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# Survey And Real-World Data: A Winning Combination

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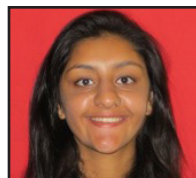
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Courts increasingly require empirical proof in cases where the impact of particular behavior, claims or statements on consumer perceptions and/or choices is a central focus. For example, in the context of a false advertising or trademark infringement case, key questions could include whether consumers were confused by an allegedly infringing word mark, symbol or misleading statement, or whether consumers relied on the word mark, symbol or statement when making their decisions. Compelling empirical evidence on the answers to these questions can be informed both by primary survey research — such as the use of an experimental consumer survey — and by analyses of historical secondary data.

Each of these two methods, on its own, can provide critical insights related to the specific allegations in a given matter. But when offered together, the combination of the two can be even more powerful, providing a more complete picture of the consumer decision-making process.

## Experimental Surveys Can Isolate Causal Relationships

Experimental consumer surveys allow for targeted comparisons across groups of respondents to provide causal evidence with respect to claims in a particular legal case. For example, in a trademark infringement matter, one might survey two groups of respondents. One group would see the product as sold in the marketplace (and which is the

subject of the infringement claim), and the other would see a modified version that is noninfringing, but otherwise identical to the original product. By comparing consumers' reactions between the two groups, a survey expert can isolate the causal impact of the at-issue element.

Experimental survey evidence can also be used to evaluate whether a disclaimer would impact consumers' purchase decisions. One such survey was cited in a recent court decision denying class certification in *Kenneth Hobbs v. Brother International Corp.* In this case, the plaintiffs alleged that certain multifunction printers did not scan complete pages, causing the edges of images to be truncated. Joel Steckel, professor of marketing at NYU Stern School of Business, evaluated the materiality of these claims. All respondents in his survey were presented with a choice of three printers: a Brother printer and two competing printers. Respondents in the test group reviewed the information about the three printers as they would in a real online purchasing experience. Respondents in the control group had access to the same information, but for the Brother printer also saw a disclaimer regarding the margin issue. Respondents in both groups were asked to choose from these three printers. The choices between the two groups did not differ, demonstrating that the presence of the disclaimer would not have affected the purchase decision.<sup>1</sup>

Accordingly, surveys can be enormously powerful in addressing causation head-on by shedding light on the reasons behind respondents' perceptions and choices. Moreover, since surveys generate primary data, they can provide the added benefit of reducing or eliminating the need to produce a client's proprietary data. However, surveys are not without limitations. Despite methods that can simulate reality and put the respondent in the frame of mind of an actual purchaser (e.g., carefully explaining the context, reproducing detailed information presented to a customer in the marketplace, and even building mock retail spaces), surveys may be unable to provide an exact replication of marketplace conditions that prevailed during the relevant time period.<sup>2</sup>

## Historical Transaction Data Represent the "Real World"

Real-world historical data have the advantage of revealing consumers' actions during the relevant time period. Examples of real-world data include "field experiments" data often performed by companies in the usual course of business and "clickstream data" on customers' online searches and website visits.

Field experiments are often conducted in the real world unbeknownst to consumers. If consumers have experienced one of several options (e.g., a product label with alternative language), the researcher may then be able to discern relationships between observed differences in the consumers' real-world behaviors and the different options. When conducted in an online environment, such experiments are called "A/B" tests. (See ["What Consumers Really Think About Reference Price Labels."](#)) For example, a company like Pandora that advertises its service or a bank that offers a credit card online may test several advertising messages in parallel. If one such message ends up being at issue in a

subsequent false advertising or trademark infringement case, an expert can use these historical data to evaluate whether the allegedly offending message resulted in more visits, purchases or subscriptions than the other, nonoffending, messages that had been tested in parallel.

Clickstream data show precisely what consumers searched for, what they viewed and what actions they took online (e.g., clicking on a particular advertisement, signing up for a newsletter, placing an item in an online shopping cart, making a purchase). When examined along with information on product prices, promotional offers and specific advertisement content, these data can shed light on consumers' behavior in the context of specific allegations.

Such data can help answer questions surrounding what was important to customers, or what led to their choices. Take, as an example, a trademark infringement case involving companies selling products through the internet in which the plaintiff alleges it lost sales to the defendant due to the defendant's online advertising that included the trademark at issue. With the benefit of clickstream data, one can examine tens (or hundreds) of thousands of online advertisement viewings, including viewings of both infringing and noninfringing advertisements.

One can also assess whether consumers' purchases were affected by the presence of the trademark within advertisements, after controlling for various relevant factors (e.g., the number of viewings of each advertisement, advertisement position, keywords used, text displayed in the advertisement). In such a case, if a significant increase in sales conversions is associated with the infringing advertisement, all else equal, one could reasonably conclude that the infringing advertisement affected sales conversions compared with noninfringing advertisements.

In this example, causal inferences are straightforward based on the sequence of relevant events (e.g., a user enters a keyword, then views ads, next clicks on a web address, and finally purchases a product) and controls for other factors that might influence a consumer's choice. However, in other instances (e.g., when the company changed multiple attributes of the ad campaign in parallel) it may be more difficult to parse out the causal effect — that is, whether the use of the allegedly infringing element led to increased website traffic. For this reason, an experimental survey may be a useful complement to such an analysis.

## **Taken Together, Experimental Surveys and Real-World Data Can Create Powerful Synergies**

When used jointly, experimental surveys and empirical analysis reinforce the validity of each stand-alone analysis. Cross-validation provides evidence on the same topic from two different perspectives and increases its overall reliability. Cross-validation can be used in several different ways in the litigation context.

For example, consider a case involving allegations of trademark infringement against an online snack retailer brought by an entity claiming rights to the name of the product. In such a case, a marketing expert could conduct an “Eveready” experimental survey (a survey format that takes its name from its use in *Union Carbide Corp. v. Ever-Ready Inc.*). In this format, respondents would be randomly assigned to view either the actual website at issue or a “control” website, identical to the actual but with the allegedly infringing word mark replaced by a “placebo” word mark. All respondents would then be asked questions about the source of the product, as well as sponsorship and affiliation connections of the website.

Suppose the survey shows that there is no difference in who consumers think is the source of the snack, whether they reviewed the actual website at issue or the control version. While that evidence would be strong, an expert may further bolster it by analyzing secondary real-world data. For example, in conjunction with the survey, the expert might analyze data on online searches that resulted in visits to the snack website.<sup>3</sup> The expert might find that only a very small number of search terms resulting in visits to the snack website were related to the plaintiff’s products and services. This additional evidence would suggest that very few consumers who searched for the plaintiff entity ended up visiting (let alone purchasing product from) the snack website. Thus, while the survey evidence would be strong on its own, the search and visit data would buttress the conclusions drawn from the survey, making them even more compelling. Such data would demonstrate that in the real world, there was no evidence of confusion when consumers searched for the name of the entity in question.

## Conclusion

Primary survey data offer insights into consumer’s thoughts as well as actions and, when experimental methods are used, demonstrate causality. The key advantage of real-world data is that they reflect actual consumer behavior during the relevant time period. Each source can offer strong evidence on its own, but substantial synergies can be obtained when the two are used together.

**Disclosure:** Two Analysis Group teams, which included Kirk Fair and Shampanier, were retained as experts by counsel for Brother International Corp. in the *Kenneth Hobbs v. Brother International Corp.* case discussed here.

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## Endnotes

- 1 Note that in this survey, the question of whether consumers were confused or misled by the absence of the disclaimer was skipped in favor of the more relevant question: "Does it matter?" Evaluating the question of materiality can be helpful in cases where consumers would make the same decisions regardless of any confusion (e.g., confusion between senior and junior marks or confusion due to lacking disclosures).
- 2 Surveys that do not reflect the marketplace closely enough may be excluded or given little weight. For example, in *Kraft Foods Group Brands LLC v. Cracker Barrel Old Country Store Inc.* (No. 13 2559, U.S. Court of Appeals, 7th Cir. 2013), the court had "doubts about the probative significance of the ... survey" in part because "it's very difficult to compare people's reactions to photographs shown to them online by a survey company to their reactions to products they are looking at in a grocery store and trying to decide whether to buy. The contexts are radically different, and the stakes much higher when actual shopping decisions have to be made." Similarly, in *Fancaster Inc. v. Comcast Corp.* (832 F. Supp. 2d 280; 2011), a survey was excluded for using printouts of static screenshots of an interactive website as stimuli instead of using a live version of the website, therefore not replicating how an internet user would actually encounter and experience the website in the marketplace.
- 3 Most websites these days purchase this type of information to help them devise and refine their online advertising strategy.

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