

# KEYSTONE

March 17, 2022

## **Empirical approaches to consumer perception**

Augmenting survey evidence in trademark & trade dress litigation

Colleen Carroll

Principal, Keystone Strategy

## Setting the stage: *USPTO v. Booking.com B. V.*

---



“Evidence ... can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and **any** other **source of evidence bearing on how consumers perceive** a term’s meaning.”

## Why use additional empirical approaches?



### Support and Validate

Enrich survey evidence by serving as a robustness check to support and validate survey data



### Fill Gaps and Hedge Risk

Fill gaps and manage risk in the face of known survey limitations (e.g., surveying a difficult to reach consumer audience)



### Reveal Inconsistencies

Highlight inconsistencies in an opposing expert's empirical analysis or resulting conclusions

## Why use additional empirical approaches?



### Support and Validate

Enrich survey evidence by serving as a robustness check to support and validate survey data



### Fill Gaps and Hedge Risk

Fill gaps and manage risk in the face of known survey limitations (e.g., surveying a difficult to reach consumer audience)



### Reveal Inconsistencies

Highlight inconsistencies in an opposing expert's empirical analysis or resulting conclusions



### Reclaim the Edge

Move the needle when alternative empirical evidence introduced by opposing parties has a neutral effect

# What kind of additional empirical approaches have been introduced in litigation to assess consumer perceptions?

## Studies of Actual Use



**Social Media  
Analysis of  
'Actual Use'**

## Market Analysis



**Crowded  
Field  
Analysis**

## Studies of Online Consumer Behavior



**Web Traffic**

## Approaches in Action: Studies of Actual Use



### Social Media Analysis of Actual Use

**Expertise** Marketing;  
consumer behavior

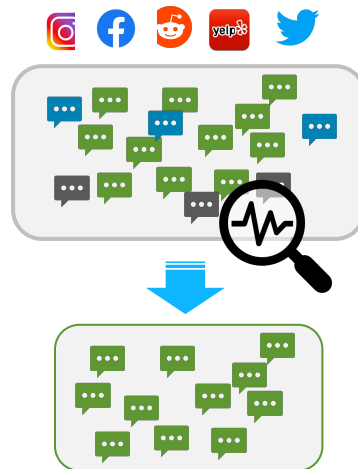
**Application** Genericness;  
secondary meaning

**Case  
Example** *Yeti Coolers v. RTIC  
Coolers*,  
A-15-CV-597-RP  
(W.D. Tex. Jan. 27,  
2017)\*

☒ *Admitted*

### Approach Overview

Analyze social media activity to evaluate extent to which consumers associate trademark/trade dress with brand



*Universe of comments  
for source and competitors*

*Sub-universe of comments  
associating source with TM/TD*

\*The Court commented when ruling that the analysis was admissible, "... commentators have noted that social media can be one of the best indicators of secondary meaning."

# Approaches in Action: Market Analysis



## Crowded Field Analysis

**Expertise** Marketing; market research; branding; consumer behavior

**Application** Likelihood of confusion (strength of brand)

**Case Example** *American Dairy Queen Corp. v. W.B. Mason Co., Inc.*, 543 F. Supp. 3d 695 (D. Minn. 2021)



*Admitted*

## Approach Overview

- Measure extent of third-party use based on analysis of relevant information sources (e.g., trademark databases, corporate records, online commerce)
- Assess impact of crowded field on strength of consumers' associations with mark/brand



*Crowded Field: Many third parties using trademark in association with their own product or entity*

# Approaches in Action: Studies of Online Consumer Behavior



## Web Traffic Analysis

<b>Expertise</b>	Online consumer behavior; Internet marketing; online retailing
<b>Application</b>	Likelihood of confusion
<b>Case Example</b>	<i>AKH v. Reinalt-Thomas Corp.</i> , 2012 WL 6840254 (C.D. Cal June 29, 2012)  <i>Introduced</i>

## Approach Overview

Compare website traffic patterns for source v. infringing website; analyze for patterns indicative of diversion from source website to infringing website





# What challenges and opportunities exist given the nascency of many areas of alternative empirical evidence?

## Challenges

## Opportunities

### Precedent

Limited case precedent may create greater uncertainty of outcomes (e.g., admission, exclusion, and weight)

Unique and creative approaches for filling in evidentiary gaps

### Standardized Methodology

Supporting the novel approach with traditional social science methodologies and/or new theoretical justifications

Potential for greater flexibility in study design

### Nature of Investment

Assessment of time, cost, and ROI may be difficult to predict v. 'tried-and-true' approaches (e.g., survey)

Depending on data and analysis, some studies may be quickly conducted with minimal external dependencies