



McKASKILL

TOM McKASKILL
tmck@swin.edu.au

Brand erosion

All the hard work you put into establishing your brand will be for nought without the right protection.

Many entrepreneurs believe that a sustainable business can be developed around building a brand. They have no doubt seen the scramble over the past two decades of the large food manufacturing corporations going around the world buying up local food and drink brands. In fact, there are companies whose sole mission is to collect a portfolio of brands around specific demographics. Although they see some resilience and protection evolving out of developing the brand, there is, of course, the ultimate payoff — the exit — in their minds. But what if they have failed to adequately protect their brand from encroachment?

Most entrepreneurs have a passing knowledge about brand building and brand protection. They all know a little bit about brand registration — those wonderful “TM” letters or the symbol ®. Entrepreneurs, of course, think those symbols are the ultimate barrier to competition. Just get those little symbols and the money comes rolling in on the exit.

In fact, the trademark symbols do go a long way to protecting a brand, says Trevor Choy of Choy Lawyers, an intellectual property legal firm. “The trademark symbols indicate that you have taken the issue seriously enough to register the mark, and generally this has been found to stop 60–70% of people thinking about copying.” But it is not, he says, entirely sufficient. “The courts are littered with trademark disputes. If it was all so easy, then why are there so many disappointed litigants out there?”

Even large corporations can get it wrong. In 1999, the Kellogg Company, owner of the Froot Loops breakfast cereal brand, was unable to stop PB Foods from registering and selling fruit drinks under the name Toucan. For more than 30 years, Froot Loops had been promoted using a toucan character called Sam Toucan. The character was always depicted on product packaging.

But Kellogg had never registered the words “toucan” or “Sam Toucan” by themselves, only incidentally to, and as names of, pictures of toucans.

PB Foods lodged a trademark application for the word toucan for fruit drinks, and sold a range of fruit juices under the Toucan label. Kellogg objected, and the matter was heard by the United States Federal Court. The court decided that the PB Foods use was not deceptively similar to the Kellogg trademarks, so unfortunately for Kellogg, Toucan fruit juices continued to be sold.

Creating protection for a brand can be quite complex. A product brand is more than a nice label with some words in a fancy font and a few swirls around it, especially when it comes to someone setting out to take business away from you by putting a brand in the market that closely resembles yours. When consumers spend nanoseconds making the final grasp to take something off the supermarket shelf, they do not always pay attention to the fine detail. Something that has a similar shape, look and feel, colour



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combination or pattern may well be confused for the real thing. So your protection may need to extend to a range of product attributes covering patterns, logos, shape, colour combination and smell, all of which can be possible trademark registrations.

A study carried out by Choy Lawyers found that 72% of leading brands had registration loopholes that could be exploited to undermine the brand. The Australian Trade Marks Office, in an article for the International Trademark Association newsletter last year, said: “More than half of all applicants have an ‘insufficient understanding’ of the rights they are seeking.” It would appear that about half the trademarks registered will not provide the protection that businesses were seeking through registration.

Choy says the problem lies in the court’s definition and interpretation of the words “substantially identical or deceptively similar to” when it comes to deciding on a trademark dispute. “These words have very specific meanings under the law. Basically, it has to look like the whole of the mark to be substantially identical. This then takes into account all your fancy borders, swirls, etc. So although the essence or feel might be copied, the infringer can use different visual elements and get away with it.”

In the case of deception, the courts are looking at consumer behaviour. “Unless you want to get into a fight with expert witnesses, this can be hard to prove in court,” Choy says. So perhaps a little bit of reading, attending a few seminars and getting some professional advice may not be a bad investment. Putting effort in now is clearly preferable to giving away a large chunk of value on the sale of your business because your brand was eroded by some smart operators trading on all your hard work. ●

Tom McKaskill is a professor of entrepreneurship at the Australian Graduate School of Entrepreneurship, Swinburne University of Technology