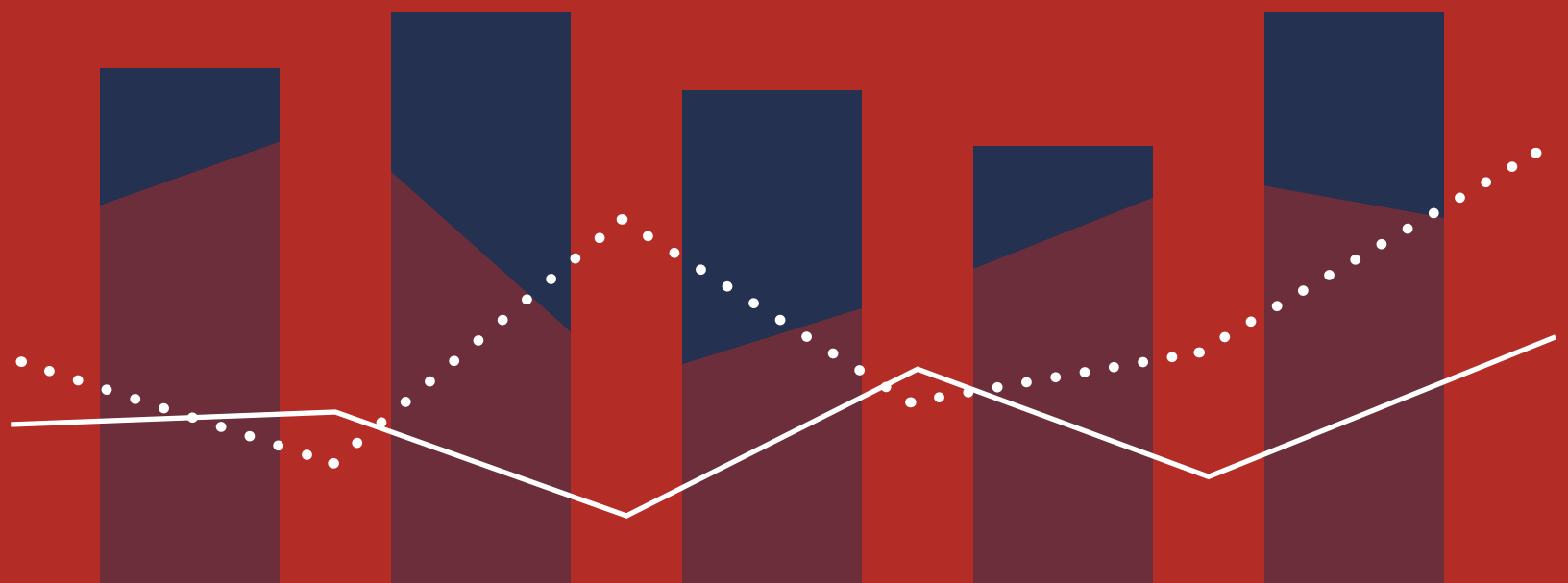


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Academia in Court: How Marketing Scholarship Informs The Law

David Reibstein, Christopher Borek, Robert Vigil, and Suneal Bedi | 07.28.2022

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The U.S. judicial system values theoretically and empirically sound research methods, and rigorous academic marketing work is playing an increasingly significant role in influencing court matters. In some cases, billions of dollars and key business models are at stake.

Thompson (1965) anticipated the trend in a *Journal of Marketing Research* article, noting that as “survey research procedures become increasingly more reliable and scientific, it is to be expected that their findings will become increasingly attractive as one logical basis for deciding cases in which public opinion or behavior is a principal factor.”

Understanding the Case Types

A range of court cases have relied on academic marketing research. Academic scholars often serve as expert witnesses in the cases and play an important role in the outcomes. Litigation examples include:

- Intellectual property cases involving allegations of patent, copyright, trademark, or trade secret infringement. Apple accused Samsung of infringing on smartphone-related patents, and Nike sued MSCHF for making custom “Satan Shoes” using its Air Max 97s. Marketing experts evaluate product features, brands, and trademarks through choice modelling, which can assess consumer willingness-to-pay or -buy based on contested features. The experts might also be called to speak about consumer confusion and trademark dilution (Bedi and Reibstein 2020).
- Consumer protection and false advertising cases involving companies accused of presenting misleading, incorrect, or fraudulent product or service information. Examples include Kraft Foods being sued over “natural” cheese claims and AT&T being sued over its 5G and “unlimited data” claims. The cases sometimes require marketing experts to analyze alleged misinformation’s impact on consumer perceptions and purchase decisions.
- Antitrust cases involving alleged anticompetitive business practices from mergers or monopolization claims. Epic Games sued Apple over its

application store fee structure, and the U.S. government sued Microsoft for the way it packaged software alongside hardware. The cases can employ survey tools, perceptual mapping, or brand switching data to assist with relevant market definitions and product substitution analyses.

- Product liability cases involving alleged harm to consumers. These may include faulty car ignition claims against General Motors and consumer cancer claims about Bayer's Roundup weedkillers. Litigants often engage marketing experts to analyze consumer harm and product defects' impact on value received, among other issues.
- Privacy cases involving personal information misuse, often in digital settings. A class action lawsuit alleged that Google unfairly collected and used browser-generated information from Safari users. Marketing experts can testify in the cases to privacy expectations and disclosure sufficiency.
- Tax cases involving the Internal Revenue Service claiming a corporate entity underpaid its liability. The IRS said Coca-Cola underpaid its taxes because it undercharged subsidiaries for its intangible property rights and Amazon owed more because it undervalued intangible assets transferred to a European division. Tax cases have used marketing experts for brand valuation and to understand international marketing contributions.

Exploring the Cases

In Apple v. Samsung (2012), Apple sought more than \$2 billion in damages for smartphone technology patent infringement. Marketing expert John Hauser conducted conjoint surveys on

behalf of Apple to measure consumers' willingness-to-pay for the smartphone features Samsung allegedly stole. On behalf of Samsung, Tülin Erdem and David Reibstein argued that Apple's patents had minimal impact on consumer demand. Many of the case arguments centered on the appropriate use of conjoint surveys, and the parties presented detailed reports and eye-tracking studies as an alternative assessment. Academic marketing research (Green and Srinivasan 1978; Green, Carroll, and Goldberg 1981; Reibstein, Bateson, and Boulding 1988; Wittink, Krishnamurthi, and Reibstein 1990; Green and Srinivasan 1990; Allenby et al. 2014; Iyengar, Jedidi, and Kohli 2018) informed the surveys that were central to the corresponding critiques.

Marketing experts, including Shari Diamond, Dominique Hanssens, Wayne Hoyer, Kevin Keller, and Peter Rossi, also played a role in the General Motors (2019) class action product liability case involving defective ignition switches, which was settled in 2020 for \$121 million. Recalled vehicle owners sought compensation equal to the difference between their car's value and its projected value had the faulty ignition switches been public knowledge. The plaintiffs performed a conjoint analysis to determine consumer willingness-to-pay given defect disclosure, but the court ultimately excluded it because it did not account for supply-side considerations in determining market value. Allenby et al. (2014) outline an approach that includes such considerations.

In Morales v. Kraft Foods Group, Inc. (2017), the plaintiffs alleged that Kraft falsely marketed its fat-free

cheddar cheese as “natural” despite containing artificial ingredients. Kraft and its marketing expert, Itamar Simonson, critiqued several aspects of a survey put forward by the plaintiff’s expert intended to show Kraft misled consumers. According to Simonson, the survey included unrealistic pricing, misrepresented the way consumers interact with the product in real life, included less information than would be available to consumers in stores, failed to include a suitable control group, and “suffered from a severe order effect.” Simonson has coauthored several Journal of Marketing Research articles laying the foundation for his critiques, including [Dhar and Simonson \(2003\)](#), [Simonson and Tversky \(1992\)](#), [Dhar and Simonson \(1992\)](#), [Novemsky et al. \(2007\)](#), and [Simonson \(1990\)](#).

Marketing experts were also involved in [Epic Games v. Apple \(2021\)](#), in which Epic alleged federal and state antitrust law violations based on Apple’s App Store operation. Determining “relevant market” was central to the case, with Epic arguing the market was confined to the online store and Apple saying it included all digital video games. Rossi conducted a survey on Epic’s behalf intended to demonstrate that consumer demand for iOS applications is relatively inelastic. Hanssens conducted surveys on Apple’s behalf to demonstrate that consumers of both Apple’s and Epic’s products had access to alternatives. Ultimately, the court found the relevant market was the digital mobile gaming submarket, and

Apple was therefore not an antitrust monopolist.

Mirroring the Academic Process

Courts put significant value in properly implemented research to ensure that contested issues are accurately measured. Marketing research conducted for litigation must therefore be rigorous.

Depositions function similarly to the academic peer review process. Outside academic marketing experts review the analyses for their theoretical assumptions and applicability to relevant issues, identifying any errors in data collection and analysis, as well as consistency with prevailing marketing literature.

Courts have excluded or rejected marketing experts’ analyses for many reasons, including failure to include proper controls, the presence of demand artifacts, using unrepresentative samples, the presence of recall bias or order effects, failure to replicate marketplace conditions, lack of external validity, failure to use double-blinds, random samples, or quasi-filters, and use of inappropriate stimuli. One court discounted a marketing expert’s testimony because it believed he was “more interested in a result that would assist his client’s case than in providing objective grounds to assist the Court in its decision making” ([Epic Games v. Apple 2021](#)).

Every case is unique, but all marketing experts go through similar general processes when conducting research for litigation. The experts:

- carefully review the case and ensure they have appropriate expertise

- review literature relevant to addressing the case’s core marketing questions
- design and implement surveys or other research techniques to address the case
- write a report using extant literature to justify data collection, modeling, and analyses and discount alternative approaches
- answer questions about their reports during depositions, and
- testify in court about their findings and defend their position against cross-examination, if necessary.

Marketing experts must assess opposing experts’ claims and, where appropriate, demonstrate flaws. Regardless of external pressures, marketing experts must only take positions they support or risk long-term credibility issues. The experts must be consistent over time, whatever their clients’ needs.

Summary

Marketing scholarship is applicable beyond academic and consulting circles—our judicial system relies on marketing concepts. The court system’s Litigation’s reliance on marketing research will likely only increase as academia improves best practices and uncovers new methods for analyzing consumer behavior.

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