Master's in Intellectual Property Law

Semester : 2

Course : 4 Trademarks, Geographical Indications, and Domain Names

Block : 2 Trademarks and Brands

Learning Objectives

After you go through this material, you should be able to:

- Understand the concept of 'brand';
- Understand the concept of logos and brands
- Understand various aspects of branding; and
- Understand globalisation and brands.

Rainmaker
THE LEGAL PEOPLE

Introduction

There exists a close interconnection between trademarks and branding. Trademarks serve as a source identifier, and distinguish goods and services of one person from another. Thus, the key function of trademark law is to protect the brand name associated with a company. Understanding branding and its relationship with trademarks, is a principal requirement for understanding trademark law.

'Brand'

A brand is a name and or a symbol that uniquely identifies a seller's goods or services in the market. Generically speaking, a brand is a mixture of tangible and intangible attributes, symbolised by a trademark, which helps a customer recognise certain goods and services, differentiate between competitors, and make a choice. In other words, brand means and includes a name, term, sign, symbol, design, or a combination of these, that is intended to identify the goods and services of one business or group of businesses, and to differentiate them from those of competitors. A brand, if properly managed, creates customer influence and generates value. Some popular brands in India are Surf, Nokia, and Onida.

Dettol is a brand that most households associate with. Image taken from [sabibspeaks] on Flickr.

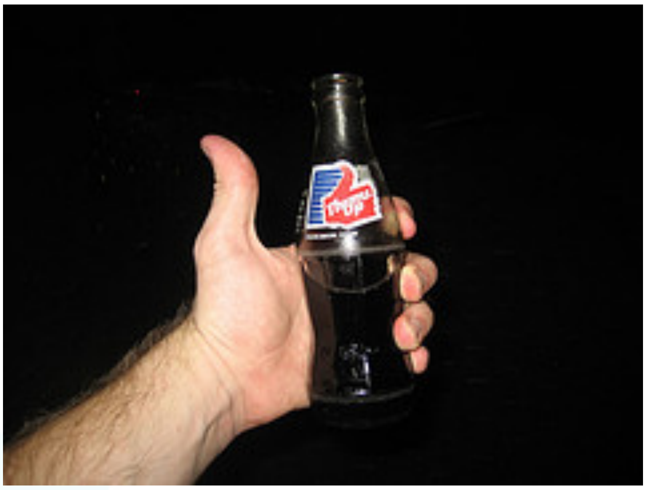
A consumer will, over time and through experience, select a particular brand over others, based on its reputation for quality, value, price-level, reliability, and other traits that help consumers choose among competing offerings. Brands have proved to be convenient and highly abbreviated tools of communication. For instance, you may choose a particular brand of detergent such as Ariel over another brand of detergent because in your experience Ariel removes stains and is also economical.

Brands are rarely developed in isolation. They normally fall within a business' product line or product group. A product line is a group of brands that are closely related in terms of their functions, and the benefits they provide. A good example would be a range of desktop and laptop computers, manufactured by companies such as Hewlett-Packard or Dell. In this context, it is relevant to understand that the focus of trademark law, in modern times, is not protection of a single mark but protection of a brand relating to a set of products. Historically speaking, changes in market practices have contributed to the evolution of branding. The economic changes brought about by the industrial revolution served as a tool to physically separate the consumer from the producer, and the modern internationalisation of commercial activities has increased this gap. Trademarks bridge this gap, so that the consumer is able to identify a product with its commercial source.

From a legal perspective, a trademark is a brand, or is a part of a brand that is given protection as intellectual property. It must be understood that in common parlance, the terms brands and trademarks tend to be used interchangeably. A trademark protects a seller's exclusive rights to use the brand name and or the brand mark within a specified market domain. The real value of a trademark to its owner depends on the market, which can be generated for the brand-name product, and this in turn is increased through promotional and advertising strategies called *brand strategy*.

Branded goods are always more expensive than "store" or "generic" brands. For instance, if you buy a Gucci handbag it will definitely cost you more than a handbag that is not branded and that you purchase from the local market.

Price and brand are complexly related. Some products have such high “brand equity" that they always command a premium. In some cases, high price itself may be a defining aspect of the brand—and consumption of that brand may signal to others the consumer's wealth or social status. In more competitive environments, brand commands loyalty only when the price is right.



Another popular brand in India - Thumbs up. Image taken from nickgraywfu's Flickr page here.

Goodwill

The concepts of goodwill and trademark are interlinked. Goodwill is a species of intangible property, which can be bought, sold, charged, bequeathed by will, and protected from infringement. It is the benefit and advantage of the good name, reputation, and connection to a business. It is what is responsible for attracting customers to a business. It adds value to the business by virtue of characteristics like a unique name associated with a business, locality (situation), connection, reputation, patronage of old customers, and agreed absence from competition. It cannot exist independently and is meaningless if not attached to a particular business. For example, Apple Inc. commands goodwill amongst a niche set of consumers.

Goodwill plays a major role in associating the name of the company with certain quality, loyalty, and integrity standards. Goodwill regarded as intellectual property has no meaning except in connection with some trade, business, or calling. As part of the assets of a firm, it includes trademark, trade name ,and get-up, and the sale of a business includes the sale of its goodwill, irrespective of whether or not this finds express mention.

Logos and Brands

A brand being intangible is not immediately identifiable in a customer's daily encounter with products. It is the logo, or the face of a brand that provides the brand with visibility. Well-known examples of logos in use today include names of products such as Surf, Snickers, and Intel, or names and monograms of companies such as Nike, Microsoft, IBM, Nokia, and Disney.

Historically, logos have been used in Europe and the United States to distinguish industrial, manufactured, and packaged products from one another. However, today logos function as guarantors of quality contributing more actively to the value of the brand. The trademark logo is usually a graphical representation of a commercial brand. The logo design is often associated with the recognition, trust, and loyalty standards of a company.

Logos are symbols that may represent the design of a company, product, or brand. Logos are not only helpful in registering a particular image in a person's mind about the company, but they also represent the company's image. Generally, trademark law protects logos. Sometimes, the logo acts as a trademark for the company as well as for the brand.

Designing a company logo is often one of the first things that is done when creating a corporate identity. The most effective logo design will have a common theme running through all of the logos. Having a common logo design theme will help increase the strength of the trademark logo and also build a corporate identity.

Aspects of Branding

Brand measurement depends on a complex interplay of various factors. The most basic type of brand measurement surveys a brand at three levels as follows:

- Firm Level: This approach evaluates the brand as a financial asset. A calculation is made of how much the brand is worth as an intangible asset. For example, if you were to take the value of the firm, as derived by its market capitalisation, and then subtract tangible assets and 'measurable' intangible assets, the residual would be the brand equity.

- Product Level: The classic product level brand measurement example is to compare the price of a no-name or private label product to the 'equivalent' branded product. The difference in price, assuming all other factors are equal, is due to the brand.

- Consumer Level: This approach makes an attempt to gauge the mind of the consumer, that is, to find out what associations with the brand the consumer has. This approach seeks to measure the awareness that is, recall and recognition, and brand image, that is, the overall associations that the brand has. Free association tests and projective techniques are commonly used to uncover the tangible and intangible attributes, attitudes, and intentions about a brand. Brands with high levels of awareness and strong, favourable, and unique associations are high equity brands.

A trademark is an integral part of a product. Admittedly, a clever brand name is not going to make an undesirable product successful. On the other hand, the success of a good product can be seriously hampered by a brand name, which has not received proper marketing considerations as well as legal considerations.

Branding, when properly executed, can be a viable solution to the problem of competition, since brand names can enhance the consumer's perception of the value of the products. Brand strength affects several areas such as market leadership, market share position, and consumer familiarity and loyalty. Brand name has been shown to be positively associated with product evaluations, perceptions of quality, and purchase rates.

The value of a mark is not inherent in the name; it is developed through publicity and advertising that is intended to promote the sale of the branded product. Without active sales and marketing methods, a trademark serves no purpose. Thus, a good branding and advertising strategy is key to making a trademark useful for the business. You may recall that after Coca-Cola and PepsiCo were embroiled in the pesticide controversy, both soft drink making companies used stars such as Shah Rukh Khan and Aamir Khan in their advertisements for damage control.

Brand management has emerged as a top management priority for a broad cross- section of organisations in the last decade or so. A number of factors have contributed to this trend, but perhaps the most important is the growing realisation that brands are one of the most valuable assets of an organisation.

A number of communication effects have been attributed to well-known and liked brands. This is often referred to as 'the halo effect.' The halo effect relates to the positive feelings toward a brand, which can positively bias the evaluation of the advertising of the brand.

Brands are valuable because they denote consistent quality, and a firm has an incentive to develop a trademark, only if it is able to maintain consistent quality. In the event that the brand's quality standards are inconsistent, the trademark may create a negative effect on the brand. This is because consumers will learn that the trademark does not enable them to relate their past to future consumption experiences.

Globalisation and Brands

Globalisation is a reality for brand owners today. The breakdown of trading borders, the growth of communication channels, and above all the speed and availability of the Internet and mobile devices means that strong global brands are more powerful than ever. But entering new markets, which may have different languages and cultures, presents special challenges to trademark owners. In addition, in the wake of the globalisation of markets, counterfeiting has become a major challenge for brand management. Owners of trademarks spend considerable costs in protecting and enforcing intellectual property rights in such emerging markets.

Brand management is particularly vulnerable to the effects of counterfeiting. In contrast to patent infringements, the imitation of trademarks requires comparatively basic capabilities. Furthermore, brand piracy is seen as a much more profitable venture than any other counterfeiting activity. In effect, brand management is confronted with the erosion of brand equity and the substitution of genuine products, thus representing a major threat to corporate value and growth.

International trademark situations are naturally more complex than those involving domestic branding because of inter-market differences in terms of language, trademark laws, and consumers' psychographic and demographic characteristics. The appropriateness of a trademark strategy can be determined in the context of these factors. Thus, a manufacturer with an international orientation should plan the brand name more carefully, keeping international markets in mind.

Standardised international branding offers more market efficiency than local branding strategies. The international marketer must decide whether he wants to use a worldwide brand known as an international, universal, or global brand in multiple market locations. The competitive strength of an international brand is that it tends to be associated with status and prestige, while providing convenient identification for international travelers. International branding also achieves maximum market efficiency overall by reducing advertising and inventory costs. The brand Gillette is perhaps the most internationally standardised brands with the use of the communication line, "the best a man can get" across the globe.

However, there are several reasons for applying a local brand strategy. One major reason is legal considerations and complications. Less developed countries may resent international brands because such brands hamper the development of local firms' products, which provide greater benefits for local economies. Thus, international brands tend to be either banned or taxed more heavily.

Another problem with international branding is the restrictions placed on the usage of certain words due to misleading connotations, trademark ownerships, and antitrust implications. Price control and parallel trading (grey marketing) pose another legal challenge. To minimise grey marketing, it may be necessary to use different national brands instead of a single global brand.

Brand standardisation may be suitable for certain products used internationally by international travelers and consumers. Credit cards and airlines are prime examples of such products. But, to use the same strategy for less standardised products, means imposing undue rigidity. Further, worldwide brand uniformity for the sake of cost minimisation may prove to be ethnocentric and myopic since it may adversely affect the brand identification and recall value.

In the context of international branding, *The Agreement on the Trade-Related Aspects of Intellectual Property Rights* ("the **TRIPS** Agreement") is of immense relevance since it requires countries to recognise and register globally well-known trademarks. Further, it provides that member states should follow the principle of national treatment, and must extend protection to service marks and collective marks.

Many service providers such as hotels, retail chains, business services, banks, and insurance firms, are increasingly global in scope and are expanding investments in local facilities abroad. Their ability to do so should be enhanced by an increased ability to market their services under more secure trade names.

Conclusion

This module deals with trademarks and certain aspects surrounding trademark law. These include branding strategies, brand management, international brands, logos, and goodwill. An understanding of these concepts will provide a strong basis for understanding the nuances of trademark law. Trademark is yet another area where the law protects the commercial goals of intellectual property owners. Hence, understanding the business and commercial aims behind formulation of trademarks, will provide us with a comprehensive view of trademarks.

Suggested Reading

- Sherman, B., and Bently, L, *The Making of Modern Intellectual Property Law: The British Experience*.
- http://www.scribd.com/doc/34522142/A-Brand-is-a-Name-or-Trademark-Connected-With-a-Product-or-Producer
- General Strategies for Global Brands http://www.placebrands.net/_files/General_Strategies_for_Global_Brands.pdf
- The International Dimensions of Branding: Strategic Considerations and Decisions http://www.vuw.ac.nz/~caplabtb/m302w07/onk_shaw.pdf
- Save Our Brand: Protecting the brands under the IP regime http://www.nalsar.ac.in/IJIPL/Files/Archives/Volume%201/7.pdf

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