

Brandmarking

THOUGHTS ON THE CREATION,
PROTECTION, AND ENFORCEMENT OF
BRAND IDENTITY

EIGHT THINGS EVERY ENTREPRENEUR NEEDS TO KNOW ABOUT CREATING AND PROTECTING BRAND IDENTITY

First in a series.

Every entrepreneur knows the importance of establishing a strong brand for a new business or product line.

“Brand” is a somewhat nebulous concept. It’s been defined as the complete set of mental and emotional associations that consumers have with you and your products: **not just who you are and what you sell, but what they think and how they feel about who you are and what you sell.**

“Brand identity,” in turn, is the visual and verbal expression of a brand communicated by names, slogans, logos, and the like. It’s what triggers those mental and emotional associations.

Here’s an example. What comes to mind when you see this symbol?



Cars, of course. Specifically, Mercedes Benzes. But other things probably come to mind as well, such as: Quality. Performance. Engineering. Luxury. When everything is working as it should, people don’t want to just own the product, they also want to take on the brand identity. They don’t just want the car, they want the logo on the hood – along with everything the logo symbolizes.

So here’s the first thing every entrepreneur needs to know: **Trademarks are the primary means by which we harness the power, and capture the value, of brand identity.** Names, slogans, and logos that have been thoughtfully created capture brand identity more effectively than those that haven’t. And those that are properly protected and enforced are capable of guarding against “brand identity theft” more effectively than those that aren’t.



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THIS MONTH:

Trademarks and Brand Identity

When Brandmarking Goes to Pot

ABOUT “BRANDMARKING”

The word is a combination of “branding” and “trademark.” It reflects a conviction that marketing and legal professionals share a common goal, and that they need to learn to speak each other’s language in order to reach it. That goal is simple: to develop powerful, durable brand identities and capture them in names, slogans, and designs that customers will associate with their products -- and with no one else’s.

If you like what you find here, feel free to pass it along to others.

ABOUT THE AUTHOR



Attorney John Blattner helps businesses develop and protect brand identities. He does trademark counseling, clearance, prosecution, enforcement, and litigation, in the fashion, entertainment, financial services, technology, retailing, media, automotive, sporting goods, restaurant, and other industries. John also teaches Trademarks and Unfair Competition at Michigan State University College of Law.

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The dollars-and-cents value of trademarks can be enormous.

Consider this: start with the market value of a successful company – the amount that a buyer would be willing to pay for it. Now subtract the value of the tangible assets: product inventory, machinery, buildings, everything down to the desks, computers, and paper clips. What’s left is the value of the company’s intangible assets: know-how, reputation, good will in the marketplace. **Much of that intangible value can only be captured, for practical purposes, by trademarks.**

The economic value of those intangible assets can be significant. If you can buy a soft drink company that comes with good recipes, modern manufacturing facilities, and efficient distribution channels, that’s good. Even better is to buy one that also comes with this trademark:



The economic value of trademarks is especially important when the time comes to sell, expand, or franchise a business. Trademarks are the vehicles by which the intangible values of brand identity are priced, transferred, or otherwise exploited.

I tell clients that my goals in helping them build a brand identity, and a trademark portfolio, are the same as their marketing department’s goals:

- First, to select names, slogans, and symbols that stand out in consumers’ minds as belonging to us – and *only* to us.
- Second, to establish and protect those marks so that they consistently convey our brand identity – and *nobody else’s* – wherever we’re doing business.
- Third, to do it all in a way that is cost-effective and that adds value to the enterprise.

There are a handful of key principles that make all this happen. **The first is simply grasping the importance of brand identity, and recognizing the crucial role that trademarks play in creating and sustaining it.** We’ll talk about others in future editions of *Brandmarking*.

WHAT HAPPENS WHEN BRANDMARKING GOES TO POT?

Much of the art of trademark practice lies in crafting the “description of goods and services” that must be included in every application for federal registration. **The description of goods and services is crucial because it defines the scope of protection afforded to the mark.**

The primary objective, of course, is to write a description that is *broad* enough to ensure that the mark gets all the protection to which it is legitimately entitled.

At the same time, a frequent secondary objective is to write a description that is *narrow* enough to navigate around existing registrations for similar trademarks that might otherwise pose obstacles to registration. Resolving the tension between these two objectives is part of what trademark lawyers do all day.

Sometimes there are other hazards to be navigated. Consider the interesting case of legalized marijuana.



Twenty-three states and the District of Columbia currently have laws legalizing marijuana in some form. Most of these pertain to the sale of marijuana for medical use, requiring a doctor’s prescription. Four states (and the District of Columbia) have gone further and legalized the sale of marijuana for “recreational” use.

Either way, there is a large and growing number of businesses in the lucrative, and highly competitive, marijuana market. **These businesses naturally want to develop brand identities, attract and retain market share, and ward off unscrupulous competitors.** So they seek to register their names as trademarks. Several of them have been surprised to discover that they cannot do so.

Why not? Because state laws to the contrary notwithstanding, *federal* law – specifically, the Controlled Substances Act – proscribes the sale of various drugs, expressly including marijuana. And because the Trademark Office is in the business of dispensing a federal benefit, it looks to federal law to determine what is legal. **Trademark applications that describe the goods simply as “marijuana” or “cannabis” are routinely rejected on this basis.**

So are sellers of legal (under state law) marijuana simply out of luck when it comes to obtaining federal trademark protection? Not necessarily.

Most businesses that sell marijuana probably don't *just* sell marijuana. They also provide (or *could* provide) goods and services that are clearly tied to marijuana use but are not illegal. Prospective customers would have little trouble connecting the dots. **By registering their trademark for these “connected” goods and services, legitimate marijuana dealers can obtain at least a measure of protection for their brandmarks.**

Here are several actual goods/services descriptions for marijuana-related businesses that have been accepted by the Trademark Office:

- “Providing consumer information in the field of medical or therapeutic marijuana.”
- “Providing an Internet website portal featuring current events information, news and commentary in the fields of cannabis, medical marijuana, hemp, and industrial hemp.”
- “Providing a searchable online advertising website and informational guide featuring the goods and services of other vendors via the internet in the field of marijuana.” (This from a registration for the mark MARIJUANA FOR SALE, which leaves little to the imagination.)
- “Tetrahydrocannabinol vaporizers for legal use with medical marijuana.”
- “Retail sale of books about marijuana, caps, t-shirts, bumper stickers; posters; printed paper signs.”

Registering your trademark solely for ancillary products or services is undoubtedly less than ideal. But it's better than nothing. It just goes to show that in brandmarking, as in so many other areas, where there's a will – and a little creativity – there's a way.

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