

TRADEMARKS FOR STARTUPS

Trademarks

Fundamentally, a trademark indicates to the buying public who is the source of the product or service. When you deal with the Trademark Office, that's the test they're going to use in evaluating your trademark. The question is, does the general public associate this trademark with your company?

Your trademark can be the name of your company, but it can also be your logo, or both. While it specifies you as the maker of the product, over time it starts to embody something else—your brand.

Your brand is your reputation. It helps to distinguish you in the marketplace; influences buying decisions; and makes it increasingly easier for you to remain profitable. So the real value of a trademark is the brand identity that it embodies. It's the difference between Joe DiMaggio and Joe Six-Pack.

Origins of Trademark Law

Trademark law dates back to English Common Law¹. A superior tradesman, a swordsmith, indicated by a mark on his sword that he was the one who made it. Some lesser swordsmith thought, "Forsooth! If I put his mark on my inferior swords, I can sell them for a lot more money!" This he did, and benighted knights strapped for cash bought inferior quality swords "on sale" thinking they were superior quality swords. After taking a royal beating in the next battle, the king, seeing all his dead knights and broken swords, summoned the superior swordsmith and was about to decapitate him when the swordsmith spoke up.

"If you're going to chop off my head, at least use one of my superior quality swords," he said.

"But this *is* your sword," the king replied. "Here's your mark right on it!"

"I didn't make that piece of crap, you twit! It's a forgery! What this kingdom needs is some serious intellectual property laws."

Being wise, the king agreed. The superior swordsmith was spared, and laws were passed to regulate how craftsman can mark their products. England started winning more battles and went on to become a leader of the Free World. History doesn't say what happened to the inferior swordsmith, but we can surmise it wasn't pretty.

As you can see, trademarks are an early form of consumer protection and a way for you to build your brand equity.

Trademark and Brand

The words trademark and brand² are often used interchangeably, but the difference is worth noting.

A trademark is simply a word or graphical image (logo) that people associate with a company. But a brand is much more general and harder to delineate. It is the sum total of all the connotations triggered by the trademark word or logo. The brand is the persona of a company, based on the cumulative impressions the marketplace receives over time. This includes news reporting, advertising, public relations, word-of-mouth, direct experience with the company and its products and much more. Like a person's personality, a brand can be likeable, disagreeable, strong, weak, reliable, undependable, positive, negative, virtually anything. Moreover, these impressions can differ from one market segment to another.

¹ Research indicates that the following account probably isn't true.

² One obscure ancient definition of the word brand is sword, hence the term "brandish."

Even No Brand Is Still a Brand

Like it or not, every company has a brand. Even if you leave no impression at all on the public, that says something about the kind of company you are. The classic public relations pitch usually includes something to the effect that, "If you don't manage how your company is perceived by the marketplace, your competitors will." That's why most companies take steps to ensure that they leave a positive impression on the public.

But the idea of branding extends far beyond marketing. Consider what the words *Made in America* mean to people around the world, or *German engineering*, *Swiss-made*, *Republican*, *Democrat*. Donald Trump can be thought of as a brand. So can Las Vegas, London and Dubai. They all summon up impressions that go beyond the dictionary denotation or travel guide descriptions. But, of course, that's for another book.

Nike and the Meaning and Value of Brand Equity

Consider one of the most popular and widely respected brands out there – Nike, sellers of athletic shoes and sundry sporting equipment. But are those really all that Nike sells?

Some time ago Nike ran a bold ad campaign – billboards showing nothing but their swoosh logo – a checkmark on steroids.

Of course, everyone recognized it. That trademarked logo has high recognition value and a lot of prestige, which is what's known in the ad biz as brand equity. People associate the "swoosh" with (a) quality; (b) the cool, hip persona which Nike has spent billions and billions of dollars cultivating; and ultimately (c) athletic glory. Any businessperson would kill for that kind of brand equity.

Stolen Equity: The Need to Protect Your Trademark and Brand

Put the Nike swoosh on anything and you immediately increase its perceived value to the

public. The perception of quality increases, even if the quality itself remains the same.

I could put the Nike swoosh on my law firm's website, and people would somehow associate me with the Nike brand. Perhaps they'd think my law firm was a division of Nike. Or that we were their official patent attorneys. Immediately my prestige and marketability would go up. And just as immediately I'd find myself in court, because I would have stolen some of Nike's brand equity and "goodwill."

That's why we have trademark laws. Poaching a brand's equity by giving the impression that Nike was in any way involved with the delivery of our service, or that we had any kind of working relationship when none exists, unfairly turns the brand owner's considerable marketing and PR investment to your own advantage. Some companies will not even approve the listing of their names on actual vendors' websites as customers because of the implied endorsement of their product or service.

In the early stage of your company's development, infringement on your trademark and brand is not likely to be a concern. Hopefully sometime soon, you will have built a brand that others would love to be associated with, even if they aren't. Your trademark, and its associated brand identity, may well be your most valuable piece of intellectual property, perhaps even your company's greatest asset.

Making Great Trademarks

Since your trademark identifies your company, you want it to be unique. A completely made-up trademark is the strongest – very likely to be unique, attributed solely to you, your company and products – and grantable because no other mark or similar trademark exists. A good example is Kodak or Xerox. Both made-up words with no similar sounding trademarks. George Eastman, the founder of Kodak, explained: "I devised the name myself. The letter

'K' had been a favorite with me -- it seems a strong, incisive sort of letter. It became a question of trying out a great number of combinations of letters that made words starting and ending with 'K.' The word 'Kodak' is the result."

Next in line are suggestive marks that hint at the benefits without explicit meaning. Good examples are *Fridigaire* and *SubZero*, now readily known as the top refrigerator brands. Consider making up marks that are fictional but suggestive. For example, Expedia and Travelocity. Both are fictional, the latter perhaps better in terms of suggestiveness in connection with travel, although expedition is just another name for the same. Both, however, quickly became identified with their services within months of being rolled out.

So, having a unique mark that no one else has is the goal. And completely made-up marks are the best. One approach is to consider an advantage or benefit of the product or service, and then make a list of those benefits. You can expand the list with a dictionary or thesaurus to find alternative words and phrases. Consider foreign word and phrases as well. One can then artfully combine fragments or words in a unique way or different order. Play around with the words a little. Maybe add a glass of wine (or two!). You might come up with a refrigerator that replaces an ice box by blowing cold air (frigid air) and get "Frigidaire" with an added e for good measure.

Another approach is a suggestive mark, such as Amazon, the longest river in the world was used to promote the idea of the largest bookstore in the world – endless flowing water and endless flowing books. Their logo also features an arrow connecting the 'a' and 'z' suggestive of offering everything from A to Z.

Running top candidates through some consumer screening is a great next step – how is

someone from the general public likely to react and associate the mark. Ask them "What does this trademark say to you?" Trust your clients, customers and consultants for feedback.

So be bold, break out of the mindset to have your goods or service's mark be too literal or instantly associated with your offering. Instead, trust that if you offer a great product or service that recognition will surely grow. When it does, your mark will be novel and provide a sustainable competitive advantage.

Example: IBM

Back in The Day when proprietary mainframes were king, people didn't buy computers; companies did. The IBM brand had a strong quality image, one that extended well beyond its actual market, and into the general public. Even those who knew nothing about computers felt good about buying IBM. It was the safe choice. Everyone knew that "Nobody ever got fired for buying IBM." This paid off big time after Apple created the home computer market and IBM introduced their cleverly named Personal Computer.

Build a Great Brand, Not Just Great Products

When you're running a small business, you want to focus your efforts on building a great brand, not just great products. Markets change. Products and service come and go. Your company will need to change with the times. Odds are, you won't be making or selling the same things five or ten years from now. But if the products and services you provide today are of reliably high quality, you'll be able to build a good brand that will embody all your hard work and the positive impression it generated and carry that brand equity forward, like a pedigree, to enhance the perception of each new generation of products.

Spend some time pondering your trademarks. Think about how you will use them

to mark your products and how they will work in your advertising. If you need to, hire a firm to help you develop good trademarks. They are worth it.

Example: BMW

Imagine the crosshair circle logo of BMW on a car. Even if you've never driven a BMW, when you see that logo you sense that you're looking at a superior example of German engineering. You might also think that people who drive one are good at their jobs because they're well paid. You might also think that BMW drivers are smug and arrogant. In fact, BMW once initiated a PR campaign to "correct" that perception in the USA; apparently some of BMW's customers developed superiority complexes of their own!

Mark Your Territory, ASAP!

When clients come to my office looking to start a business, I advise that they consider the protection of a trademark first. It's relatively easy to do; you can apply for a trademark even before your company has released a product, or before it even started using the trademark. You can actually file an "intent-to-use" application for a trademark for something you plan to use, but might not.

A proper trademark is not the name of the product or service, but the words or symbols that indicate the source of the product or service. This means that a proper trademark is used as an adjective, not as a noun. If "Cool" is your trademark, then "Cool widget" tells the public that these widgets are made by "Cool." Cool describes the widget.

When you first use your trademark, indicate you are using it as a trademark by placing the small "TM" mark next to it. Like this: Cool™ widget. Trademark rights go to the first to use the trademark in commerce, so record the date of first use, and keep a copy of your first

promotional materials. If your business is online, save a copy of the web page and make sure it has ordering or contact information for your company, so the Trademark Office will know who is using the trademark and when you used it. Better yet, file to register the trademark.

If you have a good idea for a company name or trademark, get the Internet domain for it right away. Because as soon as you search for that domain, some bottom-feeder will see that you expressed interest in it, and buy it before you do. So when you come back later looking for it, you'll be forced to pay an outrageous price to the crook for the snazzy company domain name YOU thought of! So please: develop your company name, and trademark discreetly at first. Don't go public until you secure the domain. And if you find the domain name available, buy it on the spot.

As a business person, you probably realize by now that your brand is going to be very important to you, as important as the company itself. So don't just take it for granted. Take the steps you need to protect your brand, trademark, and logo. Because what you're really protecting is your reputation, and that is the future of your company.

Example: Intel

When PCs and notebook computers hit the consumer market, people knew very little about what made one better than the other. Intel's customers were the PC manufacturers; their customers were the consumers. Perhaps inspired by IBM's overflowing reputation, Intel launched the "Intel Inside" campaign aimed at their own customers' customers. People came in looking for the "Intel Inside" decal, which made it much easier for Intel's customers to sell their products and buy more microchips.