For Trademark Litigation: Ready Or Not, Here They Come,* 97 TMR 1073 (2007); Robert H. T. Hornburg, *Trademark Surveys: Development of Computer-Based Survey Methods*, J. Marshall Rev. Intell. Prop. L., vol. 14 (2005).

online component and a telephone or in-person component. There are a number of reasons attorneys or parties to a litigation have been reluctant to commission research incorporating multiple methodologies—most notably fear of obtaining differing or even conflicting results.

In recent months, the author conducted several surveys in the context of trademark disputes that used both online and traditional (telephone or mall) components. This article uses actual data from these surveys to explore the many questions that arise concerning the reliability of online surveys in comparison with their well-accepted mall-intercept and telephone counterparts. Can the procedures designed to control the online process be as effective as the procedures used in mall-intercept and telephone interviewing? Are the differences among mall shoppers, telephone respondents, and online survey takers likely to result in substantively different responses to the same survey stimuli and questions concerning trademarks or trade dress? Do the criticisms most commonly leveled against online methodologies actually translate into any appreciable defects in the survey data that merit viewing online surveys with greater skepticism or affording them any less weight as evidence on trademark issues? A mere handful of surveys cannot fully answer these questions. Nevertheless, a comparison of results from trademark surveys using both the Internet and another methodology sheds light on the reliability of online surveys, the issues likely to be raised by courts and adversaries, and the facts to consider when deciding whether or not to use online research methods.

In Part II, this article summarizes the general requirements for an admissible survey, particular concerns regarding online surveys, the treatment of online surveys in the courts, and the conceptual and legal basis for the acceptance of online surveys in evidence. Part III presents two case studies in which a total of three surveys were conducted using both the Internet and a second methodology—two online/telephone surveys and one online/mall-intercept survey.[9] Finally, Part IV of this article examines the data from these surveys and discusses the potential implications for the reliability of online surveys and the considerations the data raises for litigants who are selecting a methodology for a trademark survey.

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9. Because the surveys discussed herein have not become public, it was necessary to replace the true parties' names and marks and certain other facts with fictitious ones. This was done in a manner that does not affect the data or analysis.

II. REQUIREMENTS FOR AN ADMISSIBLE SURVEY

A. Requirements for Admissible Trademark Surveys in General

The admissibility of surveys is governed by Federal Rule of Evidence 702, which incorporates the standards outlined by the United States Supreme Court in *Daubert v. Merrel Dow Pharmaceuticals, Inc.*[10] and *Kumho Tire Co. v. Carmichael*.[11] To be admissible, surveys are generally required to meet the following requirements:

(1) the relevant universe was properly defined;
(2) a representative sample was selected from the universe;
(3) the questions were clear, precise, and non-leading;
(4) the person conducting the survey has sufficient expertise and used reliable interviewing procedures;
(5) the data gathered was accurately reported;
(6) the data was properly analyzed; and
(7) objectivity of the process was assured.[12]

Although it is widely accepted that all surveys can be subjected to varying forms of criticism and that perceived flaws in survey methodology generally go to the weight, courts may exclude surveys if flaws are so severe that the survey's value is substantially outweighed by its tendency to mislead or result in prejudice at trial.[13]

B. Mall-Intercept Methodology

Mall-intercept surveys are conducted by scientifically selecting a geographically representative assortment of shopping malls in which to sample among the relevant universe. Professionally trained interviewers then approach potential respondents in the malls and ask them the relevant screening questions to determine whether they are members of the relevant universe. Qualified respondents are then escorted to a private interviewing area where

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10. 509 U.S. 579 (1993).

11. 526 U.S. 137 (1999). *Daubert* and its progeny, such as *Kumho*, task U.S. District Court judges with ensuring that expert evidence is sufficiently reliable and trustworthy to be admitted into evidence.

12. *See*, *e.g.*, *Leelanau Wine Cellars*, 452 F. Supp. 2d at 778.

13. *Id.* at 778-79.

they can be shown survey stimuli, if any, and asked the substantive survey questions.

C. Telephone Methodology

Telephone surveys are conducted by first obtaining lists of telephone numbers of potential survey respondents. Numerous organizations maintain or generate reliable and representative lists of phone numbers for use in market research. In many cases, the list of phone numbers will consist of telephone digits randomly generated based on the geographic scope of the research. In other cases—for instance, in surveys among businesses of a specific type—the list will consist of phone numbers of potential respondents who are already known to have a reasonably high likelihood of being within the relevant universe. Once a reliable list is generated, numbers from the list are randomly selected for dialing, and screening questions are used to identify and qualify an appropriate individual respondent. Respondents are then asked questions over the telephone. In some instances, respondents will be mailed stimuli to look at while answering the questions or—more commonly today—will be asked to access the Internet to view survey stimuli that are hosted as images on a website. Telephone surveys face increasing challenges today as heightened privacy and security concerns and increased reliance on mobile phones has lowered response rates and made it more difficult to reach respondents—particularly younger respondents—on landlines.[14]

D. Internet Methodology

Internet surveys draw potential respondents from the general population in several ways. The primary method is through the use of online "panels." As in the case of telephone sample providers, there is now a sizable industry of organizations that develop and maintain databases of individuals who are willing to participate in surveys. Such individuals, or *panelists*, provide their contact information and certain other personal data to the online panel developer and agree to be sent email invitations to participate in surveys. Panelists are typically offered reward programs as incentives to sign-up for online panels. Panelists accumulate small monetary rewards or points that can be redeemed for merchandise or other benefits.

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14. While mobile phones can be included in telephone surveys, additional legal regulations and methodological challenges make it more expensive and time-consuming to include mobile numbers in a telephone survey's sampling frame.

Because the online panel providers have data regarding the age, gender, geographic location, and often other relevant details regarding the panelists, a representative pool of panelists can be randomly selected to be invited to participate in a survey. The actual survey, including all instructions, images, and questions, is embodied in a computer program that is hosted on a website. Survey panelists receive invitations containing a link to the survey. Panelists who "click through" will arrive at a web page where they initially answer screening questions to determine eligibility. If qualified, the panelists are taken to the main survey. Panelists read instructions, view stimuli, if any, and answers questions on their computer. Survey data is collected automatically on a website, and can usually be accessed and analyzed in real-time by the researcher.

Additional methods have also been developed in an attempt to expand the pool of available online respondents beyond those who have signed up for panels. Online sample providers now offer methods of real-time sampling, which permit Internet users who are visiting certain websites to receive pop-up invitations to take surveys. Online sample providers have also partnered with other organizations that agree to make their own customers available to be invited to participate in online surveys.[15]

E. Potential Concerns Regarding Internet Surveys

Attorneys and researchers have expressed a number of concerns about the reliability of Internet surveys for use as legal evidence.

1. Size and Representativeness of Sampling Pool

In theory, most Americans can be reached on telephones and many millions can be intercepted in shopping malls. In the early days of Internet surveys, on the other hand, the percentage of Americans who could potentially be included in an Internet survey was small enough that there was significant uncertainty as to whether Internet surveys could reliably represent the overall population.[16] There was also concern that Internet panelists were

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15. For instance, an online provider might partner with an airline mileage program to get access to the mileage program's subscribers' contact information for potential inclusion in surveys.

16. *See, e.g.,* Gelb, *supra* note 8, at 1083-84. Today, the top online panel providers maintain panels of several million potential U.S. respondents and can expand their reach further through their partner organizations or real-time sampling.

"self-selecting" survey takers who took many surveys and were, accordingly, not representative of the typical consumer.[17]

2. Response Rates for Online Surveys

Arguably, low response rates to early Internet surveys further exacerbated the concerns regarding the representativeness of online surveys. Response rates are a potential concern because individuals who do not respond to a survey could, in theory, be different from individuals who do respond in meaningful ways. Accordingly, if only a small percentage of invitees respond to a survey, there is cause for concern that the responses of those who took the survey are not representative of the overall universe.[18]

3. Presentation of Stimuli

Because stimuli used in online surveys must be presented as images on a respondent's own computer screen, there has also been cause for concern regarding how the stimuli will appear to respondents. Individuals have different size computer monitors, different web browsers and different browser settings that could potentially impact how images appear to them. Various households also have a variety of computers and Internet services with varying download speeds. This caused concern that some respondents' computers would not be able to load images at all or that respondents would become frustrated with slow-loading images and would break away from surveys in the middle of the survey. Similarly, there was concern that some respondents would be unable to watch videos on the computer in instances of surveys involving perception of television commercials.

Online surveys must also address the issue of presenting products in a manner that reasonably approximates marketplace conditions. In a survey of products that are commonly marketed or sold on the Internet, this may be relatively straightforward. In other scenarios, such as that of products that would be primarily

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17. *See*, *e.g.*, Nick Sparrow, *Developing Reliable Online Polls*, 48(6) Int'l J. Marketing Research 659-80 (2006); Mick P. Couper, *Web Surveys: A Review of Issues and Approaches*, 64 Pub. Opinion Q. 464-94 (2000). Industry organizations have worked with online sample providers to develop policies that limit panelists to a reasonable number of surveys that comports with accepted standards in the field. ESOMAR, a leading international market research organization has formulated 26 important issues and questions that all online providers should address, one of which is the frequency that panelists are invited to take surveys. *See* www.esomar.org. Accordingly, the typical panelist now participates in no more than 1 to 3 surveys per month.

18. Shari Seidman Diamond, *Reference Guide on Survey Research*, *in* Reference Manual on Scientific Evidence, 230, 239-40 (2d ed., 2004).

encountered in stores, online surveys must be careful to use images that reasonably approximate an actual consumer's exposure to the item and to present the images in a manner that reflects relevant marketplace conditions.[19]

4. Lack of Interviewer Supervision

Another concern involves the absence of an interviewer to administer the survey and control the survey environment. Online respondents take surveys in their own homes, offices, or elsewhere.[20] There is no interviewer present to ensure that respondents do not click through the questions too quickly or take an unreasonably long period of time to think about the questions. There is also no supervision to ensure that the respondent does not consult another person or source to assist in answering any questions.

5. Thoroughness of Responses

The absence of a live interviewer also impacts online surveys in another way. It is widely recognized that all surveys have some degree of demand effects, one aspect of which involves the desire of human subjects to please the survey taker by providing helpful answers.[21] While demand effects are largely something the researcher tries to eliminate or control for, there is a beneficial aspect of a live interviewer being present to create a certain level of social pressure to cause the respondent to seriously review any survey materials and pay appropriate attention to the questions. With an online survey, however, there is no interviewer to exert this influence. While the online respondent may feel some obligation to honor the agreement to take the survey with appropriate attention, there is a concern that unsupervised online respondents will give less thorough, less detailed responses to questions. There is also concern that respondents would give more

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19. For instance, if products are found side-by-side in stores, it would typically be necessary to ensure the product images can be shown side-by-side on respondents' computer screens. On the other hand, if products would not be encountered side-by-side in actual stores but may be encountered in sequence, images of products in an online survey would typically be shown one-at-a-time rather than together on the same screen.

20. In some instances, respondents may be able to take online surveys on handheld mobile devices, such as Blackberries and mobile phones, which again raises concerns regarding how any stimuli will appear to the respondent.

21. *See*, *e.g.*, Martin T. Orne, *On the Social Psychology of the Psychological Experiment: With Particular Reference to Demand Characteristics and Their Implications*, 17 Am. Psychologist, Nov. 1962, 776-83.

thorough answers when speaking (as in a mall intercept or telephone survey) than they would when they have to type in the answers themselves (as in an online survey).

6. Issues in Verifying the Identities/Characteristics of Online Respondents

It is traditional to validate the results of mall-intercept surveys by having respondents called on the telephone to verify that they indeed took the survey and met the qualification criteria. The principle reason for such validation is to ensure that interviewers did not falsify answers to screening questions or, worse, fabricate interviews entirely. Online surveys do not raise such concerns, as all answers must have been legitimately provided by a real respondent. On the other hand, the concern has been expressed that the person filling out the survey may not be the actual person who was invited to participate in the survey. For instance, if a 45-year-old male is invited, it may actually be his 13-year old daughter who opens the email invitation and takes the survey. Unlike today, in the earlier years of online surveys, it was often very difficult to find any method for verifying that the person who took the survey is the actual panelist or has the relevant characteristics that the survey sponsor believes he/she does.[22]

F. Online Trademark Surveys in Court

Despite these many theoretical and practical concerns, the number of actual judicial criticisms of online surveys is quite small. The lack of criticism of online surveys in the courts can be attributed in part to the relatively small number of Internet surveys that have been offered in litigations and that the even smaller number of cases that reach the point at which a judicial decision touching on a survey is written. In 1997, a United States District Court in the Southern District of New York rejected an online survey, ruling that "there was no showing that supported the trustworthiness of the methodology."[23] Because the *Trustees of*

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22. *See, e.g.,* Gelb, *supra* note 8, at 1083-84. Today there are effective verification procedures, such as having the respondent enter certain personal details that prove he/she is the panelist. It is also often possible to have respondents' phone numbers provided to an independent validation service to conduct validation phone calls, although this is typically unnecessary given the availability of other verification methods.

23. Tr. of Columbia Univ. v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733, 747 (S.D.N.Y. 1997) (plaintiff tried to rely on an "Internet health survey" conducted by defendant apparently without submitting any expert testimony as to the reliability of the methodology; in any event, the survey did not help plaintiff's cause because it showed that only 4 respondents out of 1700 gave an answer identifying one of plaintiff's medical facilities

Columbia case did not involve a survey conducted for litigation purposes supported by expert testimony on the methodology, it should not adversely affect efforts to introduce a properly supported Internet survey. Moreover, after the *Trustees of Columbia* case, the treatment of online trademark surveys in the courts does not come close to justifying the anxiety that surrounds the topic of using online surveys for trademark litigation. Over the past several years, there have been numerous federal court opinions in trademark cases remarking on online surveys, none of which rejected a survey specifically because it was conducted using the Internet.[24] Even online surveys that have been savagely criticized by courts for other reasons—such as flaws in the universe, survey format, questions, and choice of stimuli and controls—have not been criticized for their use of an online methodology.[25]

In at least one case, *University of Kansas v. Sinks*, the court's concerns about a survey were arguably related to the use of an online methodology. The defendant's survey expert conducted an Internet survey[26] intending to measure whether consumers would mistakenly believe that the defendant's t-shirts were officially licensed by Kansas University. Although ultimately denying a motion to exclude the survey, the court found error with several features of the survey that appear unrelated to the use of the Internet: (1) failing to survey prospective purchasers of the defendant's products; (2) conducting a side-by-side comparison of products that do not appear together in the marketplace; and (3)

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when asked whether they had ever used one of defendant's medical facilities; the court found that the "Internet survey, although evidence of some confusion, is entitled to little if any weight both because of the extremely small numbers involved and because there was no showing that supported the trustworthiness of the survey methodology.").

24. *See, e.g.,* Citizens Banking Corp. v. Citizens Fin. Group, Inc., No. 08-1773, 2009 U.S. App. LEXIS 8366 (6th Cir. Apr. 2, 2009); Georgia-Pacific Consumer Prod. LP v. Myers Supply, Inc., No. 6:08-CV-6086, 2009 U.S. Dist. LEXIS 63774 (W.D. Ark. July 23, 2009); TrafficSchool.com Inc. v. EDriver, Inc., 633 F. Supp. 2d 1063 (C.D. Cal. June 4, 2008); *see also* Gelb, *supra* note 8, at 1085 for cases prior to 2008.

25. *See* Tokidoki LLC v. Fortune Dynamic, Inc., No. CV 07-1932, 2009 U.S. Dist. LEXIS 65665 (C.D. Cal. 2009); Univ. of Kansas v. Sinks, No. 06-2341, 2008 U.S. Dist. LEXIS 23763 (D. Kan. Mar. 19, 2008); ComponentOne, LLC v. ComponentArt Inc., No. 02:05 CV 1122, 2008 U.S. Dist. LEXIS 87066 (W.D. Pa. Oct. 27, 2008); Kargo Global, Inc. v. Advance Magazine Publishers, Inc., No. 06 Civ. 550, 2007 U.S. Dist. LEXIS 57320 (S.D.N.Y. Aug. 6, 2007). In each of these cases, the court entirely discredited a survey that had been conducted on the Internet but did not criticize the use of an online methodology. That being said, it is possible that opposing experts and courts did not focus on the use of the Internet because other severe flaws were perceived to be of primary importance.

26. Email invitations were sent to Internet panelists who resided in the Lawrence, KS, area and to students whose email addresses were in a Kansas University directory.

leading questioning. The court, however, also found that the sample used was not representative of the relevant universe because of the survey's 2% response rate—an extremely low rate resulting from the use of an online sampling procedure.[27]

It is also possible that one of the court's concerns about the survey in *Kargo Global* could be said to relate to the use of an Internet methodology, although the court discussed the methodology in detail and never criticized the use of an online survey. The court's primary concern with the plaintiff's survey was that the back-to-back presentation of the plaintiff's wireless services and the defendant's men's shopping magazine failed to replicate any realistic marketplace scenario and that the 80% noise level in the Control Group revealed the survey design to be excessively leading and unreliable. The court also took issue with the stimuli shown to the respondents: (1) a mock-up advertisement that showed the plaintiff's mark more prominently than it appeared in actual materials; and (2) pages of the defendant's magazine that the court felt were not representative of the magazine. While the court did not relate these criticisms to the online methodology, it is possible that the use of the Internet contributed to the expert's difficulty in presenting realistic, representative stimuli to respondents.

In other confusion cases, there is no apparent reason to think the courts' criticisms of Internet surveys were motivated by concerns about the underlying methodology. In *Tokidoki*, the court accepted the defense expert's criticisms of a survey purporting to show that the use of a heart-and-crossbones logo on the defendant's shoes would cause confusion with the plaintiff's apparel and accessory that uses a heart-and-crossbones logo: (1) the back-to-back presentation of the plaintiff's shirt and the defendant's shoe was overly leading and did not include the types of safeguards typically used in "Squirt surveys"; (2) the plaintiff's products shown contained only the plaintiff's logo and none of the distinctive trade dress that typically adorns the plaintiff's products; and (3) the control was inadequate to screen out all noise. Neither the defendant's expert nor the court criticized the use of the Internet.[28]

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27. *Sinks*, 2008 U.S. Dist. LEXIS 23763 at *13-15. Although criticizing the low response rate, the court did agree with the comment in *Reference Guide on Survey Research* (Diamond, *supra* note 18) that a response rate below 50% is cause for concern is outdated, noting that recent estimates of the typical response rates for telephone surveys are in the vicinity of 10%. The *Reference Guide*'s section on response rates is under revision to reflect current standards for response rates.

28. *Tokidoki*, 2009 U.S. Dist. LEXIS 65665 at *21-23.

Likewise, an Internet survey measuring confusion between Citizens Bank and RBS Citizens was afforded minimal weight because of the use of a poor control bank name and for diminishing the size of the plaintiff's weatherball logo in showing the plaintiff's mark to respondents. There is no indication that the court questioned the survey format or Internet methodology.[29]

In cases in which the alleged confusion would have occurred, at least in part, on the Internet, courts seemed particularly open to Internet methodologies, even if criticizing other aspects of the surveys. In *TrafficSchool.com*, the court criticized both parties' Internet surveys of consumer impressions of Internet search results and the defendant's web page. The criticisms involved the lack of a control, the failure to present the web page as an actual consumer would see it, and the phrasing of questions. The court noted but did not seem to question the use of the Internet, possibly because the study concerned the likelihood of confusion on the Internet.[30] In another case, an Internet survey of whether the use of COMPONENTART for software components would be confused with COMPONENTONE was afforded "extremely minimal weight" primarily because it showed the parties' marks in large block letters on a plain background rather than in a manner in which the marks would actually be encountered in the marketplace. The court did suggest that it would have been more accepting of the survey had it shown the images of the parties' websites or Google search results so that respondents would see the marks as they would actually be used.[31]

Courts considering online surveys conducted in 2009 and 2010 seem not to question the use of online methodologies at all, finding them admissible without raising any concerns regarding the use of the Internet.[32]

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29. Citizens Banking Corp. v. Citizens Fin. Group, Inc, 2008 U.S. Dist. LEXIS 36800 (E.D. Mich. 2008).

30. *TrafficSchool.com*, 633 F. Supp. 2d at 1078-80.

31. *ComponentOne*, 2008 U.S. Dist. LEXIS 87066 at *78-81.

32. *See* Doctor's Assocs. v. QIP Holder LLC, 2010 U.S. Dist. LEXIS 14687 (D. Conn. 2010) (finding that Internet survey regarding consumer perception of television commercial is admissible and creates a genuine issue of material fact as to whether commercial is misleading); PBM Prods., LLC v. Mead Johnson Nutrition Co., 2010 U.S. Dist. LEXIS 177 (E.D. Va. 2010); Georgia-Pacific Consumer Prod. LP v. Myers Supply, Inc., 2009 U.S. Dist. LEXIS 63774 (W.D. Ark. 2009).

G. Bases for Acceptance of Online Surveys

The lack of judicial criticism of the choice of an online methodology in these cases suggests that there is a growing judicial recognition of the Internet as an acceptable method for conducting survey research. Such recognition is entirely appropriate given the evidentiary standards evolving from *Daubert* and the role the Internet plays in the lives of Americans and in the market research world. Approximately 80% of Americans now use the Internet,[33] which is similar to the percentage of Americans who have a land telephone line[34] and greater than the percentage of Americans who live near a shopping mall with an interviewing facility. The latest data indicates that 94% or more of Americans who use the Internet also make purchases on the Internet, more than adequately establishing consumers' comfort level and proficiency with using the Internet for basic procedures.[35]

Most importantly, perhaps, the Internet is now the single most common means of collecting consumer opinion and behavior data in the market research industry.[36] Research conducted by the Council of American Survey Research Organizations shows that more market research organizations have Internet interviewing capabilities than telephone or in-person interviewing capabilities, and that the Internet is the primary method of data-collection for more research organizations than is telephone or in-person interviewing.[37] In *Kumho Tire*, the Supreme Court explained that the purpose of the *Daubert* requirement is to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[38] Accordingly, the acceptability of a methodology for use in the courtroom should parallel the acceptability of a methodology in

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33. The most recent report from the Pew Research Center's Internet & American Life Project indicates that 79% of Americans use the Internet; *available at* www.pewinternet.org.

34. A recent study by the Center for Disease Control found that slightly over 20% of American homes do not have landlines. *See* discussion of National Health Interview Survey, *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.htm.

35. Nielsen Global Online Survey, *available at* www.nielsen.com.

36. The Council of American Survey Research Organizations states that the Internet is now the most popular way that survey research is conducted. *See* http://www.casro.org/survandyou.cfm.

37. *See* CASRO Data Trends Survey, *available at* http://www.casro.org/surveys/datatrends.cfm.

38. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).

the relevant field.[39] Given the widespread acceptance of online surveys in the field of market research—indeed, given the significance of the online survey as the dominant form of market research—there would be little basis for a court today to deem online surveys that are properly conducted in accordance with generally accepted principles to be insufficiently reliable to be admissible or entitled to significant weight.[40] Still, little research has been made available that would permit meaningful analysis of how the results of online surveys submitted as evidence in litigations may or may not be impacted by the use of the Internet rather than more traditionally accepted methodologies.

III. THE COMBINATION INTERNET/OTHER METHODOLOGY SURVEYS

The following discussion concerns surveys that were designed and conducted for potential use in trademark litigation but have not yet been disclosed and are, therefore, not public information. Accordingly, certain details irrelevant to the analysis of the survey data, such as the parties' names, marks, and products, were changed to fictitious ones in order to preserve confidentiality.

A. Case Study 1—Online/Telephone Survey

The first of two cases presented involved incorporation of both online and telephone methodologies.

1. The Facts—Arthouse Versus Art's House of Brews

A popular chain of coffee roasters had been operating in Eastern Ohio under the name "Arthouse Coffee" for 12 years when

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39. By analogy, there initially was skepticism about the reliability of mall-intercept surveys for use as evidence in litigation because such surveys are non-probability samples. However, courts were convinced to accept mall-interviewing as a reliable methodology because mall-intercept surveys were widely accepted in the field of market research and the "results of these studies are used by major American companies in making decisions of considerable consequence." Diamond, *supra* note 18, at 238 (quoting Nat'l Football League Props., Inc. v. New Jersey Giants, Inc., 637 F. Supp. 507, 515 (D.N.J. 1986)). For this same reason, the fact that online surveys have become routine and widely accepted both within the market research industry and among businesses who conduct or commission market research suggests that online methodologies be recognized as accepted methodologies in the survey expert's field such that properly conducted studies of this type pass muster under the *Daubert* standards.

40. As with any survey methodology, the Internet might be appropriate for the circumstances of certain trademark disputes and not for others; a court might reasonably find that use of the Internet for a survey was improper given the relevant universe, products, or market conditions in a particular case.

a new coffee roaster called "Art's House of Brews" opened two locations within Arthouse's territories. Insisting that the mark ART'S HOUSE OF BREWS was likely to be confused with the ARTHOUSE mark, the owner of the ARTHOUSE mark threatened a trademark infringement action. The owner of Art's House of Brews refused to change the name, asserting that consumers would not confuse his establishment with the Arthouse establishment and that the ARTHOUSE mark was not protectable.

2. The Surveys—Using the Internet and the Phone

Arthouse Coffee contemplated conducting two surveys to assess the strength of its position and for potential use as evidence in a trademark infringement action—a secondary meaning survey and a likelihood of confusion survey. The Internet was judged to be a suitable method for conducting these surveys for several reasons: (1) customers of coffee roasters—that is, an establishment whose primary service is to brew and serve coffee—are common and plentiful and, therefore, adequately represented on online panels; (2) an online methodology is capable of precisely targeting the relevant geographic regions served by the coffee roasters; (3) the relevant survey stimuli could fairly be presented to respondents on a computer screen; and (4) because the survey would use an experimental design incorporating separate Test and Control Groups to screen out noise, analysis of the results would not be overly reliant on open-ended responses.[41]

Ideally, both surveys would have been carried out entirely over the Internet to minimize costs and generate survey data as quickly as possible. However, 800 total interviews were desired, 200 in each of a Test Group and Control Group for the secondary meaning survey, and 200 in each of a Test Group and Control Group for the confusion survey. Given that the relevant universe was constrained to a very limited geographic area, it may not have been feasible to obtain 800 completed interviews in a timely manner using only the Internet.[42] Therefore, it was decided to

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41. In the context of a confusion survey, the "Test" Group is the set of respondents who view and are questioned about the allegedly infringing product or usage. Surveys also sometimes use a "Control" Group, which is shown and questioned about a product or usage that is not confusingly similar. The Control Group results indicate the level of survey noise—that is, the tendency of respondents to give answers that appear to indicate confusion even when shown a stimulus that lacks the allegedly infringing mark or features. The Control Group result can be subtracted from the Test Group result to yield a "net" confusion level that must be attributed to the allegedly infringing mark or trade dress.

42. As would be the case with any online panel, only a limited number of the online sample provider's panel lived in the relatively small area relevant to the survey. A

supplement the online component of the study with a telephone component.[43]

a. Secondary Meaning

To test whether the mark ARTHOUSE had acquired secondary meaning, 200 respondents were interviewed over the Internet and another 200 over the telephone. For both studies, respondents were required to have purchased coffee at a coffee roaster (i.e., an establishment whose primary service is to brew and serve coffee) in the past month or to plan to do so in the next month. A random selection of online panelists who reside in the geographic territories served by Arthouse Coffee was invited to take part in the online component of the survey. For the telephone survey, telephone numbers were randomly selected for dialing from an RDD sample—a list of randomly generated phone numbers using extensions with the highest probabilities of reaching households within the territories served by Arthouse.

Respondents assigned to the Test Group were first asked whether they had ever seen or heard the term "Arthouse" in connection with coffee roasting services in Eastern Ohio. Those who answered "yes" were next asked whether they associate Arthouse with only one particular coffee roaster or, whether they associate Arthouse with more than one coffee roaster, or whether they have no opinion. Those who answered "only one" were next asked whether they could identify any location or locations of the coffee roaster with whom they associate Arthouse or, if they could not, why they associate Arthouse with only one coffee roaster.[44]

"feasibility" analysis, which considers the total number of panelists who reside in the relevant area, expected response rates, and the expected incidence of qualification, suggested that it would be unlikely to obtain more than 600 completed interviews within the desired time period. Accordingly, the decision was made to conduct part of the study using the telephone. Alternative options may have included partnering with additional panels to provide more sample, drawing in additional respondents through real-time invitations to visitors to online partners' websites, or extending the time period of the survey to increase the percentage of panelists who respond after one or more reminder invitation.

43. The fact that a coffee roaster is typically encountered in-person and not on a computer screen does not mean that the use of the Internet violates the requirement of replicating marketplace conditions. The standard for replicating marketplace conditions would require that the images shown to respondents on the screen reasonably simulate the establishment or its advertising as it would appear to real consumers.

44. These questions represent one of several standard approaches to surveying secondary meaning. *See* Vincent N. Palladino, *Surveying Secondary Meaning*, 84 TMR 155 (1994) and *Secondary Meaning Surveys in Light of Lund*, 91 TMR 573 (2001). Respondents in the Control Group took the same survey with the sole exception that they were asked about a control mark instead of ARTHOUSE.

b. Confusion Survey—Eveready Format

The sampling and screening procedure used for the likelihood of confusion survey was the same as for the secondary meaning survey except for the geographic territory. Because the relevant universe in this type of forward confusion scenario should focus on those who are reasonably likely to encounter the junior user,[45] both the online and phone sampling for the confusion survey was tailored to the geographic areas served by Art's House of Brews.

The format selected for the confusion survey was a standard variant of the well-established "Eveready survey."[46] All respondents in the Test Group were shown high-quality color photographs of Art's House of Brews[47] and were asked certain questions to determine whether they mistakenly believed it was one of Arthouse's establishments, such as whether they had ever seen or heard of this coffee roaster before and, if so, when they first saw or heard of it and where they believed it was located. Respondents were also asked whether they thought the establishment in the photos was connected or affiliated with any other establishment. Those who answered affirmatively were asked for details about the other establishment, including its name and location(s).[48]

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45. *See* 5 McCarthy, *supra* note 1, § 32:159.

46. The Eveready survey derives its name from a survey approved by the Seventh Circuit in Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir. 1976). The main characteristic of the Eveready survey is that it does not expose respondents to the plaintiff's mark prior to showing and questioning respondents about the allegedly infringing use. The Eveready survey is typically considered ideal for scenarios where the plaintiff's mark is well-known among the surveyed population, although there are also other important fact-specific considerations in determining whether an Eveready is appropriate in a given situation, such as the similarity of the marks and products/services involved, how the products/services appear in the marketplace, whether the sources of the products/services are well-known, and the extent to which there are distinguishing characteristics of the products or parties to which respondents can refer to make clear which party or product they are picturing. For one discussion of the Eveready format as compared with others, see Jerre B. Swann, *Likelihood of Confusion Studies and the Straitened Scope of Squirt*, 98 TMR 739 (2008).

47. Respondents in the telephone component of the survey were asked to go to a computer and visit a website on which the photos of Art's House of Brews had been posted.

48. These are common forms of questions used in Eveready surveys, along with questions focusing on sponsorship, approval, or authorization. Respondents in the Control Group took the same survey with the sole exception that the photo of Art's House of Brews had been changed so that the name appeared as "Pat's House of Brews."

B. Case Study 2—Online/Mall-Intercept Survey

The second case presented herein involved the use of both the Internet and mall-interviewing facilities to conduct a study.

1. The Facts—Snack Cake Trade Dress Issues

The plaintiff marketed Rondo Snack Cakes, a product similar to and competitive with snack food products made by Hostess and Little Debbie. The defendant had recently changed its packaging for its product, Granger Cakes, to a package with certain color-scheme and stylistic similarities to the Rondo package. The two products were being sold in the same types of convenience stores and were sometimes found in the very same stores. Rondo filed suit for trade dress infringement, arguing that consumer confusion was likely.

2. The Survey—Squirt Sequential Line-up

In defense of Rondo's trade dress claim, Granger commissioned a survey to determine whether trade dress confusion was likely. For cost purposes, Granger would have preferred to conduct the survey entirely on the Internet. Counsel for Granger, however, was concerned about relying entirely on an online survey for several reasons, including the lack of judicial decisions explicitly endorsing online surveys and concerns over the fact that online respondents would not be able to physically handle the snack cake packages. Accordingly, the study plan included doing 400 online interviews and an additional 200 mall-intercept interviews to supplement the online data.

For the online component of the study, the nation was represented by randomly selecting potential respondents from a geographically representative online panel. For the mall-intercept component of the study, two markets were selected in each of the four U.S. census regions by a computer program that assigned each market a probability of selection proportionate to the population of that market. The result was that the study was carried out in mall-interviewing facilities in malls in the New York, Philadelphia, Jacksonville, Dallas, Chicago, Indianapolis, Los Angeles, and Seattle metropolitan areas. For both studies, respondents were required to have purchased snack cakes in the past 3 months or to plan to do so in the next 3 months and were required to have shopped for snack cakes at the types of

convenience stores and gas stations mini-marts where the relevant products were sold.

To measure likelihood of confusion, a standard version of the Squirt format known as a "Sequential Line-up survey" was utilized.[49] All respondents were first shown a package of Rondo Snack Cakes and given a chance to examine it.[50] Respondents in the Test Group were then shown and asked about three other snack cake packages, including Granger and two other snack cake brands, Balconi and Drake's. The second set of three brands were shown and asked about one at a time and in randomly rotated order. For Granger and the two other brands, respondents were asked whether they thought the product was made by the same company as the product they were first shown (Rondo), or whether they thought the product was made by a different company, or whether they had no opinion. Respondents who answered "same company" were asked what made them think so. Respondents who did not answer "same company" were asked whether or not they thought the company that made the product was affiliated with the company that made the product they were first shown (Rondo). Respondents who answered that the companies that made the products were affiliated were asked what made them think so. This question series was asked for each of Granger and the other two brands.[51]

Respondents in the Control Group took the same interview but were shown an old version of the Granger pack embodying a different trade dress rather than the new Granger pack with the allegedly infringing trade dress.

As noted above in the case of the coffee roaster survey, the fact that the relevant products—snack cakes—were typically

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49. The modern Squirt survey includes a number of variations on a survey endorsed by the Eighth Circuit in Squirtco v. Seven-Up Co., 628 F.2d 1086 (8th Cir. 1980). In contrast to an Eveready format, a Squirt format will involve showing both the plaintiff's and the defendant's marks/products to the survey respondent and is generally appropriate when the products may be found together or encountered in sequence in the market. In the Sequential Lineup version of the Squirt survey, respondents are first exposed to the plaintiff's mark or trade dress and then are subsequently exposed to the defendant's mark or trade dress, usually along with, or in sequence with, other marks or trade dress. The Sequential Line-up survey is an attempt to replicate the marketplace process of exposure to the plaintiff's trademark or trade dress followed by subsequent exposure to other trademarks or trade dress, including the defendant's. *See* 5 McCarthy, *supra* note 1, § 32:177. The Sequential Line-up survey can also be referred to as a two-room survey. *See* Swann, *supra* note 46, at 749-50.

50. Respondents in the mall were handed an actual Rondo package. Online respondents viewed photos of the Rondo package.

51. These are common forms of questions used in Squirt surveys, along with questions focusing on sponsorship, approval, or authorization.

purchased in actual stores and not online did not eliminate the Internet as a methodology that could replicate marketplace conditions. Just as mall interviewing facilities are frequently used to conduct surveys about products that may not appear in the malls, the Internet is frequently used to survey consumers about products that are not sold on the Internet. If the images reasonably simulate an exposure to the actual product and are presented in a manner reasonably representative of how the products would be encountered in an actual store or in an advertisement, an online presentation of images can be a reasonable approximation of marketplace conditions.

IV. COMPARATIVE ANALYSIS OF ONLINE/OTHER SURVEY RESULTS

The procedural and substantive results from these surveys can be analyzed along a number of dimensions to shed light on how the online process performs as a reliable measure on trademark issues compared with the more traditionally accepted telephone and mall-intercept methodologies.

A. Response Rates

One potential factor in assessing the representativeness of a survey sample and, hence, the reliability of the data, is the rate of response to the survey. In theory, if the level of response is insufficiently high, questions can be raised about whether those who failed to respond to a survey are different from those who did respond in a way that could impact how they would answer the survey questions.[52] Obtaining high survey response rates since the

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52. Diamond, *supra* note 18, 239-240. Recent research has not supported the conventional notion that studies with lower response tend to suffer from biases that make them less reliable. In an analysis of surveys conducted using a typical methodology that yielded a 25% response rate and a more rigorous approach to achieve a higher response rate of 50%, the results of the two methods were statistically indistinguishable in the vast majority of cases, and the differences in the other cases were small. Scott Keeter et al., *Gauging the Impact of Growing Nonresponse on Estimates from a National RDD Telephone Survey*, 70(5) Pub. Opinion Q. 759-779 (2006). Another study examined the results of 81 national surveys with response rates varying from 5 percent to 54 percent and found that surveys with much lower response rates were only minimally less accurate. Allyson L. Holbrook et al., *The Causes and Consequences of Response Rates in Surveys by the News Media and Government Contractor Survey Research Firms,* published in Advances in Telephone Survey Methodology (James M. Lepkowski et al., eds., John Wiley & Sons) (2005). *See also* the website of the American Association of Public Opinion Research (www.aapor.org) ("experimental comparisons have also revealed few significant differences between estimates from surveys with low response rates and short field periods and surveys with high response rates and long field periods."). It has also been found that non-response

advent of technologies such as Caller ID and in the current era of heightened security and privacy concerns has became an often insurmountable obstacle.[53] One does not need to have expertise in market research to comprehend how unlikely it is that a high percentage of consumers who are telephoned at home or approached in a mall will agree to be surveyed. While the current version of the *Reference Guide on Survey Research* suggests that response rates below 50% raise concerns about the reliability of a survey, this standard has become nearly impossible to satisfy in today's market research world.[54]

1. Online Versus Telephone Response Rates

The first and less alarming type of non-response concerns the issue of what percentage of consumers with whom contact is attempted actually respond to the invitation to take the survey.[55] Of the 5037 online panelists who were invited to participate in the online secondary meaning and confusion surveys for the Arthouse Coffee case, 957 "clicked through" to start the survey, an initial response rate of 19%.[56] By comparison, 7508 working telephone

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biases are only indirectly related to non-response rates. Robert M. Groves, *Nonresponse Rates and Nonresponse Bias in Household Surveys,* 70(5) Pub. Opinion Q. 646-675 (2006). Accordingly, response rates that are below 50% but are in line with typical response rates achieved today using standard methodologies should not undermine the reliability of a survey without a specific reason to fear that non-response is the product of biases relevant to the survey.

53. The American Association of Public Opinion Research states on its website that "due to increasing refusals, response rates across all modes of survey administration have declined, in some cases precipitously." *Available at* http://www.aapor.org.

54. Response rates of even 30% have become extremely difficult to achieve, and some estimates of random digit dialing surveys have placed the typical response rate in the range of 10%. Gary T. Ford, *The Impact of the Daubert Decision on Survey Research Used in Litigation*, 24(2) J. Pub. Pol'y & Marketing 234-52 (2005). The section on response rates in the *Reference Guide* (Diamond, *supra* note 18) is under revision to reflect today's changing standards.

55. Non-response in the form of people who cannot be reached or fail to respond to a generic survey invitation is often harmless in that the reasons for such non-response are often irrelevant to the substance of the survey and do not suggest that non-responders would have answered the questions any differently. On the other hand, non-response among those who have learned the subject matter of the survey or heard any questions is a greater concern in that refusal to take the survey in this context may indicate the presence of opinions or knowledge that might be relevant to the subject matter of the survey.

56. This does not mean that 81% of potential respondents intentionally refused the invitation. A certain percentage of invitees ultimately attempted to access the survey but were closed out because the survey's quotas were filled before the invitee attempted to click through.

numbers[57] had to be dialed in order to reach 976 respondents willing to be screened for eligibility, a success rate of 13%. Of the 957 respondents who clicked through to start the online survey, 950 completed the screening process with only 7 breaking off in the middle of the screening questions, a rate of 99%. An equivalent 99% of telephone respondents completed the screening questions, with only 10 of the 976 respondents refusing to participate after starting the screening questions. Finally, of the 414 online respondents who qualified for and began the survey, 400 completed it, a rate of 97%. In the phone study, 400 of the 404 respondents who started the main questionnaire completed the survey, a 99% rate.

Table 1.
Response Rates of Coffee Roaster Survey

Response Rates	Online (%)	Telephone (%)
Initial	19	13
At Screening	99	99
At Main Interview	97	99

As indicated in Table 1, the online survey had an even higher initial response rate than the telephone survey, and the online survey had similarly high rates of screening and main survey completion. While a 19% response rate may have historically been considered low, this is a typical response rate and courts have not rejected Internet surveys because of response rates in this range.[58]

Most importantly, the 1% failure of online respondents to complete the screening process and the 3% failure to complete the main questionnaire after starting it are not cause for concern.

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57. This figure does not include 3508 phone calls made to randomly generated numbers that turned out to be non-working numbers, fax machines, businesses, or governmental institutions. This figure includes 974 respondents who answered the phone but immediately refused to speak.

58. As discussed above (note 25), the court in *University of Kansas v. Sinks*, 2008 U.S. Dist. LEXIS 23763 (D. Kan. Mar. 19, 2008), acknowledged that the 50% standard for response rates is outdated and inapplicable to Internet studies, but found that a response rate of 2.16% raised serious concerns that the sample was not representative, particularly where there was testimony from the opposing party indicating how non-response bias was likely.

Even in the unlikely event that some of these respondents broke away from the survey for reasons relevant to the substance of the survey, this number of break-aways is too small to meaningfully impact the survey results.

2. Online Versus Mall-Intercept Response Rates

Of the 15,385 online panelists who were invited to participate in the online confusion study for the Rondo/Granger snack cakes case, 3077 "clicked through" to start the survey, an initial response rate of 20%. It is difficult to determine what percentage of potential mall respondents initially refuse, because mall interviewers do not typically make a record of the many respondents who tacitly indicate their refusal to be interviewed by averting their eyes, pretending to talk on their cell phones, or suddenly veering away before they can be approached. While mall interviewers might succeed in gaining the cooperation of upwards of 50% of potential respondents who permit themselves to be approached, there is a large additional component of non-response in the form of mall visitors who do not even allow themselves to be approached in the first place. Combining reported rates of explicit initial refusals with an estimate of the high rates of non-explicit refusals to be intercepted in a mall suggests that the percentage of mall visitors who respond to a screening attempt is less than 20%. These results are summarized in Table 2.

Of the 3077 online panelists who clicked through to start the survey, all but 38 completed the screening questions, a success rate of 99%. Of the 409 respondents who qualified for and began the survey, 400 completed it, a rate of 98%. In the mall, only 9 of the 1333 respondents who agreed to be screened refused to participate after beginning the screening, a success rate of 99%. None of the 200 qualified respondents who began the main interview refused to complete it.

Table 2.
Response Rates of Snack Cakes Survey

Response Rates	Online (%)	Mall (%)
Initial	20	<20
At Screening	99	99
At Main Interview	98	100

Once again, the online survey had a higher initial response rate than the true response rate that can be realistically expected in a mall, and the online survey had similarly high rates of screening and main survey completion. The small number of failures to complete the online survey after beginning the screening questions or the main questionnaire poses no threat to the overall reliability of the data.

B. Representativeness of Sample

1. Age and Gender

Obtaining age and gender representativeness proved quite feasible using the Internet and using telephone or mall-intercept methodologies. For both cases, a "screening quota" method was used in which potential respondents were screened for eligibility in proportion to their age/gender group's representation in the actual population.[59] The resulting age and gender breakdown for the two cases are shown in Tables 3 and 4.

Table 3.
Age and Gender Representation in Coffee Roaster Survey

	Online (%)	Telephone (%)
FEMALE (ages)	53	54
18–34	20	18
35–49	19	19
50+	14	16
MALE (ages)	47	46
18–34	18	16
35–49	17	16
50+	12	14

59. For example, if females age 35 to 49 compose 13.6% of the adult U.S. population according to U.S. Census data, 13.6% of the sample screened for eligibility were females age 35 to 49. Such a procedure causes the ending sample to be representative of the category for which consumers are being screened.

Table 4.
Age and Gender Representation in Snack Cake Survey

	Online (%)	Mall-Intercept (%)
FEMALE (ages)	23	25
18–34	18	17
35–49	3	3
50+	2	5
MALE[60] (ages)	77	75
18–34	59	57
35–49	12	14
50+	6	4

As can be seen in Tables 3 and 4, there was not a meaningful difference in the rates at which the various age and gender groups were represented in the surveys.[61] Obtaining a representative sample, however, proved easiest and least expensive online. While females and members of the oldest age group responded most quickly to the survey, the cost of waiting for males and members of the younger age groups to respond was not significant. On the other hand, the difficulty of reaching males—young males in particular—at home on landlines made the cost of conducting screenings over the telephone in a representative fashion significantly more expensive and time-consuming. Likewise, the cost of having to screen many people in the malls in the age 50+ group—particularly females age 50+—entailed a cost and time inefficiency not suffered online.

60. Males answered that they purchase snack cakes at more than three times the rate of females, resulting in the survey consisting of more than three times as many males.

61. It is not always necessary for a survey sample to be proportionate to the actual age and gender percentages in the population or relevant universe. Survey data can often be re-weighted to be consistent with actual demographics.

2. Category Usage

One question that is raised about online studies is whether the universe of online panelists is sufficiently representative of the overall universe of consumers of a particular category. By calculating the incidence of qualification[62] for the surveys conducted using multiple methodologies, we can determine how the online panels stack up against the consumer populations accessible by phone or mall-intercept sampling.

Across both surveys among consumers of coffee roasters in Eastern Ohio, 44% of those screened online were eligible for participation based on their answers to screening questions and 41% of those screened over the telephone were eligible. These results are shown in Table 5.

Table 5.
Incidence of Qualification in
Coffee Roaster Survey

Online (%)	Telephone (%)
44	41

In the survey among consumers of snack cakes sold at convenience stores and gas station mini-marts, 13% of those screened online were eligible for participation based on their answers to screening questions and 15% of those screened in malls were eligible. Results of these surveys can be seen in Table 6.

Table 6.
Incidence of Qualification in
Snack Cake Survey

Online (%)	Mall (%)
13	15

62. The incidence of qualification means the number of people who qualify for the survey divided by the number who were screened for eligibility.

The very small differences in the incidences of qualification indicate that coffee roaster customers and snack cake consumers are equivalently well represented in online panels as in the populations that take mall and telephone surveys.

3. Geographic Coverage

a. Eastern Ohio—Phone Versus Online

In the coffee surveys, both online panels and random-digit telephone samples proved capable of targeting the relevant geographic territory in a representative fashion. Sixty-two zip codes in the Eastern Ohio area were represented in the online survey and sixty-six zip codes in the telephone survey. Three potential respondents in the online survey whose panel information indicated that they lived in the relevant area had since moved out of the area and were excluded from the survey.

b. National—Mall Versus Online

It has long been accepted that conducting mall research in each of the four U.S. census regions is typically sufficient to represent the nation. In the snack cake survey, interviews were conducted in two mall facilities in each of the four regions—Northeast (New York and Philadelphia; South (Jacksonville and Dallas); Midwest (Chicago and Indianapolis); and West (Los Angeles and Seattle). Across the 200 mall-intercept respondents, residents of 11 states and 152 zip codes were covered. Across the 400 online respondents, residents of 39 states and 371 zip codes were covered.

C. Presentation of Stimuli

While the potential impact of differences in the presentation of stimuli online versus in-person is best judged by considering the substantive survey results, discussed below, several indicators of how respondents perceived the stimuli are worth noting.

A potential concern regarding Internet studies is that respondents who do not have high-speed Internet access will have trouble loading and viewing graphics. As the large majority of Internet panelists have broadband, the magnitude of this concern has greatly decreased. Nevertheless, several measures were built into the snack cake surveys to attempt to detect any such

problems.[63] In the online survey, a record was kept of every respondent who broke away from the survey in the midst of a graphic loading. In addition, every time respondents were shown an image, they were given an option to select a choice indicating that they could not view the image clearly. Likewise, respondents in the mall-intercept study were instructed to inform the interviewer if they had trouble viewing the products shown to them for any reason.

A total of 400 respondents completed the online survey with no evidence of any trouble viewing the stimuli. A total of 3 respondents attempted to take the survey but broke away in the middle of loading the first image of the Rondo Snack Cake. An additional 4 respondents clicked the answer choice that they had trouble viewing the image and were therefore terminated before being asked any questions. In the mall-intercept study, 200 respondents completed the survey with no problems and only 1 respondent was terminated because he indicated he had trouble viewing the product. The percentages of respondents who had trouble viewing the product are shown in Table 7.

Table 7.
Percentage of Respondents Who Had Difficulty Viewing Stimuli in Snack Cake Survey

Online (%)	Mall (%)
1.7	0.5

As can be seen from Table 7, there was a 1.7% rate of failure to view the stimuli, presumably due to slow Internet speed, smaller monitor size, or poorly configured web browser; however, this should not be overly concerning. First, no respondents who indicated trouble viewing the stimuli gave answers that were included in the survey results. Second, the possibility that 1.7% of the relevant population would be unable to participate in an online survey due to trouble loading or viewing the image does not call into question the representativeness of the participating population.

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63. This section is inapplicable to the coffee roaster surveys because all stimuli were viewed on a computer screen for both the online and telephone components.

D. Expression of "No Opinion"

It is well accepted that survey respondents should be adequately informed that they are not required to provide an answer and should feel free to respond to any question by indicating that they don't know the answer or have no opinion. As shown in Tables 8, 9, and 10, the following were the rates of "don't know"/"no opinion" answers given by survey respondents participating in the various survey components.[64]

Table 8.
Secondary Meaning Survey
(Arthouse)

	Online (%)	**Telephone (%)**
No opinion to "Have you ever seen or heard of Arthouse?" question	1.5	1
No opinion to "One?" or "More than one?" coffee roaster question	3	5
No opinion to "What makes you associate Arthouse with only one coffee roaster?" question	7	6

Table 9.
Eveready Confusion Survey
(Art's House of Brews)

	Online (%)	**Telephone (%)**
No opinion to "Have you ever seen or heard of Art's House of Brews?" question	6.5	5
No opinion to "Do you think establishment is affiliated with any other establishment?" question	14.5	17.5

64. These percentages are based on the total number of respondents who were asked the question.

	Online (%)	Telephone (%)
No opinion to "What establishment?" probe	13.5	7.5

Table 10.
Sequential Line-up Confusion Survey
(Granger Snack Cakes)

	Online (%)	Mall (%)
No opinion to "Do you think this product (Granger) is made by the same company as the first product (Rondo) you were shown?" question	31.5	27
No opinion to "what makes you think so?" probe	2.5	3.5
No opinion to "Do you think the company that makes this product (Granger) is affiliated with the company that makes the first product you were shown (Rondo)?" question	24	26

The marginal differences reflected in the above tables indicate that proper instructions regarding the expression of no opinion can be as effective in online surveys as in telephone and mall-intercept surveys. Conversely, these results tend to dispel any concern that online respondents would answer "no opinion" at an alarmingly high rate.[65]

65. A potential concern would be that online respondents are savvier regarding survey structure and may be prone to answer "no opinion" more often because they know this will relieve them from having to answer potentially tedious follow-up probes. Such a phenomenon is not detectable in the data from the surveys presented herein.

E. Errors in Survey Administration

No matter how well interviewers are trained and briefed about a particular mall-intercept or telephone study, the possibility of interviewer error in administering a complicated questionnaire remains. As can be seen in Table 11, in the Sequential Line-up survey conducted to measure likelihood of confusion in the snack cake case, six different versions of the main questionnaire required interviewers to present a different sequence of products. For the Test Group, the test product (Granger) and the two other products (Drake's and Balconi) were shown to respondents in three different orderings. For the Control Group, the control product (Granger—old packaging) and the two other products were shown to respondents in three different orderings.

Table 11.
Test and Control Groups in the
Snack Cake Sequential Line-up Survey

Group and Rotation	Show 1st	Show 2nd	Show 3rd
TEST–Rotation 1	Granger	Drake's	Balconi
TEST–Rotation 2	Balconi	Granger	Drake's
TEST–Rotation 3	Drake's	Balconi	Granger
CONTROL–Rotation 1	Granger (old pack)	Drake's	Balconi
CONTROL–Rotation 2	Balconi	Granger (old pack)	Drake's
CONTROL–Rotation 3	Drake's	Balconi	Granger (old pack)

Of the initial 200 mall-intercept interviews that were conducted using this format, review of the completed questionnaires identified three interviewer errors in the administration of the questionnaire versions and corresponding stimuli. One interviewer showed the products in the order for Test Group Rotation 1 while administering a questionnaire designated for Test Group Rotation 2 and a questionnaire designated for Test Group Rotation 3. Another interviewer conducted a Control Group interview using the Test product (current Granger pack) instead of the Control product (old Granger pack).

Several less significant interviewer errors were also detected. In the Sequential Line-up confusion survey, if a respondent

answered that a product was made by the same company as the first product shown (Rondo), the interviewer was instructed to ask a "What makes you think so?" probe and then skip the second question series regarding connection or affiliation for that product. If a respondent answered that a product was made by a different company, the interviewer was instructed to skip the "what makes you think so" probe and ask the affiliation question series. In three of the completed questionnaires, the interviewer failed to follow a skip instruction and asked the affiliation question when the respondent had already answered that he believed the product was made by the same company. In addition, there were four instances in which an interviewer failed to follow a skip pattern and asked a "What makes you think so?" probe when the respondent had answered that the product was made by a "different company."

Because the questionnaire logic is programmed into a computer and the entire interview is automatically administered by computer program, such errors cannot occur in an online survey.[66]

F. Quality of Open-Ended Answers

One potential weakness of online surveys is that it can be difficult to get respondents to give lengthy, thorough answers to open-ended questions. There are at least two reasons for this. One, unlike respondents in the mall, for whom taking a survey is often an interesting novelty, online respondents take surveys somewhat regularly and are often doing it for the incentive provided by the company that maintains the panel. Accordingly, online respondents may move more quickly through surveys and spend less time answering questions.[67] Second, a live interviewer who administers a mall-intercept or telephone study can be helpful in yielding more thorough open-ended responses. The presence of a

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66. Certain interviewer errors can be eliminated in mall-intercept and telephone surveys by having the questionnaire programmed into a computer at the mall or telephone interviewing facility.

67. On the other hand, online respondents have a formal, ongoing relationship with the online survey organization and may feel an obligation to devote a reasonable amount of attention to surveys for which they are being given rewards. In addition, online respondents should be aware that they will not be given credit for a survey that they do not properly complete and will ultimately be removed from the panel if they do not provide meaningful responses. Surveys can also take measures to ensure that respondents are not falsely answering screening questions simply to qualify for a survey. As is the case with any traditional survey, which also often offer incentives for participation, respondents can be provided with a number of irrelevant choices so that it is not known which will result in qualification. Respondents who indiscriminately click the same response to every screening option can also be excluded.

live interviewer results in a social situation in which the respondent feels more of an obligation to make an effort to answer questions thoroughly. Respondents may also find it easier to speak a lengthy answer that the interviewer will record for them than to type in a lengthy answer themselves. A live interviewer may also be more effective in clarifying unclear and ambiguous responses and probing respondents to give more detail.[68]

1. Telephone Versus Online Answers

The results of the secondary meaning survey in the Arthouse Coffee case can be examined to shed light on how respondents answer open-ended questions over the telephone as compared with over the Internet. Respondents who answered that they have heard of Arthouse and associate it with only one coffee roaster were asked to either identify locations of Arthouse Coffee or to explain why they associate Arthouse with only one coffee roaster. Among those who were able to identify locations, respondents in the telephone study identified an average of 2.3 locations, whereas respondents in the online study typed in an average of 1.8 locations. More striking, respondents in the telephone study gave answers to the location questioning averaging 9.8 words, as compared with 4.8 words for online respondents.

Table 12.
Respondents' Identification of Coffee Roaster Locations and Number of Words Per Answer

	Telephone	Online
Number of Locations	2.3	1.8
Number of words per answer	9.8	4.8

In order to give the reader a representative sense of the difference between answers, the following tables reproduce the first 20 respondents' answers to the location question in the telephone survey and the online survey.

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68. *See infra* note 70 for discussion of when open-ended answers might be more important.

First 20 Telephone Respondents' Answers

1. There's one in the Independence Mall off 77
2. Route 42 in Strongsville across from the Bank of America
3. I've seen one in Warrensville Commons and I think they have them in Cleveland Heights and East Cleveland
4. There's several in Cleveland. I think outside the Marriott and one on Glen Street.
5. Akron, Cuyahoga Falls, Munroe
6. They have two in Youngstown around the campus. Also Smith Corners and Canfield.
7. 225 off 11 in Canfield and 225 in Ellsworth
8. Youngstown, Cleveland and Akron all have them
9. They're pretty much everywhere down 77 coming out of Cleveland—Garfield, independence, Cleveland.
10. Cleveland, the Heights, Beachwood
11. Cleveland -- Broome Street, Brook park, outside Jacobs Field
12. I've definitely seen it in Akron going through on the highway
13. A few in Cleveland I think
14. Richfield in center of town. I don't know the name of the street. Brecksville, on South St.
15. The Richmond Square Mall, the Village Commons in Brook Park; a bunch in Cleveland.
16. I know there's one in Strongsville. I believe there's one in Long Meadow. In Parma, maybe.
17. I'm not sure but I think there's one in the Aurora area.
18. Northfield on Memorial Ave; there are some in Cleveland but not sure the names of the roads
19. Cleveland, Cleveland Heights, Euclid, Maple Heights.
20. One is in downtown Maple Heights. I don't remember where the other ones are.

First 20 Online Respondents' Answers

1. Cleveland
2. Richmond Square
3. A bunch in Cleveland
4. Rte 6 in chardon

5. There's one in Canton near the hall of fame
6. Lisbon where 45 and 30 cross.
7. Youngstown and smith cornrs
8. All over the area
9. Brrom street Clevalmnd
10. Northfield, Macedonia, and along 271
11. 322 in Chesterfield and I think Euclide or maybe south Euclid
12. 2 in Youngstown
13. Girard, Youngstown
14. Akron, munroe, Barberton
15. I think they are mostly in downtown Cleveland
16. I just know the ones in Aurrora and twinsburg
17. Cleveland, Akron
18. Cleveland and East Cleveland
19. Rte 14 in twinsburg
20. Across from the Ford dealer on Smith Corners

Similarly, in response to the question asking what makes them associate Arthouse with only one coffee roaster, telephone respondents gave open-ended answers averaging 15.4 words and online respondents gave open-ended answers averaging 7.3 words. The following tables reproduce the first 20 respondents' answers to this question in the telephone survey and the online survey.

First 20 Telephone Respondents' Answers

1. I have heard of Arthouse coffee but I know nothing about it
2. I know it's a coffee house in Ohio, I just don't know exactly where any of their shops are
3. I saw the name in some publications but I don't know where in Ohio it is
4. Because they are a big coffee chain around. They are only one chain. I don't know where their home branch is located.
5. I saw an advertisement on tv and in the paper. I can't remember where the stores are.
6. I have just heard the name before.
7. I don't know too much about it but is a coffee place like a Starbucks and its just one place.

8. There are a bunch of them but they are all one organization
9. They have lots of locations but Im unsure where. They are one coffee roaster but I go to Starbucks.
10. I just know it's a chain of coffee brewers.
11. Its one coffee chain with many locations. I don't go there, I just know it's a coffee chain.
12. It's a brand name of a coffee place. That's it. I don't know anything about them.
13. I just know the name. I know people who have gone there.
14. There aren't 2 different chains called Arthouse. Its just one thing.
15. It's a popular coffee roaster
16. Its like a more local version of a Starbucks or something
17. I actually think there might be one outside of Jacobs Field now that I think about it but I know it is definitely one company that has a chain of coffee houses
18. I know the name
19. I definitley think it has to be one coffee roaster. All the places called arthouse look the same. I just can't think of where I've seen them.
20. It's the name of one coffee company

First 20 Online Respondents' Answers

1. The name.
2. I know it.
3. It's a big chain but not sure where it is.
4. The name arthouse is one brand.
5. I don't know where their locations are.
6. Maybe they're in Akron but I know I've seen it somewhere
7. Heard of it but don't know location
8. its just one chain
9. one coffee shop with a few stores
10. people in know go there
11. ben there but can't think of where
12. heard the name lots of times
13. they have ads in the paper

14. its definitely just one chain. Its very popular.
15. My brother works in Cleveland and I know he goes there. It's a well known name.
16. Arthouse coffee
17. a brand name for coffee roaster
18. I just know it's a coffee place in eastern ohio
19. don't know anything about it but its one coffee chain
20. heard of it

2. Mall Versus Online Answers

A similar trend was evident in the comparison of answers given by mall-intercept respondents compared with online respondents in the snack cake survey. When Test Group respondents who answered that the Granger product was made by the same company as the product shown first (Rondo) were asked what made them think so, respondents in the mall-intercept survey gave answers averaging 14.9 words compared with 5.7 words for online respondents, a 62% decline.

The following tables reproduce the first 20 respondents' answers to the "what makes you think so" probe in the mall-intercept survey and the online survey.

First 20 Mall-Intercept Respondents' Answers

1. This one reminds me a lot of what the wrapper on the first one looked like. They're both the same kind of thing and use a similar wrapping.
2. They are using the same colors so they probably can't do that if they aren't the same company
3. I've eaten these before and I think they're all Hostess products, but I could be wrong.
4. Not really sure.
5. The packages the cakes come in are yellow and blue, although the blue is a little different. The writing looks pretty much the same though.
6. The packages are very similar.
7. Both are yellow frosted cupcake in a yellow packet with blue letters
8. They just looked the same to me. I mean the outside part that it is wrapped up in.

9. I think they're all from the same company. Because all the companies are always consolidating these days.
10. You can't have products that use the same design and colors or you'd get sued
11. The package. The colors
12. They're both blue and yellow and look very alike.
13. I can't remember but I think the first one had a little picture on it that looks like the design on this one. They are both gold wrappers.
14. I like junk food like this. I eat it a lot and this looks familiar.
15. The same stores sell lots of things like this.
16. I do design work and I know designers like to have their own look so I don't think anyone would have designed this package like this if they wanted it to stand out as its own
17. Just the colors. Nothing else really.
18. The coloring and the font. The whole style.
19. It just strikes me as pretty similar.
20. Both are sweets that kids like to eat. Parents don't want their kids eating this stuff.

First 20 Online Respondents' Answers

1. Both snack cakes
2. Colors - yellow and blue
3. No clue
4. Same company probably makes all this junk
5. the designs a bit the same
6. both are vanilla cake with frosting
7. seen them both in stores
8. yellow color stands out
9. the package looks the same
10. I just thought so
11. all the snack food companies are merged
12. blue and yellow wrapper
13. one seems like a cheap version of the other's package
14. don't know
15. their cupcake deserts with frosting

16. one is in a yellow pack with blue writing and the other is pretty close
17. the logos and designs of it
18. they are both very bad for you
19. the letters are blue and look like the same font
20. the style of it

The comparative survey results in both the coffee roaster case and the snack cake case lend credence to the theory that online respondents tend to give shorter responses.[69]

3. Weaknesses in Online Responses

The set of online data also included several open-ended responses that had to be categorized as nonsense or gibberish. For example, the following answers were typed in by online respondents when asked what made them think a snack cake was made by the same company as the first snack cake shown to them: "Bored," "gfgfgfggfg," and "Ttttttttttttt."

These completed interviews had to be removed from the data set because of the obvious concern over whether the preceding and subsequent closed-ended responses were legitimate or the nonsensical result of random clicking. As only about 1% of responses needed to be cleaned out because of the nature of the responses, the drawback of receiving such responses was not

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69. It should be noted that all the surveys conducted in these cases used experimental designs that did not heavily rely on open-ended answers for their analysis. Each survey included a Test Group and a Control Group and a method of analysis that involved subtracting the "noise" level found in the Control Group from the gross secondary meaning or confusion level found in the Test Group to yield a "net" secondary meaning or confusion level. Accordingly, open-ended answers were relevant and informative to a certain degree, but were not necessary for reliable analysis of the issue being studied. In other cases, open-ended responses might be critical to the reliability and evaluation of survey results. In such scenarios, the researcher must make a judgment about whether a series of questions and probes can succeed in obtaining sufficient open-ended responses or whether a methodology that uses a live interviewer would be preferable. For instance, consider a false advertising challenge regarding a television commercial. Although market researchers commonly use the Internet to test consumer take-away of messages from television commercials, a defendant who relies on an online survey to prove that no misleading messages were taken away from the commercial may be criticized if respondents do not appear to have provided thorough responses regarding their perceptions of the commercial's messages. Of course, this criticism can be made of any perception survey that does not appear to have sufficiently questioned or probed respondents, but the risk of obtaining overly concise answers appears greater online.

significant. There was no such problem with any gibberish or nonsense responses in the telephone or mall-intercept studies.

G. Time to Complete Survey

The time it takes an online respondent to complete a survey can be an indicator of the survey's reliability. A potential concern regarding online surveys is that an unsupervised respondent may take too much time to consider a question that is intended to elicit an instantaneous reaction or that the respondent might even consult resources outside of the survey for assistance in answering a question.[70] Conversely, an unsupervised respondent might click too quickly through the survey questions without paying sufficient attention to the instructions, questions, and stimuli. Both of these concerns can largely be addressed by monitoring how long it takes the respondent to complete the survey. [71]

1. Telephone Versus Online Times

Times for completing the coffee roaster secondary meaning survey over the telephone and online were generally similar.

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70. In the author's opinion, such concerns are minor in the typical online trademark survey context, as online respondents are typically more interested in promptly completing a survey than in doing additional work to provide what they think might be the "correct" answer to any question. Based on reviewing the results of many online surveys and routinely working with representatives of online interviewing organizations who have expertise regarding panelist behavior, the evidence does not seem to support this concern. Accordingly, it is unlikely that more than a negligible number of online respondents are breaking away from surveys to conduct additional thought or research to help them answer questions. In certain circumstances, the concern that online respondents are taking the survey unsupervised and might consult other people or resources may be greater.

71. On the other hand, it must be considered that the recorded amount of time an online respondent took to complete a survey can be misleading. For example, the amount of time it takes to advance from one survey screen to the next and for graphics or videos to load will be included in the data on time of completion. Accordingly, a respondent with a slower computer or Internet connection may appear to have taken a meaningful larger amount of time to complete the survey when, in fact, it simply took more time for each page to appear to the respondent. A respondent may also appear to have spent more time on a survey when, in fact, time had elapsed while they were interrupted, for instance by a ringing phone or door bell.

Table 13.
Response Times for Coffee Roaster
Secondary Meaning Survey

	Telephone	Online
Median Length	4 min.	3.5 min.
Shortest	3 min.	1.5 min.
Longest	6 min.	224 min.
% 3 to 6 min.	100%	91.5%

Overall, there was little indication that online respondents failed to take the survey in a timely manner and as intended. Among online respondents, 91.5% completed the survey within the 3- to 6-minute range that all telephone interviews took with a live interviewer administering the survey.[72] Within this set of online respondents, the average time of survey completion was 3.7 minutes, which was comparable to the 4-minute telephone average.

The online survey had greater variability at the extremes, with the shortest survey being completed in only 1.5 minutes and the longest taking 224 minutes.[73] The number of surveys completed outside of a typical time range, however, was small. Only 10 online respondents (5%) took the survey in less time than the shortest telephone interview. All 10 fell in the reasonable 1.5- to 3-minute range. Only 7 online respondents (3.5%) took the survey in more time than the longest telephone interview, and only 3 (1.5%) took more than 10 minutes.

Time for completion was also comparable for the coffee roaster confusion survey.

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72. In this case, the excessively short or long interviews were not removed from the survey results, as the results of these interviews did not differ from the overall results and because review of the survey responses indicated no other irregularities. Some online interviewing organizations routinely weed out excessively short or long interviews as a matter of course, determining what range of completion times is reasonable based on repeated tests of the survey.

73. An interview length in the ballpark of 224 minutes almost certainly indicates that the respondent was interrupted after clicking through to the survey and completed the survey at a later time, rather than that the respondent actually spent 224 minutes completing the questions.

Table 14.
Response Times for Coffee Roaster
Confusion Survey

	Telephone	Online
Median Length	4.5 min.	4 min.
Shortest	3 min.	1.5 min.
Longest	6.5 min.	87 min.
% 3 to 6.5 min.	100%	90%

Among online respondents, 90% completed the survey within the 3- to 6.5-minute range that all telephone interviews took. Within this set of online respondents, the average time of survey completion was 4 minutes, which was comparable to the 4.5-minute telephone average.

Only 12 online respondents (6%) took the survey in less time than the shortest telephone interview. All 12 fell in the 1.5- to 3-minute range. Only 8 online respondents (4%) took the survey in more time than the longest telephone interview, and only 5 (2.5%) took more than 10 minutes.

2. Mall Versus Online Times

Times for completion of the online component of the snack cake confusion survey also matched up fairly well with mall-intercept times.

Table 15.
Response Times for Snack Cake
Confusion Survey

	Mall	Online
Median Length	6.5 min.	5.8 min.
Shortest	3 min.	2 min.
Longest	8.5 min.	117 min.
% 3 to 8.5 min.	100%	91.5%

Among online respondents, 90.5% completed the survey within the range that the mall-intercept interviews took with a live interviewer administering the survey. Within this set of online

respondents, the average time of survey completion was 5.5 minutes, reasonably similar to the 6.2-minute mall-intercept average.

Only 14 online respondents (3.5%) took the survey in less time than the shortest mall-intercept interview. All 14 fell in the 2- to 3-minute range. Only 20 online respondents (5%) took the survey in more time than the longest telephone interview, and only 6 (1.5%) took more than 10 minutes.

H. Validation of Interviews

For some types of surveys, particularly mall-intercept surveys, it is standard to validate completed surveys—that is, to contact a certain percentage of respondents to confirm that they actually participated in the survey and met the eligibility requirements. The standard in the market research industry is to validate approximately 15% of the interviews.[74]

It should be noted that online surveys are not subject to the most important concerns underlying the traditional validation process—that an interviewer fabricated a survey or falsified a respondent's eligibility. As there is no interviewer, all online surveys must be completed by actual respondents. Likewise, because an online survey is filled out by the respondent and not an interviewer, there is no chance of an interviewer making an error in recording answers to the screening questions or falsifying an answer to create artificial eligibility. Therefore, assuming the sample is provided by a reputable source that cleans and maintains its panel,[75] there is far less need for validation of online interviews. If validation of online interviews is deemed necessary, the purpose would be to ensure that the person who completed the survey is the panelist to whom the invitation was sent and not a different person with access to the same email account.[76]

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74. Diamond, *supra* note 18 at 259.

75. Panel cleaning and maintenance refers to the use of various quality control measures to maintain the integrity of panels, for instance by ensuring that each panelist is a unique individual, that new panelists are continuously recruited to maintain the representativeness of the panel, and that panelists who do not provide legitimate responses to surveys are weeded out.

76. If a person other than the panelist completes a survey, the substantive answers to the survey questions are not unreliable, but the age, gender and/or other characteristics of the respondent included in the data set may not be the same as the expected characteristics for the panelist.

1. Telephone Versus Online Validation

A telephone interviewing organization that is unaffiliated with the service that conducted the survey attempted calls to all 400 survey respondents from the coffee roaster surveys to confirm eligibility and participation.[77] The validating service successfully reached 208 respondents, a validation rate of 52%. All who were reached confirmed participation and eligibility. There were two age discrepancies found.

Validation calls were also attempted to all 400 online panelists that completed the survey.[78] The validating service successfully reached 172 panelists, a validation rate of 43%. In one instance, the panelist reached had not taken the survey. The panelist confirmed that her panel information was still valid, including email address, but stated that her roommate shares the email account and may have taken the survey. The other 171 panelists confirmed taking the survey and confirmed that the age and gender data on file was accurate.

2. Mall-Intercept Versus Online Validation

Of the 200 respondents interviewed in the snack cake mall-intercept study, 193 provided phone numbers during the certification process. An independent telephone interviewing service attempted 100% validation and successfully reached 127 respondents, a validation rate of 66%. No discrepancies were found.[79]

For the online component of the snack cake survey, a different method of validation that is, perhaps, better suited to the circumstances of online surveys was used. All respondents were required to input their birthdates at the beginning of the screening process. If the birthdate did not match the birthdate on file with the online panel, the respondent was rejected. If the birthdate did match, the respondent was confirmed to be the panelist invited

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77. Validation of telephone surveys is not typical. Validation was conducted here in order to be able to compare validation results across methodologies.

78. While it was originally extremely difficult to gain access to panelist contact information to allow validation, online sample providers are increasingly amenable to providing panelist contact information to independent validation services for the purposes of validating interviews. Telephone validation, however, is often unnecessary given the availability of equally effective validation techniques.

79. While no discrepancies were found in this survey, validation of mall-intercept interviews does occasionally uncover discrepancies that require additional investigation. This tendency can be one of the justifications for ensuring a sufficiently large sample size so that even the elimination of a number of respondents can be sustained without threatening the overall reliability and integrity of the sample.

and was asked the screening questions to determine if he or she was qualified to participate.[80]

I. Survey Results

Perhaps the most significant question is whether the hypothesized flaws in the online survey process actually result in the collection of data that is meaningfully different from the data collected by the more traditionally accepted methodologies.

1. Telephone Versus Online Results

a. Secondary Meaning

The following tables show the key results of the secondary meaning survey concerning the mark ARTHOUSE among telephone respondents compared with online respondents.

Table 16.
Response to Question:
"Have you ever seen or heard of ARTHOUSE?"

	Phone (%)	**Online (%)**
Yes	83	84.5
No	16	14
Don't know/no opinion	1	1.5

80. The screening questions included additional verification questions, such as the respondent's age, gender, and certain other characteristics. In combination with the date of birth, other pieces of demographic data could be examined to confirm that the respondent is the panelist, obviating the need for independent telephone validation.

Table 17.
Response to Question:
"One or more than one coffee roaster?"

	Phone (%)	Online (%)
One	73	75.5
More than one	5	6
Don't know/no opinion	5	3
Not asked	17	15.5

The major substantive result—the percentage of respondents who knew the ARTHOUSE mark and associated it with a single source—did not vary meaningfully based on the methodology. The Test Group result was 73% for the telephone survey and 75.5% for the online survey. The noise level was roughly 5% for both surveys, yielding comparable net secondary meaning levels of 68% and 70.5%, respectively.

b. Confusion (Eveready)

When asked the first series of questions about Art's House of Brews, 8% of respondents in the telephone study and 7% of respondents in the online study Test Groups gave answers indicating that they were thinking of an Arthouse Coffee establishment.[81]

The following tables show the key results to the second series of questions regarding affiliation.

The groups were shown a photo of Art's House of Brews and were asked if it was affiliated with any other establishment.

81. For example, respondents answered that they first heard of the coffee roaster before Art's House of Brews came into existence and described locations where an Arthouse Coffee exists.

Table 18.
Responses to Affiliation Question

	Phone (%)	Online (%)
Yes	31	33.5
No	51.5	52
Don't know/no opinion	17.5	14.5

If respondents answered "Yes" to the above question, they were then asked, "What establishment?"

Table 19.
Responses to Question Regarding Name of Affiliated Establishment

	Phone (%)	Online (%)
Arthouse	9.5	12
Starbucks	12	13
Arabica	2.5	3
Dewey's	1.5	0.5
Sunrise	0	0.5
Don't know	5.5	4.5
Not asked	69	66.5

Accordingly, the total Test Group confusion levels were as follows:

Table 20.
Test Group Confusion Levels

	Phone (%)	Online (%)
TOTAL	17.5	19
Direct confusion	8	7
Affiliation	9.5	12

As in the case of the secondary meaning survey, the major substantive result (17.5% Test Group confusion versus 19% Test Group confusion) was very similar. Noise levels were also comparable, yielding very similar net confusion levels.

Table 21.
Major Substantive Results

	Phone (%)	Online (%)
Test Group confusion	17.5	19
Control group noise	3	3.5
Net confusion	14.5	15.5

2. Mall Versus Online Results

Table 22 shows the results of the Sequential Line-up confusion survey conducted in connection with the snack cake matter.

Table 22.
Response to Question:
"Is this product made by the same company that makes the first product shown (Rondo)?"

Granger	Mall (%)	Online (%)
Yes	24	22
No	49	46.5
Don't know/no opinion	27	31.5

Drake's	Mall (%)	Online (%)
Yes	15	13.5
No	53	52.5
Don't know/no opinion	32	34

Balconi	Mall (%)	Online (%)
Yes	13	11.5
No	62	56
Don't know/no opinion	25	32.5

Table 23.
Response to Question:
"Is this product made by a company that is affiliated with the company that makes the first product shown?"

Granger	Mall (%)	Online (%)
Yes	6	5.5
No	50	54
Don't know/no opinion	20	18.5
Not asked	24	22

Drake's	Mall (%)	Online (%)
Yes	4	4
No	59	63
Don't know/no opinion	22	19
Not asked	15	14

Balconi	Mall (%)	Online (%)
Yes	5	4
No	64	68.5
Don't know/no opinion	18	15
Not asked	13	12.5

Accordingly, the total Test Group confusion level for the defendant's product (Granger) was 30% in the mall and 27.5% online.

Table 24.
Total Test Group Confusion Level for Granger

	Mall (%)	Online (%)
	30	27.5
Same company	24	22
Affiliated company	6%	5.5

The Test Group result for Drake's was 19% in the mall and 17.5% online, and the result for Balconi was 18% in the mall and 15.5% online.

Table 25.
Test Group Results for Confusion for Granger and Other Products

	Mall (%)	Online (%)
Granger	30	27.5
Drake's	19	17.5
Balconi	18	15.5

As the above table indicates, both methodologies showed a consistent picture. The level of supposed confusion between the

defendant's product and the plaintiff's product exceeded the rate at which respondents connected the other products shown, which did not have similar trade dress to the plaintiff's product, by roughly 10%.

The noise levels measured in the Control Groups were also consistent from the mall to the online survey.

Table 26.
Total Noise Levels for Granger Control Groups

Granger (old pack)	Mall (%)	Online (%)
	24	20
Same company	18	15.5
Affiliated company	6	4.5

As shown in the above series of tables, the mall-intercept results were slightly higher than the online results in both the Test and Control Groups, yielding extremely similar net confusion results and conclusions.

Table 27.
Net Confusion and Noise Results

	Mall (%)	Online (%)
Test Group confusion	30	27.5
Control group noise	24	20
NET confusion	6	7.5

V. CONCLUSION

The data from the three surveys discussed herein supports the view that properly designed and conducted online surveys can be as reliable as traditionally accepted telephone and mall-intercept surveys. Response rates for the online surveys were as high as or higher than typical response rates for methodologies that are commonly accepted. Online methodologies were equally, if not more, suitable for obtaining samples that were representative in terms of age, gender, geography, and category usage. Only negligible numbers of respondents had trouble viewing stimuli,

gave gibberish or nonsense answers, or took a troublingly small or large amount of time to complete the survey. Online respondents had similar rates of expressing "no opinion" as respondents in the telephone and mall surveys. The attempts to validate online interviews revealed little cause for concern about the identity and characteristics of those taking online surveys. Most significantly, the substantive results of multiple survey formats were statistically equivalent across the different methodologies. The one apparent disadvantage of the online surveys was that online respondents provided shorter, possibly less thorough responses to open-ended questions, suggesting that some amount of caution is due when considering an online methodology for a study that will rely heavily on the presence or absence of certain open-ended responses. A party that requires open-ended responses to demonstrate that consumers hold certain opinions or perceptions takes a risk of not obtaining optimal open-ended responses online. On the other hand, a party that is hoping to show that consumers do *not* hold certain opinions or perceptions risks criticism for relying on the lack of certain open-ended answers from online respondents.

In summary, a party should consider the following issues, among other issues common to all surveys, in designing an online survey:

- Selecting a reliable sample supplier, survey host and programmer;
- Implementing procedures for targeting the relevant universe online and sampling among the online universe in a representative fashion;
- Achieving online response rates in line with industry standards;
- Using quality control measures to ensure respondents pay adequate attention to survey instructions and questions and properly complete survey;
- Creating proper, representative stimuli that are easily viewable and ensuring that respondents can view the stimuli without problems;
- Ensuring that the types of questions asked will result in sufficiently thorough answers, particularly if the survey results are reliant on open-ended questions; and
- Verifying respondent characteristics, either through collecting data that can confirm characteristics to a sufficiently high degree of probability or through independent validation methods.