THE FUTILITY -- AND UTILITY -- OF “WHY?” QUESTIONS©1

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Examination of the questions used in likely confusion and likely deception surveys reveals that, regardless of how phrased, most ask one or more “Why do you say that?” questions. No less a luminary than Prof. McCarthy advises that questions used to assess likely confusion “should be followed up by the important question: ‘Why do you say that?’” Often, an examination of the respondents’ verbatim responses to the ‘why’ question are the most illuminating and probative part of a survey, for they provide a window into consumer thought processes in a way that mere statistical data cannot.”2 While I and many other survey researchers generally follow this advice, and though I agree with virtually everything else Prof. McCarthy writes, in this instance, the advice seems poorly informed. Surveys offered as evidence in litigated matters are supposed to rest on scientific foundations,3 yet the directly pertinent scientific literature reveals that placing great weight and relying on answers to ‘why’ questions runs counter to generally accepted scientific wisdom and research findings.

This paper has three principal sections. First, it reviews but a fraction of the scholarly literature that calls into serious question the reliability and validity of answers given to ‘why’ questions of the sort typically used in trademark confusion likelihood of deception surveys. Second, noting that the scientifically called for alternative to asking ‘why’ questions is the use of

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1 © 2013. Based on Sections 9.05.2 and 9.05.3 from Jacob Jacoby (forthcoming) Trademark Surveys. The American Bar Association.

2 McCarthy on Trademarks and Unfair Competition, Section 32:175.

appropriate experimental designs, it provides a concrete illustration of why answers to ‘why’ questions cannot be relied upon by describing the survey conducted in *Fresh Del Monte Produce v. Del Monte Foods Company et al.*

That said, the concluding section discusses some reasons why one *should* continue asking ‘why’ questions.

**What the Scholarly Literature Has to Say Regarding ‘Why?’ Questions**

The amount of information packed into the adult human mind is staggering and we rely upon this base of remembered information for virtually everything we do, including answering questions. Some of this information can be easily and accurately retrieved from long term memory (e.g., What colors are used by the Green Bay Packers football team?) and, as necessary, used to interpret the world around us (e.g., Who do you think puts out this product?). Answering such questions is relatively easy and, assuming the respondent is motivated to answer honestly, the answers are likely to be accurate. Part of the reason why answering these questions is easy is because they ask us to describe a *state* of mind, essentially, the *outcome* of thinking and learning, not the *process* by which we came to that state of mind. Securing information regarding the processes we use, such as how we came to arrive at being confused, is a different matter.

Based upon considerable empirical results, most research psychologists doubt people’s ability to observe directly or identify the workings of their own minds. As examples: “It is the result of thinking, not the process of thinking, that appears spontaneously in consciousness.”

“The analysis of situations and appraisal of the environment [including the trademarked products

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4 *Fresh Del Monte Produce, Inc. v. Del Monte Foods Company and Del Monte Corporation*, U.S.D.C. SDNY, Case # 08-Cv-8718 (SHS).

and services in that environment] … goes on mainly at the nonconscious level.” In a report to the National Science Foundation regarding the psychological factors influencing consumer choice, Prof. William McGuire wrote:

We have mentioned several times in this discussion of the information-processing steps in decision making that the person is often unconscious of what he or she is doing and when explicitly questioned is unable to give an adequate explanation of how the information was handled or the decision was reached. At other times, the person can report how the decision was arrived at, but analytic techniques allow us to determine that in actuality the processing that the person describes (presumably in good conscience) was not actually employed.

Even people in highly rational enterprises who make decisions of great importance (such as investment counselors advising a client on the appropriate make up of a stock portfolio …) are often unaware of the bases for their own decisions or, still worse, think they use bases for deciding that they actually do not employ….. Those interested in the bases for consumer behavior should be familiar with this literature in order to determine how one can check the extent to which one can take at face value the consumers’ self-reports of bases for decision, and how one can test alternative hypotheses about the bases of choice.7


In two classic articles, Nisbett and Wilson\textsuperscript{8} marshaled considerable empirical evidence showing that respondents are unaware of stimuli that exert appreciable, often determinative, impact on their evaluations, judgments, choices or actual behavior. The less salient or obvious the stimulus, the less likely are respondents to identify that stimulus as being responsible for their response. In one series of experiments:

Components of a complex stimulus situation were manipulated; subjects responded to the situation in some fashion – evaluational, judgmental, or behavioral; and subjects were asked what effect, if any, the manipulated stimulus components had upon their responses. The results indicate that people’s reports are highly inaccurate. Stimulus components with substantial effects on responses were reported to have had no effect on responses, and stimulus components with little or no effect were reported to have had substantial effects. The results indicate that research which relies on people’s introspective reports about the causes of their behavior may have little value as a guide to the true causal influences.\textsuperscript{9}

This is not to say that verbal reports regarding mental processes are always in error. Rather, as discussed by Nisbett and Wilson, when people report on their cognitive processes, their reports are based either on \textit{a priori} implicit causal theories they bring to the situation, or on \textit{a posteriori} judgments about the extent to which a particular salient stimulus they recognize in the situation is a plausible cause of their response. In this way, respondents are considerably


\textsuperscript{9} Timothy Wilson & Richard Nisbett, op. cit., at 118.
more likely to report what they think must have caused their response, not necessarily on what actually did cause their response. Sometimes these a priori implicit causal theories or a posteriori judgments are correct; other times, not. And because we generally remain unaware of contradictory evidence, we tend to be confident that we “got it right.” Yet research reveals that we may have no greater ability to identify the mental processes that occur in our minds than we do to identify the course of the electrical impulses coursing through our brains during this processing.

Nisbett & Wilson’s research and conclusions have since been replicated by others and the sobering findings have important implications for trademark surveys.\(^{10}\) This is especially so for likelihood of confusion and deceptive advertising surveys, where respondents who exhibit confusion or deception are typically asked “Why?” questions -- questions that ask them to introspect and identify the factors that led them to be confused or deceived. As noted, Prof. McCarthy has written that questions used to assess likely confusion “should be followed up by the important question: ‘Why do you say that?’.”\(^{11}\) In light of the empirical evidence, this practice seems questionable, especially since, as discussed below, there is a scientifically preferable – indeed, dictated -- alternative. As the empirical evidence regarding our ability to capture and validly describe our mental processes becomes better known, one suspects Prof. McCarthy and courts that rely upon the answers to ‘Why?’ questions may question this practice as well.

\(^{10}\) Not surprisingly, Nisbett and Wilson’s classic work is cited in Diamond’s “Reference Guide on Survey Research” in the FJC’s Reference Manual on Scientific Evidence (Third edition at 398, FN 173), in various articles that have appeared in the Trademark Reporter (e.g., Jerre Swann (2008) Likelihood of Confusion Studies and the Straightened Scope of Squirt, 98 Trademark Rep. 739, at 741 FN 13) and, on occasion, by experts in their submitted reports and testimony in trademark matters.

\(^{11}\) McCarthy, Section 32:175.
The Scientifically Called For Alternative to “Why?” Questions

If respondents who are confused cannot be relied on to tell us what caused their confusion, is there a scientifically preferred alternative to parsing out the cause(s) of confusion or deception? The answer is yes. Understanding the frailties of respondents’ verbal reports, especially those regarding psychological processes, social scientists instead rely on properly designed and implemented experiments for assessing cause and effect. While a detailed discussion of experimental design is beyond the scope of this paper,12 we can illustrate the approach by describing plaintiff’s study in Fresh Del Monte Produce v. Del Monte Foods Company et al,13 where the findings obtained through the of experimental manipulations led to completely opposite findings and conclusions than did the answers obtained to ‘why’ questions.

Prior to 1989, Del Monte Foods — then a subsidiary of RJR Nabisco Inc. — consisted of both a processed foods operation and a fresh division. The fresh fruit operations were sold to Polly Peck International late in 1989 and ultimately became known as Fresh Del Monte Produce Inc. (“Fresh Del Monte”). With the sale, the owners of Fresh Del Monte (FDC) were granted perpetual, royalty-free rights and license to use the Del Monte brand and marks in connection with the production, manufacture and sale of “fresh fruit, fresh vegetables and fresh produce.” The same agreement provided, with a few exceptions, that Del Monte Foods Co. (DMFC) retained the right to use the Del Monte brand and marks on the sale of any processed food, or goods other than “fresh fruit, fresh vegetables and fresh produce.” The two Del Monte company’s products of appeared in different sections of supermarkets — Fresh Del Monte

12 For a detailed discussion of experimentation, the reader is directed to Jacob Jacoby (2002) Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys. The Trademark Reporter 92 (4) 890-956, a copy of which is available by clicking on the link

13 Fresh Del Monte Produce, Inc. v. Del Monte Foods Company and Del Monte Corporation, U.S.D.C. SDNY, Case # 08-Cv-8718 (SHS).
products in the fresh fruits and vegetables sections, with Del Monte Foods products in the canned foods sections — and the distinction seemed clear, *fresh* versus *processed*. When a dispute arose over the scope of Fresh Del Monte’s rights, a judge ruled in 1999 that Fresh Del Monte’s exclusive rights included the right to sell fresh-cut fruit.

By the mid 2000’s, Del Monte Foods began selling processed cut-fruit in thin, see-through plastic containers (similar in appearance to those frequently used for fresh fruit) and having these containers placed on refrigerated shelving situated in the fresh produce sections of supermarkets. At that point, Fresh Del Monte sued Del Monte Foods Co. alleging that the type of container (thin, plastic see-through) + refrigeration + section of the supermarket where the goods were being displayed (fresh produce section) were, in combination, likely to deceive a not insubstantial proportion of consumers into believing that the products (sold under such names as “Fruit Naturals” and “SunFresh”) contained fresh cut-fruit, not preserved cut-fruit.

Counsel for Fresh Del Monte retained this author to design and conduct a survey to determine whether consumers were deceived into believing that DMFC’s *Fruit Bowl* cut-fruit products consisted of fresh (not preserved) fruit. A mall intercept study was conducted involving 600+ respondents. Qualified respondents were brought into a shielded testing facility where they first were shown one of several videos. Approximately one minute in length, each video provided a “from the shopper’s eyes view” of what a shopper would see upon entering a supermarket and walking either to the chilled refrigeration area within the fresh produce section, or to the canned foods aisle of the supermarket. The videos also differed in terms of how they ended, with each zooming in on one of three DMFC products being displayed either in the chilled refrigeration area within the fresh produce section, or in the canned foods aisle of the supermarket; all three products contained preserved red grapefruit sections. When the video
ended, either a chilled or room temperature exemplar of the product corresponding to the one shown in the video was placed in front of the respondents who were asked to examine the product as if they were considering whether or not to buy it.

The experimental design thus consisted of manipulating the type of container (thin, flexible see-through plastic vs. thick, solid, inflexible see-through plastic), section of the supermarket (fresh produce vs. canned foods) and temperature of product when handed to the respondent (chilled vs. room temperature). Immediately after indicating they were done examining the product, each respondent was asked “If you can tell, does this cut fruit product contain preserved fruit or fresh fruit?” followed by “What, in particular, makes you say that?” -- essentially a ‘why do you say that?’ question -- and “Can you tell me more about that? Anything else?”

Although there were other aspects to the study, the principal findings were as follows. After viewing a video showing DMFC’s Red Grapefruit Fruit Bowl product displayed in the chilled refrigeration area within the fresh produce section of the supermarket and then being handed a chilled exemplar of this product, 52.4% of the respondents tested in this condition said they thought this product contained fresh fruit. In contrast, after viewing a video showing the same DMFC Red Grapefruit Fruit Bowl product displayed in the canned foods aisle of a supermarket and then being handed a room temperature exemplar of this product, 32.3% of the respondents in tested this condition said they thought this product contained fresh fruit. The 20% difference represents a not inconsequential level of confusion/deception attributable to combined 14 To counterbalance for potential order effects, half the respondents were asked this question with the response options provided in the reverse order, viz. “If you can tell, does this cut fruit product contain fresh fruit or preserved fruit?”
effect of refrigeration + section of the supermarket where the goods were being displayed; in finding for plaintiff, the jury agreed.

During trial, defendant’s counsel pointed out that when asked “What, in particular, makes you say that [the product contained fresh fruit or preserved fruit]?” none of the respondents who saw the video showing the product in the fresh produce section and who were then given a chilled container to examine answered the reason why they thought the contents consisted of fresh fruit was because of the container, refrigeration or section of the supermarket where the product was being displayed. In contrast, approximately 40% of those same respondents said they thought the container’s contents consisted of fresh fruit because of the appearance of the fruit, with 25% saying the fruit “looked fresh.” What explains this difference between the findings derived from the experiment and those yielded by asking a ‘why’ questions, namely, “What, in particular, makes you say that [the product contained fresh fruit or preserved fruit]?” As explained by Nisbett & Wilson:

Generally, … we will be blind to contextual factors, or at any rate be particularly poor at disentangling the effects of the stimulus [in this case, the fruit in the container] from the context in which it was encountered [in this case, the temperature of the container and the section of the supermarket in which it appeared]. Contextual cues are not likely to be spontaneously salient when we are asked, or ask ourselves, why we evaluated an object as we did. Any questions about an object is likely to focus our attention on the properties of the object itself [the fruit looked fresh] and to cause us to ignore contextual cues.\(^\text{15}\)

So how should answers to “Why?” questions that, while not necessarily inconsistent, do

\(^{15}\) Nisbett & Wilson, op cit., at 252.
not yield answers that corroborate the experimental findings, be interpreted? The answer: if the experiment was properly designed and implemented then, from the perspective of accepted science, the findings from the experiment trump those obtained from the verbal reports. As Prof. Diamond, author of the Federal Judicial Center’s “Reference Guide on Survey Research,” writes: “[R]espondents who are questioned about their reasons for an answer will search for a plausible explanation that may or may not be the reason for that earlier response. Although people are often able to justify their positions when asked to explain their actions, such post-hoc explanations can only imperfectly capture the reasoning that actually produced their answers. The best method for determining the cause of a confusion response is a survey design with a tight control that directly isolates the explanatory feature by showing that the answer changes when it is no longer present.”

In other words, answers to “why” questions possess considerably less value than do the findings obtained from properly conducted experiments. This is not to say that the answers to ‘why’ questions possess no value. As Wilson and Nisbett write:

The experiments reported here call into question the accuracy of verbal reports about cognitive processes, and question the use of these reports by social scientists. ….

We are not suggesting that researchers turn a deaf ear to the reports of their subjects about stimulus effects. Such reports can be very useful, *so long as they are not considered to be accurate assessments of the actual influence of stimuli on their responses.* [Italics supplied]

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17 Timothy Wilson & Richard Nisbett, op. cit., at 130.
**Why Ask “Why?” Questions?**

One pragmatic, albeit not scientifically defensible, answer to “Why Ask “Why?” questions?” is that some triers of fact expect survey researchers to ask ‘why’ questions. Other defensible answers apply as well.

As a second reason, answers to “Why are you confused?” questions may also have value where the purpose is to arrive at an unquestionably (but perhaps overly) conservative estimate of likely confusion or deception. Consider a situation where it is defendant’s brand name that is alleged likely to cause confusion. If, when asked “Why do you say this comes from the same company as [plaintiff]?” a respondent answered “because of the colors of the package” or “because my friend told me it was,” leaning in a conservative direction, plaintiff’s expert might elect not to consider such respondents as being confused for the trademark relevant reason(s) being alleged. On the other hand, because it might be the most correct of all, answers such as “I really don’t know” should not be cause to eliminate respondents from the tally of those who were confused.

Third, circumstances also arise where the findings from an experiment actually need to be augmented by the answers to a “Why?” question. Consider the issue tested by one of defendant’s surveys in *Adidas v. Herbalife.*

Adidas owns and uses several logos, one of which, termed the Tre-Foil logo, appears on its “Originals” line of merchandise. Herbalife also owns and uses several logos, one of which, termed the Tri-Leaf logo, appears on most of its goods, including the jerseys, shirts and other items of apparel used by sports teams it sponsors in the United Stated and worldwide. Roughly speaking, both plaintiff’s and defendant’s logos may be

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interpreted as depicting three broad, sprouting leaves. As the sponsor of the Los Angeles Galaxy soccer team, along with the name Herbalife, Herbalife’s Tri-Leaf logo was emblazoned on the front of *Los Angeles Galaxy* soccer team jerseys. Since the jerseys were made by plaintiff for the team, they also contained the Adidas name and its “Performance” (but not its “Originals”) logo. The question at issue was whether appearance of Herbalife’s Tri-Leaf logo in conjunction with the Herbalife name would confuse relevant consumers into believing that Herbalife either was the source of the goods, had some business affiliation or relationship with Adidas, or was authorized by Adidas to place its Tri-Leaf logo on the jersey.

To simplify description, an experiment was set up whereby half the respondents were shown LA Galaxy jerseys bearing the Herbalife name and Herbalife’s Tri-Leaf logo emblazoned on the front of the jersey, while the other half of the respondents were shown photos of LA Galaxy jerseys bearing the Herbalife name and an alternative Herbalife logo (termed Ring of Leaves) emblazoned on the front of jersey. The questions asked to determine whether there was confusion as to source was “If you think you know, what is the name of the company responsible for making and putting out the item shown in this photo?” If a respondent answered that Herbalife was the company responsible for making and putting out the item shown in this photo, would this due to the fact that the name Herbalife appeared on the jersey or would it be due to the appearance of the Tri-Leaf logo? To resolve this question, answers of “Herbalife” were followed-up by asking “What, in particular, makes you say that?” In response, virtually no one identified the Tri-Leaf logo as the reason for their confusion; almost all who answered Herbalife said it was because of the name Herbalife.19

19 Subsequent to submission of defendant’s surveys, plaintiff dismissed all its trademark claims and claim for monetary damages.
When their use is indicated, one bit of advice applies to the wording of “Why?” questions -- it is probably best not to use the word “why.” The words “who,” “what,” “where,” “when” and “how” all refer to objects and events that are concrete. In contrast, “why” refers to things that are more abstract and suggests the respondent engage in a qualitatively different and higher level of thinking. For this reason, some respondents are more likely to experience problems answering a question such as “Why do you say that?” and, as a consequence, be inclined to answer “don’t know.” The level of abstraction can be lessened by asking respondents to answer an equally effective question worded “What makes you say that?”

The bottom line is that verbal reports are essential, but their value depends first, upon whether mental states or mental processes are being assessed and, second, on whether the findings from an experiment need to be augmented by asking clarifying questions. When the questions concern the outcomes of mental processing (termed mental states; e.g., “What is your mother’s maiden name?”), respondents may be willing and able to provide honest and accurate answers. However, it is an “illusion” to think that the answers respondents give to questions seeking to measure their mental processes (such as, “How did you bring that maiden name into your consciousness of the moment?,” “What is it that causes you to believe [i.e., to be confused] that X comes from the same company as Y?”) are reliable indicators of the actual influence of stimuli on their responses.

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20 Nisbett & Wilson, op cit., at 255.