

**EXHIBIT 106**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

J.T.COLBY & COMPANY, INC. d/b/a/  
BRICKTOWER PRESS, J. BOYLSTON &  
COMPANY, PUBLISHERS LLC and  
IPICTUREBOOKS LLC,

Plaintiffs,

-against-

APPLE, INC.,

Defendant.

Case No. 11 Civ. 4060 (DLC)

REBUTTAL REPORT OF PLAINTIFFS'  
EXPERT, JACOB JACOBY, Ph.D.

**I. PERSONAL INFORMATION**

1. My full name is Jacob Jacoby. I reside at 160 West 66<sup>th</sup> Street, New York, New York 10023. A description of my qualifications and credentials is provided as Appendix A attached hereto.

2. A copy of my Curriculum Vita is provided in Appendix B. Additionally, information responsive to the U.S.C. Rule 26 (Fed. R. Civ. P.) requirements that I indicate my trial and deposition testimony during the past four years is provided in Appendix C.

**II. CIRCUMSTANCES LEADING TO THIS REBUTTAL REPORT**

3. I was contacted on September 27, 2012 by counsel for the plaintiffs, Colby et al., ("Colby"). Counsel requested that I evaluate the September 2012 "Book Survey Report" authored by Dr. Deborah Jay of the Field Research Corporation describing a survey designed,

conducted, analyzed and reported by Dr. Jay on behalf of the defendant in this matter (hereinafter referred to as the "Jay Report" or "Jay Survey").

4. This Rebuttal Report represents my evaluation of the Jay Survey. Other than sworn testimony at deposition and trial, I am being compensated at the rate of \$900 per hour, which is my standard rate for such services. This compensation is for the value I place on my time; it is in no way related to the outcome of this matter. Listed below are the items counsel in this matter have provided to me.

- Amended and Supplemental Complaint and Jury Demand
- Answer and Affirmative Defenses
- Examples of the plaintiffs' print and electronic books
- Book Survey Report (E. Deborah Jay, Field Research Corporation)

### III. OVERVIEW OF KEY PROBLEMS WITH DR. JAY'S SURVEY

5. Let me note at the outset that I have no opinion as to whether either party's allegations are valid and correct. My sole function is to evaluate the scientific adequacy of Dr. Jay's Survey and the opinions and conclusions drawn there from.

6. In my opinion, because it possesses significant and fatal flaws, Dr. Jay's Survey provides no reliable, scientifically valid information regarding what has occurred or is likely to occur in the relevant marketplace. The principal flaws include the following:

- a. Dr. Jay studied the wrong universe. Because no questions were asked that would identify purchasers or prospective purchasers of *electronic* books, her survey tells

us nothing about what such consumers think or believe, yet the electronic marketplace is where confusion is most likely to occur.

- b. Examination of the questions asked of the respondents reveals that Dr. Jay's questions fail to appropriately test for likely confusion as to *business association, connection or affiliation*, a type of confusion that is central to this matter.
- c. Examination of the questions asked of the respondents reveals that Dr. Jay's questions fail to appropriately test for likely confusion as to *sponsorship or authorization*, a type of confusion that is central to this matter.

Section III discusses these as well as other flaws in greater detail.

### III. EVALUATION OF DR. JAY'S SURVEY AND CONCLUSIONS

7. My evaluation of Dr. Jay's Survey and Report relies upon the seven factors cited in the Federal Judicial Center's *Manual for Complex Litigation* (4th, Section 11.493). This Rebuttal Report is organized around these factors.

8. **Problem with the Universe: The Population was not Properly Chosen.** There is a critical flaw with the universe defined and tested by Dr. Jay that, in my opinion, renders the survey worthless for the purpose for which it is being proffered. Questions S4, S5 and S6 of Dr. Jay's Screener questionnaire ask potential respondents whether they bought a *paperback or hardcover book* of certain genres at Amazon.com or BarnesandNoble.com. Yet the plaintiffs have published *both electronic and print books*, and it is in the *digital space* that there is direct overlap between the plaintiffs and the defendant and where confusion is, and will be, most likely to occur. Without any question asked that would identify purchasers and prospective purchasers

of electronic books, Dr. Jay's survey tells us nothing about the states of mind of purchasers of such books. In my opinion, Dr. Jay has conducted a study of a narrow and incorrect universe. It is entirely possible that someone who is a savvy reader of digital books/e-books would respond differently than a person who is not -- that iBooks might strike digital-book-reading individuals as indicating a role by Apple. Dr. Jay's study is incapable of providing any information as to this possibility.

9. **Problems with the Test Stimuli.** It is noteworthy that the plaintiffs' mark almost always -- and always within the pages of the plaintiffs' books -- appears as "iBooks" (with a lowercase "i" and an uppercase "B"). Notwithstanding this fact, Dr. Jay used as stimuli the terms "ibooks, Incorporated" (with a lowercase "b" followed by the full word "Incorporated," which tends to dwarf the "ibooks" portion) and "Ibooks, Inc." (with a capitalized "I" and lowercase "b"). This is important because Apple is known for using a lowercase "i" followed by the initial capitalization of the adjoining noun (e.g., iPhone, iMac, iPad, iTunes, iBooks, etc.). By using the stimuli that she did, Dr. Jay's survey fails to test the way in which the plaintiffs' mark is generally provided to and seen by the public -- a presentation identical to Apple's and thus logically more likely to cause confusion than those buried within the stimuli that were in fact tested.

10. **Problems with the Test Protocol: It did not Provide a Fair Test of What I Understand to be the Critical Question and, as a Result, was Biased toward Finding No Confusion.** Dr. Jay's survey addresses the question: "Do people pay attention to the name of the publisher when asked, in an artificial test-like situation, to 'browse this page the way you normally do when you are deciding whether to buy a book'." While many people may not pay attention to the identity of a book publisher when asked to give a perfunctory review of a

webpage, I question whether that is the issue that needed to be addressed. In my opinion, the critical question to be addressed is: "What do relevant consumers think when they come across the name iBooks? Would they think it came from, was affiliated with, or put out with the authorization of Apple?" As a consumer psychologist with 45 years of professional experience, I am of the opinion that while point-of-sale confusion may occur, it is post-sale confusion that is more likely.<sup>1</sup> Dr. Jay's survey did nothing to test the likelihood of post-sale confusion.

11. Note that earlier questions of "Part I. Respondent Instructions" -- specifically, Questions C, G, H and I -- all informed the respondent that they would be looking at a *page* on the Amazon.com or BarnesandNoble.com web site. As used in these questions, the word *page* is not leading; that is, it does not lead respondents to pay attention to certain elements on the page or lead respondents away from paying attention to other elements on that page. In contrast, Question J abruptly changes the focus from *the page* to *the book*. (Specifically, Question J told respondents they would be asked questions "*about the book* described on the page," not about the *page*.) In this subtle way, changing the respondents' focus from the *page* to the *book* likely led many respondents *toward* considering the *book*, but *away from* considering the book *publisher*. A non-leading question would have been: "*Now, I would like to ask you a few questions about information appearing on the page from the Amazon.com/BarnesandNoble.com website that I just showed you.*"

12. Instead of providing respondents with hard copies of books or copies or screenshots of the relevant pages where publisher information appears in a book, Dr. Jay provided respondents with a web page from Amazon.com or BarnesandNoble.com that described a book.

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<sup>1</sup> My own experience when shopping for books generally (as opposed to shopping for series with which I already am familiar), which I suspect mirrors that of many other book purchasers, is to buy a book because of its content, author or title, and only afterward -- either at point of purchase or sometime later -- pay attention to the name of the publisher.

This distinction is important. The pages in hard-copy or e-books books that provide the name of the book publisher generally do so along with a limited amount of other information, as can be seen in Appendices D-H, attached. In contrast, when it comes to web-page descriptions such as those on Amazon.com and BarnesandNoble.com, the name of the publisher is generally buried in the context of a web page that contains a considerable amount of additional and extraneous information. Few, if any, respondents could have paid attention to and remembered all the information (including that about the book publisher) that appeared on the webpage. Under circumstances that approach information overload, I think a fair and proper test would have been to focus respondents' attention on the publisher when answering the questions. In point of fact, the study did just the *opposite*, asking who "printed, released, or put out" the book, but *never* coming out and asking directly who published it.<sup>2</sup>

13. In light of the factors described in paragraphs 9 through 12, *supra*, it should not be surprising that when asked Q1a, *What company or companies do you think printed, released or put out this book?*, virtually no one mentioned Apple.

14. **Problems with the Questionnaire: Respondents were Given Instructions that, at Best, were Silly or Puzzling, and at Worst, Encouraged Them to Guess.** In the introduction to the Screener portion of the questionnaire, the respondents were told "*I would like to assure you that there is no right or wrong answer.*" Immediately afterward, Question S1 asked them to indicate their age -- to which there is one right and several wrong answers!! There also are right and wrong answers to Questions S4, S5, S6, S7, S8, S10 and S11. Because there definitely are right and wrong answers to these questions, the representation that "*there is no*

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<sup>2</sup> The phrase "*printed, released or put out this book*" is off-putting not only because the issue is not who "printed" or "released" the book, but rather who *published* it; also, lay consumers who buy books are accustomed to the word "publisher." It is thus curious and surprising that this familiar and consumer-friendly term was *never* used in any of the questions.

*right or wrong answer*” is false and, in my opinion, likely either to be seen as strange by the respondents and/or to lead them to be more cavalier in responding. After all, “*if there are no right or wrong answers,*” then it doesn't matter what I say and I might as well say anything.

15. Another example of a silly Screener question is Question S9: “Do you know anyone who has participated in the survey or did anyone tell you about this survey before now?” Since respondents have not yet been told what “this survey” is about, how can they answer a question asking whether they “know anyone who has participated in this survey or did anyone tell you about this survey before now?” Asking silly questions like these can only undermine the seriousness that respondents accord the survey and the answers they give to the questions they are being asked.

16. The instruction “*I would like to assure you that there is no right or wrong answer*” is repeated as item J immediately preceding the substantive questions on the Main questionnaire. Immediately afterward, the respondent is asked Q1a designed to assess confusion as to source: “*Now, for my very first question. What company or companies do you think printed, released or put out this book?*” If the person answered “iBooks” (or “Ibooks” or “ibooks”) that would be a “right answer.” If the person answered “Argosy Press,” that would be a “wrong answer.” So there are right and wrong answers. Moreover, having twice been told “there are no right or wrong answers,” there is little incentive for the respondents to engage in the cognitive effort to remember the details of what they saw and respond accordingly.

17. **Problems with the Questionnaire: Failure to Ask an Appropriate Question to Assess Likely Confusion as to Affiliation, Connection, or Association.** While respondents may not have thought Apple was the source of the book, it is quite possible that they thought



Apple had some business affiliation, connection, or association with the source of the book. In my experience, the typical question designed to get at confusion as to affiliation, connection, or association is worded something like the following: *Do you think the company that printed, released or put out this book ... does have a business connection, association or affiliation with another company; does not have a business connection, association, or affiliation with another company; or have you no thoughts about this?* By specifying a business connection, association, or affiliation with another company, the question is clear and unambiguous about what is being asked.

18. In marked contrast to the question provided in Paragraph 17, *supra*, consider Question 2a posed by Dr. Jay: *Now, with respect to the company or companies that printed, released or put out this book... Do you think... they have made or put out other things, besides books, .... they have not made or put out other things, besides books, or, ... do you have no opinion?* In her description of the Survey Design and Approach (see page 10) as well as in her Conclusions (see page 32), it is clear that Dr. Jay intended Q2a to be a question that assessed confusion as to affiliation. Yet this question is incapable of assessing confusion as to affiliation, as it basically asks “What other items does *this particular source* put out?,” not whether the source of the book has a business connection or association or affiliation with any *other* source. Given that no other question in Dr. Jay’s survey does so, her survey fails to test for likely confusion regarding whether the source of the book has a business connection, association or affiliation with another company.

19. When considered closely, Question 2a essentially asks: “Do you think this book company makes or puts out other things besides books?” Conveying this meaning, Question 2a subtly leads respondents *toward* thinking of *book companies, per se*, and *away from* thinking of

*non-book companies (such as Apple)*. The question makes it seem as if the source of these “other” products has to be a book company.

20. **Problems with the Questionnaire: Failure to Ask an Appropriate Question to Assess Likely Confusion as to Sponsorship or Authorization.** Dr. Jay’s Q3a (*Now, with respect to the company or companies that printed, released or put out this book ... Do you think .... One, that they did receive permission or approval from some other company to print, release or put out this book, ... Two, that they did not receive permission or approval from some other company to print, release or put out this book, or.... Three, do you have no opinion?*) suffers from a fatal problem. Specifically, by asking about permission “*to print, release or put out this book*” (an action that is not at issue), Q3a leads the respondents’ attention away from thinking about permission *to use the name* (iBooks) -- the action that is at issue. In other words, Q3a focuses attention on the wrong issue; it is quite possible for someone to believe permission *was not needed to print, release or put out this book*, while also believing permission *was needed to use the name* (iBooks). In this way, Dr. Jay’s survey failed to ask the question regarding confusion as to sponsorship or approval that needed to be asked. To see that such misdirection was not necessary, consider the following wording: “Do you think the company that printed, released or put out this book... did receive permission or approval from some other company, did not receive permission or approval from some other company, or have you no opinion?” If so, “From whom did it need permission?” “What makes you say that?” By improperly focusing on the book and *not* the company that published it, Dr. Jay’s Q3a fails to get at the heart of what consumers might perceive Apple’s relationship with iBooks to be.

21. **Problems with the Questionnaire: Procedures for Checking that the Correct Stimulus has been Provided.** In Part I: Respondent Instructions, Items D and E have the

interviewers check themselves on whether or not they handed the respondent the correct stimulus. This has a bit of the "fox guarding the chicken coop" about it. A better procedure is to have an independent check of the interviewer's actions. As an example of how this can easily be accomplished, most surveys I have seen involve the interviewer handing the envelope to the respondent, who then indicates whether or not s/he has been handed the correct envelope by answering a question such as "What is the letter on the envelope I just handed you?"

22. **Questions Regarding the Validation.** Footnote 8 on page 35 reads "All of the respondents will be contacted by telephone for validation purposes confirm their participation in the mall survey and other eligibility criteria." Though I looked for it, I did not see anything that indicated what proportion of respondents had been re-contacted (was it 20%, 50% 80%?), or whether the validation was conducted by an independent third party, as is recommended by the Federal Judicial Center's *Reference Manual on Scientific Evidence*.

## CONCLUSIONS AND OPINIONS

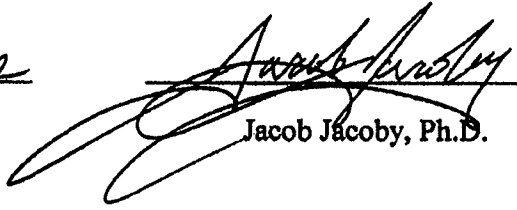
23. For the reasons set forth above, in my opinion, Dr. Jay's Survey and Report are scientifically invalid and cannot be relied upon as support for the conclusions and opinions being proffered therein.

24. I reserve the right to supplement or revise this report based on additional materials that may be forthcoming.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that, based upon the information available to me, to the best of my knowledge, the foregoing is true and correct.

Oct 24, 2012

Date

  
Jacob Jacoby, Ph.D.

## APPENDIX A

### RELEVANT QUALIFICATIONS OF JACOB JACOBY

July 2012

From time to time, I am asked to describe my qualifications as an expert in surveys proffered as evidence in litigated matters and/or as a scholar. The information below seeks to be responsive to such requests.

#### **Qualifications as an Expert in Surveys Proffered as Evidence in Litigated Matters**

Author: Jacob Jacoby, *Trademark Surveys* (Forthcoming 2013). Sponsored by the American Bar Association. Published by Thomson/West.

Since 1978, I have been providing testimony in U.S. District Courts. Since 1980, I have been conducting surveys that have been proffered as evidence in U.S. District Courts. I have played a lead role in conducting well over 1,000 consumer, marketing and communication (including advertising) studies in support of litigation and provided oral testimony in more than several hundred matters. An incomplete list of my past and present corporate and organizational clients can be found at [JacobyResearch.com](http://JacobyResearch.com)

With relatively few exceptions, courts have admitted and given weight to my testimony. An incomplete list of court commentary is attached. My scholarly writings have been cited in *amicus* briefs filed with the United States Supreme Court and have been cited in Second Circuit opinions<sup>3</sup> as the basis for shifting the burden of proof in trademark disclaimer cases from plaintiff to defendant.

At the invitation of the American Bar Association, I have written a treatise entitled *Trademark Surveys* to be published in 2013 by Reuters-Thomson/West under the ABA imprimatur.

In 1995, at the invitation of the Federal Judicial Center, I presented a set of lectures on how to evaluate survey research to judges attending the FJC's workshops for District Court judges and Magistrates held in Atlanta and Seattle. In 1994 and again in 1998, I was invited by the Federal Judicial Center to serve as a peer reviewer for the

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<sup>3</sup>See: *Charles of the Ritz Group, Ltd. v. Quality King Distributors, Inc.* 832 F.2d 1317, 4 U.S.P.Q.2d 1778 (2d Cir. 1987); *Home Box Office, Inc. v. Showtime/Movie Channel, Inc.* 832 F.2d 1311, 4 U.S.P.Q.2d 1789 (2d Cir. 1987).

"Survey Reference Guide" appearing in the 1994 and 2000 editions of its *Reference Manual on Scientific Evidence*.

Under contract to the Food and Drug Administration, I developed the definition of and approach to measuring deceptive advertising used by the FDA<sup>4</sup>. Based upon my research into consumer use and comprehension of nutrition information, I also served as an expert on a U. S. Senate Office of Technology Assessment committee preparing nutrition education guidelines for the public.

I have been an invited speaker on the subjects of litigation surveys and consumer confusion/dilution/deception before various organizations, including the International Trademark Association, the International Bar Association, the American Intellectual Property Law Association, the Practising Law Institute, the Federal Trade Commission, the National Association of Attorneys General, several law schools (e.g., New York University; Fordham University, Franklin Pierce Law Center; Roger Williams University; Benjamin Cardozo Law School; Santa Clara University) and a number of state (California, Virginia) and local (e.g., New York City) bar and intellectual property associations.

From 1993 through 2003, I served as a member of the Editorial Board of *The Trademark Reporter*.

Examination of J. Thomas McCarthy's 7-volume treatise "*McCarthy on Trademarks and Unfair Competition*," particularly the "Survey Evidence" section of Chapter 32, reveals that I am the most cited survey researcher in that treatise.

My research and testimony have often been considered instrumental in achieving favorable decisions and settlements. In several instances, the monetary value at stake exceeded \$1 billion dollars.

Attached are selected U.S. District and Circuit court comments regarding my research and testimony. Also attached are citations to selected publications pertaining to issues that surface in litigated matters.

### **Qualifications as a Scholar**

Since 1981, I have held an endowed chair as the Merchant's Council Professor of Consumer Behavior and Retail Management at New York University's Leonard N. Stern Graduate School of Business.

Based upon my scholarly productivity and impact, in 2011, Sage Publications identified me as one of a handful of "Legends in Consumer Behavior" and will be publishing most of my articles and book chapters as an eight volume set

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<sup>4</sup> Jacoby, J. and Small, C. B. (1975) The FDA approach to defining misleading advertising. *Journal of Marketing*, 39 (4), 65-68.

I have published six books and more than 160 book chapters and articles, most of the latter in rigorously refereed scholarly journals. Based upon my scholarly publications in the field's most rigorously reviewed peer journals, two independently conducted surveys identified me as the most influential and most frequently cited individual in the field of consumer behavior for the twenty year period spanning 1968-1988.

1. The first study, conducted by Donna Hoffman and Morris Holbrook and published in the field's leading peer-reviewed scholarly journal showed that I had the highest "influence index" of any of the field's 42 most-published scholars whose work was accepted and published by the *Journal of Consumer Research* during the 15 year period spanning 1974-1989 (Hoffman & Holbrook "The Intellectual Structure of Consumer Research," *Journal of Consumer Research*, 1993 (19), 507-517, at page 511).<sup>5</sup>

2. The second study<sup>6</sup> shows that, based on my scholarly publications in the *Journal of Marketing*, *Journal of Marketing Research* and *Journal of Consumer Research* (which, collectively, have traditionally been considered as the field's three most rigorous peer-reviewed journals), I was the second most often cited marketing (and first-most often cited consumer) scholar in the *Social Science Citation Index* for the 20 year period spanning 1969 through 1988. The *Social Science Citation Index* covers more than 1,400 journals worldwide.

I have been fortunate to have my research and scholarly writings accorded significant recognition. Among other honors and awards are the following:

1. In 1978, I received the American Marketing Association's Harold H. Maynard award for an article judged to have made "the most significant contribution to marketing theory and thought" during the preceding year.

2. In 1991, I received the American Academy of Advertising's first "Outstanding Contribution to Advertising" award for having made "a significant and sustained contribution to advertising research through a systematic program of research."

3. In 1995, I was the fifth recipient to be awarded the American Psychological Association's Society for Consumer Psychology bi-annual "Distinguished Scientist Award" for "sustained, outstanding contributions to the field of consumer psychology." (Basking in reflected glory, the third recipient was awarded a Nobel Prize in 2002.)

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<sup>5</sup> As an indication of its selectivity and rigor, the *rejection* rate at the *Journal of Consumer Research* tends to hover between 85% and 88% of the papers submitted.

<sup>6</sup> Joseph Cote, Siew Meng Leong and Jane Cote. "Assessing the Dissemination and Utilization of Marketing Research in the Social Sciences: A Citation Analysis Approach." School of Business, Oregon State University, August 10, 1990.

4. Based upon my research productivity, I have been elected a Fellow in the following organizations: American Psychological Association, American Psychological Society, Association for Consumer Research, Society for Consumer Psychology, Society for Law and Psychology, Society for Personality and Social Psychology. In each instance, the honor of being elected a Fellow is accorded to less than 10% of the membership. In the case of the Association for Consumer Research, it is 1%. I am also an Academic Fellow of the Center for Law and Business at New York University.

5. I am listed in numerous "Who's Who" compilations, including: *Who's Who in the World*, *Who's Who in America*<sup>7</sup>, *Who's Who in Science and Engineering*, *Who's Who in Frontier Science and Technology*, *Who's Who in Advertising*, *Who's Who in American Education* and *Who's Who of Emerging Leaders in America*.

Approximately once every thirty years or so, an encyclopedia is published covering all the social and behavioral sciences. The third such compendium, the 24 volume *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Science Ltd./Pergamon: Oxford, UK) was released in 2002. The fourth such compendium will be published in 2015. Of the thousands of scholars whose principal focus is the study of consumer decision making and behavior, I was the one invited to write the chapter on consumer psychology for both these editions.

I have been active in many scholarly and professional organizations, including serving as President of the American Psychological Association's Society of Consumer Psychology (in 1974) and President of the Association for Consumer Research (in 1975).

A list of selected publications in law journals and others pertinent to the legal arena is provided at the end of this document.

Last, I have served on the Editorial Boards of the leading peer reviewed scientific journals in my field (*Journal of Consumer Research*, *Journal of Marketing Research*) as well as journals in other disciplines (*Computers and Human Behavior*, *Trademark Reporter*). Until I no longer accepted such requests, I also served as an *ad hoc* reviewer for other scholarly journals (including the *Journal of Applied Psychology*, *Journal of Applied Social Psychology*, *Journal of Finance*, *Journal of Marketing*, *Journal of Nonverbal Behavior*, *Journal of Public Policy and Marketing*, *Organization Behavior and Human Performance*, *Public Opinion Quarterly*, and *International Journal of Research in Marketing*). The job of an Editorial Board member/reviewer is to evaluate the quality of the submitted research/writings and, for each paper, to render a "publish –do not publish" recommendation to the Editor. In the process, the reviewer determines whether and to what extent the research conforms to basic scientific standards. In this way, reviewers at peer reviewed journals serve as the "gatekeepers" of their science.

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<sup>7</sup> The *New York Times* (November 13, 2005, Section 9, Page 1) reports that inclusion in *Who's Who in America* is based upon "position and accomplishment;" further, the two-volume set contains approximately 109,000 entries.



**JACOB JACOBY, Ph.D.**  
**SELECTED DISTRICT AND APPELLATE COURT COMMENTS**  
**REGARDING JACOB JACOBY**

"...the Court is impressed with the steps plaintiff took to insure the reliability of the survey. It was well-designed, meticulously executed and involved some of the very best experts available....plaintiff's survey results were essentially uncontroverted." *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 658 (W.D. Wash. 1982).

"Dr. Jacob Jacoby...has extensive knowledge and experience in the design and interpretation of consumer surveys, and is an expert in those areas." *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 513 (D.N.J. 1986).

"... Dr. Jacoby [is] a nationally recognized expert on consumer research. Most of the points made in his testimony...are reflected in the above discussion [by the Court]." *Frisch's Restaurant, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 661 F. Supp. 971, 985 (S.D. Ohio 1987).

[Jacobys survey provides] "very persuasive evidence of the tendency to abbreviate the Schering names and persuasive evidence of confusion." *Schering Corporation v. Schering Aktiengesellschaft*, 667 F. Supp. 175, 189 (D.N.J. 1987).

"...the court finds [Jacobys survey] evidence thorough and convincing..." *Ferrari S.p.A. Esercizio v. McBurnie*, 11 U.S.P.Q. 2d 1843, 1846-47 (S.D. Cal. 1989), 1989 U.S. Dist. LEXIS 13442\*11.

The survey "demonstrates that among consumers of alcoholic beverages a high awareness of the mark "BEAM" exists." *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 18 U.S.P.Q. 2d 1486 n.2 (S.D.N.Y. 1990), 1990 U.S. Dist. LEXIS 13759\*7n2.

"We also agree with the district court...the survey evidence...amount[s] to abundant evidence that the exterior design features...have acquired secondary meaning." *Ferrari S.p.A. Esercizio v. Roberts*, 944 F.2d 1235, 1240 (6<sup>th</sup> Cir. 1991). See also *Ferrari Esercizio S.p.A. v. Roberts*, 739 F. Supp. 1138 (E.D. Tenn. 1990).

"The court finds that Dr. Jacoby made a good faith effort to, and did, conduct fair, unbiased consumer studies using methodology consistent with both industry standards and the requirements set forth by courts for evaluating what is communicated by advertisements." *The Gillette Co. v. Wilkinson Sword, Inc. and Friedman Benjamin, Inc.*, No. 89 3586 (S.D.N.Y. 1991), 1991 U.S. Dist. LEXIS 21006\*22-23C.<sup>8</sup>

"The results...are overwhelmingly supported by Dr. Jacoby's secondary meaning study....This court awards substantial weight to properly conducted surveys." *Conopco, Inc. v. May Department Stores Company*, 784 F. Supp. 648, 677 (E.D. Mo. 1992).

"The two [Jacoby] surveys are probative evidence of lack of confusion between the two marks." *Smartfoods, Inc. v. Hunt-Wesson, Inc.*, No. 3:92-CV-2061-D (N.D. Tex. Dec. 30, 1992).

"The consumer survey commissioned by the plaintiff...was conducted by Professor Jacob Jacoby....Dr. Jacoby conducted the consumer survey relied upon by the Court of Appeals...in...the leading trade dress case in this circuit....[T]he consumer survey conducted [in the present case]...effectively establishes that there is a likelihood of confusion." *P.T.C. Brands, Inc. v. Conwood Company L.P.*, 28 U.S.P.Q. 2d 1895, 1902, 1905, 1993 (W.D. Ky. 1993).

"The plaintiff's study, conducted by Jacob Jacoby, was far more substantial and the district judge found it on the whole credible." "Jacoby's survey was not perfect, and this is not news. Trials would be very short if only perfect evidence were admissible." Despite minor shortcomings, the Seventh Circuit concurred with the district judge "in crediting the major findings of the Jacoby study and inferring from it...that the defendant's use of the name 'Baltimore CFL Colts'...was

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<sup>8</sup> In part, based on the three surveys we conducted for Gillette and our criticisms of the surveys offered by Wilkinson Sword, the Court (Hon. Kimba M. Wood) took the unprecedented action of determining that the advertiser (Wilkinson) and its advertising agency (Friedman Benjamin) were jointly and severally liable for the amount of the damages.

likely to confuse a substantial number of consumers." *Indianapolis Colts et al v. Metropolitan Baltimore Football Club et al*, Seventh Circuit. #94-2578. Decided Aug. 12, 1994.

"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." We have considered Balducci's argument attacking the survey's findings because of alleged shortcomings in its methodology; however, like the district court, we have 'no quarrel with the [survey's] design or execution." *Anheuser-Busch, Inc. v. Balducci Publications, et al.* Eighth Circuit. #93-2196. Filed June 30, 1994.

"As will become apparent in the court's findings of fact and conclusions of law, we are persuaded that the survey, testimony and opinions of Dr. Jacoby are credible and correctly establish that the term 'air door' was generic in 1962 and remains generic. Based on case law and treatises recited in the Conclusions of Law which follow, as well as the testimony of Dr. Jacoby, the court has ruled that Plaintiff need not prove majority usage in order to establish genericness." *Berner International Corporation v. Mars Sales Company*, U.S.D.C. W.D. Penn., #89-1999. May 16, 1996.

"The Court finds that the Jacoby survey constitutes reliable evidence of actual confusion. This survey, in combination with plaintiffs' four actual confusion witnesses, is substantial evidence in favor of plaintiffs on the likelihood of confusion issue." "The Court's finding that Tour 18's written disclaimers are ineffective at reducing confusion is also supported by the Jacoby survey. The Court first notes that Jacoby is one of the leading experts in the field of consumer disclaimers. His treatise, *Jacoby & Raskoff, Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble than they are Worth?*, 76 *Trademark Rept.* 35 (1986), has been relied upon by many courts facing the issue of consumer disclaimers. See *Charles of the Ritz Group*, 832 F.2d at 1324; *Home Box Office*, 832 F.2d at 1315. From: *Pebble Beach Compan, Resorts of Pinehurst, Inc., and Sea Pines Company, Inc. v. Tour 18 I, L.T.D.*, U.S.D.C. S.D. Texas; No. 93-3875; Filed Sept. 10, 1996.

"However, [Jacob Jacoby,] defendants expert has raised significant issues regarding the accuracy and reliability of the survey questioning." *Azta Corporation v. N.Y. Entertainment, L.L.C., d.b.a. Big Apple Casino Cruises, Jubilee of the Bahamas, Inc., a Bahamian Corporation, and Fred Collins, Jr.* U.S.D.C., E.D. N.Y., Memorandum and Order 97-CV-3674.

Indicating it was relying at least in part on the testimony of “defendant’s expert, Dr. Jacob Jacoby” (p.575), the court found plaintiff’s “studies flawed and the survey results untrustworthy and unreliable” (p.571). *Cumberland Packing Corp. et al. v. Monsanto Co., The Nutrasweet Co., et al.* 32 F. Supp. 2d 561. Filed Jan 12, 1999.

“Apple also presents survey evidence [from its survey expert, Jacob Jacoby] showing that its efforts have established an association between the trade dress and Apple in the minds of the public.... This evidence is sufficient to establish a likelihood of success in proving that the trade dress has acquired distinctiveness through secondary meaning.” USDC, NDCalifornia (San Jose Division) Case #C-99-20612-JF. Filed November 5, 1999.

“... the jury was entitled to consider Dr. Jacoby’s consumer survey study, which lent some support to Braun’s claim that the public was confused by the ad.” USDC SDNY 98 Civ 4070 (RCC). *Braun Inc. and The Gillette Company v. Optiva Corporation.* From the Memorandum decision filed February 25, 2000.

“Dr. Jacob Jacoby...conducted a consumer survey to determine the likelihood of confusion... This survey evidence supports a finding of a likelihood of confusion under Section 43(a) of the Lanham Act.” USDC, ED Virginia (Alexandria Division). CA No. 99-454-A. *The Teaching Company Limited Partnership v. Unapix Entertainment, Inc.* From the “Memorandum Opinion and Final Judgment.” Filed March 3, 2000.

“Nor are we persuaded by Far Eastern’s contention that expert testimony by Jacoby as to the efficacy of disclaimers on its packaging should have been excluded on the basis that Jacoby was not qualified to give that testimony. Given the evidence as to Jacoby’s credentials, we see no error in the court’s admission of that testimony.” *Bic Corp. and Wite-Out Products Inc. v. Far Eastern Source Corp.* 23 Fed Appx. 36, 2001 WL 1230706 (2<sup>nd</sup> Cir. (NY)) at 4. (Oct 12, 2001)

“DotCom offered a consumer study it commissioned of individuals in the plastics industry who used, or were likely to use a recruiting firm. This study [conducted by Jacob Jacoby] showed that only 2% of those queried appeared to know ‘U.S. Search,’ the type of firm it is, and the services it provides.” *U.S. Search, LLC, v. U.S. Search.Com Inc.* (2002 WL 1880250 (4<sup>th</sup> Cir.(Va.))

“[T]he court begins by noting that Dr. Jacoby is a thoroughly trained and experienced market researcher, and that his survey methods and practices have been admitted by numerous courts throughout the country.... For the foregoing reasons, OneBeacon’s Motion to Exclude Testimony of Jacob Jacoby is Denied.” *The Beacon Mutual Insurance Co. v. OneBeacon Insurance Group*. U.S.D.C. D R.I. 253 F. Supp. 2d 221, 226; 2003 U.S. Dist. Lexis 5068, 14

“The court finds the credentials and testimony of Dr. Jacoby to be impeccable, and his rationale thoroughly persuasive. Dr. Jacoby’s critique of Mr. [X’s] survey, as set forth above in the findings of fact, convince the court that Mr. [X’s] conclusions lack scientific validity.” *Hill’s Pet Nutrition, Inc. v. Nutro Products, Inc.* USDC, D Kansas (#03-4001 SAC), Memorandum and Order, March 25, 2003.

In holding for plaintiffs (and, in effect, reversing the Trademark Trial and Appeals Board), the U.S. District Court for the District of Columbia wrote: “First, the TTAB’s opinion presents no defense to the critique by Dr. Jacoby that the survey improperly extrapolated the views of its respondents to the Native American population as a whole.... Instead of explaining why Dr. Jacoby’s critique was flawed, the Board concludes – with no explanation – that the survey ‘represents the views of the two populations sampled.’ Dr. Jacoby’s criticisms, while listed by the TTAB, are never engaged. ... The Court, therefore, concludes that the TTAB’s decision to extrapolate the results of [defendants’] survey ... was not supported by substantial evidence. Critiques by Dr. Jacoby went unanswered in the TTAB opinion.” *Pro-Football, Inc. v. Susan Shown Harjo, et al.* Civ. Action No. 99-1385 (CKK), Memorandum Opinion of September 30, 2003, at pages 39 – 41.

Plaintiff’s expert’s “methodology was severely criticized by defendant’s witness, Dr. Jacob Jacoby, an extremely well qualified expert in consumer behavior and research methodology.” [Footnote 14 appended to the word “methodology” reads, in part:] “Counsel also cross-examined Dr. Jacoby on the handful of cases in which his findings had been criticized, suggesting that Dr. Jacoby had intentionally ‘rigged a survey to get a particular result.’ I have read those cases, and I have read cases that laud Dr. Jacoby’s credentials and research. I do not find it surprising that a witness who has testified in over 100 cases has been criticized from time to time, and find Dr. Jacoby is a highly qualified and well-recognized expert in consumer confusion and survey evidence” [citations omitted]. *Wells Fargo & Co., et al. v. WhenU.com, Inc.* U.S.D.C., E. D. MI (Southern Division). Case No. 03-71906 (NGM). Memorandum Opinion and Order Denying Plaintiff’s Motion for Preliminary Injunction. Nov. 19, 2003.

“... Defendant WhenU.com produced Dr. Jacob Jacoby. Dr. Jacoby attacked [Plaintiff’s survey] on a number of fronts.” *1-800-Contacts, Inc. v. WhenU.com and Vision Direct USDC, SDNY*, Decided Dec 22, 2003, Filed Dec 23, 2003. *U.S. Dist. LEXIS 22932*, \* (at page 10). The court then adopted many of these criticisms (see pages 23-25).

“Based upon Dr. Jacoby’s testimony, his expert report, the evidence regarding the methodology and questions employed in conducting the survey, and answers given by the survey respondents, the Court finds that Dr. Jacoby’s survey results are persuasive evidence that actual confusion is likely.” *Red Bull GmbH and Red Bull North America, Inc. v. Matador Concepts, Inc. and Leslie A. Gilmer*. U.S.D.C. CD CA. Decided Jan 13, 2006, Filed Jan 13, 2006. Case No. CV 04-9006-JFW (PLAx).

“There was a second survey that was offered into evidence. Lancome chose a renowned expert to design its study. Jacoby designed a survey for Lancome to test the extent to which use of the word Juicy in connection with Lancome was likely to cause confusion.... It found negligible, if any, evidence of confusion. [FN 33: “It is unnecessary to spend time addressing Couture’s attacks on the Jacoby survey... Suffice it to say that the attacks on Jacoby’s well-designed survey were strained and unpersuasive.”] From the Opinion and Order, *Juicy Couture, Inc. and L.C. Licensing, Inc. v. L’Oreal USA, Inc. and Luxury Products, LLC*. U.S.D.C. S.D.N.Y. April 19, 2006. 04 Civ. 7203 (DLC).

**APPENDIX B**

**CURRICULUM VITA OF JACOB JACOBY**

## ACADEMIC CURRICULUM VITA

Name: **Jacob (Jack) Jacoby**

Vita updated: January 1, 2012

Home address and phone:

N.Y.U. office address and phone:

160 West 66<sup>th</sup> Street

Stern School of Business

Apartment PHA

New York University

New York, N.Y. 10023

40 West 4th Street, Room 909  
New York, NY 10012

212-721-9005; 212-769-2700

212-998-0515

### EDUCATION:

Ph.D. Michigan State University (1966)

Major: Social Psychology; Minors: Statistics, Sociology

M.A. Brooklyn College, The City University of New York

(1963) Psychology

B.A. Brooklyn College, The City University of New York

(1961) Psychology

### PROFESSIONAL EXPERIENCE:

1981 - present: **Merchants Council Professor of Consumer Behavior and Retail Management**, Stern School of Business, New York University.

1981 - 1985: Merchants Council Professor of Marketing, New York University and Director of the Institute of Retail Management.

1975 - 1981: Professor, Department of Psychology, Purdue University

1971 - 1975: Associate Professor, Department of Psychology, Purdue University.



- 1968 - 1971: Assistant Professor, Department of Psychology, Purdue University
- 1976 (Jun.-Jul.) Guest Professor, SFB 24, University of Mannheim, Mannheim, Germany
- 1975 (May): Guest Professor, SFB 24, University of Mannheim, Mannheim, Germany
- 1965 - 1968: Active duty (U.S. Air Force). Served as Chief, Behavioral Science Branch, the National Security Agency, Fort George G. Meade, Maryland. Duties were primarily to plan and conduct applied research in industrial/organizational psychology. Security clearance: Top Secret.
- 1966 - 1968: (Part-time) Assistant Professorial Lecturer, Department of Business and Public Administration George Washington Univ. Promoted to Associate Prof. Lecturer the semester I left.

**MEMBERSHIPS IN PROFESSIONAL ORGANIZATIONS:**

- American Association for Public Opinion Research (1967-1968, 1972-1973; 1982-2008)
- American Marketing Association (1968-present)
- American Psychological Association (Associate, 1963-1967; Member, 1968-1972; Fellow, 1973-present. Also elected to Fellow status by Divisions 8, 23 and 41.)
- American Psychological Society (1996-present; Fellow 1998)
- American Psychology-Law Society (1988-present; Fellow 1994)
- Association for Consumer Research (1969-present; Fellow 1993)
- International Trademark Association (1991-present)
- Market Research Council (1989-present)
- Midwestern Psychological Association (Member, 1968-1975)
- Sigma Xi, The Scientific Research Society of North America (Associate Member, 1962-1968; Member, 1969-1981)
- Society for the Psychological Study of Social Issues (Member, 1963-1968)
- Society for Judgment and Decision Making (Member, 1986-1990)

**ACTIVITIES IN PROFESSIONAL ORGANIZATIONS:**

1. American Psychological Association
  - Member, Council of Representatives (governing body of APA), 1971-1973
  - Member, Committee on Student Aid (COSA), 1973.
  
2. **Society of Consumer Psychology** (Division 23) of the American Psychological Association
  - **PRESIDENT**, September 1973 to August 1974
  - Representative to APA Council of Representatives, 1971-1973
  - Member, Committee on Scientific and Professional Affairs, 1968-1971
  - Chairman, Convention Program Committee, 1970-1971
  - Contributing Editor, The Communicator, Division 23 Newsletter, 1970-1973
  - Chairman, Membership Committee, 1971-1971
  - Member, Membership Committee, 1972-73
  - Policy Board Representative to the Journal of Consumer Research, 1971-1974, 1976-1978; Alternate Representative, 1974-1975
  - Chairman, Fellowship Committee, 1975; 1980; Member, 1979, 1981
  - Chairman, Election Committee, 1975
  
3. **Association for Consumer Research**
  - **PRESIDENT**, 1975
  - Member, Advisory Council (ACR's governing body thru 1972), 1969-1972
  - Member, Executive Committee, 1973-1974, 1976
  - Member, Program Committee, 1970-1971

- Member, Publications Committee, 1970-1972
- Chairman, Publications Committee, 1973
- Editor, ACR Newsletter, 1973
- Chairman, Election Committee, 1976
- Member, Election Committee, 1975, 1977
- Policy Board rep., *Journal of Consumer Research*, 1981-1984

4. American Association of Public Opinion Research

- Member, Professional Standards Revision Committee, 1983-1984
- Policy Board rep., *Journal of Consumer Research*, 1984-1986
- Member, ad hoc committee on changing *P.O.Q.* publisher, 1986

5. Market Research Council

- Executive Committee, Member at Large, 1991-1992
- Chairman, Marketing "Hall of Fame" Award Committee 1991-1992

6. International Trademark Association

- Member, Editorial Board, *The Trademark Reporter*, 1993-2003
- Member, Advisory Board, Brand Names Educational Foundation, 2004-6

**OTHER PROFESSIONAL ACTIVITIES:**

1. Editorial Board Memberships.

- *Journal of Consumer Research*, Founding member of JCR and Member, Editorial Board, 1973-1974.
- Member, Policy Board (group that selects editors and, initially, established journal policies) Representing APA-Division 23, 1971-1974, 1976-78; Alternate, 1974-1975; Representing ACR: 1981-1984; Representing AAPOR: 1984-1986; Vice Chairman of Policy Board: 1984-1986;
- *Journal of Marketing Research*, Member, Editorial Board, 1972-1974.

- *Computers in Human Behavior*, Member, Editorial Board, 1984-1994.
- *Trademark Reporter*, member, Editorial Board, 1993-present.

## 2. Reviewer of Manuscripts

- American Psychological Association, Annual Conventions: 1970-1976
- Association for Consumer Research, Annual Conventions: 1971, 1972, 1974, 1978, 1979, 1986, 1989, 1990
- ACR European Conference, 1995
- *Organization Behavior and Human Performance* - 1971
- 1972 American Marketing Association, Fall Convention
- 1972 Research Design Competition, APA-Division 23
- *Journal of Applied Social Psychology* 1972, 1984
- *Journal of Applied Psychology* 1972
- *Public Opinion Quarterly*, 1973, 1974
- *Journal Supplement Abstract Service*, Am. Psych. Assn. 1975
- American Marketing Association, 1979 Ph.D. dissertation competition
- *Journal of Marketing* (1980)
- *Journal of Finance* (1985)
- *Journal of Nonverbal Behavior* (1988)
- *International Journal of Research in Marketing* (1988)
- "Marketing and Public Policy" conference 1995,
- *Journal of Public Policy and Marketing*, 1997-1999
- *Reference Manual on Scientific Evidence*. 1994 and 2000 editions. Federal Judicial Center, Washington, D.C.

### 3. Reviewer of Proposals

- National Science Foundation (1973, 1974, 1975, 1976, 1979, 1980, 1986, 1988)
- Social Science Research Council of Canada (1981)
- Food and Drug Administration(1975)
- Million Dollar Round Table (1979)

### 4. Reviewer of Advertising

- Judge, 1991 Effie Awards (annual award for Advertising effectiveness)

### HONORS AND AWARDS:

1969 - Admitted into Sigma Xi, the National Honorary Society of Science.

1973 - Elected a Fellow of the American Psychological Association

1973 - Elected a Fellow of the Division of Consumer Psychology

1981 - Elected a Fellow of the Division of Personality and Social Psychology

1995 - Elected a Fellow of the Division of Law and Psychology

1973 - **President**, Division of Consumer Psychology, the American Psychological Association.

1975 - **President**, the Association of Consumer Research.

1978 – Recipient of the American Marketing Association's **Harold H. Maynard Award** for the article making the most "significant contribution of marketing theory and thought" in the *Journal of Marketing*, 1978.

1991 - First recipient, American Academy of Advertising's **Outstanding Contribution to Advertising Award** for having "made a significant sustained contribution to advertising research through a systematic program of research."

1993 - Elected a **Fellow** of the Association of Consumer Research

1995 – Recipient of the Society of Consumer Psychology's fifth bi-annual **Distinguished Scientific Research Award**.

2001 - Appointed an Academic Fellow, the Center for Law and Business, New York University.

2011 - Based upon scholarly impact on the field of consumer behavior, selected by editors at Sage Publication as a "Legend in Consumer Behavior." Sage will be publishing many of Jacoby's writings in 1213 as an 8 or 9 volume set.

Listed in:

*Who's Who in the World*

*Who's Who in America*

*Who's Who in the East*

*Who's Who in Frontier Science and Technology*

*Who's Who of Emerging Leaders in America*

*Who's Who in Advertising*

*Who's Who in American Education*

*Men of Achievement*

**BOARD OF DIRECTORS:**

1991-1994 - Advertising Educational Foundation. (New York)

**MAJOR RESEARCH GRANTS AND CONTRACTS (Total: more than \$1.1 million):**

\$148,000

from the National Science Foundation for studying: "Amount, type, and order of package information acquisition in purchasing decisions." For the period from June 1, 1974 to December 30, 1976. (GI-43687).

\$155,000

from the Federal Trade Commission for: "Study of likely impact of disclosure of life insurance costs on agent and consumer behavior." For the period from January 1, 1977 to August 4, 1978. (L0226).

\$181,000

from the American Association of Advertising Agencies for studying: "The Miscomprehension of Televised Communication". For the period from February 1978 through February 1980.

\$353,000

from the National Science Foundation for studying: "Assessing the effects of science based information on consumer technological choices." (Co-authored with James J. Jaccard). For the period from February 15, 1980 through August 31, 1983 (PRA7920585).

\$270,000

from The Advertising Educational Foundation, Ind. (Co-sponsored by the American Association of Advertising Agencies and the American Advertising Federation) for studying: "The Miscomprehension of Print Communication". For the period from January 1983 through December 1985.

**M.S. THESIS AND Ph.D. DISSERTATION:**

Jacoby, J. "Imprinting: An experimental approach to a biphasic interpretation." Unpublished Master's Thesis, Brooklyn College, 1963. (Major Professor: Howard Moltz)

Jacoby, J. "Situational anxiety and ordinal birth position as determinants of dogmatism and authoritarianism." Unpublished Doctoral Dissertation. Michigan State University, 1966. (Major Professor: Milton Rokeach) See: *Dissertation Abstracts A. Humanities and Social Science*, 1967, 27, p. 4338-A.

## PUBLICATIONS

### BOOKS

1. Jacoby, J. and Chestnut, R.W. (1978) *Brand loyalty: Measurement and management*. New York: John Wiley and Sons.
2. Jacoby, J., Hoyer, W.D. and Sheluga, D.A., (1980) *The miscomprehension of televised communication*. New York: American Association of Advertising Agencies.
3. Jacoby, J. and Craig, C.S. (Eds.), (1984) *Personal selling: Theory, Research and Practice*. Lexington Books, Lexington, Mass.
4. Jacoby, J. and Olson, J.C., (Eds.), (1984) *Perceived quality: How consumer view stores and merchandise*. Lexington Books, Lexington, Mass.
5. Jacoby J. and Hoyer, W.D., (1987) *The comprehension and miscomprehension of print communications: An investigation of mass media magazines*. Lawrence Erlbaum Associates, Hillsdale, New Jersey.
6. James Jaccard and Jacob Jacoby (2010) *Theory Construction and Model Building Skills: A Practical Guide for Social Scientists*. New York: Guilford Press.
7. Jacob Jacoby (2013, forthcoming) *Trademark Surveys*. Chicago: The American Bar Association
8. Jacob Jacoby and James Jaccard (In preparation) *Generalizing from Research: External validity and Generalizability*.

### SELECTED UNPUBLISHED MONOGRAPHS:

1. Uh1, J.N., Armstrong, J., Courtenay, H.V., Ishida, J.T., Kepner, K.W., Potter, H.C., and Jacoby, J. (1970) *Survey and evaluation of consumer education programs in the United States*. (2 volumes). Purdue Research Foundation, Lafayette, Indiana. March. 666 pages. Microfilm \$2.50; hard copy \$33.40 (Available from: ERIC Document Reproduction Service, ED-038-549, Fairmont Avenue, Bethesda, Maryland 20014).
2. Jacoby, J., Olson, J.C., Szybillo, G.J., and Hart, E.W. Jr. (1975) *Affirmative nutritional disclosure in advertising and selected alternatives: The likely impact on consumer behavior*. Washington, D.C.: Consumer Research Institute (Grocery Manufacturers of America, Inc.), December.



3. Jacoby, J. and Olson, J.C. (1976) *Consumer reaction to price: An attitudinal, information-processing perspective*. Unpublished; 100 pages. (A 30-page condensation was published as article #69; see below).
4. Jacoby, J. and Chestnut, R.W. (1977) *Amount, type, and order of package information acquisition in purchasing decisions*. Final report to the National Science Foundation (GI-43687), June.
5. Jacoby, J. (1980) *Psychological foundations of consumer behavior: Lecture notes*. Bloomington, Indiana: TIS Incorporated, Publishing Division. (160 pages).
6. Jacoby, J. and Jaccard, J.J. (1984) *The influence of health and safety information on consumer decision making concerning new technological products*. Final report to the National Science Foundation, June.

**PUBLISHED TEST:**

Jacoby J. and Terborg, J.R. (1975) *The Managerial Philosophies Scale*. Teleometrics International, The Woodlands, Texas. Copyright. This is a 36-item Likert-type instrument designed to assess McGregor's Theory X-Theory Y managerial orientations. An Examiner's Manual is available (through Teleometrics), as is a manuscript describing the scale's empirical development (entitled: "Development and Validation of Theory X and Y scales for assessing McGregor's Managerial Philosophies").

**ARTICLES:**

1. Jacoby, J. (1967) The construct of abnormality: Some cross-cultural considerations. *Journal of Experimental Research in Personality*, 2, 1-15.
2. Jacoby, J. (1967) Open-mindedness and creativity. *Psychological Reports*, 20, 822.
3. Jacoby, J. (1968) Birth-rank and pre-experimental anxiety. *Journal of Social Psychology*, 76, 9-11.
4. Jacoby, J. (1968) Examining the *other* organization: A methodology for studying informal organizational structure of complex organizations. *Personnel Administration*, 31, 36-42.
5. Jacoby, J. (1968) Work music and morale: A neglected but important relationship. *Personnel Journal*, 47, 882-886.

6. Jacoby, J. (1968) Creative ability of task-oriented versus person-oriented leaders. *Journal of Creative Behavior*, 2, 249-253.
7. Jacoby, J. (1969) Time perspective and dogmatism: A replication. *Journal of Social Psychology*, 7, 281-82.
8. Jacoby, J. (1969) Accuracy of person perception as a function of dogmatism. *Proceedings, 77th Annual Convention, American Psychological Association*, 4, 347-348.
9. Jacoby, J. (1970) The plight of the uniformed Air Force Psychologist. *Professional Psychology*, 1, 383-387.
10. Jacoby, J. (1971) Personality and innovation proneness. *Journal of Marketing Research*, 8, 244-247. Reprinted in: H.H. Kassarian and T.S. Robertson (Eds.), *Perspectives in Consumer Behavior* (2nd ed.). Glenview, Illinois: Scott Foresman, 1973, pp. 149-155. (A one-page abstract appears in David L. Sparks (Ed.). *Broadening the Concept of Marketing*. Chicago: American Marketing Association, 1970.)
11. Jacoby J. (1971) A model of multi-brand loyalty: Preliminary results and promotional strategies. *Journal of Advertising Research*, 11(3), 25-31.
12. Jacoby, J. (1971) Training consumer psychologists: The Purdue University program. *Professional Psychology*, 2, 300-302.
13. Jacoby, J. (1971) A multiple-indicant approach for studying new product adopters. *Journal of Applied Psychology*, 55, 384-388. Reprinted in M. Wallendorf and G. Zaltman (Eds.), *The Consumer Behavior of Individuals and Organizations*. N.Y.: John Wiley, 1979.
14. Jacoby, J. (1971) Interpersonal perceptual accuracy as a function of dogmatism. *Journal of Experimental Social Psychology*, 7, 221-236.
15. Jacoby, J. (1971) Brand loyalty: A conceptual definition. *Proceedings 79th Annual Convention, American Psychological Association*, 6, 655-656.
16. Jacoby, J. and Aranoff, D. (1971) Political polling and the lost letter technique. *Journal of Social Psychology*, 83, 209-212.
17. Jacoby, J. and Matell, M. (1971) Three point Likert scales are good enough. *Journal of Marketing Research*, 8, 495-500.
18. Jacoby, J., Olson, J.C., and Haddock, R.A. (1971) Price, brand name, and product composition characteristics as determinants of perceived quality. *Journal of Applied Psychology*, 55, 570-579.

19. Deering, B.J. and Jacoby, J. (1971) The effect of "alternative relationships" and "relative resources" on consumer decisions between mother and child. In David M. Gardner (Ed.) *Proceedings, Second Annual Conference, The Association for Consumer research*, 1, 135-142.
20. Matell, M.S. and Jacoby, J. (1971) Is there an optimal number of alternatives for Likert scale items? Study I: Reliability and validity. *Educational and Psychological Measurement*, *31*, 657-674.
21. Olson, J.C. and Jacoby, J. (1971) A construct validation study of brand loyalty. *Proceedings, 79th Annual Convention, American Psychological Association*, 6, 657-658.
22. Jacoby, J. (1972) Opinion leadership and innovativeness: Overlap and validity. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference, The Association for Consumer Research*, *2*, 632-649.
23. Jacoby, J. and Kaplan, L.B. (1972) The components of perceived risk, In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference, The Association for Consumer Research*, *2* 382-393.
24. Bowen, D.D., Perloff, R. and Jacoby, J. (1972) Improving manuscript evaluation procedures. *American Psychologist*, *27*, 221-225.
25. Deering, B.J. and Jacoby, J. (1972) Price intervals and individual price limits as determinants of product evaluation and selection. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference, The Association for Consumer Research*, *2*, 145-166.
26. Deering, B. J. and Jacoby, J. (1972) Risk enhancement and risk reduction strategies for handling perceived risk. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference, The Association for Consumer Research*, *2*, 404-416.
27. Heimbach, J.T. and Jacoby, J. (1972) The Zeigarnik effect in advertising. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference, The Association for Consumer Research*, *2*, 746-748.
28. Matell, M.S. and Jacoby, J. (1972) Is there an optimal number of alternatives for Likert scale items? Effects of testing time and scale properties. *Journal of Applied Psychology*, *56*, 506-509.
29. Olson, J.C. and Jacoby, J. (1972) Cue utilization in the quality perception process. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference, The Association for Consumer Research*, *2*, 167-179.

30. Szybillo, G.J. and Jacoby, J. (1972) The relative effects of price, store image, and intrinsic product differences on product quality evaluation. In M. Venkatesan (Ed.), *Proceedings, Third Annual Conference*, The Association for Consumer Research, 2, 180-186.
31. Jacoby, J., Kohn, C.A. and Speller, D.E. (1973) Time spent acquiring product information as a function of information load and organization. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 813-814.
32. Jacoby, J. and Kyner, D.B. (1973) Brand loyalty vs. repeat purchasing behavior. *Journal of Marketing Research*, 10, 1-9.
33. Hart, E.W. and Jacoby, J. (1973) Novelty, recency, and scarcity as predictors of perceived newness. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 839-840.
34. Hollander, S.W. and Jacoby, J. (1973) Recall of crazy, mixed-up TV commercials. *Journal of Advertising Research*, 13 (3), 39-42.
35. Kohn, C.A. and Jacoby, J. (1973) Operationally defining the consumer innovator. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 837-839.
36. Szybillo, G.J., Jacoby, J. and Busato, J. (1973) Effects of integrated advertising on perceived corporate hiring policy. *Proceedings, 81st Annual Convention*, American Psychological Association, 8 (2), 815-816.
37. Jacoby, J. (1974) Consumer reaction to information displays: Packaging and advertising. In S.F. Divita (Ed.), *Advertising and the Public Interest*. Chicago: American Marketing Association, 101-118.
38. Jacoby, J. (1974) Consumer behavior: A neglected but fertile field for psychological research. *Contemporary Psychology*, 19 (7), 543. (Review of S. Ward and T.S. Robertson, Eds., *Consumer Behavior: Theoretical Sources*. Englewood Cliffs, N.J., Prentice-Hall.)
39. Jacoby, J. (1974) The construct validity of opinion leadership. *Public Opinion Quarterly*, 38 (1), 81-8
40. Jacoby, J. and Olson, J.C. (1974) An extended expectancy model of consumer comparison process. In S. Ward and P. Wright (Eds.), *Advances in Consumer Research*, 1 319-333. Urbana, Illinois: Association for Consumer Research.

41. Jacoby, J., Speller, D.E. and Kohn, C.A. (1974) Brand choice behavior as a function of information load. *Journal of Marketing Research*, 11 (1), 63-69.
42. Jacoby, J., Speller, D.E. and Berning, C.A.K. (1974) Brand choice behavior as a function of information load: Replication and extension. *Journal of Consumer Research*, 1 (1), 33-42.
43. Berning, C.A.K. and Jacoby, J. (1974) Patterns of information acquisition in new product purchases. *Journal of Consumer Research*, 1 (2). 18-22.
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1975 - Chestnut, Robert W.	as above
1975 - Weigl, Karl	Unknown
1976 - Silva-McSorley, Rasario	Homestead, Florida
1978 - Sheluga, David A.	as above

1979 - Hoyer, Wayne D.	as above
1979 - Pite, Elizabeth	Pite Plus Marketing Hartford, Connecticut
1980 - Nelson, Margaret C.	Unknown
1981 - Zimmer, Mary R.	Department of Marketing University of Georgia
1984 - Troutman, Tracy	Hershey Foods Corp. Hershey, PA

**Jacob Jacoby -- Publications  
2000 – 2012**

Books:

James Jaccard and Jacob Jacoby (2010) *Theory Construction and Model Building Skills: A Practical Guide for Social Scientists*. New York: Guilford Press.

Jacob Jacoby (2013, in press) *Trademark Surveys*. Commissioned by the American Bar Association. Published by Thomson/West.

Articles and Book Chapters:

Morrin, M. and Jacoby J. (2000) "Trademark dilution: Empirical measures for an elusive concept." *Journal of Public Policy & Marketing*. 19 (2) 265-276.

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Morrin, M., Jacoby, J., Johar, G., He, X., Kuss, A. and Mazursky, D. (2002) Taking stock of stock brokers: Exploring investor information accessing strategies via process tracing. *Journal of Consumer Research*. 29 (2), 188-198.

Jacob Jacoby (2002) Experimental design and the selection of controls in trademark and deceptive advertising surveys. 92 (4) *The Trademark Reporter* 890-956.

Jacob Jacoby (2002) A Critique of Rapoport's "Litigation Surveys—Social 'Science' as Evidence" 92 (6) *The Trademark Reporter* 1480-1501.

Jacob Jacoby (2006) Sense and Nonsense in Measuring Sponsorship Confusion. *Cardozo Arts and Entertainment Law Journal*. 24:1 (June) 63-97.

Gideon Mark and Jacob Jacoby (2006) Continuing Commercial Impression and its Measurement. *Marquette Intellectual Property Law Review*. 10:3, 431-454.

Jacob Jacoby and Mark Sableman (2007) Keyword-Based Advertising: Filling in Factual Voids (*GEICO v. Google*). 97:3 *The Trademark Reporter*, 681-731.

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Wayne D. Hoyer & Jacob Jacoby (2010) "Consumer Psychology." In Irving Weiner and Edward Craighead (Eds.) *Corsini's Encyclopedia of Psychology* (Fourth Edition; Volume 1). NY: John Wiley & Sons. 397-400.

Jacob Jacoby (2012) "Closed-ended Questions in Litigation Surveys" In Shari S. Diamond and Jerre Swann (Eds.) *Trademark and Deceptive Advertising Surveys*. American Bar Association.

Jacoby, J. (2012) Patent Infringement: Proving customer demand .. or a lack thereof. *Intellectual Property Today*. October.

## APPENDIX C

### JACOB JACOBY - 2007 COURTROOM TESTIMONY

Dec 20        **Nextel Communications, Inc. v. Motorola, Inc**  
T.T.A.B., Washington, D.C.  
Deposition here equates to providing direct testimony before  
the TTAB and cross-examination.  
Trademark matter (acquired distinctiveness of 1800 Hz chirp)

### JACOB JACOBY - 2009 COURTROOM TESTIMONY

Apr 14        Before Judge Marilyn L. Huff  
U.S.D.C S.D. California  
**Brighton Collectibles, Inc. v. Marc Chantal USA, Inc.**  
Trade dress matter

Oct 7         Before Judge Ann D. Montgomery  
U.S.D.C. Minnesota  
**Mooney et al. (class) v. Allianz Life Ins. Co., No. America**  
Deceptive sales practices matter

Nov 6        Before Judge Ann D. Montgomery  
U.S.D.C. Minnesota  
**Fair Isaac Corp. (FICO) et al. v. Experian, Equifax and  
TransUnion**  
Likely confusion matter

### JACOB JACOBY - 2011 COURTROOM TESTIMONY

Jan 18        Before an arbitration panel  
Arbitration Services of Portland  
**Bibiji Inderjit Kaur Puri v. Golden Temple of Oregon, LLC**  
Secondary meaning/likely confusion matter  
Arbitrators:  
Jeff Edelson: <http://www.mhgm.com/showattorney.asp?Show=45>  
Alan McCollum: <http://www.techlaw.com/>  
Peter Staples:  
<http://www.chernofflaw.com/showbio.aspx?show=631>

**JACOB JACOBY – 2012 COURTROOM TESTIMONY**

Mar 29 and Apr 2	Before Judge Sidney H. Stein U.S.D.C. S.D.N.Y. <b>Fresh Del Monte Produce, Inc.</b> v. Del Monte Foods Co and Del Monte Corp. Deceptive advertising/packaging matter
May 14	Before Judge James Spencer U.S.D.C. E.D. Virginia (Richmond) Pennington Seed, Inc. v. <b>The Scotts Miracle-Gro Company</b> Deceptive advertising/packaging matter
Oct 19	Before Judge Andrew J. Guilford U.S.D.C. C.D. Ca. <b>Mixed Chicks LLC</b> v. Sally Beauty Supply et al. Trademark and trade dress confusion matter

**JACOB JACOBY - 2007 DEPOSITION TESTIMONY**

- Nov 1            **Claimants v. W.R. Grace & Co.**  
U.S. Bankruptcy Court, D. Delaware
- Dec 12           **Raymond Weil v. Charlize Theron**  
Value of celebrity endorsement  
USDC, SDNY

**JACOB JACOBY - 2008 DEPOSITION TESTIMONY**

- Jan 24           **Brighton Collectibles v. Marc Chantal**  
Trade dress confusion matter  
USDC, SD CA
- May 1            **Polaroid v. Hewlett-Packard**  
Patent matter  
U.S.D.C. D. Delaware C.A. No 06-738 (SLR) (2007).
- Jul 5             **The Evercare Co. v. 3M Company**  
Materiality and deceptive labeling matter  
USDC, ND GA
- Nov 20           **Ameritox, Ltd. v. Aegis Sciences Corp.**  
Deceptive advertising matter  
USDC, SD FL
- Dec 15           **Fair Isaac Corp. v. Equifax et al.**  
Likely confusion & deceptive advertising matter  
U.S.D.C. D. Minnesota

**JACOB JACOBY - 2009 DEPOSITION TESTIMONY**

- Jan 21           **Viacom et al. v. Activision et al.**  
Likelihood of Confusion Issue  
JAMS Arbitration Tribunal
- Jan 23           **Factory Five Racing, Inc. v. Carroll Shelby & C. H. Shelby Trust**  
Trade dress matter  
U.S.D.C.
- Mar 3            **Kerzner International Ltd. et al. v. Monarch Casino & Resort**  
Likely confusion matter  
U.S.D.C. D. Nevada
- Jul 18           **Picture Me Press v. Portrait Corp. of America, CPI Corp. and CPI Images.**  
Trademark matter



U.S.D.C. Northern District of Ohio

Aug 12      **Laryngeal Mask Co, Ltd. & LMA NA, Inc. v. Ambu A/S, et al.**  
Deceptive advertising matter  
U.S.D.C. S.D. CA

Oct 16      **j2 Global Communication et al. v. Zilker Ventures et al.**  
Trademark matter  
U.S.D.C. S.D. CA

**JACOB JACOBY - 2010 DEPOSITION TESTIMONY**

Jun 30      **Mirror Worlds, Inc. v. Apple Inc.**  
Patent matter  
U.S.D.C. E.D. TX (Tyler Div.) 08cv88

Oct 7      **Fresh Del Monte v. Del Monte Corp.**  
Deceptive advertising/package matter  
U.S.D.C. S.D.N.Y 08 Civ-8718 (SHS)

**JACOB JACOBY - 2011 DEPOSITION TESTIMONY**

May 6      **Am. Express Marketing & Development Corp. et al. v. Black Card LLC**  
Secondary Meaning  
U.S.D.C. S.D.N.Y. 10 CIV 1605 (DLC)

May 7, 19      **Dongguk University v. Yale University**  
Reputational damage  
U.S.D.C. D.Conn 308CV00441 RNC

June 2      **Louis Vutton v. Hyundai**  
Trademark confusion  
U.S.D.C. S.D.N.Y. 10 CIV 1611 (PKC)

**JACOB JACOBY - 2012 DEPOSITION TESTIMONY**

Apr 24      **Munchkin, Inc. v. The First Years, Inc., et al.**  
Materiality of patent markings  
U.S.D.C. C.D. CA, CV10-2219-GW(AGRx).

Apr 26      **Apple Inc. v. Samsung Electronics et al.**  
Secondary meaning  
U.S.D.C. N.D.Ca Case No. 11-cv-01846-LHK

May 4      **FLIR Systems, Inc. v. Sierra Media, Inc. and Fluke Corp.**  
Confusion and deception matter

U.S.D.C. D. Oregon (Portland Division) CV 10-971-HU

May 23

**Mixed Chicks LLC v. Sally Beauty Supply et al.**  
Trademark and trade dress confusion matter  
U.S.D.C. C.D.Ca Case No. SACV11-452-AG (FMOx)

July 26

**Moldex v. McKeon**  
Trade dress matter  
U.S.D.C. C.D. Calif (Western Division) CV11-01742 GHK (AGR)

**APPENDIX D**



# SAMURAI!

By **SABURO SAKAI**  
with **MARTIN CAIDIN** and  
**FRED SAITO**

# Samurai!

Saburo Sakai  
with Martin Caidin  
and Fred Saito



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Interior design by Gilda Hannah

## APPENDIX F

# Voodoo Moon Trilogy

–Werewolf’s Kiss

–Werewolf’s Touch

–Werewolf’s Sin

by Cheri Scotch



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## APPENDIX H

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# SNIPER HITSHOT



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AUTHOR'S NOTE:

The characters in this book are not modeled on anyone who actually exists. Rather, they are combinations of various people I've known and the product of my own somewhat bizarre imagination. With very few exceptions, any resemblance to actual people or events is unintentional and coincidental. All errors, technical and otherwise, are my own.

For the late Dr. Leonard N. Ozeroff

I wish to give my sincerest thanks to the following people:

To my wife Cyndi and my children Sarah, Rebecca, Leah, Jordan, Barry Jr., and Andrew—I'm sorry for the unrecoverable lost time, I really am. You deserved more from me. To my mother Sheila Ozeroff (whom I have placed on a pedestal so high I can no longer see her), thank you for your unending enthusiasm and support, which actually kept me going when I gave thought to throwing in the towel. To my brother and fellow author Mark Ozeroff, thanks for all your invaluable input, editorial suggestions, and other help.

To my other brother, Captain David F. Ozeroff, USN:

You were manning your post all the while, and I salute you.

To Randy Bulger—teacher, mentor, physician, inspiration, critic, and, above all, friend. Also, my provider of good diversions, good music, and good fellowship.

To my publishing team—my agent John Talbot, my publisher Roger Cooper, my editor Anne Greenberg, and my webmaster, Bill Parker. You da bomb.

And to the many others along the way, each of whom has been uniquely helpful, though you are too numerous to list, I send you my sincerest thanks. I hope to pay it forward.

This book is dedicated to America's domestic warriors; men and women who, though they wear

different uniforms and patches, are all still part of the same army. These are the heroes who run toward the sound of gunfire; the officers, deputies, and troopers who man our country's internal front lines against an ever growing tide of homegrown evil. Every day they push a sled around the worst areas of town, going head to head with and taking crap they don't need from people everyone else is afraid of. Too often they must see and do things that should be asked of no human, and only occasionally do they get to do things that make it all seem worthwhile. How is it that I always hear them say, "Can you believe they actually pay us to do this?"

You stay safe out there, all of you.

Prologue

Red and blue stroboscopic lightning cut through the venetian blinds and ricocheted off the frightened faces surrounding me. Sticking to the shadows with my back to the wall, I crept to the window and peeked between the slats.