

## Navigating Trademark Law's Empirical Turn

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An accurate reading of consumer behavior has long been the holy grail of trademark law, but it has been assumed that such a reading would never be fully realizable. But what if, thanks to twenty-first century techniques for studying and predicting such behavior, this assumption was no longer justified? From neuroscience to linguistic databases to artificial intelligence, new technologies point to a potential sea change in our understanding of the consumer. If “trademarks are property purely of consumers’ minds,” then new methods for better understanding those minds may have great significance for trademark doctrine.

The point of this Article is to sound a note of caution about enhanced empirical understandings of the consumer. Even if consumer perception becomes more measurable, there are reasons not to base trademark law exclusively on those measurements. Trademark law operates according to several normative guideposts that are not strictly dependent on consumer reaction. Greater reliance on more accurate readings of human behavior could prompt an unwitting rejection of some of trademark law’s long-held principles. For businesses, too much legal reliance on such readings can ignore competitive need and cement marketplace inequalities. For consumers, too much legal focus on evidence of consumer perception could reshape their own thought patterns—if cases are simply decided based on whether or not consumers will be confused, there will be little room for consumers to experience confusion and to train themselves to detect and avoid minimally deceptive marketing.

The first part of the Article documents the empirical turn. This is not the first time that trademark law has had to respond to marketing innovations and scientific breakthroughs. Still, I argue that there is something different going on today, both in the probativity of these new understandings of the consumer and in the U.S. Supreme Court’s recent closing off of non-empirical trademark doctrines.

The second part of the Article charts a course for reconciling the empirical with the non-empirical. A completely empirical approach to trademark law would be undesirable, but so would blinding our eyes to better evidence of consumer behavior. The key is a considered balance of trademark law’s descriptive aspects with its prescriptive ones. The Article provides some suggestions—including crafting avenues for maintaining debate about normative guideposts, maintaining epistemic humility about predicting human behavior, and borrowing non-empirical doctrines from other bodies of law—for successfully maintaining this balance in the face of trademark’s empirical turn.

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