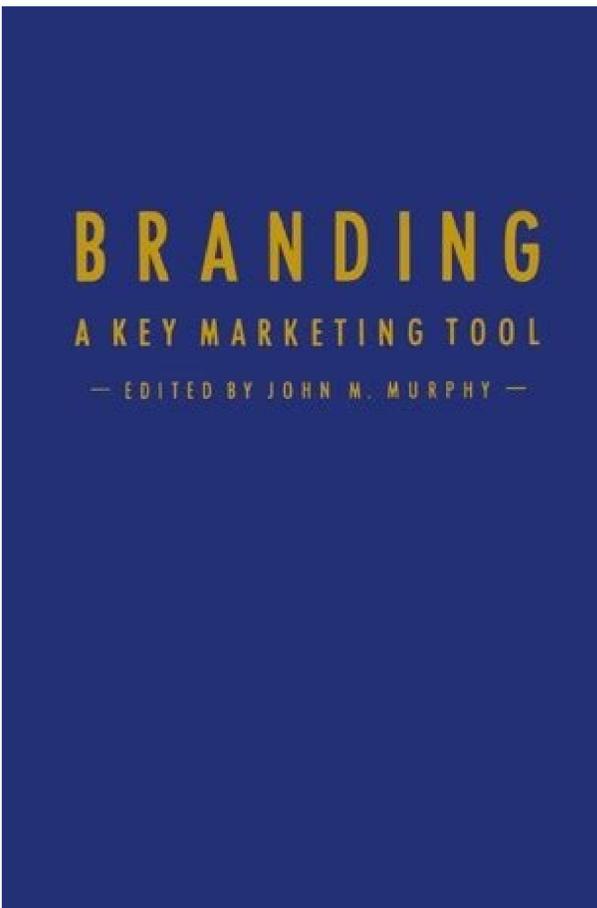
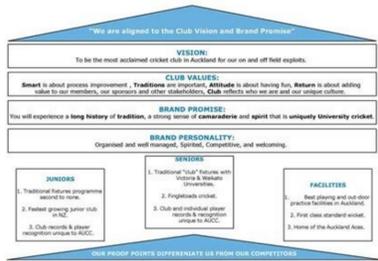


I'm not robot!

MARKET CONDUCT QUESTIONNAIRE		
	Yes	No
<p>For each "yes" answer explain fully on a separate page. In accordance with Procedural Rule P-53, Rebates and Discounts are Prohibited. No person doing the business of title insurance under the authority of the Texas Title Insurance Act of the Insurance Code (in this rule called an Authorized Person) and no Affiliate of an Authorized Person shall, directly or indirectly, pay for or subsidize advertising or promotional materials or activities of any Producer or Affiliate of a producer in a position to make a referral of title insurance business. For the purposes of this Rule:</p> <p>a. A "producer" is defined as a real estate broker or agent, lender, mortgage company, mortgage broker, builder, developer, attorney or architect or any Affiliate but a person is not a Producer if the person is an Authorized Person, or an Affiliate of Authorized Person(s), and</p> <p>b. An "Affiliate of a Producer" or "Authorized Person" is an officer, director, agent or employee of such a person, or a member of the immediate family of any of them, or a person who owns, is owned by or is under common ownership with a Producer or Authorized Person, respectively.</p> <p>c. An "intermediary" is defined as any firm or person in a position to refer title insurance business to a title insurance agent.</p>		
1. Who is responsible for your agency's marketing program?		
2. How many marketing persons do you employ?		
3. Is your company part of an affiliated business arrangement as defined by RESPA, 12 U.S.C. 2602(7)?		
4. Does any Producer, Affiliate of a Producer, Intermediary or any person in a position to refer title insurance business have an ownership interest in your company?		
5. Do you furnish payments to or split premiums with anyone in a position to refer title insurance business to you? (This includes dividends to owners, salaries to partners, commissions or business space to any Producer, Affiliate of a Producer or Intermediary — payments of any type or form.)		
6. Does anyone with whom you split premiums for services actually performed then subsequently furnish payments of any type to any other person or firm in a position to refer title insurance business?		
7. Do you have any agreement of any type concerning business arrangements with any Producer, Affiliate of a Producer or Intermediary?		
8. Are you involved in any related-party transactions including, but not limited to, referral of business, purchase or rental of facilities, purchase of services, or purchase of supplies?		
9. Do you rent office space from or to any Producer, Affiliate of a Producer or Intermediary?		
10. Do you receive any direct or indirect benefit from any financial institution because of escrow funds kept on deposit there or because of any other marketing arrangement?		



CLUB BRANDING STRATEGY



What is a key marketing tools in services. Keys to branding. Branding key points. Branding a key marketing tool murphy.

with particular objects. This association is quite arbitrary and conventional and has grown up historically, its origin lost in the mist of time. Thus the word 'book' refers to an object like (a book). The association is purely conventional and arbitrary. There is nothing inherent in the term 'book' which implies that it has to be used for that purpose, nor is there anything about the book which suggests that it must be referred to by that term. This follows for the same reasons as for some other words. Sapir took pairs of meaningless word forms, such as 'mal' and 'mil', which are identical except for the vowel sound. He told his subjects - the people he persuaded to act as guinea pigs in his experiment - that mal and mil meant 'table' (in an unspecified language). One of these words meant 'large table' and the other 'small table'. The subjects were then asked to indicate which of the words they thought would be the large table and which would be the small. He used sixty such word pairs and all were given arbitrary meanings (table, or something else). All sixty were unlike any real words. The result of the experiment was that 80 per cent of the time the words with the 'a' sound (he used a long 'ah') were found to indicate the larger object, and the 'i' sound to indicate the smaller object. In other words, quite apart from any actual word or object, the 'a' sound is likely to imply something large, and the 'i' something small. These sounds have a feeling-significance and a certain meaning in themselves. To make a more watertight test, he repeated the experiment using 100 word pairs and every type of phonetic contrast, that is, not just 'a' and 'i' but forms of a, e, i, o, u and consonants as well, arranged in a random way so that subjects would not realise the object of the test. He used no less than 500 subjects in this experiment ranging from eleven years old to adults. It is not necessary to go into the details of the experiment here. Suffice it to say that a consistent pattern emerged in the response of the subjects, showing that in the majority of cases they all found the same symbolic value in the word forms, as these suggested large or small, in varying degrees (Le. the contrast in 26 The Psychology of Names 'size' connotation between 'a' and 'i' was greater than between 'e' and 'i', etc.). Sapir concluded that he was encountering an independent psychological factor which he termed 'phonetic symbolism': certain vowels and consonants 'sound bigger' than others. Now it must be that if you were to amass a large number of words meaning large and another group meaning small, as from a thesaurus, there might be a correspondence of one kind of vowels and consonants in the one, and other kinds of vowels and consonants in the other. The experiment in this case suggests a quite different explanation. It is that acoustically 'large' vowels/consonants sound larger. Equally, and in addition perhaps, he suggested there could be a kinaesthetic explanation, that in mouthing these words the tongue and mouth position is larger for the 'large' sounds and smaller for the 'small' ('cf. 'a' and 'i' respectively). The idea is that a spatially extended mouth movement unwittingly symbolises a larger object. These hypotheses sound very simple and basic, but in so far as there is such a thing as phonetic symbolism, it could well arise from such a basic origin. In talking to his subjects afterwards, Sapir got the impression that with some of the acoustic interpretation fitted better, with others, the kinaesthetic. Similar experiments were conducted by Stanley Newmann, in which more elaborate statistical methods were used to discriminate between the symbolic values put on different sounds, both vowels and consonants. He felt that he confirmed more tellingly from this data that the symbolic value accorded to sound i- 'mechanical' depending on the resonance and articulation of given sounds (i.e. the acoustic and kinaesthetic bases). He also experimented with a dark and light value, in addition to large and small. He felt he was able to relate light and dark values to aspects of articulation, in a way comparable to that for large and small symbolism. Newmann did one further thing. He set out to discover whether the symbolic values his subjects attached to certain sounds would be reflected in normal English words. A great number of words relating to size were taken from Rogel's Thesaurus and separated into those denoting 'large' in various ways and those denoting 'littleness'. These two lists were analysed for their sound content and compared. The results indicate that the phonetic content of English words takes no account of magnitude, symbolically. Table 3.1 shows, in terms of the indices used, that there is virtually no difference between large and small words as to their phonetic content, taking them as a whole. However a comparable exercise in the French language suggests that phonetic symbolism is reflected in the ordinary vocabulary (see Table 3.2 below). This suggests that phonetic symbolism may be a feature of some languages and not of others. Probably the content of English has been more eclectically formed than that of French. In way phonetic symbolism is like onomatopoeia. The word 'splash' suits very well the thing it names by its sound and feel. Onomatopoeia is obvious in 27 Leslie Collins TABLE 3.1 Relations between phonetic content and meaning, as for largeness and smallness, in the English language 1. Long vowels and diphthongs 2. Consonants 3. Short vowels SOURCE Words denoting smallness 0.9832 0.8476 0.9162 0.8024 1.4072 1.3711 S. Newmann. 'Further Experiments in Phonetic Symbolism', Amer. Jnl. Psychol., 1933. TABLE 3.2 Relation between vowel sounds and contents in the French vocabulary Concepts suggesting velocity, lightness, nearness slowness, heaviness, distance SOURCE Words denoting largeness Front vowels Back vowels 63 p.c. 33 p.c. 37 p.c. 78 p.c. M. Chastaing, 'Nouvelles Recherches sur le Symbolisme des Voyelles', Jnl. de Psych., 1964, this respect while most phonetic symbolism is not. Intuitive skill in handling this inherent, unwitting, phonetic symbolism is part of the skill of the copywriter and name creator. It is also, no doubt, part of the art of the poet. In sum, it appears that phonetic elements of language tend to convey a meaning of their own, a 'feel' of meaning, or symbolic meaning, quite independent of ordinary linguistic meaning. Moreover, this phonetic symbolism is objective, formed in accordance with the mechanical patterns of speech, and age has little effect on it; it is found in children from at least nine years upwards. JUNG'S WORD ASSOCIATION TEST The word association test, originally devised by the eminent psychologist Jung, highlights the fact that words have more than simply a referential function. This test was originally used in a clinical setting purportedly as a means of probing the unconscious mind. The procedure is relatively simple: the psychologist has a list of words, mostly quite ordinary words- book, table, chair - but including others that may be emotionally charged for the person being examined and 'planted' among the ordinary words. Such emotionally charged words might be 'mother', 'father', 'husband', 'wife'. The person examined is required to say the first word that comes into his/her mind. Usually the word produced is instantaneous - I say 'table', the patient says 'chair'; I say 'book', the patient says 'pen'; I say 'guilt' ... Now if there is delay 28 The Psychology of Names in responding this may itself suggest resistance to disclosing associations that the word has for the individual, and/or the response word produced may signal what the uneasy associations are. In the commercial field, this process can have an application when trying to link word associations with potential brand names. Various examples can be offered to consumers, inviting them to relate them with each word being considered. This can sometimes yield surprising results. When the word 'lamb' was being evaluated in this way, only 40 per cent associated it with wool, only 10 per cent with food, but 70 per cent with warmth, and 60 per cent with softness. There is another form of the word association procedure where the subject is required to produce as many different associations as possible. This is supposed to be a test of the associative potential of a word. It is probable that a brand name has more potential for penetration and memorability if it is rich in associative possibilities, whereas there are some word forms which are relatively soul-less or anaemic and which promise little magic. The word form 'Whumies' would probably produce a greater network of association than, say, 'Pelatate' or 'Adgel'. A word list was once compiled, called Glaze's List, which ranked all threeletter word forms according to their inherent associations. No such forms were ever free of any associations. Such a list cannot keep up to date, though, because language moves. Three-letter forms such as 'mod' and 'fab' came into popular usage, and so changed their associative value considerably. Fernando Dogana considers in greater depth the idea of the suitability or appropriateness of a given brand name, in terms of its phonetic symbolism. He suggests that when a brand name symbolically 'fits' the object that it designates, it seems to have the capacity to represent that object more vividly, more satisfactorily, more satisfyingly, than if it were a less good fit. He cites the fact that workmen, working in a certain quarry in France, use the terms 'poutil', 'par and 'pir to designate three qualities of stone. The first is for the soft quality, 'paf', the better quality, and 'pif' the hardest, most resistant stone. He suggests that these phonetic variations reflect well the differences in the objects perceived. By contrast, terms like 'hill' and 'mountain' are connected in an arbitrary un symbolic way to the objects designated. To the English ear, his 'pout', 'pa' and 'pif' would seem quite meaningful in the way he suggests. What is of additional interest is that these terms were coined by French-speaking workmen, and Dogana himself wrote his article in Italian. This suggests phonetic symbolism can 'work' with people of different languages. What makes certain word forms symbolically suitable and able to 'fit' specific objects, more or less satisfactorily? The source of it is partially, as already mentioned, the articulation process of mouthing particular word forms. Dogana seeks to identify, from the field of linguistics, 'meanings' that elements of word formation can symbolise. He gives us suggestions as to how movement, size, shape, luminosity can be conveyed by certain phonetic forms. 29 Leslie Collins Thus, with regard to movement it is said that 'i', 'e', 'e', 'e', 'e' seem especially apt to express dynamic concepts (rapidity, vivacity, lightness), while the back vowels (a, o, u) are more related to the opposite (slowness, heaviness). Regarding size, we saw how Sapir with his mal/ml type of contrast found that vowels represent decreasing size as they go in the series a, e, e, i, a. As regards shape, acute sounds designate sharp shapes, and flat sounds refer to flat shapes. During one reported experiment subjects were asked to attribute fictitious names (on the Sapir model) to abstract figures, which were either sharp-edged or roundish. The frequency with which vowels were assigned (Table 3.3) clearly shows the sharp and the flat associations. TABLE 3.3 Vowels e a o SOURCE Relation of vOIVel sounds and shapes Sharp-edged figures Roundish figures 325 31 8 5 12 7 46 71 118 141 Ohwahi and Sato, 'Psychological Relationship between Visual and Auditory Stimuli', Tohoku Psychol. Folio, 1954. One investigator noted that an eighteen-month-old child called all round and rolling objects 'golloh' where the rolling articulation seemed to represent the object and movement in question. According to another investigator, quoted by Dogana, degree of luminosity is evoked as follows: light is symbolised by 'clear' vowels (i, e, e) while night is characterised by dark vowels (a, o, u). Newmann claimed, by the statistical treatment of his data, to be able to rank consonants as to the degree to which they suggest darkness or light (Table 3.4). TABLE 3.4 Relation between consonants and luminosity Deassing from K to BR K S L H P 0.000 0.051 0.159 0.395 0.4197 N. 5413 G. 5545 B. 5573 R. 6016 ~~~~~ SOURCE GL. 7789 D. 5930 M. 9778 GRI.0438 BRI.0816 ~~~~~ Further Experiments in Phonetic Symbolism', American Journal of Psychology, 1933. Dogana claims, in general, that psycholinguistic studies show that when we hear a new and unknown word for the first time, it is not neutral but embodies certain resonances and values, caused by the phonetic composition of the 30 The Psychology of Names word. If you have ever played the dictionary game, known on British television as 'Call my Bluff', you will know that there is a strong tendency to define unknown words in terms of the various kinds of resonances - be it semantic, phonetic, Jungian - that they have. Dogana further claims that, hearing an unknown name for the first time, whether of a person or a brand, leaves us with a positive or negative first impression and that the 'wrong' naming of a brand can be an enduring handicap. Presumably this view is shared by the people in show business who were responsible for changing the name of Norma Baker to Marilyn Monroe or of Maurice Micklewhite to Michael Caine. Dogana suggests brand names can be divided into four main categories: (1) Invented names with no particular expressive value (Omo could be an example). (2) Invented names having a phonetically symbolic value (e.g. Soflan, to suggest gentleness in a woollen material). (3) Names having a known semantic significance (e.g. Dual, Mars). (4) Names with both a semantic and an expressive value (e.g. Crunchie). He considers the last category, which unites the semantic and the symbolic, to be the most satisfactory brand names. He offers advice which might help towards creating such names. The recommended steps are: (1) Identify the qualities or aura of the product that it is intended the name should possess. (2) Identify word characteristics most apt to reflect these qualities. (3) Create lists of names by means of various combinations. (4) Reduce to a short-list and conduct consumer research to determine the most suitable names. CONCLUSIONS Names are made of single syllables, or connected syllables. These syllables are never 'neutral', never devoid of meaning or values. Indeed any given name may represent a wealth of meanings, whether referential, symbolic, associative, or combinations of these. That is part of the seemingly infinite resource of language. The derivation of effective brand names is, among other things, an exercise in the skill and art of using language and, within its own context, is all of a piece with literary creativity generally. Leslie Collins 31 REFERENCES Chastaing, M., 'Nouvelles Recherches sur le Symbolisme des Voyelles', Journal de Psychologie, 1964. Dogana, Fernando, 'Psycholinguistic Contributions to the Problem of Brand Names', Translated from the Italian, for European Marketing Research Review, 1967, vol. II, no. 1, pp.50-8. Newmann, S., 'Further experiments in Phonetic Symbolism', American Journal of Psychology, 1933. Sapir, E., 'A Study in Phonetic Symbolism', Journal of Experimental Psychology, 1929. 4 The Legal Side of Branding CLARKE GRAHAM MARKPEROFF WHAT IS A TRADEMARK? A trademark is a sign or symbol which distinguishes the goods or services provided by an enterprise. It can consist of a word or words, letters, numbers, symbols, emblems, monograms, signatures, colours or combinations of colours. It can even, in some cases, be a phrase or slogan but whatever it is, it can only properly fulfil its function from both legal and marketing standpoints if it is distinctive. A trademark has three functions: to distinguish the goods or services of the enterprise from those of another; to indicate the source or origin of the goods or services; to represent the goodwill of the trademark owner and to serve as an indication of the quality of his goods or services. These functions are best expressed by example. The mark Zest is a well-known brand name for soap in the United States. The Zest mark distinguishes one product from the myriad of other soap products on the market. The Zest mark functions as an indication of source. The public recognises that there is a single source for Zest soap- though it may not know what it is. Indeed, under United States trademark practice the actual source of the product does not have to be identified. Finally, the Zest name represents the quality of the product and the goodwill of the manufacturer. A purchaser who is pleased with the first bar of Zest soap he buys will, it is hoped, develop a brand loyalty. He will, when he repurchases soap, look specifically for the Zest brand. Brand loyalty arises from the goodwill which develops in a mark, the direct result of the continued and unwavering quality of the product. It is this brand loyalty which product managers and advertisers continuously seek to develop and enhance. It is the market share which arises from brand name recognition that in many cases determines the life or death of a consumer product. For this reason, 32 Clarke Graham and Mark Peroff 33 tremendous amounts of money are spent in developing a name, promoting it and protecting it. Trademarkers are, therefore, powerful marketing tools. If well selected, protected and properly used they can help keep the competition at bay, allow the manufacturer to maintain margins and resist the enormous buying power of middlemen or retailers. In effect they allow the manufacturer to talk directly to the consumer and build up in a brand a set of values, both tangible and intangible, which are appropriate and attractive to consumers and conducive to the development of customer loyalty. WHAT A TRADEMARK IS NOT Many lay people when talking about brand names will often mistakenly use the terms 'patent', 'copyright' or 'design' when they mean 'trademark'. Though sometimes used by the public interchangeably, these concepts are entirely different and afford distinctly different types of protection. The protection afforded to patents, copyrights and designs is significantly different from the protection given to trademarks both in its historical and its legal antecedents. The former are limited grants of monopolies awarded by a government to inventors, authors and designers as a reward for their discoveries, their writings and their creative abilities. In the United States, for example, these grants are specifically established by the constitution and have existed since the early days of the nation. Federal statutory trademark protection, on the other hand, did not arise until the late 1800s. The rights attached to patents, copyrights and designs have always been for a limited period of time only. They are not perpetual grants. A trademark, however, may last indefinitely if properly cared for. For example, the trademarks CocaCola and Bass are both about one hundred years old. Trademarks, generally speaking, do not owe their existence to some act of invention, discovery or novelty. They differ too in their legal nature. Patents, copyrights and designs are created by statute, while trademarks are created by common law. The protection for a patented invention is limited, generally, to twenty years. Design protection is concerned with features of shape, configuration, pattern or ornamentation of a useful article - the appearance of the product. Provided the features of the design appeal to the eye and are not dictated solely by the function for which the article is intended, the design will be protectable, albeit for a limited period usually fifteen years. 34 The Legal Side of Branding Copyright is concerned with the physical expression of a creative effortthe law of copyright is designed to prevent the unauthorised copying or reproduction of a person's 'work, labour, skill or taste'. It applies to literary, dramatic, musical and artistic works, sound recordings, film and broadcasting. To enforce a copyright it is necessary to show that the work is original, that the person claiming the copyright is the author of the work (or a successor in title thereto) and that there has been an element of copying. Generally speaking the copyright begins when the work is created and ends fifty years after the death of the author. Perhaps some of the differences in these rights can best be illustrated by reference to Zest soap, our earlier example. Zest is a trademark of Procter & Gamble. The machines which are used to manufacture Zest soap or the process by which Zest soap is manufactured may be protected by patent. The artwork on the packaging for Zest soap may be protected by copyright. The shape of the container in which the soap is sold or the general appearance of the soap itself may be protected by design. SELECTING THE TRADEMARK Role of the Trademark Adviser In some organisations there is frequently resistance on the marketing side to involving a legal adviser in the trademark selection process - either as a result of sheer ignorance of the legal considerations or because the involvement of a legal adviser is thought of simply as slowing down or detracting from the creative, frontline job the marketing team is doing. Trademark advisers are often seen as having (at best) a narrow, legalistic view of the trademark process. However, the trademark adviser can play a constructive role in the trademark selection process. The trademark adviser can provide constructive assistance of the legal adviser a powerful marketing weapon can come out of the selection process - a mark that is strong, distinctive and protectable, as well as being appropriate, memorable, easy to pronounce and otherwise effective in marketing terms. It is advisable, therefore, to take legal advice early in the selection process. Consultation with a trademark adviser will often mitigate, if not avoid, unnecessary expenditures of time and money. To be told just prior to launch that the name for the new product may infringe another's rights, or to be 'hit' with a trademark infringement suit within days or weeks of a project launch can be devastating to the marketing plans for the product, not to mention costly and embarrassing. Clarke Graham and Mark Peroff 35 The Selection Process A company will often want to select a brand name that readily suggests the product since such a mark may arguably have greater consumer recall- a very important point, particularly when launching a new product in an otherwise crowded field. A business may also want to develop a new brand name that will fit into an already existing stable of marks. A third consideration may be the image which the company wants to project - futuristic, exciting, wholesome or dependable. One mark may be more attractive than another from this point of view. These, and other business considerations, are often factored into the selection process. Legal considerations, too, must be part of the equation. The primary legal considerations are: - the availability of the proposed mark, and the relative strength of the mark. Strong versus Weak Trademarks There is an established hierarchy of trademarks ranging from strong to weak. Four categories are generally recognised, and are, in descending order: (1) (2) (3) (4) invented or arbitrary; suggestive; descriptive; generic. Invented or Arbitrary Marks An invented or arbitrary trademark is the strongest type of mark. Perhaps the most cited example of an invented mark is Kodak, a word which never existed before. Another, more recent example of an invented mark is Exxon which was specifically created as a replacement for Esso. These marks are 'fantastical' and as such are entitled to broad protection against secondcomers. Other examples are Bic for ballpoint pens, Nike for footwear, Rolex for watches, Samsnite for luggage and Listerine for antiseptic mouthwash. An 'arbitrary' mark is slightly different in the sense that the word itself may have existed before its use as a trademark but its choice for the product is arbitrary. Zest for soap is a prime example. Other examples are Beefeater for gin, Birds Eye for frozen food, Maestro for motor vehicles, Camel for cigarettes, Apple for computers and Anteaus for male toiletries. 36 The Legal Side of Branding Suggestive Marks 'Suggestive' marks are also considered good marks and are entitled to a wide range of protection. These are favoured by trademark counsel and are often appealing to product managers. For example, Ivory for soap is suggestive of its purity, a central theme in Procter & Gamble's advertising campaigns for the soap. Other examples are Wrangler for jeans, Paper Mate for writing instruments, Visa for credit cards, Lux for soap, Fanta for soft drinks, Flex for shampoo, Eskimo Pie for ice cream and Slalom for razors. Descriptive Marks 'Descriptive' marks are the most troublesome. As we have noted already product managers often favour descriptive marks because, in a sense, they make their jobs a little easier. They frequently feel that they do not have to work as hard to explain or describe the nature or benefits of the product because the mark already does it for them. Examples of descriptive marks are King Size for men's clothing, Easyload for cameras, Lean 'n' Tender for cooked beef, Comfort for shoes, Kwik-Fit for a tyre fitting service and HiProtein for food. Such marks are not generally given protection in law because they describe a physical characteristic or attribute of the product and therefore may not serve the key trademark functions of indicating source or origin of the product. In the UK and the USA the registration of descriptive marks per se is not precluded. Rather the registration of marks which are 'according to their ordinary significance' 'merely' descriptively is precluded. In other words, descriptive trademarks cannot be registered without proof that they have come to distinguish the applicant's products or services. This evidence is known as 'acquired distinctiveness' or 'secondary meaning'. A descriptive mark which has acquired such secondary meaning is registrable. A few examples of such registered marks are Beer Nuts for salted nuts, Nu-Enamel for enamel paint, Little Tavern for restaurant and bar services and Kool for cigarettes. Generic Marks The final category is generic marks. There are actually two types of generic marks: those which are generic from their inception and those which have become generic through misuse. 'Soap' is obviously a generic term for a soap product and cannot function as a trademark for those goods. Indeed, some courts have held that the phonetic equivalent of a generic term is also incapable of trademark protection. It is to avoid genericism that trademark owners are consistently advised by Clarke Graham and Mark Peroff 37 counsel to use the mark as an adjective, not as a noun. Some companies exhort the public likewise. For example, advertisements are often run by the Xerox Corporation advising the public that Xerox is a trademark and should always be used as an adjective: Xerox copier. Similarly, General Foods is careful to advertise some of its products as 'Jell-O brand gelatine' and 'Sanka brand coffee', thus impressing upon the public the brand name status of the marks. In doing so, it is hoped that if these valuable marks are ever challenged as being 'merely generic', courts would find them valid. We discuss in more detail later in this chapter a number of general rules which should be followed by all those responsible for a company's trademarks to ensure that the proprietorship of the mark cannot be undermined. The other type of generic mark is the mark which, through misuse, has become the common or generic name for the product. The trademark owner, sometimes through his own failure to police his mark or, on other occasions through no fault of his own, may run the risk of losing his mark to genericism. The loss occurs when the public uses the brand name of the product as the name for the product itself. A prime example is 'aspirin' which was once the trademark for a type of pain reliever but, as a result of public misuse, became (in certain countries at least) the name for the product itself. Other terms which are now generic in the USA (though not necessarily elsewhere) but were once valid marks include cellophane, escalator, shredded wheat, and thermos. In a recent and controversial decision, the Ninth Circuit Court of Appeals in the USA has held that Monopoly is a generic term for a real estate board game. (It should be noted, however, that as a result of that decision, the US Trademark Act 1946 (The Lanham Act) has been amended to provide that the primary significance of a registered trademark to the relevant public, rather than the purchaser motivation, shall be the test for determining whether that trademark has become the common descriptive name of the relevant goods or services.) In addition to descriptive marks and generic marks there are other categories of mark which are regarded as legally weak and which should be avoided in the selection process and are noted below. Laudatory names Names such as Perfection, Great, Modern, Prestige, Superb, Magnifique, Premium, Silk Soft, Super and Fantastic, should be avoided. They are, generally speaking, incapable of being protected. Phonetic variations or misspellings of such laudatory words should also be avoided. Geographical names These too should be avoided, particularly those which have an association. 38 The Legal Side of Branding direct or indirect, with the product, e.g. Detroit for cars, Aspen for ski equipment, Pittsburgh for steel, London for gin or Munich for beer. Common surnames If you call your new brand of snack foods Jones a competitor called Jones may well be able to use the same name. After all, it is his name too! Common surnames should therefore be avoided as you will not, at least until you have established a considerable reputation in a name, be granted exclusive rights to that name to the detriment of others who have claims to it. Letters and numerals These are generally considered non-distinctive and are difficult to protect. Trademarks like IBM are rare exceptions and have had the benefit of an extraordinary amount of expenditure over a long, long period. It would be foolhardy to try to emulate their example! With extensive usage, however, many of the marks categorised above, e.g. surnames, geographical names and letters/numerals have become strong trademarks, e.g. 4711 for eau de cologne, Ford and Cadillac for cars. However for domestic appliances, Philadelphia for cheese, Philips for electrical goods, No 5 for perfume and Guinness for beer. This usage has been considerable and, in today's competitive environment, it would not generally be sensible to adopt names which, at the outset, are as legally weak as these were in the hope that infringements can be resisted and distinctiveness can thus be acquired. Misdescriptive, Deceptive or Scandalous Names Other kinds of names which should be avoided are those which could, even possibly, be regarded as misdescriptive of the product in question or which could give rise to an allegation that use of the mark on the product would lead to deception, e.g. Orwlova for products which are not all wool, China Thermo for non-china products, Realemon for a product not consisting of, in some way, real lemon. Scandalous names which have unpleasant meanings or connotations (even in slang) should also be avoided, e.g. Hallelujah. TRADEMARK SEARCHING The availability of a name depends upon whether the identical or a confusingly similar name has already been registered or, in some jurisdictions Clarke Graham and Mark Peroff 39 (notably the USA, UK and other common law based countries) used by another party on the same or similar products. It is therefore necessary, before adopting a name, to conduct thorough searches to determine what marks have already been registered or used in the markets of interest in relation to similar goods and which might give rise to problems. Your trademark adviser can conduct these searches and any subsequent investigations which may be necessary. If carried out on an international basis such searches can be both expensive and time-consuming. They should not, however, be avoided - to do so would be to jeopardise the whole project. To determine whether a mark is available in the USA, for example, counsel will conduct a search of the records of the Patent and Trademark Office, trade directories, state trademark registers, 'phone books and other similar sources. A professional search firm with an established library containing such information will almost always be engaged by counsel to conduct the search. The final determination as to whether the mark is available, however, is a legal conclusion which should be made only by experienced trademark counsel. In reviewing a search report and prior to ACQUIRING TRADEMARK PROTECTION Having selected the name for the new product or service and having had appropriate searches and investigations made to ensure that it is available and the proposed usage of the question is then asked: 'How can we protect the name?' There are two methods whereby a trademark can be protected: by registration and by usage. Registration By registering a trademark a trademark owner is recording a claim to proprietorship of the mark with the appropriate government authority. In some countries, e.g. France and the Benelux countries, registration is secured merely by depositing an application with the relevant authority. In other countries, notably the UK and the USA, it takes some time to secure registration - after going through an exhaustive examination and opposition process. The resultant registration is, however, a more valuable piece of property than is a simple 'deposit' registration. It should be borne in mind that in most countries (the USA being an important exception) there is no requirement, at least initially, actually to use the mark in order to secure registration. Unlike other 'use' jurisdictions (e.g. the UK, Canada and Australia) the United States does not recognise 'an intention to use' as the basis for registration of a mark. While limited use of a mark within a small geographical area may be adequate for establishing an exclusive right to use in that geogniphic area, actual use in interstate commerce is a sine qua non to filing an application to register a trademark in the United States Patent and Trademark Office. In all jurisdictions, however, the cost of filing a trademark is fairly modesta few hundred dollars - and the benefits can be substantial. Clarke Graham and Mark Peroff 41 Usage In certain countries, mainly those whose legal systems are based on English common law principles, it is possible to obtain rights in a trademark through usage - the owner's rights accumulate over time. Trademarks which have not been accepted for registration - for example, on the grounds of their descriptiveness or their surname or geographical significance - may, with extensive usage, come to represent the goodwill of the trademark owner, indicate the product's source of origin and distinguish the goods of one company from those of another. They then acquire a measure of legal 'status'. In the absence of a registration a trademark may be more vulnerable to competitive attack. Moreover, the process of defending such common law rights is a most uncertain one. In practice, the trademark owner should seek even notional registration if at all possible. WHY REGISTER THE TRADEMARK? In a large number of countries (e.g. most of Europe, South America, Africa and Japan) if the trademark is not registered the 'owner' of the mark has no rights even if the mark is being used. The only exceptions are in the cases of famous trademarks such as Coca-Cola and Kodak, although even these may be uncertain. Besides, in countries which follow the British legal system, infringement actions cannot be founded upon unregistered marks even in those countries where such marks can acquire a measure of legal status. Actions must therefore be based on the law of 'unfair competition' or the equivalent law in other jurisdictions, for example 'passing off' in the UK. An unfair competition action is invariably difficult and the outcome is far less easy to predict than an infringement action. This is because, without registration, the rights in a trademark (in those countries where rights can be established by use) arise as a result of the reputation which has been built up in the name. It is expensive, time-consuming and sometimes simply impossible (in the case, for example, of a new product which has come on to the market without an extensive supporting advertising campaign) to prove such a reputation. As far as new products in particular are concerned, the rights in a registered trademark ordinarily arise before the mark has been used (a notable exception as indicated above is the USA). If the mark is unregistered and has not been used, obviously no rights can be said to have been established. In the USA, large corporations, as well as individuals and small firms, which test market many products each year, often take advantage of 'taken use'. This is the use of a mark on a small number of goods accompanied by a good faith intention to continue that use within a reasonable period of time. 42 The Legal Side of Branding Under this doctrine, a company can ship a dozen bars ofSkana soap to a store in another state on 2 January 1985 and claim that date as a date of first use, even though test marketing of the product may not commence for a few months and nationwide distribution may not begin for a year or more. Since a crucial element is the intention to continue use, no hard or fast rule can be pronounced and each case is weighed on its own merits. The key consideration is whether the 'taken use' constituted a bona fide sale or shipment at arms length. A further consideration is that by registering the mark the rest of the world is put on notice that you own it. Accordingly you prevent a third party raising the defence that they innocently adopted the mark. This is called 'constructive notice' in the USA. Also, the assignment of an unregistered trademark can be uncertain and unsatisfactory in a number of countries. A registered mark, on the other hand, may freely be assigned with or without goodwill in the UK and in most other countries. In the USA, however, it should be noted that an assignment of a mark must include the assignment of the goodwill symbolised by the mark. Assigning a mark without the goodwill is an 'assignment in gross' or a 'naked assignment' which constitutes an abandonment of the mark. A further benefit of registering a mark is that details concerning registration can in some countries (including the UK and the USA) be deposited with the appropriate Customs authorities. This 'registration' with the Customs in theory means that any goods bearing an apparently infringing mark may be seized and impounded by the Customs authorities upon importation. In an age when trademark infringement and counterfeiting are becoming virtually epidemic, this benefit can be a real one. In practice, however, the United States is the only country where this procedure is so far really effective. The licensing of a trademark can also be greatly facilitated by registration. A licence often requires a licensor to have registered his mark. Without a registered mark the rights being licensed are necessarily vague. WHEN SHOULD THE MARK BE REGISTERED? The registration process should be started as soon as the selected name has been approved by counsel, or, in the USA, as soon as taken use has been made. Applications for registration should be filed at that time in all those countries where it is proposed to market the product and where there is a real likelihood that, in the future, the product may be marketed. Registration of a trademark is not a speedy process. In many jurisdictions (including the UK and USA) it takes about eighteen months to two years to complete registration. In other jurisdictions it takes even longer. In Italy, for example, it takes over five years. Even in those countries where registration is a formality and involves simply Clarke Graham and Mark Peroff 43 the deposit of an application (e.g. France and the Benelux countries) it still takes more than six months to secure registration. In most cases, once the registration is secured it is mandated to be filed when the original application was filed and the trademark owner's rights in the registered mark run from that date. It is important therefore to apply for registration without delay in all the markets of interest. Whilst the costs of applying for registration in one country may be modest, if two or three categories or classes of product are to be covered (e.g. it may be prudent in the case of a medicated confectionery product to file applications in both the pharmaceutical and confectionery classes) and a number of countries are involved, in total the costs may be considerable. However, such costs are readily justified when one considers the protection which registration provides. Also, the initial registration offers normally seven to twenty years protection, and the payment of another smaller renewal fee offers protection for extended periods thereafter. Consider too that the costs involved in having to adopt a different trademark in just one or two separate markets could be substantial - not just the time and delay involved in developing a new name but the cost of researching the mark to make sure it is available for use, plus the added cost of creating new packaging and advertising to support the new name. Failure to register the mark in all likely markets also leaves open the possibility of a competitor registering the same or a very similar name in that market and causing serious difficulties as a result. QUESTIONS OF CLASSIFICATION It is important for counsel to be informed of the precise nature of the goods or services to be marketed under the name, and into what other fields it is proposed to expand use of the trademark. This information is required to ensure that the product category is correctly and fully described in the application documents and that, eventually, registration for the mark is secured in the right class or classes and for the right goods and/or services. Most countries nowadays adhere to what is called the International Classification of Goods and Services. If a mark is registered in the wrong class or does not cover a sufficiently broad range of goods within the class concerned, the rights established by registration could well be ineffective in doing what they are supposed to do, i.e. enable the trademark owner's rights to be enforced speedily and avoid a defence being put up by the other side that, for one reason or another, the registration being relied upon is defective or invalid. It is probably sufficient for our purposes here simply to say that if counsel is given full information on the goods or services in question, problems in this regard should not arise. 44 The Legal Side of Branding IN THE TRADEMARKS OFFICE The trademark has now been selected and its use has been approved by counsel. Applications have been filed for registration in all the countries of interest. Actual use of the mark can begin. However, the purpose of conducting searches and seeking counsel's advice is to determine whether or not the mark is anticipated by previous registrations and whether it is, therefore, clear to use. Once your counsel gives you the green light you can move ahead with your marketing plans but the actual processes of obtaining registration must be followed. The procedures before the various national Trademark Offices of the world, other than those which simply operate a 'deposit' system, are very similar. Twelve months or so after the application is filed (and, as mentioned earlier, any registered rights are, in due course, back-dated to the filing date in most countries) it is examined and the applicant is informed whether or not the mark is acceptable for registration; provided the preliminary searches were conducted properly no objections are likely to be raised on the basis of earlier registered marks. If the mark is an inherently strong one (i.e. it is not merely descriptive, geographic or a surname, etc.) it is unlikely to prompt objections. If any such objections are in fact raised they can be argued by counsel. If the mark is accepted it is then generally published for opposition purposes, though in some countries, e.g. Italy and the Benelux countries, there is no provision for opposition at the Trademark Office and any third parties who object to a registration must raise their objections in court. Provided a mark survives the examination and opposition stages it will become a registers Year. 1 992 Pages In File: 230 Language: English Identifier: 978-1-349-12630-9, 978-1-349-12628-6 Doi: 10.1007/978-1-349-12628-6 Org File Size: 22,393,289 Extension: pdf Tags: Marketing Toc: Front Matter...Pages 1-xiWhat Is Branding?...Pages 1-12History of Branding...Pages 12-21The Psychology of Names...Pages 22-31The Legal Side of Branding...Pages 32-50Making a Brand Works Harder...Pages 51-58Commercial Counterfeiting...Pages 59-72Developing New Brands...Pages 73-85Developing New Brand Names...Pages 86-97Creative Execution...Pages 98-103The Opportunity for World Brands...Pages 104-115Branding - the Retailer's Viewpoint...Pages 116-124The Branding of Services...Pages 125-129Branding in the Pharmaceutical Industry...Pages 130-137Branding at Austin Rover...Pages 138-147The Wide World of Branding...Pages 148-155The Corporate Identity as the Brand...Pages 156-164Organising for New Product Development...Pages 176-183Assessing the Value of Brands...Pages 184-197Back Matter...Pages 198-206

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