



Measuring “Continuing Commercial Impression” in Tacking Litigation

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Continuing Commercial Impression (CCI) is a pivotal element of the Tacking Doctrine.¹ Our interest in it derives from the fact that courts, having shown reluctance to rely solely on judgment in determining the presence of CCI, have indicated their readiness to accept consumer surveys as substantiation of the presence of CCI². That prompted us to identify the relevant theory with a view to developing an effective survey design for uncovering the occurrence of CCI and measuring its intensity.

The Issue

CCI implies that a company, using a series of marks over time, may claim that all the marks form a continuum of impressions if consumers in the relevant target market can connect the old and the new mark without hesitation or doubt.

Thus, “continuing” acquires two meanings, one of which is related to a time dimension and a second that renders the number of events, i.e., changing of the mark in question, immaterial. Therefore, “continuing” gives the mark owner substantial marketing liberties to amend the mark as often as he deems necessary as long as the affected consumers can act upon the new mark as they would have upon the old one in so far as identifying the mark is concerned.

Consumers may feel differently about the new mark, as we suspect the mark owner indeed intends them to feel, but they exhibit no hesitation or doubt as to the identity of the mark. As is often the case, marks need to be updated to keep up with the times. In marketing, it is very important to use symbols that are congruent with the target market’s cultural frame of reference and since brand marks represent symbolic information they require constant vigilance and periodic adaptation.

The issue before us is: “What is the best way to determine that consumers have no hesitation or doubt about the identity of the mark when its aural, visual, or both expressions have changed?”

Theoretical Foundation

The psychological dimension best suited for dealing with the issue at hand is *cognition*.³ Based on the definition of cognition, we have to show that when processing the information obtained from the first and subsequent exposures to the new mark, consumers would incontrovertibly connect it to the identification of the old mark they have stored from previous exposures.

¹ J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition § 17:25-27, 4th ed., 2004.

² Gideon Mark and Jacob Jacoby, “Continuing Commercial Impression” and Its Measurement,” New York University School of Law, New York University Law and Economics Working Papers, Paper 36, 2005.

³ “The term **cognition** (*Latin: cognoscere*, “to know”) is used in several loosely-related ways to refer to a facility for the human like processing of [information](#), applying knowledge and changing preferences” as presented in <http://en.wikipedia.org/wiki/Cognition>.

The presence of that connection can be established through two related laws in cognitive theory: “The Law of Comparative Judgment”⁴ and “The Weber-Fechner Law.”⁵ The Law of Comparative Judgment represents a general theoretical model which, when applied in a particular empirical context, can generate testable hypotheses regarding comparisons among sets of objects.⁶

Empirically, the measurement associated with The Law of Comparative Judgment consists of *pairwise comparisons*—asking consumers for their impression as to the degree of similarity between the members of a pair of logos, marks, etc.. This procedure results in a similarity array (from the highest to the lowest, or from the highest positive to the highest negative) that is a faithful replica of the continuum implied by the courts when requiring CCI, as we discussed earlier.

The Weber-Fechner Law goes one step further in that it identifies a quantity labeled “the just noticeable difference” which is an estimate of the required value of the stimulus that would enable consumers to find two entities to be different. The just noticeable difference metric is very useful in consumer behavior applications in marketing management, for example, when a firm wants to identify the tipping point when consumers can recognize a new version of an existing brand as being indeed “new and improved.” The metric is less useful in tacking litigation and will, therefore, not be included in our proposed methodology.

In conclusion, we find that CCI has a firm standing in cognitive theory and that there is a well-established measurement tradition associated with it. For that reason, empirical researchers should welcome the implicit invitation extended by the courts to supply consumer-derived evidentiary data. The next task is to develop proper methodology and to test it in the courtrooms.

Measurement Protocol

The theoretical foundation described above suggests a design whereby a pair of marks is presented to respondents who are asked:

“Do these two logos impress you as being the same, being different or you don’t know?”

If the answer given by the respondent is “the same” or “different,” a probing follow-up question is asked:

“Why do you say that?”

and the answer is recorded verbatim. The follow-up question is used to pinpoint the specific elements of the two marks that cause the impression to be continuing or not.

The rationale for offering the “don’t know” option is to remove any feeling on the part of respondents that they must form an opinion on the spot just to please the researcher. Ultimately, this raises the validity of the findings as each respondent is encouraged to give a “truthful” answer.

In cases in which more than two marks form a continuum of impressions, the design should incorporate all the possible pairs.⁷

Analysis

This protocol yields proportions of “same,” “different” and “don’t know” that add up to 100 percent⁸. One could argue very simply that the larger the proportion of “same” the stronger the evidence of the presence of Continued Commercial Impression. However, without taking into account the proportion of consumers who “don’t know” we are providing only part of the answer and that could be misleading. Exhibit 1 shows five possibly cases in which 60 percent of the respondents voted for “same” and yet it is quite obvious that there are significant differences among those five cases.

⁴ http://en.wikipedia.org/wiki/Law_of_comparative_judgment.

⁵ http://en.wikipedia.org/wiki/Weber%27s_law.

⁶ Ibid.

⁷ The number of pairs is given by the formula $n(n-1)/2$.

⁸ See Exhibit 1 for an illustration.

For that reason we recommend taking the analysis one step beyond reliance on direct survey answers through the creation of a CCI Score that goes up as the proportion of “don’t know” increases in a specific situation. By allowing that to happen we are reinforcing the requirement for a clear indication that consumers perceive a difference between two stimuli. The CCI Score is obtained thus:

$$CCI(s) = \frac{P_s - P_d}{P_s + P_d}$$

where:

P_s is the proportion of respondents who found that the pair of marks made the same impression

P_d is the proportion of respondents who found that the pair of marks made different impressions

CCI(s) can take on values between -1.00 and +1.00. The former denotes complete difference or no Continuous Commercial Impression while the latter denotes complete sameness or uninterrupted Continuous Commercial Impression. When the proportion of “same” in a sample is equal to the proportion of “different,” regardless of the specific level, the CCI Score is equal to zero. That denotes a situation when regardless of the size of the “don’t know” component, there is no evidence of any “Continuing Commercial Impression.”

The span 0 to +1.00 is the only relevant range for the purpose of establishing the presence of CCI. Increasing negative scores (up to -1.00) indicate that we are beyond the tipping point.

Summary and Conclusions

This paper offers a methodological approach for estimating Continuous Commercial Impression in tacking litigation that is consistent with cognitive theory as it pertains to consumer behavior. In line with the accepted theory upon which it is based, the proposed methodology is capable not only of revealing the existence of Continuous Commercial Impression but also of estimating its magnitude. The CCI Score—ranging as it does in its relevant region between 0 and 1.00—provides us with a CCI magnitude estimate. This should be particularly important when the litigation requires comparisons across more than two marks.

Unfortunately, with all of its power, this test cannot produce an “either-or” solution; it cannot replace human judgment with an automatic decision calculator. In the absence of a natural threshold of Continuing Commercial Impression, the courts will still have to decide when to grant CCI status based on the CCI Scores with which it is presented.

Exhibit 1 Illustration of CCI (s) Derivation

Case Number	Percent Same	Percent Different	Percent Don't Know	CCI(s) Calculation	CCI(s)
1	60	30	10	$(60-30)/(60+30)$	0.33
2	60	25	15	$(60-25)/(60+25)$	0.41
3	60	20	20	$(60-20)/(60+20)$	0.50
4	60	15	15	$(60-15)/(60+15)$	0.60
5	60	10	30	$(60-10)/(60+10)$	0.71