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SENSE AND NONSENSE IN MEASURING SPONSORSHIP CONFUSION¹

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Examination of case law reveals emerging disagreement across courts on what needs to be assessed when measuring “sponsorship” confusion. Various issues, including the logic underlying such measurement, are discussed. In the process, the author explains why, from the perspective of both science and law, one approach accepted by courts makes sense while another does not.

The Relevant Statute

Section 43 of the Lanham Act prohibits any “false or misleading misrepresentation of fact which is likely to cause confusion, or to cause mistake, or to deceive ... as to the ... sponsorship or approval” of goods or services.²

Cases often turn on confusion as to sponsorship. Consider *NFL Properties, Inc. v. Wichita Falls Sportswear, Inc.*,³ where the issue was not so much whether prospective consumers were confused into believing that defendant’s football replica jerseys actually were manufactured by the NFL or

¹ Gratefully acknowledge are helpful comments on earlier drafts of this manuscript from the following: Leon B. Kaplan, Ph.D. (Princeton Research & Consulting Center), Richard Z. Lehv Esq. (Fross Zelnick et al., NY) and Pasquale A. Razzano Esq. (Fitzpatrick, Cella et al., NY).

² Lanham Act § 43(a)(1), 15 U.S.C. § 1125(a)(1) (1999).

³ *NFL Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651 (W.D. Wash. 1982). The author served as an expert witness for plaintiff in this matter.

any of its teams — most consumers understand that professional sports teams are not in the business of producing t-shirts to be sold at retail — but whether consumers were confused into believing plaintiff had sponsored or authorized defendant to produce these knock-offs. As another example, consider *City of New York v. Albert Elovitz, Inc.*⁴ where the products at issue were defendant's gift and souvenir items (such as pens, coffee mugs, items of apparel and decorative license plates) bearing either the initials "NYPD" in navy blue, or an exact replica of the shield used by the New York City Police Department. Again, few prospective consumers of gift and souvenir items are likely to be confused into believing that either New York City or the NYPD were in the business of producing such items to be sold at retail. Rather, the case turned on whether prospective consumers are likely confused into believing that either New York City or the NYPD sponsored or authorized defendant to produce these items.

Clearly, both the NFL and its teams and the City of New York own strong marks associated with the services they provide. Just as clearly, even though they are not in the business of making souvenirs, the Lanham Act was intended to allow them – and others – to protect their marks against third party uses suggesting they authorized or sponsored those products and/or services.

Considerations in Measuring Sponsorship Confusion.

Section 43(a)(1) of the Lanham Act also prohibits confusion as to "origin" (or source) and as to "affiliation, connection, or association," and survey evidence

⁴ No. 04 Civ. 2787 (S.D.N.Y. 2004). Settled. The author served as an expert witness for plaintiff in this matter.

regarding these other forms of confusion had been proffered in a number of cases prior to 1980.⁵ This includes classic cases that gave rise to the terms “Eveready format,”⁶ “Exxon format”⁷ and “Squirt format,”⁸ as well as a number of other cases.⁹

Insofar as can be determined, Lexis and Westlaw searches reveal that, prior to 1980, only one reported case mentioned survey evidence proffered on the issue of likely confusion as to “sponsorship or approval.”¹⁰ While that court cited other questions from the survey (dealing with whether and how the State of Delaware’s “Scoreboard” lottery games based on National Football League games would impact the NFL’s reputation), it did not cite the question used to assess confusion as to sponsorship or approval. It simply noted that “19% of the Delaware respondents surveyed ... said that, as far as they knew, the legalized betting on professional football was arranged by the State with the authorization of the teams. . . . These figures establish that there is substantial confusion on

⁵ 15 U.S.C. § 1125(a)(1).

⁶ *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976).

⁷ *Exxon Corp. v. Tex. Motor Exch. of Houston, Inc.*, 628 F.2d 500, 504 (5th Cir. 1980).

⁸ *Squirt Co. v. Seven-Up Co.*, 207 U.S.P.Q. 12, 20-21 (E.D. Mo 1979), *aff’d* 628 F.2d 1086 (8th Cir. 1980).

⁹ *See, e.g., James Burrough, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 574, 576-579, (7th Cir. 1976) (discussing the use of survey evidence in trademark infringement cases); *Scott Liquid Paper v. Scott’s Liquid Gold, Inc.*, 439 F. Supp. 1022, 1043 n.55 (D. Del. 1977) (discussing potential bias created by survey questions), *rev’d*, 589 F.2d 1225 (3d Cir. 1978); *Esquire Sportswear Mfg. Co. v. Genesco, Inc.*, 141 U.S.P.Q. 400, 404 (T.T.A..B. 1964) (similar).

¹⁰ *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D.C. Del. 1977) (holding, among other things, that sponsorship confusion was created by defendant’s lottery tickets).

the part of the public about the ... sponsorship of the lottery.”¹¹ In remedy, the court “determined that the plaintiffs are entitled to limited injunctive relief, in the nature of a disclaimer on all Scoreboard materials disseminated to the public.”¹²

When retained to design plaintiff’s survey in *NFL Properties, Inc. v. Wichita Falls Sportswear, Inc.* [hereinafter, *Wichita Falls*] — a case where the court was also considering the use of a disclaimer as a remedy — this author determined that several issues regarding the language and intent of the law required resolution before the survey question could be crafted.

What Language Should be Used? The Lanham Act uses the words “sponsorship or approval.”¹³ Is this language appropriate for a survey of lay consumers?¹⁴ If not, why not and what language should be used instead? Although designed prior to courts opining that, when it is likely that terminology well-defined for legal matters would not be correctly understood by laypersons, such terminology should be avoided in questions asked of the general public,¹⁵ the *NFL Properties’* survey was designed with this consideration in mind.

¹¹ Id. at 1381.

¹² Op.Cit., at 1376.

¹³ 15 U.S.C. § 1125(a)(1).

¹⁴ The term “lay consumer” is used to describe consumers having no training in law in general, or in the Lanham Act in particular.

¹⁵ In *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 515 F. Supp. 448 (N.D. Cal. 1981), the issue was remanded to the district court with the invitation for that court to receive new evidence. In commenting upon the new survey evidence, the court noted that the questions used “were pulled, verbatim, from an illustration in the text of the appellate court opinion. Plaintiff’s expert, not a trained attorney, misconstrued the purpose of the [appellate court’s] illustration, which was to illustrate a point, not to suggest language for a scientific study.” *Id.* at 454 n.5 (citation omitted). Similarly, in *Firestone v. Crown Center Redevelopment Corp.*, the court noted that a question containing the phrase “compensatory damages,” though well-defined for attorneys, was not likely to be correctly understood by laypersons. 693 S.W.2d 99, 103 (Mo. 1985) (en banc).

One issue requiring attention was removing ambiguity. Consider the word “approval,” which has a reasonably precise meaning when used in the context of the Lanham Act.¹⁶ As used in everyday parlance, however, the word has a range of meanings, not all of which convey the meaning intended by the Lanham Act. “Approve” can mean to give formal or official sanction (as in “Congress approved the budget”); it can also mean to have or express a favorable opinion (as in “I approve of body-piercing noses, tongues and lips as a fashion statement”). Reflection upon how lay consumers understand and use the word “approve” suggested it most often is in the latter sense, as expressing an opinion. Those responding to survey questions asking about “the President’s approval rating,” as well as the broader public informed of these survey results, recognize that the president’s approval rating has nothing whatever to do with those surveyed giving formal or official sanction to the President,¹⁷ but everything to do with their expressing opinions. Since one could not be certain which meaning(s) consumers had in mind, designing a survey question to assess sponsorship confusion among lay consumers that relied on “approve” (or “approval”) would necessarily yield ambiguous and unreliable findings and, thus (even in the pre-*Daubert* era¹⁸) was understood to be scientifically indefensible.¹⁹

¹⁶ 15 U.S.C. § 1125(a).

¹⁷ Answering “yes, I approve” to the question “Do you approve or disapprove of the way in which the President is handling his job?” in no way means that one has authorized the president to act as he has.

¹⁸ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (holding that scientific evidence must meet a certain minimum standard in order to be admissible); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (same); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (same). Unless otherwise indicated, henceforth, mentions of *Daubert*, by reference, include both *Joiner* and *Kumho* as well.

Arguably more important than eliminating ambiguity is insuring that, as used in the survey question, the language of the law is readily comprehended by lay consumers. This author's prior experience as a consumer psychologist and researcher (which included, among other things, having been retained by the Food and Drug Administration to develop its definition of misleading advertising and the approach for measuring same²⁰ — a subject that, at core, involves consumer comprehension and miscomprehension of commercial language — as well as being called upon by the advertising industry to design and conduct seminal research on consumer comprehension and miscomprehension of advertising²¹) led me to recognize that the language of the law -- in this instance, the word "sponsorship," especially if used alone – likely would be inappropriate for a lay consumer survey. Even now, twenty-five years later, lay consumers tend to be unaware of the word's trademark-relevant meaning. When asked, many think "sponsor" refers either to individuals who act as benefactors, patrons or guarantors, or to firms that support, pay for, or subsidize television or radio programs in return for advertising time on these programs. These meanings

¹⁹ Notwithstanding its inherent ambiguity, one court suggested that "approval" be used in surveys directed toward assessing sponsorship confusion. See *Pebble Beach Co. v. Tour 18 Ltd.* 155 F.3d 526, 544 n.10. The author served as an expert witness for plaintiff in this matter.

²⁰ Jacob Jacoby & Constance B. Small, *The FDA Approach to Defining Misleading Advertising*, 39 J. MARKETING, 65-68 (1975), reprinted in Practising Law Institute, *ADVERTISING LAW IN THE NEW MEDIA AGE* (Jeffrey S. Edelstein, ed.).

²¹ Jacob Jacoby, Wayne D. Hoyer & David A. Sheluga, *THE MISCOMPREHENSION OF TELEVISED COMMUNICATION* (1980). See also Jacob Jacoby & Wayne D. Hoyer *The Miscomprehension of Televised Communication: Selected Findings*, 46 J. MARKETING, 12, reprinted in 4 MASS COMMUNICATION REVIEW YEARBOOK 129-144 (Ellen A. Wartella & D.C. Whitney, eds.); Jacob Jacoby & David W. Hoyer, *THE COMPREHENSION AND MISCOMPREHENSION OF PRINT COMMUNICATIONS: AN INVESTIGATION OF MASS MEDIA MAGAZINES* (1987).

suggest it is the sponsor that pays (or potentially pays) for the privilege of being a sponsor, not that the sponsor is the beneficiary of royalties and so forth for its authorization. In neither case do these meanings of sponsor convey the meaning this writer believes was intended by the Lanham Act, namely, to authorize or permit.

Accordingly, a set of synonyms for “sponsor” (or “sponsorship”) was compiled that plaintiff’s counsel and I believed also conveyed the core meaning intended by the Act. These words were: authorize-authorization, endorse-endorsement, license and permit-permission. Next, I consulted a standard reference work²² that listed the empirically-derived frequencies with which these words appeared in newspapers and magazines directed to the general public. Their frequency of occurrence per million words of print, were as follows:

72	permit/permission
22	license
13	authorize/authorization
12	sponsor/sponsorship
4	endorse/endorsement

The fact that “permit-permission” enjoys a six-fold greater usage frequency in media directed to the general public is taken as an indication that lay consumers are more likely to understand and use these words than “sponsor-sponsorship.”

Developed to incorporate both the language of the law (sponsorship) and the language most familiar to and used by the public (permission), the question used in *Wichita Falls* was: “Did the company that made this shirt have to get

²² Robert L. Thorndike & Irving Lorge, THE TEACHER'S WORD BOOK OF 30,000 WORDS (1944) (listing word frequencies based on words appearing in American magazines and newspapers).

authorization or sponsorship — that is, permission — to make it?”²³ Those answering “yes” were asked a follow-up question: “From whom did they have to get authorization or sponsorship, that is, permission?”²⁴ To be tallied as confused, a respondent had to identify plaintiff in answer to this second question. Worded this way, the permission question²⁵ reflects a more fundamental issue that required resolution at the time plaintiff’s survey was developed, and which has since become a point of disagreement among the courts.

Should the Question Focus on Whether Permission was “Obtained” or Whether Permission was “Required”? When developing the permission question for plaintiff’s survey in *Wichita Falls*, the last issue this writer had to resolve was whether the question should ask if respondents thought permission *had been* obtained as opposed to if they thought permission *had to be* obtained. Giving the matter considerable thought led me to the following understanding.

If not of logic, then as a matter of common sense, why would any entity—particularly a “for profit” enterprise—seek permission from another “for profit” entity if no permission was required? Although there may be quaint exceptions in regard to other things—a prospective groom asking the bride’s parents’ permission to marry their daughter—when it comes to business entities, as a

²³ Jacob Jacoby & Robert L. Raskopf, *Disclaimers in Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 TMR 35, ?? (1986) (providing an in-depth analysis of the questionnaire); See also *Wichita Falls*, 532 F. Supp. at 659.

²⁴ Jacoby & Raskopf, *supra* note 23, at 52; See also *Wichita Falls*, 532 F. Supp. at 659.

²⁵ As used from this point onward, the term “permission question” refers to a survey question that seeks to assess confusion as to what Section 43(a) refers to as “sponsorship or approval.”

general rule,²⁶ permission is sought only when permission is required. Hence, logically, “Was permission required?” is temporally prior to “Was permission received?” One reaches the question “Was permission received?” only after answering “yes” to “Was permission required?”

Once conceptualized this way, it became obvious that the “was permission obtained” formulation necessarily represented a major flaw that could generate nothing other than unreliable data. Asking whether permission was obtained implies that permission was required; thus, it constitutes a classic form of leading question. A respondent who answers “yes, permission was obtained” is most likely led to provide this answer because the question carries with it the pragmatic implication²⁷ that permission must have been required. If it were not, it would not have been requested and, not needing to be requested, would not have been received.

At this point, a third and irrefutably fatal flaw with the “was permission obtained” formulation became obvious. “Was permission obtained?” asks the respondent regarding an objective fact and, as such, may be a valid question for executives at the disputing parties or for someone privy to the negotiations that led to permission being requested and obtained. However, unless it was of such moment that lay people could reasonably be expected to have read or heard about it through the mass media, asking “Was permission obtained?” is an

²⁶ *But see* Luther R. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572-573 (1994) (in which defendant requested permission in advance to parody a copyrighted work).

²⁷ R. J. Harris & G. E. Monaco, *Psychology of Pragmatic Implication: Information Processing Between the Lines*, 107 J. EXPERIMENTAL PSYCHOL.: GENERAL 1 (1977).

unreasonable inquiry of lay consumers. Most lay consumers have no way of knowing whether or not permission had been obtained so that, when asked whether defendant obtained permission, the only truthful answer the vast majority can give is “I don’t know.”

Consider the following questions asked in sequence: “Do you think permission was required?”²⁸ In the majority of instances, lay consumers are able to honestly answer “Yes” (or “No”) to this question. Suppose respondents were then asked: “Do you think permission was received?” If being truthful, most people would have to answer “I don’t know” to this second question (e.g.: “How am I supposed to know? I wasn’t there and didn’t read or hear anything about it. It might or might not have been obtained; I just don’t know”). Thus, regardless of whether respondents answered that permission “had been obtained-given-received,” or “had not been obtained-given-received,” as they would have no basis for knowing, either a “yes” or “no” answer can be nothing other than an unreliable guess. Since answers that are guesses are neither probative nor relied upon, why ask such a question in the first place?

Sharing these thoughts with plaintiff’s counsel produced agreement that the only rational and defensible focus for the question measuring sponsorship confusion would be one that asked whether permission was required, not whether it was obtained. As noted earlier, this resulted in the following questions: “Did the company that made this shirt *have to get* authorization or

²⁸ Because it explicitly mentions only the affirmative (viz. “was required”), the above phrasing creates a “leading” question. It is used here only to focus on the “required vs. received” issue. As discussed below, when used in surveys proffered for litigation, the question needs to be rephrased to give explicit emphasis to the affirmative, negative and neutral positions.

sponsorship – that is, permission – to make it?” and “From whom *did they have to get* authorization or sponsorship, that is, permission?” (italics supplied).

Case Law on Measuring Sponsorship Confusion.

In *Wichita Falls*, the issue was whether the court’s proposed disclaimer (inclusion of the statement “Not authorized or sponsored by the N.F.L.” on the sewn-in neck tag of defendant’s football replica jerseys) would be sufficient to bring confusion down to a *de minimus* level.²⁹ To test this proposition, the questions “Did the company that made this shirt have to get authorization or sponsorship – that is, permission – to make it?” and “From whom did they have to get authorization or sponsorship, that is, permission?” were asked of 3,766 respondents randomly assigned to several test (disclaimer) and control (no disclaimer) groups. The findings were that 58% of the respondents shown a football replica jersey *without* the disclaimer, as compared to 59% of the respondents shown the same garment *with* the disclaimer, thought authorization from the NFL or its teams was necessary.³⁰ The proposed disclaimer was thus shown to exert no corrective impact whatever on confusion as to sponsorship or approval.

As becomes clear from reviewing the case law,³¹ in the majority of instances where surveys are discussed, published opinions do not quote the

²⁹ 532 F. Supp. at 656.

³⁰ Jacoby & Raskopf, *supra* note 23, at 53.

³¹ The author appreciates the assistance of Robin A. Moore, J.D. Candidate, NYU School of Law, in searching WestLaw and Lexis, as well as for cite-checking the manuscript.

complete survey question(s, or even phrases drawn therefrom,) on which they rely. Hence, this review is perforce limited to cases that do quote the question or specific phrases, or where this writer has personal knowledge of same.

In accepting and according considerable weight to plaintiff's survey,³² the *Wichita Falls* court wrote: "interviewees who saw the team name on the shirt ... believed that the manufacturer *was required to obtain* authorization from the NFL or one of the member clubs in order to manufacture the jerseys"³³ (emphasis added). By quoting the question wording, the court exhibited its understanding that the question, and the findings obtained using the question and on which it relied, focused on whether consumers thought permission "was required" (i.e., had to be obtained).

As *Wichita Falls* represented the first time a disclaimer approved by a court was tested prior to being implemented (and was then rejected by that court as a consequence), a paper describing the survey and its findings was prepared and appeared in the *Trademark Reporter*.³⁴ That article did not discuss confusion as to "origin" (or source) or "affiliation, connection, or association;" rather, it focused on sponsorship confusion, quoting the two questions developed to measure this form of confusion.

³² "...the Court is impressed with the steps plaintiffs took to insure the reliability of the survey. It was well-designed, meticulously executed and involved some of the best experts available. . . . [P]laintiff's survey results were essentially uncontroverted." *Wichita Falls*, 532 F.Supp. at 658.

³³ *Id.* at 659.

³⁴ Jacob Jacoby, *Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 TMR 890 (2002).

The article was then cited and relied upon by the Second Circuit in *HBO, Inc. v. Showtime/The Movie Channel, Inc.*³⁵ In that decision, referring specifically to the Jacoby and Raskopf article and, by necessary implication, to the “needed to get permission” questions upon which that article was based, the court wrote, “This conclusion [that disclaimers which employ brief negator words such as ‘no’ or ‘not’] was based on a study of the effect of disclaimers on football jerseys . . .”³⁶ Issued at the same time, another Second Circuit decision also cited Jacoby and Raskopf as a prime reason for its conclusion³⁷.

Unfortunately, most published opinions do not quote the survey question(s) (or phrases) used in the surveys they discuss, thereby making it exceedingly difficult to provide a comprehensive treatment of how these questions fared in court. Relying upon instances where the question was quoted, and upon personal knowledge of your author, from 1982 through 1996, the “had to get permission” (i.e., “permission was required”) formulation was used by this researcher³⁸ and others³⁹ in at least a dozen reported (and dozens of

³⁵ 832 F.2d 1311 (2d Cir. 1987).

³⁶ *Id.* at 1316.

³⁷ *Charles of the Ritz Group v. Quality King Distrib., Inc.*, 832 F.2d 1317, 1324 (2d Cir. 1987) (citing Jacoby and Raskopf for the proposition that “[a] growing body of academic literature has concluded that disclaimers . . . which employ brief negator words such as ‘no’ or ‘not,’ are generally ineffective.”).

³⁸ There are numerous other examples through 1995 where this author used the “had to get permission” formulation to measure sponsorship confusion, and where courts offered no criticism but accepted the results based on this formulation. See *Aris-Isotoner Gloves, Inc. v. Fownes Bros.*, 594 F. Supp. 15, 23 (S.D.N.Y. 1983) (holding that both plaintiff’s and defendant’s surveys were relevant without discussing either survey’s wording); *NFL Properties, Inc. v. NJ Giants, Inc.*, 637 F. Supp. 507 (D.N.J. 1986) (stating, in dicta, that the survey by the author was relevant without discussing the survey’s wording); *Smartfoods, Inc. v. Hunt-Wesson, Inc.*, No. 3:92-CV-2061-D (N.D. Tex. Dec. 30, 1992) I CAN’T FIND THIS CASE IN WESTLAW; *P.T.C. Brands, Inc. v. Conwood Co.*, 28 U.S.P.Q. 2d 1895, 1902, 1904-05 (W.D.Ky. 1993) (accepting a survey without discussing the specific wording of the survey’s questions); *Indianapolis Colts v.*

unreported) cases, and district and appellate courts accepted and gave appreciable weight to findings based upon this formulation. In at least one instance, an appellate court relied upon a survey using the “needed to get” formulation as the basis for overturning a district court decision.⁴⁰

Particularly noteworthy among these decisions is *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*⁴¹. In its opinion, the District Court mentioned the “needed to get” formulation not once, but twice on the same page,⁴² then indicated it placed “great weight” upon the data yielded by that

Metropolitan Baltimore Football Club 31 U.S.P.Q.2D 1801, *aff'd* 34 F.3d 410 (7th Cir. 1994) (similar). *But see* Schering Corp. v. Schering Aktiengesellschaft, 667 F. Supp. 175 (D.N.J. 1987) (holding that neither plaintiff’s or defendant’s survey should be given significant evidentiary weight without discussing a rationale). On only one occasion did this writer depart from his customary practice to use the “did get” rather than “did need to get” formulation. See Pebble Beach Co. v. Tour 18 I, Ltd., 155 F.3d 526 (5th Cir. 1998). This formulation was used at the insistence of counsel and with the understanding that, if challenged, I could disavow the “did get permission” in favor of the “needed to get permission” formulation. Both the district and circuit courts accorded considerable weight to the findings from this survey.

³⁹ While surveys conducted by others using the “had to get” permission meaning have been criticized on other grounds, in none of these instances were the courts critical of the “had to get” formulation. See *Sports Authority, Inc. v. Abercrombie & Fitch, Inc.*, 965 F. Supp. 925, 933, 939 (E.D.Mich. 1997) (“Do you believe Abercrombie & Fitch needed permission from The Sports Authority to use ‘original outdoor authority?’”); *Rock & Roll Hall of Fame Museum, Inc. v. Gentile Prods.*, 71 F. Supp. 2d 755, 762(N.D.Ohio 1999) (“From whom do you believe that they would need permission or authorization?”); *Cairns v. Franklin Mint Co.*, 107 F.Supp. 2d 1212, 1219 (C.D.Cal. 2000) (“The survey consisted of several questions. The first asked: ‘does the company of organization that is selling this Diana, Princess of Wales product need the permission or approval of any other company or organization before it could offer it for sale, or not?’”).

⁴⁰ In reviewing the lower court’s ruling in *Anheuser-Busch, Inc. v. Balducci Publications*, the Eighth Circuit wrote: “The survey evidence, whether considered direct or indirect evidence of actual confusion, tilts the analysis in favor of Anheuser Busch. . . . Our review of . . . the survey evidence convinces us that the court erred in finding no likelihood of confusion.” 28 F.3d 769, 775 (8th Cir. 1994). The court further stated: “We have considered Balducci’s argument attacking the survey’s methodology because of alleged shortcomings in its methodology; however, like the district court, we have ‘no quarrel with the [survey’s] design or execution.’” *Id.* at 775 n.4. The author served as an expert witness for plaintiff in this matter.

⁴¹ 31 U.S.P.Q.2d 1801 (S.D. Ind. 1994).

⁴² *Id.* at 1807 “The test was for confusion as to authorization, that is from whom did the manufacturer *have to get* permission to make the merchandise. . . .” “One out of five people surveyed were confused as to whether the CFL *had to have* the permission of the NFL to use the

question.⁴³ What makes this case particularly noteworthy is that it was appealed to the Seventh Circuit where Judge Richard Posner, generally acknowledged to be one of the most scientifically astute judges in the country, wrote the opinion.⁴⁴ By citing the formulation three times in the appellate opinion, Judge Posner makes it abundantly clear that he and his Seventh Circuit colleagues (Judges Bauer and Kanne) understood that plaintiff's survey relied upon the "needed to get" formulation. Describing the procedures, he wrote:

Then they were asked, with reference to the "Baltimore CFL Colts" merchandise that they were shown, such questions as . . . whether the team or league *needed someone's permission* to use this name, and if so whose. If, for example, the respondent answered that the team *had to get permission* from the Canadian Football League, the interviewer was directed to ask the respondent whether the Canadian Football league had in turn *to get permission from* someone.⁴⁵ [Italics supplied]

And what did Judge Posner and his colleagues think of the survey and the findings it obtained using the "needed to get" formulation? As the opinion states:

The plaintiffs' study, conducted by Jacob Jacoby, was far more substantial [than defendant's study] and the district court found it on the whole more credible. . . . Jacoby's survey was not perfect . . . Trials would be very short if only perfect evidence were admissible. . . . [Regardless, the Seventh Circuit upholds the district court's decision] in crediting the major findings of the Jacoby study and inferring from it and the other evidence in the record that the defendants' use of the name 'Baltimore CFL Colts'

'Baltimore CFL Colts" name. These results are the primary foundation of plaintiffs' position that they have met their burden..." (emphasis added). Indianapolis Colts v. Metropolitan Baltimore Football Club, 34 F.3d 410, 415 (S.D. Ind. 1994). The author served as an expert witness for plaintiff in this matter.

⁴³ "Likelihood of confusion can be proven without any evidence of actual confusion, i.e., without a consumer survey. If, as is the case here, such evidence exists, it is entitled to great weight...." *Id.* at 1808.

⁴⁴ Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd., 34 F.3d 410 (7th Cir. 1994).

⁴⁵ *Id.* at 415.

whether for the team or on merchandise was likely to confuse a substantial number of consumers.⁴⁶

Since Judge Posner reviewed the record – in the process, necessarily reading where the district court cited, accepted and placed “great weight” upon a question using the “had to get” formulation – then mentioned the “needed to get” formulation three times before upholding the district court’s decision, it seems reasonable to conclude that judge Posner and his colleagues found no problem with the “need to get” formulation.

Thus, reviewing published case law spanning more than a dozen years reveals that, as of 1995 and with only one exception,⁴⁷ permission questions using the “need to get” formulation were accepted and relied upon by at least a dozen district courts, by the Seventh Circuit (in *Indianapolis Colts, Inc.*) and by the Second Circuit (in *HBO, Inc.*).

For reasons that become obvious, one last case needs to be discussed before turning to the emerging inconsistency across courts in regard to the question “how should sponsorship confusion be measured?” This case involved another Southern District of New York matter decided in 1994 — two years before the case that provoked the emerging controversy. Referring to prior Second Circuit decisions in its opinion, the *Schiefflin & Co. v. Jack Co. of Boca, Inc.* court wrote:

The court has considered defendant’s other objections ... and determines that they are without merit. Defendants’ objection to the question, “Do you think the company that makes or distributes the product

⁴⁶ *Id.* at 415-416.

⁴⁷ *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 544-45 (5th Cir. 1998).

I showed you *had to get authorization – that is, permission* – from anyone else to market the product?” as a “legal” question is ineffective. The question... certainly [is] a relevant question under this Circuit’s caselaw.” (emphasis added)⁴⁸

In light of case law, particularly as articulated in Second Circuit opinions, one would think that *stare decisis*, namely, reliance upon precedent, would hold in Southern District of New York opinions.

The “Had to Get (Obtain/Receive)” Versus “Did Get (Obtain/Receive)” Controversy

The emerging controversy involves three opinions on one side vs. several times as many on the other.

Novo-Nordisk v. Eli Lilly.⁴⁹ In a 1996 Southern District of New York ruling that has exerted substantial impact on trademark confusion surveys conducted since then, the court in *Novo-Nordisk* objected to the “had to get” formulation.⁵⁰

In that matter, after reviewing a Humulin package containing the statement “FOR USE ONLY IN B-D PENS, B-D PEN ULTRA, NOVOLINPEN, NOVOPEN, AND NOVOPEN 1.5,” health care professionals were asked: “*Do you think the company that puts out this insulin cartridge product, did have to get authorization to use any of the names of these pens in its statement [pause], did not have to get authorization to use any of the names of these pens in its statement [pause], or you have no opinion about this?*” In its opinion, the court wrote:

⁴⁸ 850 F. Supp. 232, 247 (S.D.N.Y. 1994).

⁴⁹ *Novo Nordisk of N. Am. v. Eli Lilly & Co.*, No. 96-Civ.-5787, 1996 WL 497018, (S.D.N.Y. Aug. 6, 1996).

⁵⁰ *Id.* at *7 n.26.

[R]espondents were asked whether the maker of each of the pens named on the package “had to give its permission or approval to the maker of Humulin for the use of the Humulin cartridge in” the pen. This question mistakenly asks respondents what they believe is the legal requirement (because of the use of the phrase “*had to*”), rather than asking them merely whether they believed that the maker of the Humulin *did receive* authorization to use the names of the pens.⁵¹ (emphasis added)

As the rationale for asking “have to get” rather than “did get” has been discussed above and need not be repeated, consider the following. While the quotation marks used around the paraphrased question in the opinion suggest the question was a “knowledge” question (essentially: “*If you know*, did the maker of this product have to obtain permission to use these other names on its package?”) the question actually asked only for the respondents’ thoughts and opinions: “*Do you think* the company that puts out this insulin cartridge product, did have to get authorization to use any of the names of these pens in its statement [pause], did not have to get authorization to use any of the names of these pens in its statement [pause], or you have no opinion about this?” The scholarly literature recognizes that there are important differences between questions that try to ascertain what people know (“knowledge questions”) and questions that ask people for their impressions, thoughts or opinions (“opinion questions”). Asking “*do you know*” (which inquires regarding an objectively verifiable fact) is not equivalent to asking “*do you think*” (which inquires regarding

⁵¹ *Id.* at *7 n.24.N.B. Two surveys were conducted for plaintiff in this matter, one by this writer and one by another expert. Both surveys used a “needed to get permission” question. Although the *Novo-Nordisk* court rejected the data obtained with the “needed to get permission” question, it did not reject this author’s survey. As it wrote, “[t]his Court accepts the results of the first two questions in the Jacoby survey”, namely, the questions used to measure confusion as to origin and confusion and to connection or relationship. *Id.* at *6.

an impression).⁵² As discussed more fully at the end of this paper, although this may suggest to some that the question could be worded “*Do you think* they did obtain permission . . .?”, such wording fails to address the basic problem of respondents answering “How do I know? I have no way of knowing whether they did or not.”

That said, the *Novo-Nordisk* court raised an exceedingly important issue, namely, what should be the proper focus of a question designed to measure sponsorship confusion under § 43(a) of the Lanham Act? However, not being versed in social science methodology, courts cannot be faulted for not knowing that the question the *Novo-Nordisk* court raised is a variant of a well-researched and irrefutably settled scientific issue. During the last half century,⁵³ the scientific literature is replete with examples showing that asking questions when respondents cannot be expected to know the answer can and will cause them to guess or, to paraphrase the title of a classic article, “tell more than they can know.”⁵⁴ As discussed above, “was or was not permission given?” is a legitimate question for those expected to have first-hand knowledge. However, as lay respondents generally do not have any basis for such knowledge, so that an answer of “yes” or “no” can be nothing other than a guess, to ask such

⁵² The “Do you think . . .” language, at least conceptually, parallels what survey researchers ask when testing for confusion as to source – namely, “*Do you think* this item comes from Company A?” Survey researchers do not ask “*Did* this item come from Company A?”

⁵³ Such evidence can be traced back at least as far as the classic work by Stanley Payne, *THE ART OF ASKING QUESTIONS* (1951), and probably decades before as well.

⁵⁴ For a classic and highly illuminating article on the subject, see Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychol. Rev.* 231, 231-59 (1977).

respondents whether they believe defendant “did receive” permission is a prescription for “junk science” – the very thing *Daubert* and progeny⁵⁵ have charged courts with preventing.

Since the *Novo-Nordisk* court’s commentary represented an isolated instance where a survey using the “need to get” formulation had been criticized⁵⁶ -- and naively thinking that courts deciding future disputes would recognize and accept the considerable weight of case law to that point in time (and, hence, defer to *stare decisis*) -- I continued using the “needed to obtain” rather than “had obtained” formulation.

NFL Properties Inc. v. ProStyle Inc.⁵⁷ At the time it issued its opinion in *Novo-Nordisk*, that court was relatively new to the bench. This was not the case with the court in *ProStyle*, an experienced trier of fact at the time it issued its opinion. As described by the *ProStyle* court, the case involved the following facts:

Defendants, through ProStyle, have recently and without plaintiffs’ consent commenced selling in interstate commerce merchandise, including shirts, sweatshirts, dresses, swimsuits, caps and jackets, bearing the designations “PACK,” “GREEN BAY P,” with a player’s name and number, “GBP CENTRAL DIVISION CHAMPIONS” AND “DIVISION CHAMPIONS GREEN BAY.” Defendants’ merchandise often display the Packers’ team colors, which are dark green and yellow, or variations thereof. Certain articles of defendants’ merchandise also bear football

⁵⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (holding that scientific evidence must meet a certain minimum standard in order to be admissible); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (same); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (same).

⁵⁶ This is true insofar as surveys are concerned. In a case that did not involve survey research, the court commented: “In view of the trademark’s strength, this nearly identical reproduction of the stitching pattern no doubt is likely to cause consumers to believe that appellee somehow is associated with appellants or at least has consented to the use of its trademark.” *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 873 (2d Cir. 1986).

⁵⁷ No. 96-C-1404 (E.D. Wis. filed July 25, 1997).

indicia, including football helmets, in the Packers team colors or variations thereof, which are displayed in conjunction with the aforementioned designations or with the names of various Packers' players and the respective numerals worn by those players. Defendants' products are often interspersed in the marketplace with products officially licensed by plaintiffs. Defendants have advertised their products in interstate commerce through a mail-order catalog.... In the catalog, pictures of defendants' products are interspersed throughout defendants' catalog with color photographs of team members of the Packers in team uniforms and team helmets.⁵⁸

Plaintiffs commissioned a survey of likely confusion.⁵⁹ It involved showing ten comparable groups of respondents (six groups tested using a "Point-of-sale" protocol and four tested using a "Post-sale" protocol) one of ten shirts. Five shirts were defendants' "as sold" garments – four bearing the indicia described above, the fifth missing some of the indicia, but bearing the name and player numeral of a popular Green Bay Packers player. The other five shirts were "control" shirts. Except for substituting a non-infringing element on the control shirt where the allegedly infringing element appeared on defendants' shirts, the control shirts were identical to defendant's shirts. For example, whereas defendants' garments used the name "Green Bay," the corresponding control garments were the same in all respects, except for the fact that "Green Bay" was replaced with "Ellison Bay," the name of another bay in northern Wisconsin.⁶⁰

⁵⁸ *Id.* slip op. at 6-7..

⁵⁹ Jacob Jacoby "The Extent to Which Green and Yellow, When Seen in the Context of Other Pertinent 'Cues,' Have Acquired Secondary Meaning and are Likely to Cause Consumer Confusion." April 1997. (Unpublished survey report proffered as evidence in *NFL Properties, Inc. v. ProStyle, Inc.* (E.D. Wis. 1997)).

⁶⁰ Contrary to some representations ("The survey's flaws (especially lack of control) warranted exclusion." Kenneth A. Plevan, *Daubert's Impact on Survey Experts in Lanham Act Litigation*, 95 TMR 596, 607 (2005)), the survey contained not one, but five controls.

After being shown one of the test or control shirts, the respondent was asked: *What, if anything, do you think of when you see this shirt?* To assess confusion as to sponsorship, the next question asked: *Do you think that in order to put out this shirt, the company that put it out did need to get permission, did not need to get permission, or you have no thoughts about this?* Respondents who answered “did need to get permission” were then asked “*From whom did they need to get permission?*” and “*What makes you say that the people who put out this shirt needed to get permission from ____? Anything else?*”

Parenthetically, some have criticized questions worded this way as being unnecessarily complex. It is true that a question could be constructed to more closely parallel the question form we are asked all the time in non-research settings, such as: *Do you think that in order to put out this shirt, the company that put it out did need to get permission? (or: Do you think that in order to put out this shirt, the company that put it out did not need to get permission?).* However, were a survey researcher to ask such yes-no questions, he or she would most certainly be criticized for asking a classic form of leading question.⁶¹ In contrast “when a question is neutral ... or balanced (‘Was the water hot or cold?’), it is not leading.”⁶² Such is the case with the balanced question I developed and used in *ProStyle*. Because it gives equal emphasis to the affirmative (“did get”), negative (“did not get”) and neutral (“no thoughts about it”), this balanced question is an improvement over the permission question developed and used in *Wichita Falls*.

⁶¹ For definitions and discussions of “Leading Questions” see BLACK’S LAW DICTIONARY (7th ed. 1999). See also John Henry Wigmore, 3 EVIDENCE IN TRAILS AT COMMON LAW § 769 (1970); 1 MCCORMICK ON EVIDENCE § 6(b) (5th ed. 1999).

⁶² See MCCORMICK, *supra* note 61.

Although complex, to satisfy the requirements of being a non-leading question, it is “necessarily complex” and of the sort that lay respondents can comprehend and answer easily.

Defendants in *ProStyle* filed a motion *in limine* to exclude both the survey and this author’s opinions. The court devoted several pages to considering each of the five arguments defendants presented in support of this motion. Though it rejected four, it accepted the argument that “the survey’s confusion question improperly asked for a legal conclusion.”⁶³ As it said:

Plaintiffs respond that defendants are “nitpicking” and that Jacoby had to insert the phrase “need to get permission” or else most people would respond that they did not know whether or not the maker got permission to make the shirt. The court may have been more sympathetic to this position had Jacoby himself not formulated the same survey question rejected in *Novo Nordisk* and had that court not suggested to him what would have been acceptable.

It was surprising that an experienced court in the Eastern District of Wisconsin would ignore considerable precedent, as well as an opinion by the most prominent appellate judge in its own circuit (or, arguably, in any circuit, namely Judge Richard A. Posner), in favor of relying on the isolated opinion of a new-to-the-bench district court judge in the Second Circuit. It became less surprising after reading the *ProStyle* court’s clearly erroneous understanding and discussion of scientific controls,⁶⁴ a topic that has been addressed elsewhere.⁶⁵ The *ProStyle* court’s opinions in

⁶³ *ProStyle, Inc.*, 16 F. Supp. 2d at 1018-19.

⁶⁴ See *ProStyle, Inc.*, 57 F. Supp. 2d.

⁶⁵ Jacob Jacoby, *Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 TMR 890, 922-53 (2002).

this matter lost any ability to surprise after this author did as Judge Posner suggested, namely, “get hold of the briefs and record to check the accuracy of the factual recitals in the opinion.”⁶⁶ Doing so reveals the *ProStyle* court’s opinions to be what Judge Posner’s colorful language labels “a mine of misinformation.”⁶⁷ However, these issues -- of failing to rely on precedent, of reaching clearly erroneous conclusions regarding scientific controls, and of misrepresenting the record in the case as well as prior case law -- were never appealed because, from plaintiffs’ perspective, they never needed to be; even without plaintiffs’ survey, the jury held for plaintiff.

The “Posing a Legal Question” Objection is Predicated Upon Invalid Assumptions. The objection that asking lay people “Was Permission Required?” amounts to asking them an improper legal question necessarily presumes that only those trained in the law know, or should know, the law. A derivation from this assumption is that lay people essentially are, or should be, *tabula rasa* when it comes to the law. As a moment’s reflection should reveal, this cannot be a

⁶⁶ Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 211 (1991).

Rarely will the commentator get hold of the briefs and record to check the accuracy of the factual recitals in the opinion.

All this would be of relatively little importance were it not that lawyers and, particularly, judges’ knowledge of the world... derives to a significant degree from judicial opinions. One of the distinctive features of judges ... is that they obtain much of their knowledge of how the world works from materials that are systematically unreliable sources of information. *Id.*

⁶⁷ *Id.* at 210. See also Jacob Jacoby, *Judicial Opinions and Journal Articles as ‘Minefields of Misinformation’* (New York University Center for Law and Business, Paper No. 02-010), available at <http://papers.ssrn.com/abstract=368167> (identifying many ways in which the *ProStyle* court’s published opinions misrepresent statements in plaintiff’s briefs as well as prior judicial opinions).

reasonable or valid assumption. Indeed, civilized society is based upon lay people understanding the law. This is particularly obvious in regard to laws involving property rights. Regardless of how much he may covet my new lawnmower, my neighbor, Smith, and I both know he cannot use it without my permission – and neither of us had to consult with a judge or lawyer to know that this is so. If I see my other neighbor, Jones, driving Smith’s car -- a car I know by its distinctive paint job -- understanding that it was Smith’s car, it would be natural for me to think that Jones *needed* (and probably obtained) Smith’s permission to drive the car. However, unless Smith, Jones or someone else told me that authorization actually had been granted, my belief that Jones *obtained* Smith’s permission can only be supposition. The one thing of which I can be certain is that, as long as the car is Smith’s property, under most circumstances that can be envisioned, Jones requires Smith’s permission to drive the car.

Suppose I saw Smith’s 12 year old son driving the same car. Although I would not know whether or not Smith or his spouse gave permission, though not an attorney by birth or training, I do know it is against the law for a 12 year old to be driving a car on city streets. Moreover, both Smith and I know that if his son were stopped by a police officer, even though Smith might say he gave his son permission to drive the car, neither would be absolved from having committed a misdemeanor. As courts and lawyers are wont to remind laypeople, ignorance of the law is no excuse.

As a matter of fundamental public policy, society wants – indeed, requires – citizens to have some knowledge of the law -- and they do. Having been

socialized in contemporary American society, most of us have an essential understanding of property rights long before we are ten – and none of us have read any law books to acquire this understanding. That being so, how can it be wrong to ask them a question regarding intellectual *property*, especially one that parallels their understanding of real property law in the real world?

If a leap at all, it is not much of a leap to go from asking “Do you think Jones *needed* permission from Smith to use the latter’s car?” to “Do you think entity B *needed* permission from entity A to use the latter’s mark, dress, etc.?” In this day and age, the majority of lay consumers have some understanding of licensing, authorization and permission. Few who patronize fast food restaurants such as McDonald’s, Burger King and Wendy’s, believe these restaurants are in the business of making the Disney, Star Wars, and other movie or television characters that frequently appear on the glasses, toys and other items often provided to patrons at these restaurants. Most are aware that, to distribute such trinkets, the restaurant must have obtained the permission or authorization of the respective trademark or copyright owners. So if they see a likeness of Mickey Mouse on a cup being distributed at McDonald’s, the vast majority are likely to think this must have been done with Disney’s permission. This general awareness extends beyond items distributed at fast food restaurants.⁶⁸ Thus,

⁶⁸ Throughout their lives, virtually every branded product bought and used by American consumers carry on them, or on their packaging, either or both of the familiar ® and™ symbols. To think these symbols possess no meaning for consumers is naïve. Unpublished research by this writer reveals that, without entering law school or ever reading a single law book, approximately 90% of the adult lay public understand that the ® and™ symbols confer protectable rights. These respondents also understood that another party who sought to use the designations to which these symbols were affixed would “need to get permission” from the holder of that mark to do so. Without doubt, lay consumers have some understanding of the pertinent laws.

asking a permission question using the “needed to get” formulation does not require consumers to have knowledge of legal requirements that they would not ordinarily have. It simply taps into knowledge that, as responsible citizens, they already do have.

Evidence on point comes from surveys that have asked questions using the “did obtain permission” formulation. It now is widely accepted by trademark professionals that (regardless of whether phrased using either the “permission was required” or “permission was obtained” formulation) having a not insubstantial proportion of survey respondents answer “yes” to a permission question is but a necessary, not a sufficient, condition for supporting a claim of trademark or trade dress confusion. This is because respondents can be confused for a variety of reasons, not all of which may support plaintiff’s claims. For example, a plaintiff alleging confusion as to sponsorship may rest its claim solely on similarity in name between defendant’s product and its own (e.g., Colt’s Head v. Horse Head) but, when asked to explain why they are confused, consumers may refer to the similarity in container color(s). In this hypothetical, only answers pertaining to the similarity in name (or meaning) would count toward supporting a claim of confusion; answers pertaining to the colors would be considered irrelevant. It is for this reason that respondents who answer “yes” to a permission question need to be asked follow-up questions of the “Why do you say that?” variety.⁶⁹ These answers then need to be examined to determine

⁶⁹ See J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:175, at 3-13 (4th ed. 2003) [*hereinafter McCarthy*]; Phyllis J. Welter, TRADEMARK SURVEYS, § 24.03[1][c] (1999).

whether the reason(s) why consumers are confused are the reasons alleged by the plaintiff. Absent such a showing, though respondents may exhibit confusion, said confusion is of no relevance to the dispute.

Tellingly, when those who respond “yes” to a “was permission obtained” question are asked “Why do you think that?”, the findings offer compelling evidence that such “yes” answers are predicated upon consumers understanding *that the law requires* obtaining such permission. Consider *Dreamwerks Production Group, Inc. v. SKG Studio*,⁷⁰. Relying upon the *Novo-Nordisk* decision, plaintiff’s expert explained in his report⁷¹ that he used the “had received permission” formulation...

in recognition of a recent court decision in the Southern District of New York [i.e., *Eli Lilly v. Novo-Nordisk*] that said a question phrased similarly to ‘____ needed to get permission from ____’ requires a consumer to have knowledge of legal requirements that a consumer would not ordinarily have and should be phrased similarly to ‘____ received permission from ____.’

Those who answered “yes” were then asked to indicate the reason(s) why they thought permission had been received. In response, the majority (56%) of those who said they thought permission had been received then gave answers to the “Why do you say that?” question that revealed their answers were predicated upon believing *permission was required* which, in essence, means that their answers were based upon their lay understanding of the law. As provided in that expert’s report, these verbatim responses included:

⁷⁰ 142 F.3d 1127 (9th Cir. 1998). The author served as an expert witness for defendant in this matter.

⁷¹ "Report of John A. Bunge" (October 28, 1998), ¶ 3.

“It would be unethical and a possible lawsuit to use a trademark or copyright names without permission.”

“Because if one company wants to use the copyright name of another company they need to get permission.”

“Copyrights. Can’t use someone else’s name. If they did they could get in a lot of trouble.”

“Usually an infringement if they don’t.”

“Legally, if you use another company’s name you have to get permission.”

“I believe there are laws that let them sue if don’t get permission.”

“I think they received permission ‘cause they are smart enough not to want to be sued.”

“The logo and copyright. I’m sure to use their name you need permission.”

“Usually there are lawsuits going left and right if they don’t.”

“Just for legal reasons.”

“I am sure they had to or they would be sued.”

“You can’t do anything like that without permission unless you want a lawsuit.”

“Because Spin City is a trademark show.”

“Well it covers your butt. I wouldn’t want to do anything to get sued.”

“Because if not they are setting themselves up for a big lawsuit.”

“Legalities.”

Since these respondents had been asked whether they thought *permission was received* (not whether they thought *permission was required*), would courts adverse to lay consumers answering such questions on the grounds that they are

offering a legal opinion be consistent and require that the data given by these respondents to the permission question be excluded? I tend to suspect not.

Regardless of whether a layperson is asked “was permission required?” or “was permission received?”, it is clear that those who answer “yes” to either question generally predicate their answer upon their lay understanding of the law. Respondents who answer “yes” to the “was permission received?” formulation presume permission was *received* because it was *required*. “Being required” is the predicate upon which answers of “been received” is based. In a sense, asking “was permission obtained” is equivalent to a Trojan horse. Without realizing it, lay respondents likely interpret this question as meaning “was permission needed.”

As a last word on the issue, consider Prof. McCarthy’s views. Commenting upon the Fifth Circuit’s remark that the “need to get” version was “problematic” because it “allows for the consumer’s misunderstanding of the law,”⁷² Professor McCarthy, probably the premiere authority on trademark law, writes: “However, as the author [McCarthy] has pointed out, it is consumer perception that creates ‘the law’ of whether permission is needed.”⁷³ Although Prof. McCarthy has been making this point for a number of years, as some courts do not grasp its significance, it seemed prudent to consider how the permission question could be modified to satisfy the “posing a legal question” objection.

⁷² *Pebble Beach Co.*, 155 F.3d at 544.

⁷³ *McCarthy*, *supra* note 69, at 32-264. *Id.* at 24-9.

Revising the Permission Question. It should be appreciated that during the very same period the *Novo-Nordisk* and *ProStyle* courts were rejecting the “needed to get” formulation, a greater number of courts accepted and credited survey questions that relied upon this formulation — and continue doing so through today.⁷⁴ And while many other cases have been settled in favor of parties using such questions in their surveys⁷⁵, from these two rulings, it

⁷⁴ *E.g.*, *Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F.Supp. 279 (S.D.N.Y. 1997) (the author served as an expert witness for plaintiff in this matter) (the court went to lengths to emphasize it had a single criticism — considering the word “version” to be ambiguous; it found nothing wrong with the “had to get” formulation); *Harlem Wizards Entm’t Co. v. NBA Props., Inc.*, 952 F. Supp. 1084 (D.N.J. 1997) (the author served as an expert witness for defendant in this matter); *A&H Sportswear Co. v. Victoria’s Secret Stores, Inc.*, 166 F.3d 197 (3d Cir. 1999) (the question used by defendant’s expert was: “If you have an opinion, do you think that the company that puts out this brand of swimwear needs to have the permission or authorization of any other company to put it out?”); *Teaching Co. v. Unapix Entm’t, Inc.*, 87 F.Supp.2d 567 (E.D.Va. 2000) (the author served as an expert witness for plaintiff in this matter); *Trovan, Ltd. v. Pfizer, Inc.*, 2000 WL 709149 (C.D.Cal. 1999) (the author served as an expert witness for plaintiff in this matter); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199 (9th Cir. 2000) (the author served as an expert witness for plaintiff in this matter).

Because the survey expert was author of the Reference Guide on Survey Research in the Federal Judicial Center’s *Reference Manual on Scientific Evidence*, especially noteworthy is *Pharmacia Corp. v. Alcon Laboratories, Inc.*, 201 F.Supp.2d 335 (D.N.J. 2002) where the court opined, “[t]he questions that Professor Diamond selected for the survey (... and ‘Please tell me whether or not you believe that the company whose advertisement you just saw *needs* authorization, permission or approval from some other company in order to put out the product advertised?’) ... are a standard type and format of questions used to gauge confusion in trademark cases.” (emphasis added) (citation omitted). *Id.* at 377. Having described a question that used the “needed to get” formulation, the Court concluded: “the survey conducted by Professor Shari S. Diamond, J.D., Ph.D. ... demonstrates persuasively a confusion rate of [only] 1.5%.” *Id.*

⁷⁵ Examples of where a question including the “needed to get” formulation was used and the survey was considered instrumental in obtaining favorable pre-trial and pre-decision settlements include *Glock v. Smith & Wesson NDGa* (The author served as an expert for plaintiff in this matter); *Media General Business Communications, Inc. v. Virginia Publishing Co.* (1999) (The author served as an expert for plaintiff in this matter); *Northern States Power Co. v. PECO Energy Co. and Xcel Energy* (U.S.D.C. MN 2000) (The author served as an expert for defendants in this matter); *Bacou USA Safety, Inc. and UVEXS Safety Manufacturing, Inc. v. Crews, Inc.* (2000) (The author served as an expert for defendants in this matter); *Discovery Communications, Inc. v. Pearson plc* 2001 SDNY (The author served as an expert for plaintiff in this matter); *Nabisco, Inc. v. Brach’s Confections, Inc.* (U.S.D.C. E.D.TN 2001) (The author served as an expert for defendants in this matter) *The American National Red Cross v. Cosmetic Car Co., Inc.* (2003) (The author served as an expert for defendant in this matter); *GEICO v. Google et al.* EDVa 2005 (The author served as an expert for defendant Google in this matter).

becomes obvious that to continue asking a question that focused on “need to get” is to risk raising the ire of yet other courts.

Accordingly, seeking to be responsive to the “legal requirement” objection raised in *Novo-Nordisk* and echoed in *ProStyle*, I set about re-formulating the permission question. My initial inclination was to ask two separate questions, one focusing on “Do you think they needed to get permission?” and another on “Do you think they did get permission?” As the risks of asking the former question have just been noted, consider the risks attached to asking a question that uses the “did get” formulation.

Asking “Do you think they *did get* permission?” is to risk three highly undesirable outcomes. First, perhaps alerted by opposing counsel, the court might decide to throw out all “yes” or “no” answers on the grounds that any such answers are necessarily guesses. In this scenario, the question and data produced by that question would be worthless. Second, *in extremis*, the court might hold that respondents who gave such answers should be removed from all the analyses, as they were unreliable respondents. In this scenario, instead of excluding the data from a single question, all the data from all the questions asked of these respondents would be worthless. Last, since all “yes” or “no” answers to a “did get” question represents error, the court might decide these answers should be added together to arrive at a “noise estimate” that should be subtracted from the percentages obtained from the other survey questions. Since considerable social science research informs us that large proportions of respondents would give “yes” or “no” answers to the question “Do you think they

did get permission?,” using the resultant noise estimates -- from a question guaranteed to generate guessing and unreliable data -- would be so large as to overwhelm most valid findings of confusion.

Yet other arguments weighed against asking “Did the company that put out this product *need to get* permission from some other company?” and “Did the company that put out this product *get* permission from some other company?” Asking two separate questions would leave researchers, especially those doing surveys for plaintiffs, vulnerable to charges of “bludgeoning the respondent” and “taking multiple bites of the apple” in an untoward effort to obtain answers that benefited their client. Another consideration was that questions used to assess confusion as to sponsorship normally are asked only *after* respondents have been asked a question (and corresponding follow-up questions⁷⁶) to ascertain confusion as to source or origin, and a second question (and corresponding follow-up questions) to ascertain confusion as to connection or affiliation. To then follow these questions with two separate questions (and corresponding follow-up questions) to assess sponsorship confusion would make these latter questions and the issue of permission stand out like a sore thumb.

Taking all of the above arguments into consideration, I opted for reformulating the permission question as a single, combined question that read as follows:

*“Do you think that in order to put out this item, the company that put it out either **did get** or did need to get permission [pause], **did not get** or*

⁷⁶ Answers of “yes” are normally followed up with questions asking “from whom?” and “why do you say that?”

need to get permission [pause], or have you no thoughts on this?"

(Bolding supplied here to indicate how this question differs from the plain vanilla "needed to get" formulation.)

This revised phrasing incorporates both the "need to obtain" and "did obtain" meanings, relying upon the word "or" to separate these two components within each answer option. Use of the word "or" means that an answer of "yes" to either component requires answering "yes" to both. The lay public is well accustomed to answering such questions. To illustrate, were I to be asked "Does your car have a red or blue exterior?," as my car has a black exterior, I would have no problem answering "no." However, were I to be asked "Does your car have a red or black exterior?," I would have no problem answering "yes." Because the question relies on the word "or" (not "and") to separate the two meanings, neither the question nor the answer admit to ambiguous interpretation. Regardless of whether the respondent thought the company that put out this item "*did get permission*" or "*needed to get permission*," his answer to the question would be "yes."

While the re-formulated question now asks whether respondents believe the maker *did get* permission (authorization), thereby handling the "legal opinion" objection raised in *Novo-Nordisk* and *ProStyle*, it remains true that the lay public has no basis for answering such a question. From the perspective of social science, the only thing that saves the question from representing a meaningless inquiry guaranteed to produce unreliable "junk" data is the fact that it also asks about "need to get permission."

The question, however, does have a vulnerability, albeit one thought to be relatively inconsequential. The real world -- and, more importantly from the perspective of trademark law, the consumer's thoughts regarding what is happening in the real world⁷⁷ -- contains four possibilities. A consumer may think:

1. Permission was needed and permission was obtained.
2. Permission was not needed, so permission was not obtained.
3. Permission was needed, but permission was not obtained.
4. Permission was not needed, yet permission was obtained.

Scenarios 1 and 2 provide no problem as, respectively, they are equivalent to response options 1 (*did get or need to get permission*) and 2 (*did not get or need to get permission*). Although theoretically possible, scenario 4 does not make sense – and it seems reasonable to believe most lay consumers understand that a commercial enterprise would not invest the time and money to seek and obtain permission when no such permission was required. Hence, the

⁷⁷ Several years prior to enactment of the Lanham Act, Justice Felix Frankfurter wrote: “The protection of trademarks is the law’s recognition of the *psychological function* of symbols.” *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.* 316 U.S. 203 (1942) (emphasis added). Fifteen years earlier, Frank Schechter, in his famous *Harvard Law Review* article, defined dilution as “the gradual whittling away or dispersion of the identity and hold upon *the public mind* of the mark or name by its use upon non-competing goods.” Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927). In what probably is the single most authoritative source on trademark law, J. Thomas McCarthy asserts: “However, secondary meaning is a fact *only* in the sense that *the state of a buyer’s mind* is a fact.” *McCarthy* supra note 66, 15-29 (emphasis added). In like fashion, Richard Kirkpatrick writes: “trademarks are intellectual or psychological in nature. It follows that the question of trademark infringement is primarily one of the psychology – cognitive and behavioral – of consumers.” Richard L. Kirkpatrick, *LIKELIHOOD OF CONFUSION IN TRADEMARK LAW*. (1999); For an elucidation of how psychological theory and research apply to basic trademark concepts, see: Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TMR 1013.

likelihood of consumers thinking scenario 4 had occurred probably is close to, if not actually, zero.

Scenario 3, however, may pose a problem – but only if one assumes lay consumers would have some basis for knowing that permission was not obtained which, as we have seen, is a dubious assumption at best.⁷⁸ When providing their answer, consumers who sensed they had no basis for knowing whether “permission was not obtained” likely would rely upon the “permission was needed” component of the question. I believe the majority of lay consumers would fall into this category. But, *in arguendo*, suppose some respondents did think permission was needed, but not obtained, how might such respondents answer the re-formulated combined question? There are various possibilities.

Some who think permission was needed, but don’t think it was obtained, might inform the interviewer that they were having a problem answering the question. If this did occur – especially if it occurred with any frequency -- it is likely that the researcher would learn of the problem. This is because survey researchers generally contact the field testing sites regularly to check on progress and learn of problems, if any, being experienced by the interviewers. In my experience, in only a small number of instances (say, one in out of 100 surveys) does such feedback reveal problems of question wording or comprehension. However, as questions using the combined “did get, did need to get” formulation have now been asked in more than a score of studies involving

⁷⁸ On the other hand, if one appreciates that consumers generally have no basis for knowing whether or not permission was obtained, then it is more likely that respondents would rely upon, and answer in terms of, the “need to” portion of the first two answer options (“did need to get permission” and “did not need to get permission”), or would answer “don’t know.”

several thousand respondents and no feedback has been received to indicate any problem with the formulation, it appears that the problem is either non-existent or, if genuine, rare.

Of course, respondents might experience the problem but, instead of informing the interviewer, might select one of four answer options – either “did get or did need to get permission,” “did not get or need to get permission,” “don’t know,” or “have no thoughts about it” (the latter being an answer option provided in the question stem). Since respondents are (or should be) instructed “don’t know” is an acceptable answer to all questions they are asked, those who have a problem with the combined question can answer “don’t know.” Others may select the “have no thoughts about it” response. In either instance, as these individuals thought permission was needed but not obtained, answering “don’t know” or “no thoughts about it” cuts against plaintiffs, underestimating likely confusion.

Others who think permission was needed but not obtained might select the “did get or did need to get permission” or the “did not get or need to get permission” answer option. Arguments might be made that one or the other of these answer options is more likely. However, I know of no scientific bases for contending one of these answers is more likely than the other and believe such arguments reflect speculative opinion, not empirically supported fact.

This analysis suggests the following.

Respondents believing:

1. Permission was needed and permission was obtained.

Would answer:

“did get or did need to get permission”

- | | |
|---|---|
| 2. Permission was not needed, so permission was not obtained. | “did <u>not</u> get or need to get permission” |
| 3. Permission was needed, but permission was not obtained. | 1. “don’t know,” or
2. “have no thoughts about it,” or
3. “ <u>did</u> get or did need to get permission” or
4. “did <u>not</u> get or need to get permission” |
| 4. Permission was not needed, yet permission was obtained. | An unlikely scenario that, if present, could yield any of the four answers identified for Scenario 3. |

Recognize that this analysis applies only when one assumes that lay consumers have some basis for knowing that permission was not obtained. If one appreciates that this assumption is dubious at best, then one is better able to appreciate that it is more likely respondents would rely upon, and answer in terms of, the “need to” portion of the first two answer options, or would answer “don’t know.”

Given that the combined question would, in most instances, lean in the direction of underestimating confusion, and believing that the potential consequences from using two separate questions posed greater risk, I concluded that, as courts were of different minds on the “needed to get” v. “did get” issue, the combined question posed the least amount of risk .

Although I would much prefer using a question that relied solely on the “need to get permission” meaning⁷⁹, to be responsive to courts who would hold that doing so amounts to asking for a legal opinion, I have been using the combined question version since 2000, including in *City of New York v. Albert Elovitz, Inc.*,⁸⁰ a matter settled the day trial began. What makes this matter worth mentioning is that it is the only instance I know of where plaintiff commissioned two independent surveys to measure sponsorship confusion, one using the combined (*did obtain or need to obtain*) formulation⁸¹ and the other using the *did obtain* formulation.⁸² Although the procedures and stimuli differed somewhat, rendering direct comparisons somewhat tenuous, the estimates of likely sponsorship confusion produced by the two surveys were, for all practical purposes, equivalent. In answer to the first two questions used (see footnotes 62 and 63), and after adjusting for noise, the two surveys estimated sponsorship confusion to be 38.3% and 43%, respectively. For reasons discussed earlier, it can safely be presumed that, although they were asked a question about “did

⁷⁹ Not only is this meaning completely defensible from a scientific perspective and the other meanings less so, but I believe those who understand *Daubert* and its implications would recognize that a formulation that relies on the “did get” meaning is a prescription for generating junk science.

⁸⁰ No. 04 Civ. 2787 (S.D.N.Y. 2004). Settled. The author served as an expert witness for plaintiff in this matter.

⁸¹ Jacob Jacoby, To what extent is Elovitz’s “NYPD-Designated merchandise” likely to confuse the relevant public? May 2005. Questions: *If you have any thoughts about it, do you think that in order to put out this item, the company or people that put it out did get, or did need to get, permission or a license [PAUSE], or did not get, or need to get, permission or a license? If “yes”: From whom do you think they got, or needed to get, permission or a license?*

⁸² Michael Rappeport, Perceptions of NYPD and FDNY. June 2005. Questions: *If you were considering purchasing a hat of mug having _____ on it, would you think that the company that puts out that hat or mug obtained authorization or permission to use _____? If “yes”: From whom did they obtain permission?*

obtain,” respondents in the latter survey interpreted the question as meaning “did need to obtain.” Beyond the close correspondence, these findings are made more interesting by the fact that the combined question (essentially two questions in one) produced a lower (albeit not statistically different) estimate of confusion than did the single question approach.

Malletier v. Dooney Burke.⁸³ Because it includes the “did obtain permission” phrase, in both form and meaning, the combined permission question is materially different from the question criticized in *Novo-Nordisk* and *ProStyle*. However, either not recognizing or appreciating this difference, the court in *Malletier* wrote:

Dooney & Bourke next challenges the basis for Dr. Jacoby’s finding that seven percent of the respondents mistakenly believed that Dooney & Bourke “obtained, or needed to obtain, permission or authorization from the company that put out the Louis Vuitton bag.” Dr. Jacoby draws this conclusion from respondents’ answers to a series of questions asking those surveyed to indicate whether “to come out with this bag,” the company needed to get permission or a license from the company whose bags were shown in the [Louis Vuitton] ad’.” Similar questions have been included in previous Jacoby studies and rejected by courts because they improperly ask respondents for a legal conclusion. [In the concluding sentence of an accompanying footnote, the court comments: “Dr. Jacoby is clearly aware of this criticism.”]^{84,85}

Although no combined question – one that included both the “did get” and “did need to get” meaning -- had been criticized to that point, it is true that “similar questions” have been used before. Quite simply, the reason is because no one

⁸³ *Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp. 2d 415 (S.D.N.Y. 2004).

⁸⁴ *Id.* at 444-45.

⁸⁵ Interestingly, the court raised no problems with the questions used to assess confusion as to source or as to connection – which, together (and after subtracting noise), yielded a confusion estimate above 17%. Hence, the court could have ignored the data obtained with the criticized sponsorship question and still found an actionable level of confusion, but chose not to do so.

has yet figured a way to assess whether consumers are confused as to sponsorship or approval without asking such questions. Regardless, after reading this decision, more than a few trademark attorneys have asked “So where do we go from here?”

Where Do We Go From Here?

In light of the conundrum created by case law, just how should confusion as to sponsorship or approval be measured? What would be most helpful – but, as yet, has not been forthcoming — is for some thoughtful court to go beyond criticizing and indicate how such questions should be phrased, providing the logic and scientifically defensible rationale underlying such phrasing. In the absence of such guidance, a number of points merit consideration.

Daubert has given courts great authority *vis-à-vis* judging science. It should be recognized, however, that because a few courts have opined that the *need to get* formulation is incorrect does not make it so. It is simply an opinion held by some (but clearly not all) judges and, from a scientist’s perspective, not an informed one. As Judge Posner explains:

And even if all the judges up and down the line agree, their decisions have much less intrinsic persuasiveness than unanimous scientific judgments have, because judges’ methods of inquiry are so much feebler than scientists’ methods.... Our legal discourse is not so positivistic that one is forbidden to appeal to a “higher law” even after the oracles of the law have spoken;...⁸⁶

In this arena, we have unanimous scientific judgments. The scientific literature is replete with evidence confirming the fact that survey respondents will give substantive answers to questions when they cannot possibly know what they are

⁸⁶ POSNER, *supra* note **Error! Bookmark not defined.**, at 79-80.

talking about. *Daubert* requires that proffered data be reliable (*qua* being trustworthy and scientifically valid). As guesses cannot be reliable, courts generally hold inadmissible data obtained using questions that encourage or promote guessing. Lay consumers generally have no way of knowing whether or not permission had been received. Thus, regardless of whether respondents answer permission “had been given-received” or “had not been given-received,” such answers can be nothing other than guesses. Since guesses are not probative, according to the precepts of *Daubert*, there is no justification for asking such questions in the first place.

Some contend that, since no court has held against asking the “did get” formulation while some have held against the “need to get” formulation, the “did get” formulation represents the more conservative approach and is one to use. My response is that, via *Daubert et al.*, the Supreme Court has inveighed against “junk science” and while some may not appreciate that asking lay consumers the “did get” formulation generates “yes” and “no” answers that are merely guesses (and, as such, constitute junk science), since reputable scientists⁸⁷ do or should appreciate this, there would seem to be no legitimate reason for them to use the “did get” formulation.

To expand thinking, consider an analogy to deceptive advertising law.

From the perspective of what is going on in the consumer’s mind, there is not

⁸⁷ By “reputable scientists,” I do not mean to include a number of so-called experts conducting and proffering survey evidence who do not have credentials as scientists in relevant disciplines (which include psychology, sociology, marketing and communications), nor do I mean to include individuals who do have such credentials, but who often ignore their training and the empirical findings published in the social scientific literature. Although many attorneys are quick to prohibit those not credentialed as attorneys from offering opinions or commentary about the law, few seem to appreciate the irony in their accepting opinions or commentary about science from those not credentialed as scientists in the relevant discipline(s).

much difference between a consumer being “confused” as a result of exposure to a trademark or trade dress or “deceived” as a result of exposure to an advertisement. This being so, courts hearing confusion cases might consider a parallel from advertising law, wherein a distinction is made between *false* advertising and *deceptive* (or *misleading*) advertising. In determining whether an advertising claim is false, no consideration need be given to what consumers think. Empirical evidence is adduced on the truth or falsity of the claim – either the advertised cereal does or does not contain sugar; either the advertised razor does or does not provide a smoother shave than its competitors, etc. -- and, based upon this evidence, the claim is judged to be substantiated (i.e., not false) or not (i.e., false). On the other hand, assessing when an ad is or is not deceptive is all about assessing the states of mind of relevant consumers. An ad is considered deceptive when a not insubstantial proportion of consumers extract an incorrect meaning that is material to their decision making and purchase behavior. Whether the incorrect meaning extracted by consumers accurately or inaccurately reflects the law is irrelevant; it is the consumers’ impressions that are determinative.⁸⁸ In like fashion, perhaps courts can appreciate that what really counts in making a determination of consumer confusion is consumers’ impressions, not whether these impressions accurately or inaccurately reflect the law.

⁸⁸ A more detailed treatment of these issues is provided in Jacob Jacoby et al., *Survey Evidence in Deceptive Advertising Cases Under the Lanham Act: An Historical Review of Comments from the Bench*, 84 TMR 541, 542-44, 578.

So What is Sense and What is Nonsense? If the objective is to assess what the respondent thinks and believes then, from the perspective of both science and *Daubert*, it makes no sense asking respondents questions the answers to which must necessarily be guesses. Asking “Did Company Y obtain permission?” inquires regarding a question of fact; it presumes the respondent has some foundation for knowing whether Company Y did indeed obtain permission – an assumption that can be valid in only a limited number of instances (such as when the respondent was privy to the negotiations or if the outcome was widely reported in the press).

Prefacing the “did get” formulation with “Do you think...” does not cure the problem. Since a commercial entity generally seeks and obtains permission only if permission is required, revising the question by asking “*Do you think* Company Y did obtain permission?” contains the subtly leading implication that permission must have been necessary, thereby suggesting to the respondent that the only thing he (or she) has to do is guess whether or not it actually was obtained. Asked “Do you think B obtained permission from A?” truthful respondents not influenced by the leading nature of the question would have to answer “I don’t know.”

There seems to be little question that asking “Did Company Y *need to obtain* permission?” also inquires regarding a question of fact – one requiring the respondent to have a proper understanding of the law. On the other hand, asking “*Do you think* Company Y *needed to* obtain permission?” does not ask regarding an objective fact. Rather, it asks for the respondent’s opinion – an

opinion informed by that respondent's own lifetime experience with and understanding of real property. Such an opinion represents the respondent's perception and, as Prof. McCarthy astutely notes, "...it is consumer perception that creates 'the law' of whether permission is needed."⁸⁹

As the preceding review reveals, survey questions used to measure confusion as to sponsorship have evolved since their first use in *Wichita Falls*⁹⁰. Regardless of the specific form of future evolutions, as a matter of both law (in light of *Daubert* and progeny) and science, what makes the most sense in this writer's opinion are questions phrased so as to incorporate both the "do you think" and "*needed to obtain permission*" meanings .

Closing Comments. When all is said and done, it would be beneficial to all if courts had a greater appreciation of several truisms. Independent of opinions issued by individual courts and even independent of *Daubert*, reputable scientists have a strong desire to not sully their science and, most especially, their own hard-earned reputations and will assiduously avoid creating and proffering junk science. Yet it is obvious that, perhaps unaware of the full implications of what they are doing⁹¹, some courts are calling upon science experts to do just that.

⁸⁹ *McCarthy, supra* note 69, at 32-264.

⁹⁰ See FN 3.

⁹¹ See, e.g., Sophia Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & HUMAN BEHAVIOR 433, 433-58; Margaret B. Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality on Judge's Evaluations of Psychological Science: Are Judge's Effective Gatekeepers?*, 85 J. APPLIED PSYCH. 574, 574-86.

More fundamentally, to assist in their deliberations, one presumes courts want reliable and relevant scientific information, and most reputable scientists who provide expert opinion in litigated matters wish to oblige. But how can this be accomplished in the face of unreliability among the courts – where some find it appropriate to ask and place great reliance upon the *need to get* formulation while others do the opposite? Without knowing in advance which court will try the matter, or what prior decisions that court will choose to ignore or cite, the expert is placed in a position akin to playing Russian roulette.

To have reliable science, courts must treat science reliably, not erratically or inconsistently, both within and across Districts and Circuits. Moreover, they need to do so with an understanding of the scientific rationale and empirical findings which apply. Instead of being quick to criticize once testimony has concluded, if courts assumed a more active role from the bench and asked experts to explain the logic and empirical findings underlying their use of certain language and procedures, they would end up with an enhanced understanding, the system would end up with better experts, with the likely outcome being improved justice. Wouldn't that be nice?