

ESTTA Tracking number: **ESTTA478185**

Filing date: **06/14/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198355
Party	Plaintiff Facebook, Inc.
Correspondence Address	JEFFREY T NORBERG COOLEY LLP 777 6TH ST NW, SUITE 1100 WASHINGTON, DC 20001 UNITED STATES trademarks@cooley.com, krobinson@cooley.com, gcharlston@cooley.com, nmcMahon@cooley.com, jnorberg@cooley.com, mweiand@cooley.com, peckah@cooley.com
Submission	Testimony For Plaintiff
Filer's Name	Brendan J. Hughes
Filer's e-mail	bhughes@cooley.com, vbadolato@cooley.com
Signature	/Brendan J. Hughes/
Date	06/14/2012
Attachments	Ford Testimony Depo Trial Exhibit 1 - Expert Declaration.pdf (44 pages (211560 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application)	
Serial No. 85056260)	
)	
For the mark:)	Opposition No.: 91198355
FACEMAIL)	
)	Testimonial Declaration
Published in the Official Gazette)	of Dr. Gerald L. Ford
(Trademarks))	and Exhibits Thereto
)	
Facebook, Inc.,)	
)	
Opposer,)	
)	
v.)	
)	
Think Computer Corporation,)	
)	
Applicant.)	

I, Dr. Gerald L. Ford, hereby declare as follows:

INTRODUCTION

1. I am a partner in the marketing research and consulting firm of Ford Bubala & Associates, located in Huntington Beach, California, where I have been engaged in commercial marketing research and consulting for the past thirty-six years. I am also an emeritus faculty member of the School of Business Administration, California State University, Long Beach, where I held a full-time teaching position for twenty-five years, prior to my retirement from academia in 1994. My professional experience is further summarized below in paragraphs 57 through 67.

2. At the request of Cooley LLP, counsel for Facebook, Inc. ("Facebook" or "Opposer"), I designed and caused to be conducted two surveys. The first survey was designed to address the issue of fame with respect to the FACEBOOK mark.

Specifically, this survey was designed to measure the degree of recognition of the FACEBOOK mark for a social networking site, if any, among both the general public and the general consuming public.

3. Subsequently, at the request of Cooley LLP, I was asked to design and cause to be conducted a survey to address the issue of likelihood of confusion with respect to the proposed FACEMAIL mark. Specifically, the second survey was designed to measure the degree, if any, to which Think Computer Corporation's proposed FACEMAIL mark, as identified in Application Serial No. 85056260 for "E-mail data services; Providing e-mail and instant messaging services; Providing e-mail services; Secure e-mail services," is likely to cause confusion as to the source, authorization or approval of, or business affiliation or business connection of Applicant's business with Opposer, in particular due to the use of FACE in the proposed FACEMAIL mark.

4. The results of the first survey evidence a high level of recognition for the FACEBOOK mark among both the general public and the general consuming public (defined as past and/or potential internet users and past and/or potential social networking site users). The recognition of the FACEBOOK mark ranks first, exceeding the level of recognition of each of the other social networking marks tested. In total, on a net basis, after adjusting the survey data for mismeasurement or agreement bias, approximately ninety-five percent (94.58%) of the general public recognized the FACEBOOK mark. Among the general consuming public, marginally more past and/or potential internet users (i.e., 96.85%/96.36%) recognized the FACEBOOK mark and marginally

more past and/or potential social networking site users (i.e., 98.31%/97.93%) recognized the FACEBOOK mark.

5. It is my opinion that the results of the first survey support a finding that the FACEBOOK mark is famous.¹ Specifically, the survey results provide clear evidence that the FACEBOOK mark is widely recognized among both the general public and the general consuming public.

6. The results of the second survey evidence, on a net basis, after adjusting the survey data for mismeasurement error based upon the control, that approximately thirty-six percent (36.20%) of the relevant universe of potential consumers of email and/or instant messaging expressed the belief that Applicant's business provided under the proposed FACEMAIL mark is either offered by Facebook, that the name is being used with the authorization/approval of Facebook, or that the company that uses the name has a business affiliation/connection with Facebook.

7. It is my opinion that the results of the second survey clearly support a finding of likelihood of confusion. The survey results evidence that the relevant universe of potential consumers of email and/or instant messaging services are likely to be confused or deceived by the belief that Applicant's services are either offered by Facebook, are being offered with the authorization/approval of Facebook, or that the company that offers applicant's services has a business affiliation/connection with Facebook, and that such confusion is due in particular to the use of FACE in the proposed FACEMAIL mark. Specifically, the

¹ See 15 U.S.C.A. § 1125(c)(2)(A).

survey results make clear that the causal nexus for likelihood of confusion is due to the use of FACE in the proposed FACEMAIL mark and is not due to any other alternative explanation. That is because the control cell, using THINKMAIL, also employed the same list of services and asked the same survey questions, and resulted in no likelihood of confusion, it is certain that the net measured likelihood of confusion of approximately thirty-six percent (36.20%) is attributable solely to the presence of the FACE portion of Applicant's proposed FACEMAIL mark. Conversely, the survey results also make clear that the use of a dissimilar mark, such as THINKMAIL, in conjunction with the list of Applicant's specified services is not likely to cause confusion with Opposer Facebook.

FAME SURVEY

Survey Background

8. Attached hereto as Exhibit A are the results of the survey which addressed the issue of fame with respect to the FACEBOOK mark. Specifically, the survey reported herein was designed to measure the degree of recognition of the FACEBOOK mark, if any, among both the general public and the general consuming public. Exhibit A provides a synopsis of the survey methodology, survey screeners and questionnaires, and response frequencies for the survey questions. The Appendix of this report contains a sequential listing of the survey responses, copies of the Supervisor and Interviewer instructions which provide additional details of the survey protocols, and other survey-related background materials.

9. The survey sample selection, questions, questionnaire design, and interviewing procedures employed in this fame survey were designed in accordance with the generally accepted standards and procedures in the field of surveys. The survey was also designed to meet the criteria for survey trustworthiness detailed in the Federal Judicial Center's Manual for Complex Litigation, Fourth.²

10. I was responsible for the design of the survey, the survey's questions and the instructions given to the survey's supervisors and interviewers, and the procedures to be followed in conducting the interviews. Interviewing, data gathering, and response recordation were carried out, under the direction of Ford Bubala & Associates, by interviewers employed by an independent professional interviewing organization. The Project Director working on this study was personally trained by a representative of Ford Bubala & Associates in the survey design, procedures, and related protocols. In addition, approximately forty-seven percent (47.04%) of the study interviews were validated by the survey's supervisors' telephone monitoring of the interviews while they were being conducted or by telephone callback; and Ford Bubala & Associates also conducted validation

² For the proffered poll or survey, "...Relevant factors include whether: the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; and the data were analyzed in accordance with accepted statistical principles...In addition, in assessing the validity of a survey, the judge should take into account the following factors: whether the questions asked were clear and not leading; whether the survey was conducted by qualified persons following proper interview procedures; and whether the process was conducted so as to ensure objectivity..." See Federal Judicial Center, Manual for Complex Litigation, Fourth, Section 11.493, @ 102-104 (2004).

via telephone callback of an additional approximately twenty percent (20.44%) of the interviews in the study. Net, unduplicated validation totaled approximately sixty-four percent (63.79%).³ None of the interviews failed to validate.

11. The fame survey conducted in this matter was a probability-based survey employing a random digit telephone protocol. The sample of random digit telephone numbers for this survey was purchased from Survey Sampling, Inc., a firm which specializes in providing samples for survey research purposes. The sample for this survey was based upon a random digit probability sample of telephone numbers drawn from all working telephone exchanges in the continental U.S. for both landlines and cellular telephones. Quotas for completed interviews were established to provide a sample that is representative of the age and gender distribution of the U.S. population 13 years of age and older, based on the U.S. Census.

12. Generally, respondents qualified for inclusion in the survey were either (1) individuals who live in households with either listed or unlisted landline telephones (the respondent in the household was randomly selected using the next-birthday method),⁴ or (2) randomly selected cellular telephone numbers for individuals who receive all or most of their personal calls on a cellular telephone.

13. Attempts to contact prospective respondents were

³ This level of validation exceeds industry standards of 10% to 15%.

⁴ See James H. Frey, Survey Research by Telephone, Second Edition, 1989, pages 110-115.

made during afternoon and evening hours on weekdays and during daytime hours on weekends, in the time zones of respective respondents. Telephone callbacks occurred at any time during the day/evening when it was suggested that a prospective respondent would be available (i.e., for the landline calls). Interviewers made an initial call and, as necessary, up to five telephone callbacks (i.e., six calls) to reach a prospective respondent.

14. The sampling procedure utilized in the survey provides results that are representative and statistically projectable to all individuals, thirteen (13) years of age or older, in households in the continental U.S. who have a working landline telephone or receive all or most of their personal calls on a cellular telephone, with a known degree of error.⁵

15. In this study, the survey screeners (i.e., a screener for landline telephone calls and a screener for cellular telephone calls) and questionnaire were programmed for computer-assisted telephone interviewing (CATI) so that interviewers could read the survey questions and record the survey responses directly on their computer terminals. In total, four hundred six (406) interviews were completed among qualified randomly-selected respondents.

16. The fame survey was administered under a double-blind protocol. Specifically, not only were the respondents not informed as to the purpose or sponsor of the survey, but similarly, both the survey's supervisors and interviewers were

⁵ In the fame survey, the error factor at the 95% level of confidence is +/-2.20% among the general public. See Exhibit A, Appendix F.

not informed as to the purpose or sponsor of the survey.

Survey Procedures and Questions

17. The fame survey employed a traditional scientific experimental survey design consisting of test questions and an in-treatment control. In this survey, the in-treatment control was a fictitious mark (i.e., BROADMORE) that is not the name of a social networking site but rather a fictitious mark to provide an estimate of mismeasurement error (sometimes referred to as 'noise') resulting from such respondent behaviors as "yea saying" agreement bias or acquiescence.

18. The fame survey, as previously described, utilized a telephone protocol. After calling a telephone number and identifying a respondent who met the screening criteria (i.e., the universe definition),⁶ the qualified survey respondent was then told:

In a moment, I am going to ask you some questions about social networking sites on the internet.

Please understand that we are only interested in your opinions; and if you don't have an opinion or don't know the answer to a question, that is an acceptable answer.

The respondent was then asked the following unprompted or unaided question:

4.0 Now, thinking about social networking sites on the internet would you please tell me the names of the social networking sites that you can think of?

A respondent who could think of one or more social networking

⁶ For the landline telephone calls, the universe definition was that individual in the household having the next birthday. For the cellular telephone calls, the universe definition was that the individual received all or most of their personal calls at that cellular telephone number. See Exhibit A, pages 5-6 and page 10.

sites was then asked a second unaided question:

- 4.1 What other names of social networking sites, if any, can you think of?⁷

The respondent was then told:

- 5.0 Now, I am going to read you some additional names that may or may not be names used for social networking sites on the internet.⁸

The respondent was then asked a prompted or aided question with regard to several social networking site names. To accomplish this the respondent was read a list of social networking site names and asked whether he/she had ever heard of each of the social networking site names. The social networking site names on the list included: FACEBOOK, TWITTER, CLASSMATES, DIGG, BEBO, GATHER, HELIUM, GOODREADS,⁹ ¹⁰ and the control social networking site name BROADMORE. The order of the list of social networking site names and the control name were randomized for each respondent to guard against any potential order bias. The

⁷ Respondents who could not think of one or more social networking sites, to question 4.0, were not asked this question.

⁸ Respondents who did not name any social networking sites in question 4.0 were not asked question 5.0 but rather were asked question 5.1: I am going to read you some names that may or may not be names used for social networking sites on the internet.

⁹ In the aided question, respondents were only asked about social networking site names that they had not mentioned in response to either of the unaided questions (i.e., questions 4.0 and 4.1).

¹⁰ The eight social networking names, in the aided list, were randomly chosen from the top 20 most-visited social networking sites based upon comScore data of total unique visitors in the U.S. for a 12-month average from December, 2009, through November, 2010. Two social networking site names, for which there were data available for all twelve months, were randomly selected from each of the 4 quartiles in the top 20 sites.

BROADMORE name, which is a fictitious social networking site name, was asked of each respondent to measure the level of mismeasurement error or agreement bias in the data that may have been generated as a result of asking the aided question (i.e., an in-treatment control question).

19. Next, a respondent was asked four questions:

6.0 Within the past month, have you accessed the internet?

6.1 Within the next month, are you likely to access the internet?

7.0 Within the past month, have you accessed one or more social networking sites?

and

7.1 Within the next month, are you likely to access one or more social networking sites?

See Exhibit A, pages 7-9 and pages 11-13.

Survey Results - General Public

20. The FACEBOOK mark for a social networking site was identified by approximately seventy-four percent (73.65%) of the general public in response to the unprompted or unaided recall questions (i.e., "...would you please tell me the names of social networking sites that you can think of?" and "What other names of social networking sites, if any, can you think of?"). This level of unaided identification of the FACEBOOK mark for a social networking site exceeds the level of unaided identification of all other social networking sites. See Exhibit A, Table 1, page 15.

21. In total, in response to the unaided and aided questions combined, approximately ninety-seven percent (97.29%) of the general public reported recognition of the FACEBOOK mark

for a social networking site. See Exhibit A, Table 2, page 16.

TABLE 1¹¹

UNAIDED RECOGNITION OF SOCIAL NETWORKING MARKS

- Q4.0 Now, thinking about social networking sites on the internet, would you please tell me the names of social networking sites that you can think of?
- Q4.1 What other names of social networking sites, if any, can you think of?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=406)
1. Facebook	299	73.65
2. Bebo	1	0.25
3. Broadmore	--	---
4. Classmates	2	0.49
5. Digg	3	0.74
6. Gather	--	---
7. Goodreads	--	---
8. Helium	--	---
9. Twitter	157	38.67
10. Google	15	3.69
11. LinkedIn	34	8.37
12. Myspace	184	45.32
13. Yahoo	22	5.42
14. Other unaided social networking marks ¹²	112	na
15. None	92	22.66

22. The total recognition of a mark is accomplished by adding the unduplicated unaided and aided recall of the mark. In total, recognition of the FACEBOOK mark for a social networking site among the general public is approximately ninety-seven percent (97.29%) when the results of the unaided questions are combined with the results of the aided questions. This level of recognition of the FACEBOOK mark for a social networking site

¹¹ The table numbers in this declaration correspond to the table numbers in Exhibit A and therefore may not be sequential.

¹² No other social networking mark accounted for more than 3.0%. See Appendix B.

exceeds the level of recognition of every other social networking site tested with the exception of TWITTER. See Exhibit A, Table 2, page 16.

TABLE 2

UNAIDED AND AIDED RECOGNITION OF SOCIAL NETWORKING MARKS

- Q4.0 Now, thinking about social networking sites on the internet, would you please tell me the names of social networking sites that you can think of?
- Q4.1 What other names of social networking sites, if any, can you think of?
- Q5.0 Now, I am going to read you some additional names that may or may not be names used for social networking sites on the internet. Have you ever heard of INSERT NAME(S) NOT MENTIONED IN Q4.0 OR Q4.1?
- Q5.1 Now, I am going to read you some names that may or may not be names used for social networking sites on the internet. Have you ever heard of...

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=406)
1. Facebook	395	97.29
2. Bebo	57	14.04
3. Broadmore	11	2.71
4. Classmates	187	46.06
5. Digg	46	11.33
6. Gather	5	1.23
7. Goodreads	22	5.42
8. Helium	22	5.42
9. Twitter	394	97.04
10. Other unaided social networking marks	367	na

23. As noted earlier, each respondent was asked, in the aided question, whether they recognized the fictitious mark BROADMORE, as a measure of the level of mismeasurement error or agreement bias in the survey data that may have been generated as a result of asking the aided question (i.e., an in-treatment control question). The mismeasurement adjustment is accomplished by reducing the percent of FACEBOOK identifications (unaided)

plus the percent of FACEBOOK recognitions (aided) by the percent of "yes" responses to the aided question "Have you ever heard of BROADMORE?" Thus, in total, on a net basis, after adjusting the survey data for mismeasurement or agreement bias, approximately ninety-five percent (i.e., $97.29\% - 2.71\% = 94.58\%$) of the general public recognizes the FACEBOOK mark for a social networking site.

Survey Results - General Consuming Public -
Past and Potential Internet Users

24. A review of the survey results with respect to the past and potential internet users evidences a marginally higher level of recognition of the FACEBOOK mark for a social networking site than the general public in total.

25. Specifically, after adjusting the survey data for mismeasurement or agreement bias, the net level of recognition of the FACEBOOK mark for a social networking site among past and potential internet users ranges from approximately ninety-seven percent for past internet users ($99.71\% - 2.86\% = 96.85\%$) to approximately ninety-six percent for potential internet users ($99.16\% - 2.80\% = 96.36\%$) (i.e., the general consuming public). See Exhibit A, Table 6, page 21, and Table 8, page 23.

TABLE 6

PAST INTERNET USERS
UNAIDED AND AIDED RECOGNITION OF SOCIAL NETWORKING MARKS

- Q6.0 Within the past month, have you accessed the internet?
[Yes]
- Q4.0 Now, thinking about social networking sites on the internet, would you please tell me the names of social networking sites that you can think of?
- Q4.1 What other names of social networking sites, if any, can you think of?
- Q5.0 Now, I am going to read you some additional names that may or may not be names used for social networking sites on the internet. Have you ever heard of INSERT NAME(S) NOT MENTIONED IN Q4.0 OR Q4.1?
- Q5.1 Now, I am going to read you some names that may or may not be names used for social networking sites on the internet. Have you ever heard of...

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=350)
1. Facebook	349	99.71
2. Bebo	50	14.29
3. Broadmore	10	2.86
4. Classmates	175	50.00
5. Digg	42	12.00
6. Gather	4	1.14
7. Goodreads	17	4.86
8. Helium	17	4.86
9. Twitter	345	98.57
10. Other unaided social networking marks	356	na
11. None	47	13.43

TABLE 8

POTENTIAL INTERNET USERS
UNAIDED AND AIDED RECOGNITION OF SOCIAL NETWORKING MARKS

- Q6.1 Within the next month, are you likely to access the internet? [Yes]
- Q4.0 Now, thinking about social networking sites on the internet, would you please tell me the names of social networking sites that you can think of?
- Q4.1 What other names of social networking sites, if any, can you think of?
- Q5.0 Now, I am going to read you some additional names that may or may not be names used for social networking sites on the internet. Have you ever heard of INSERT NAME(S) NOT MENTIONED IN Q4.0 OR Q4.1?
- Q5.1 Now, I am going to read you some names that may or may not be names used for social networking sites on the internet. Have you ever heard of...

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=357)
1. Facebook	354	99.16
2. Bebo	53	14.85
3. Broadmore	10	2.80
4. Classmates	177	49.58
5. Digg	45	12.61
6. Gather	5	1.40
7. Goodreads	18	5.04
8. Helium	19	5.32
9. Twitter	349	97.76
10. Other unaided social networking marks	359	na
11. None	51	14.29

Survey Results - General Consuming Public -
Past and Potential Social Networking Users

26. A review of the survey results with respect to the past and potential social networking users once again evidences a marginally higher level of recognition of the FACEBOOK mark for a social networking site than the general public in total.

27. Specifically, after adjusting the survey data for mismeasurement or agreement bias, the net level of recognition of the FACEBOOK mark for a social networking site among past and

potential social networking users is approximately ninety-eight percent for both past users of social networking sites (100.00% - 1.69% = 98.31%) and potential users of social networking sites (100.00% - 2.07% = 97.93%) (i.e., the general consuming public). See Exhibit A, Table 12, page 28, and Table 14, page 30.

TABLE 12

PAST SOCIAL NETWORK USERS
UNAIDED AND AIDED RECOGNITION OF SOCIAL NETWORKING MARKS

- Q7.0 Within the past month, have you accessed one or more social networking sites? [Yes]
- Q4.0 Now, thinking about social networking sites on the internet, would you please tell me the names of social networking sites that you can think of?
- Q4.1 What other names of social networking sites, if any, can you think of?
- Q5.0 Now, I am going to read you some additional names that may or may not be names used for social networking sites on the internet. Have you ever heard of INSERT NAME(S) NOT MENTIONED IN Q4.0 OR Q4.1?
- Q5.1 Now, I am going to read you some names that may or may not be names used for social networking sites on the internet. Have you ever heard of...

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=236)
1. Facebook	236	100.00
2. Bebo	39	16.53
3. Broadmore	4	1.69
4. Classmates	137	58.05
5. Digg	28	11.86
6. Gather	3	1.27
7. Goodreads	11	4.66
8. Helium	13	5.51
9. Twitter	234	99.15
10. Other unaided social networking marks	288	na
11. None	12	5.08

TABLE 14

POTENTIAL SOCIAL NETWORK USERS
UNAIDED AND AIDED RECOGNITION OF SOCIAL NETWORKING MARKS

- Q7.1 Within the next month, are you likely to access one or more social networking sites? [Yes]
- Q4.0 Now, thinking about social networking sites on the internet, would you please tell me the names of social networking sites that you can think of?
- Q4.1 What other names of social networking sites, if any, can you think of?
- Q5.0 Now, I am going to read you some additional names that may or may not be names used for social networking sites on the internet. Have you ever heard of INSERT NAME(S) NOT MENTIONED IN Q4.0 OR Q4.1?
- Q5.1 Now, I am going to read you some names that may or may not be names used for social networking sites on the internet. Have you ever heard of...

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=242)
1. Facebook	242	100.00
2. Bebo	39	16.12
3. Broadmore	5	2.07
4. Classmates	136	56.20
5. Digg	27	11.16
6. Gather	3	1.24
7. Goodreads	13	5.37
8. Helium	15	6.20
9. Twitter	240	99.17
10. Other unaided social networking marks	285	na
11. None	19	7.85

Conclusion

28. It is my considered opinion, based upon my education, background, and professional experience, and based upon my review and analysis, that the results of the survey designed to address the issue of fame support a finding that the FACEBOOK mark is famous. Specifically, the survey results provide clear evidence that the FACEBOOK mark is widely

recognized among both the general public and the general consuming public.

LIKELIHOOD OF CONFUSION SURVEY

Survey Background

29. Attached hereto as Exhibit B are the results of the survey which address the issue of likelihood of confusion with respect to the source, authorization/approval of, or business affiliation/connection of Applicant's business with Opposer Facebook. Exhibit B provides a synopsis of the survey methodology, copies of the survey exhibits, the survey screener and questionnaire, response distributions for the survey questions, and a listing of the survey responses. The Appendix of Exhibit B contains a sequential listing of the survey responses and other survey-related background materials.

30. The sample selection, questions, questionnaire design, and interviewing procedures employed in this survey were designed in accordance with the generally accepted standards and procedures in the field of surveys. The survey was also designed to meet the criteria for survey trustworthiness detailed in the Manual for Complex Litigation, Fourth.¹³

31. I was responsible for the design of the survey, the survey's questionnaire and for the procedures to be followed in conducting the survey. Interviewing and data gathering were carried out, under the direction of Ford Bubala & Associates, by Knowledge Networks, an independent professional organization who maintains an online non-volunteer internet panel. Ford Bubala &

¹³ Supra note 2.

Associates conducted validations of approximately twenty percent (20.15%) of the interviews by recontacting, by telephone, survey respondents to confirm their qualification and participation in the survey.¹⁴ None of the interviews failed to validate.

32. The survey conducted in this matter was administered under a double-blind protocol. Specifically, not only were the respondents not informed as to the purpose or sponsor of the survey, but similarly, the staff of Knowledge Networks was not informed as to the purpose or sponsor of the survey.

33. Generally, respondents who qualified for the survey were males and females eighteen (18) years of age or older who met the following specific criteria: who currently use email and/or currently use instant messaging; who agreed to answer the questions in the survey by themselves without the help or assistance of anyone else and without seeking information from any other source (e.g., internet search); and who, if they wore contact lenses or eyeglasses when looking at a computer monitor,¹⁵ would wear them when filling out the questionnaire.

¹⁴ Supra note 3.

¹⁵ When the Knowledge Networks' panel was originally created, in 1999, all participating households were given a WebTV to use in answering surveys. In 2002, Knowledge Networks allowed panel members to use their own internet-connected computers, if they had one, in answering surveys. In 2009, Knowledge Networks provided laptops to non-internet households instead of WebTV units. See <http://www.knowledgenetworks.com/knpanel/KNPanel-Design-Summary.html>.

34. This survey employed a non-volunteer internet panel created and maintained by Knowledge Networks. Knowledge Networks' panel is a probability-based internet panel generally representative of the U.S. population based upon the U.S. Census. Knowledge Networks' panel consists of approximately fifty thousand U.S. residents eighteen years of age or older, including cell phone-only households.

35. Potential survey respondents were randomly selected from members of the Knowledge Networks panel.

36. The survey results are representative and statistically projectable to all adults in the U.S. eighteen (18) years of age or older who currently use email and/or instant messaging, and who also met the other conditions of the survey universe.

Survey Structure

37. The likelihood of confusion survey employed in this matter used a traditional scientific experimental survey design consisting of two survey cells: (1) a test or experimental survey cell designed to measure the likelihood of confusion, if any, with respect to the source, authorization/approval of, or business affiliation/connection of Applicant's business provided under the proposed FACEMAIL mark; and (2) a control survey cell designed to measure the extent of mismeasurement in the test cell survey results.

38. This survey was designed to conform to the survey design preference of the Patent and Trademark Office Trademark Trial and Appeal Board.¹⁶

39. In the test cell, survey respondents were shown, on a computer monitor, the Applicant's proposed FACEMAIL mark, in the format shown on Application Serial No. 85056260, and below that the list of services taken directly from the Applicant's trademark application. Respondents were asked to look at Applicant's proposed mark and description of services (i.e., E-mail data services; Providing e-mail and instant messaging services; Providing e-mail services; Secure e-mail services,) on the screen and were then asked questions regarding their state of mind with respect to the source, authorization/approval of, or business affiliation/connection of Applicant's business provided under the proposed FACEMAIL mark. See Exhibit B, page 6.

40. In the control cell, respondents were shown, on a computer monitor, the fictitious THINKMAIL mark in the same size and font as the mark on the test cell card, and below that the same list of services from Applicant's trademark application. Respondents were asked to look at the fictitious THINKMAIL name and services on the card and were then asked the same questions as in the test cell regarding their state of mind with respect to the source, authorization/approval of, or business

¹⁶ See Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc., 1 USPQ2d 1445 (TTAB 1987); Carl Karcher Enterprises, Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995); and OMS Investments, Inc. v. Central Garden & Pet Company, 2006 TTAB LEXIS 274 (TTAB 2006).

affiliation/connection of a business with the fictitious mark.
See Exhibit B, page 55.

41. The control survey cell, using the fictitious THINKMAIL mark, provides a measure of mismeasurement error, to the degree it exists, in the test cell survey results. That is, the control survey cell functions as a baseline and provides a measure of the degree to which respondents are likely to give the answer FACEBOOK or an answer related to a social networking site not as a result of Applicant's use of the proposed FACEMAIL mark for its services, but because of other factors, such as the survey's questions, the survey's procedures, the nature of the services identified on the application, or some other potential influence on a respondent's answers such as Opposer's market share or brand popularity.

42. In a fashion similar to the protocols employed in a pharmaceutical drug test, the test or experimental cell represents the drug or pill with the "active" ingredient and the control cell represents the "placebo" that does not contain the active ingredient being tested, "FACE." Thus, THINKMAIL was chosen as the control mark because it includes the Applicant's corporate name but not the "active" ingredient "FACE."¹⁷

¹⁷ This methodology is consistent with the methodology discussed by Professor Diamond in the Federal Judicial Center's Reference Manual on Scientific Evidence, Second; "It is possible to adjust many survey designs so that causal inferences about the effect of a [stimulus]...become clear and unambiguous. By adding an appropriate control group, the survey expert can test directly the influence of the stimulus.... Respondents in both the experimental and control groups answer the same set of questions. The effect of the [stimulus]...is evaluated by comparing the responses made by the experimental group members with those of the control group members.... Both preexisting beliefs and other

[continued]

43. The test and control cells were separate surveys. The questions and procedures for the test cell and the control cell were identical with the exception of the mark or name on the computer monitor shown to respondents. Any single respondent participated in interviews in only one of the two survey cells.

44. The likelihood of confusion survey conducted in this matter also used a "Why do you say that?" question to provide insight into the respondents' beliefs expressed in response to the survey's source, authorization/approval of, and business affiliation/connection questions.

45. In total, five hundred fifty-one (551) interviews were conducted in this survey: two hundred seventy-nine (279) interviews were conducted in the test cell; and two hundred seventy-two (272) interviews were conducted in the control cell.

Survey Procedures and Questions

46. Initially, potential survey respondents received an email invitation (see Exhibit B, Appendix B) inviting them to fill out the screening portion of the interview to determine whether or not they met the defined universe definition. See Exhibit B, page 7. Subsequently, those potential respondents who met the defined universe definition were invited to complete the main survey. See Exhibit B, pages 8-10.

background noise should have produced similar response levels in the experimental and control groups. In addition, if respondents who viewed the [test cell stimulus]...respond differently than respondents who viewed the control [cell stimulus]..., the difference cannot be the result of a leading question, because both groups answered the same question..." Shari Seidman Diamond "Reference Guide on Survey Research," in the Federal Judicial Center's Reference Manual on Scientific Evidence, Second, pages 257-258.

47. At the beginning of the questionnaire, respondents were shown the following statements:

In this survey, you are going to be shown a survey exhibit and then you will be asked a few questions.

Please understand that we are only interested in your opinions or beliefs; and if you don't have an opinion or belief or don't know the answer to a question, that is an acceptable answer.

Please feel free to take as much time as you like looking at the survey exhibit before moving on to the survey questions.

Respondents were then shown, on the monitor, the Applicant's mark and description of services from the trademark application or the control mark and the same description of services. When a respondent was finished viewing the exhibit, he/she proceeded to the next screen¹⁸ and was asked:

4.0 Who, or what company, do you believe is offering these services with this name?¹⁹

For respondents who indicated a belief as to who is offering these services with this name, the respondent was asked the basis for that belief with the question:

4.1 Why do you say that?²⁰

¹⁸ On this and all subsequent screens respondents were shown the same survey exhibit but in a reduced size.

¹⁹ The first principal survey question (i.e., question series 4.0) was designed to address the issue of likelihood of confusion as to source or origin and were patterned after similar accepted questions. See Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir. 1976), cert. denied, 429 U.S. 830, 50 L. Ed. 2d 94, 97 S. Ct. 91 (1976); E. & J. Gallo Winery v. Gallo Cattle Co., 12 USPQ2d 1657, 1674 (E.D. Cal. 1989) aff'd, 967 F.2d (9th Cir. 1992); and J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Vol. 6 §32:174 at 32-373, Rel. #53, 3/2010.

²⁰ Respondents who did not indicate a belief as to who is offering these services with this name were not asked question 4.1.

Next, all respondents were then asked:²¹

- 5.0 Do you believe that the services with this name:
- one, are being offered with the authorization or approval of any other company or companies;
 - two, are not being offered with the authorization or approval of any other company or companies;²²
or
 - three, don't know or have no opinion?

Respondents who indicated that they believed that the services with this name was being offered with the authorization/approval of any other company or companies were asked:

5.1 With what other company or companies?

If the respondent provided a company/companies he/she was asked the basis for the belief with the question:

5.2 Why do you say that?²³

²¹ The principal survey questions designed to address likelihood of confusion as to authorization or approval or business affiliation/connection were also patterned after similar accepted questions. J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Vol. 6 §32:175 at 32-375, Rel. #53, 3/2010.

²² To guard against any order bias, the first two alternatives in this list were rotated (i.e., approximately one-half of the respondents saw the list with the first alternative being "...are being offered with the authorization or approval..." and approximately one-half of the respondents saw the list with the first alternative being "...are not being offered with the authorization or approval...").

²³ Respondents who did not know the name of the company or companies in response to question 5.1 were not asked this question.

All respondents were asked this same series of questions with regard to business affiliation/connection. Specifically, respondents were asked:

- 6.0 Do you believe that the company that offers these services with this name:
- one, has a business affiliation or business connection with any other company or companies;
 - two, does not have a business affiliation or business connection with any other company or companies;²⁴ or
 - three, don't know or have no opinion?

Respondents who indicated that they believed that the company that offers these services with this name has a business affiliation/connection with any other company or companies were asked:

- 6.1 With what other company or companies?

If the respondent provided a company/companies he/she was asked the basis for the belief with the question:

- 6.2 Why do you say that?²⁵

²⁴ Again, to guard against any order bias, the first two alternatives in this list were rotated (i.e., approximately one-half of the respondents were shown the list with the first alternative being "...has a business affiliation or business connection..." and approximately one-half of the respondents were shown the list with the first alternative being "...does not have a business affiliation or business connection...").

As an additional guard against order bias, the order of question series 5.0 and 6.0 were rotated (i.e., approximately one-half of the respondents were queried in question 5.0 regarding authorization/approval and in question 6.0 regarding business affiliation/connection, and approximately one-half of the respondents were queried in question 5.0 regarding business affiliation/connection and in question 6.0 regarding authorization/approval).

²⁵ Again, respondents who did not know the name of the company or companies in response to question 6.1 were not asked this question.

Survey Results - Test Cell

48. In the test cell, approximately thirty percent (30.47%) of the relevant universe of potential consumers of email and/or instant messaging services expressed the belief that Facebook is the source of the email and/or instant messaging services offered under the proposed mark FACEMAIL. See Exhibit B, Table 1, page 11.

TABLE 1
TEST CELL - FACEMAIL

Q4.0 Who, or what company, do you believe is offering these services with this name?
Q4.1 Why do you say that?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=279)
1. Facebook	85	30.47
2. Facebook or Other	2	0.72
3. Facemail	50	17.92
4. Other	26	9.32
5. Don't know	116	41.58
6. No response	--	---
Total	<u>279</u>	<u>100.00</u>

49. An additional approximately one percent (1.08%) of the survey respondents in the test cell, reported that they believed that the email and/or instant messaging services offered under the name FACEMAIL were being offered with the authorization or approval of Facebook. See Exhibit B, Table 2, page 28.

TABLE 2
TEST CELL - FACEMAIL

- Q5.0 Do you believe that the services with this name...
- one, are being offered with the authorization or approval of any other company or companies;
 - two, are not being offered with the authorization or approval of any other company or companies; or
 - three, don't know or have no opinion?
- Q5.1 With what other company or companies?
- Q5.2 Why do you say that?

<u>Response Categories</u>	<u>Response Distribution</u>			
	<u>Number</u>	<u>Percent</u>	<u>Unduplicated</u>	<u>Percent</u>
		(n=279)		(n=279)
1. Are being offered with authorization or approval				
• Facebook	16	5.73	3	1.08
• Facebook or Other	3	1.08		
• Facemail	--	---		
• Other	8	2.87		
• Don't know	27	9.68		
• No response	--	---		
Subtotal	54	19.35		
2. Are not being offered with authorization or approval	47	16.85		
3. Don't know/No opinion	177	63.44		
4. No response	1	0.36		
Total	279	100.00		

50. An additional approximately four percent (4.30%) of the survey respondents in the test cell, reported that they believed that the company that offers the email and/or instant messaging services under the name FACEMAIL has a business affiliation or business connection with Facebook. See Exhibit B, Tale 3, page 39.

TABLE 3
TEST CELL - FACEMAIL

- Q6.0 Do you believe that the company that offers these services with this name...
- one, has a business affiliation or business connection with any other company or companies;
 - two, does not have a business affiliation or business connection with any other company or companies; or
 - three, don't know or have no opinion?
- Q6.1 With what other company or companies?
- Q6.2 Why do you say that?
-

<u>Response Categories</u>	<u>Response Distribution</u>			
	<u>Number</u>	<u>Percent</u>	<u>Unduplicated</u> <u>Number</u>	<u>Percent</u>
		(n=279)		(n=279)
1. Has a business affiliation/ connection				
• Facebook	43	15.41	12	4.30
• Facebook or Other	3	1.08		
• Facemail	--	---		
• Other	15	5.38		
• Don't know	45	16.13		
• No response	1	0.36		
Subtotal	107	38.35		
2. Does not have a business affiliation/connection	36	12.90		
3. Don't know/No opinion	134	48.03		
4. No response	2	0.72		
Total	279	100.00		

Survey Results - Control Cell

51. In the control cell, none of the relevant universe of potential consumers of email and/or instant messaging services expressed the belief that Facebook is the source of the email and/or instant messaging services offered under the control mark THINKMAIL. See Exhibit B, Table 4, page 60.

TABLE 4
CONTROL CELL - THINKMAIL

Q4.0 Who, or what company, do you believe is offering these services with this name?

Q4.1 Why do you say that?

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Number</u>	<u>Percent</u> (n=272)
1. Facebook	--	---
2. Facebook or Other	--	---
3. Thinkmail	72	26.47
4. Other	47	17.28
5. Don't know	153	56.25
Total	<u>272</u>	<u>100.00</u>

52. None of the survey respondents in the control cell reported that they believed that the email and/or instant messaging services offered under the name THINKMAIL were being offered with the authorization or approval of Facebook.²⁶ See Exhibit B, Table 5, page 75.

TABLE 5
CONTROL CELL - THINKMAIL

- Q5.0 Do you believe that the services with this name...
- one, are being offered with the authorization or approval of any other company or companies;
 - two, are not being offered with the authorization or approval of any other company or companies; or
 - three, don't know or have no opinion?
- Q5.1 With what other company or companies?
- Q5.2 Why do you say that?

<u>Response Categories</u>	<u>Response Distribution</u>			
	<u>Number</u>	<u>Percent</u>	<u>Unduplicated</u>	<u>Number</u>
		(n=272)		(n=272)
1. Are being offered with authorization or approval				
• Facebook	--	---	--	---
• Facebook or Other	1	0.37		
• Thinkmail	--	---		
• Other	25	9.19		
• Don't know	29	10.66		
• No response	--	---		
Subtotal	55	20.22		
2. Are not being offered with authorization or approval	50	18.38		
3. Don't know/No opinion	167	61.40		
Total	272	100.00		

²⁶ One respondent to the question series 5.0 and one respondent in question series 6.0 gave a FACEBOOK or other response. FACEBOOK or other responses were not counted as an indication of a likelihood of confusion in the test cell and, as such, are not counted as a likelihood of confusion in the control cell, due to the fact that they are not exclusive FACEBOOK answers.

53. None of the survey respondents in the control cell reported that they believed that the company that offers the email and/or instant messaging services under the name THINKMAIL has a business affiliation or business connection with Facebook. See Exhibit B, Table 6, page 86.

TABLE 6
CONTROL CELL - THINKMAIL

- Q6.0 Do you believe that the company that offers these services with this name...
- one, has a business affiliation or business connection with any other company or companies;
 - two, does not have a business affiliation or business connection with any other company or companies; or
 - three, don't know or have no opinion?
- Q6.1 With what other company or companies?
- Q6.2 Why do you say that?

<u>Response Categories</u>	<u>Response Distribution</u>			
	<u>Number</u>	<u>Percent</u>	<u>Unduplicated</u>	<u>Number</u>
		(n=272)		(n=272)
1. Has a business affiliation/ connection				
• Facebook	--	---	--	---
• Facebook or Other	1	0.36		
• Thinkmail	--	---		
• Other	32	11.47		
• Don't know	49	17.56		
Subtotal	82	29.39		
2. Does not have a business affiliation/connection	56	20.07		
3. Don't know/No opinion	134	48.03		
Total	272	97.49		

Summary of Survey Results

54. The results of the likelihood of confusion survey evidence, on a net basis, after adjusting the survey data for mismeasurement error based upon the control mark, that approximately thirty-six percent (36.20% - 0% = 36.20%) of the relevant universe of potential consumers of email and/or instant

messaging expressed the belief that Applicant's business provided under the proposed FACEMAIL mark is either offered by Facebook, that the name is being used with the authorization/approval of Facebook, or that the company that uses the name has a business affiliation/connection with Facebook. See Exhibit B, Table 7, page 99.

TABLE 7
TEST CELL AND CONTROL CELL

Composite Response Analysis
Net Unduplicated Facebook Responses

<u>Response Categories</u>	<u>Response Distribution</u>	
	<u>Test Cell</u>	<u>Control Cell</u>
	<u>Percent</u> (n=279)	<u>Percent</u> (n=272)
1. Facebook	36.20	---

55. Finally, the likelihood of confusion survey also used a "Why do you say that?" question to provide insight into the respondents' beliefs expressed in response to the survey's source, authorization/approval of, and business affiliation/connections questions. In response to the "Why do you say that?" question, numerous respondents made specific reference to the similarities in the names FACEMAIL and FACEBOOK as the reason for their expressed beliefs.

TEST CELL
RESPONDENT

NUMBER RESPONSE

462	Q4.0	Facebook.
	Q4.1	Because of the name.
466	Q4.0	Facebook.
	Q4.1	Just a guess because of Facebook.
469	Q4.0	It doesn't say, but by the name could be Facebook.
	Q4.1	The name Facemail, like Facebook.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

476	Q4.0	Facebook.
	Q4.1	Face.
482	Q4.0	Facebook.
	Q4.1	Face is not a word I would associate with e-mail normally. So it must be a reference to a company like Facebook.
500	Q4.0	Facebook.
	Q4.1	Sounds similar.
503	Q4.0	Facebook.
	Q4.1	The use of the word Face as the name of the product.
505	Q4.0	Facebook.
	Q4.1	Face?
531	Q4.0	Facebook.
	Q4.1	Similar name.
537	Q4.0	Facebook.
	Q4.1	Reference to Face before e-mail.
539	Q4.0	Facebook.
	Q4.1	Part of the name.
540	Q4.0	Facebook.
	Q4.1	Sounds like Facebook would name a service Facemail.
542	Q4.0	Facebook.
	Q4.1	Simply because of the similarity in the two names. Facemail, Facebook.
548	Q4.0	Facebook.
	Q4.1	The word Face in Facemail.
549	Q4.0	Facebook.com.
	Q4.1	Face.
551	Q4.0	Facebook.
	Q4.1	Facebook, Facemail = simple association.
555	Q4.0	Facebook.
	Q4.1	Name similar.
561	Q4.0	Probably Facebook.
	Q4.1	Because it has Face in the name.
562	Q4.0	Facebook.
	Q4.1	Face is in name.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

575	Q4.0	Facebook.
	Q4.1	The name, plus the fact that the services offered are also offered by Facebook through their website.
580	Q4.0	Facebook. E-mail.
	Q4.1	Face-mail implies it.
585	Q4.0	Facebook.
	Q4.1	Face in the name.
586	Q4.0	Facebook.
	Q4.1	Similar name.
587	Q4.0	Facebook.
	Q4.1	The Facemail logo and the word Face.
591	Q4.0	Facebook.
	Q4.1	Similar name/service.
592	Q4.0	Facebook.
	Q4.1	So closely associated with Face.
596	Q4.0	Facebook.
	Q4.1	Because the word Face is in both.
597	Q4.0	Facebook.
	Q4.1	Because of Face in the name.
598	Q4.0	Facebook.
	Q4.1	Face in the title.
624	Q4.0	Facebook.
	Q4.1	Facemail looks similar to Facebook.
627	Q4.0	Facebook.
	Q4.1	Because they both start with Face.
631	Q4.0	Facebook.
	Q4.1	Similar name.
632	Q4.0	I would associate it with Facebook.
	Q4.1	The first part of the email refers has part of the company's name.
635	Q4.0	Facebook.
	Q4.1	Facebook and Facemail both begin with the word Face, so it seems that they should be owned by the same company.
643	Q4.0	Facebook.
	Q4.1	Because of the name.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

644	Q4.0	Facebook.
	Q4.1	The word Face preceding the word mail.
658	Q4.0	Facebook.
	Q4.1	I say that based on the name.
663	Q4.0	Facebook.
	Q4.1	The name.
664	Q4.0	Facebook.
	Q4.1	Face is the first part of the name.
670	Q4.0	Facebook.
	Q4.1	Because it has Face in the name.
701	Q4.0	Facebook.
	Q4.1	I thought I heard it on the news.
703	Q4.0	Facebook.
	Q4.1	The word Face in the title.
733	Q4.0	Facebook.
	Q4.1	They both have Face in the front. Probably only a big company will consider to enter the email provider industry.
749	Q4.0	Facebook.
	Q4.1	Facemail - Face maybe from Facebook.
758	Q4.0	Facebook.
	Q4.1	Facemail, like Gmail is Google.
767	Q4.0	Facebook.
	Q4.1	Starts with Face.
773	Q4.0	Probably Facebook.
	Q4.1	It seems like it's a play on words with email for Facebook users.
776	Q4.0	Facebook.
	Q4.1	Because of the name Facemail.
781	Q4.0	Facebook.
	Q4.1	Because it's called Facemail like Facebook.
784	Q4.0	Facebook.
	Q4.1	Because of Face in the name.
801	Q4.0	Facebook.
	Q4.1	Because it starts with the word Face.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

810	Q4.0	Facebook.
	Q4.1	From the name I could see its similar to Facebook. They don't have an e-mailing feature as of now, may be they are going introduce that as well.
811	Q4.0	Facebook.
	Q4.1	Because of the word Face.
814	Q4.0	Facebook.
	Q4.1	Face is in name.
823	Q4.0	Facebook.
	Q4.1	Face in the email title.
828	Q4.0	Possibly Facebook, but I haven't heard of it, yet.
	Q4.1	I use Facebook often, but haven't seen it advertised on there.
830	Q4.0	Facebook.
	Q4.1	They are popular now & because of the word Face.
860	Q4.0	Facebook.
	Q4.1	It sounds like Facemail.
866	Q4.0	Facebook.
	Q4.1	Face.
875	Q4.0	Facebook.
	Q4.1	It is called Facemail.
882	Q4.0	Facebook.
	Q4.1	Similar in name.
884	Q4.0	Facebook.
	Q4.1	Because of the name Face.
893	Q4.0	Facebook.
	Q4.1	Face is likely the root of Facemail similar to Facebook much like iMac, iTunes, iPod are related with "i."
899	Q4.0	Facebook.
	Q4.1	Because Facemail seems to be a combination of Facebook and email.
904	Q4.0	Facebook.
	Q4.1	Because of the Face in the name.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

905	Q4.0	Facebook.
	Q4.1	Makes sense Facebook would come up with some type of email.
906	Q4.0	Facebook.
	Q4.1	The word Face.
907	Q4.0	Facebook.
	Q4.1	The word Face.
909	Q4.0	Facebook.
	Q4.1	Because of the word Face in Facemail.
921	Q4.0	Facebook.
	Q4.1	It sounds the same.
940	Q4.0	Facebook.
	Q4.1	It looks like the Facebook logo.
941	Q4.0	Facebook.
	Q4.1	The name.
943	Q4.0	Facebook.
	Q4.1	Because of the name, and I know they started up a new email service.
948	Q4.0	Facebook.
	Q4.1	Because it says Facemail.
955	Q4.0	Facebook.
	Q4.1	Because of the Face in Facemail.
970	Q4.0	Facebook.
	Q4.1	Rather obvious, isn't it?
974	Q4.0	Facebook.
	Q4.1	Synonymous with Facebook.
977	Q4.0	Facebook.
	Q4.1	Face.
979	Q4.0	Facebook.
	Q4.1	It seems like it could be a part of Facebook offerings and it has Face in the name with out any spaces. I.e., not Face mail but Facemail.
992	Q4.0	Facebook.
	Q4.1	Face in Facemail.
994	Q4.0	Facebook.
	Q4.1	Seems logical.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

1002	Q4.0	Facebook.
	Q4.1	Duh. Both start with the word Face, and I suspect Facebook has some sort of copyright on the use of derivatives of its name. The same way McDonald's blocks the usage of any item prefixed with the title "Mc."
1039	Q4.0	Facebook.com.
	Q4.1	The name is very much the same just with a slant towards email services.
1040	Q4.0	Facebook.
	Q4.1	Seems a logical connection.
1046	Q4.0	Facebook.
	Q4.1	They're always improving Facebook. And they want you to know it's their product, i.e., Facemail.
628	Q5.1	Facebook.
	Q5.2	Based on the name.
716	Q5.1	Facebook.
	Q5.2	Same as before - the name suggests an affiliation. I'm also partially assuming the best, as I think Facebook would be suing this company if they weren't in some way related or working together.
836	Q5.1	Facebook.
	Q5.2	Seems so close in name that if not authorized they are wide open to a lawsuit.
617	Q6.1	Facebook.
	Q6.2	Name is similar.
637	Q6.1	Perhaps Facebook.
	Q6.2	Shares the word Face.
735	Q6.1	Those who have Facebook on the internet.
	Q6.2	Because these services could be some derivative of such a company.
778	Q6.1	Facebook.
	Q6.2	Because of the odd name. It doesn't seem likely that another company could (or want to) use a name so similar.
832	Q6.1	Facebook.
	Q6.2	Just a guess.

TEST CELL
RESPONDENT

NUMBER RESPONSE - continued

852	Q6.1	Face book.
	Q6.2	Similarity of name.
853	Q6.1	Facebook?
	Q6.2	Facemail - Facebook.
911	Q6.1	Facebook.
	Q6.2	Beginning of name.
954	Q6.1	I would assume that there is an affiliation with Facebook. It is very similar in name.
	Q6.2	It is very similar to Facebook, so they might be affiliated with Facebook or using Facebook recognition to propel their company name.
961	Q6.1	Facebook.
	Q6.2	Just a hunch.
1008	Q6.1	Facebook.
	Q6.2	Name similar to what Google does with Gmail.

Conclusion

56. It is my considered opinion, based upon my education, background, and professional experience, and based upon my review and analysis, that the results of the survey clearly support a finding of likelihood of confusion. The survey results evidence that a significant portion of the relevant universe of potential consumers of email and/or instant messaging services are likely to be confused or deceived by the belief that Applicant's services are either offered by Facebook, are being offered with the authorization/approval of Facebook, or that the company that offers applicant's services has a business affiliation/connection with Facebook, and that such confusion is due in particular to the use of FACE in the proposed FACEMAIL mark. Specifically, the survey results make clear that the causal nexus for likelihood of confusion is due to the use of FACE in the proposed FACEMAIL mark and is not due to any other

alternative explanation. That is because the control cell, using the THINKMAIL mark, also employed the same list of services and asked the same survey questions, and resulted in no likelihood of confusion, it is certain that the net measured likelihood of confusion of approximately thirty-six percent (36.20%) is attributable solely to the presence of the FACE portion of Applicant's proposed FACEMAIL mark. Conversely, the survey results also make clear that the use of a dissimilar mark, such as THINKMAIL, in conjunction with the list of Applicant's specified services is not likely to cause confusion with Opposer Facebook.

QUALIFICATIONS

57. I hold a Bachelor's Degree in Advertising (B.A.) from San Jose State University, a Master's Degree in Business Administration (M.B.A.) from the University of Southern California, and a Doctoral Degree in Business Administration (D.B.A.) from the University of Southern California.

58. During my twenty-five year academic appointment, my teaching responsibilities included both graduate and undergraduate level courses in a variety of subject areas. My teaching responsibilities included courses in marketing (e.g., marketing, marketing management, advertising, promotion, consumer behavior, and marketing research) and management (e.g., principles of management; business policy and strategy; business policies, operations, and organizations; and integrated analysis).

59. I am a member of the American Marketing Association (AMA), the American Academy of Advertising (AAA), the

American Association of Public Opinion Research (AAPOR), the Council of American Survey Research Organizations (CASRO), and the International Trademark Association (INTA).

60. As a partner with Ford Bubala & Associates, I have been retained by a variety of firms engaged in the consumer product, industrial product, and service sectors of the economy to provide marketing consulting and research services. Approximately one-half of Ford Bubala & Associates' consultancies in which I have participated have involved the design and execution of marketing research surveys.

61. During the past thirty-six years, I have been retained in a number of litigation-related consultancies involving intellectual property matters, including matters before federal and state courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and the International Trade Commission. I have designed and executed surveys relating to intellectual property matters, including false advertising, trademark, patent, and other related matters. I am familiar with the accepted principles of survey research, as well as the tests for trustworthiness of properly conducted surveys or polls.²⁷

62. During the past thirty-one years, I have addressed a variety of groups on the subject of surveys or polls and their use in the measurement of the state of mind of consumers, with respect to Lanham Act matters. Specifically, I have spoken at meetings of the American Bar Association, the American Intellectual Property Law Association, the Intellectual Property Owners Association, the American Marketing Association, the

²⁷ Supra note 2.

International Trademark Association, the Marketing Research Association, the Intellectual Property Law Institute of Canada, and the Practising Law Institute.

63. I have also written on the subject of the design and execution of litigation-related surveys in Lanham Act matters. Attached hereto as Exhibit C is a list of papers I have written since 2001.

64. For the past fourteen years I have served as a member of the Editorial Board of The Trademark Reporter, the scholarly legal journal on the subject of trademarks, published by the International Trademark Association.

65. I have been qualified and accepted as an expert in marketing and marketing research in more than fifty (50) trials before federal and state courts and administrative government agencies, including the Trademark Trial and Appeal Board.

66. Attached hereto as Exhibit D is a list of cases in which I have provided trial and/or deposition testimony since 1992.

67. Attached hereto as Exhibit E is a copy of my professional history, describing my qualifications and professional background.

MATERIALS CONSIDERED

68. Materials considered in this matter include: Notice of Opposition; First Amended Notice of Opposition; and Answer to Notice of Opposition; comScore data on number of total unique visitors in the U.S. to social networking sites; and Statistical Abstract of the U.S. 2011, Table No. 7, Residential Population by Sex and Age: 2009, and Table No. 10, Residential

Population by...Single Years of Age: 2009; and the Trademark Application Serial No. 85056260.

COMPENSATION

69. Ford Bubala & Associates' fees for this engagement consist of billable time and expenses. Standard time is billed at the rate of \$500.00 per hour for the services of a Partner and \$250.00 per hour for the services of a Research Associate. Deposition and trial time are billed at the rate of \$600.00 per hour plus expenses.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 6th day of September, 2011, in Huntington Beach, California.


Dr. Gerald L. Ford