

Briefing Note: Brand Management

An Introduction to the Guide

This checklist sets out the practical steps that will help your business protect, use and exploit any brands that it owns. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

What is a brand?

A strong brand helps distinguish your products from your competitors'. It adds value to your business by enhancing consumer awareness and improving customer loyalty. A brand can be made up of many elements, including:

- A logo (Nike swish)
- A word (Kodak)
- A colour (Virgin red)
- A shape (Coca-Cola bottle).
- A strap line or jingle (The future's bright, the future's Orange)
- A domain name (Amazon.com)
- A person's name (David Beckham)

A strong brand can be a very valuable commercial asset. According to a recent survey the top three global brands by value were:

- Coca-Cola (worth \$68,734 million).
- IBM (worth \$60,211 million).
- Microsoft (worth \$56,647 million).

Brands can also be lost or devalued if they are not adequately protected; they can even be destroyed by a single remark. Gerald Ratner, CEO of the jewellery group Ratners, famously described some of his own products as "total crap". An estimated £500 million was wiped off the value of the group and it eventually had to be completely re-branded as the Signet Group.

Creating and protecting a brand

Many elements of a brand can be protected as so-called intellectual property rights. These are legal rights that apply to creative work and, for example, prevent copying and unauthorised third party use.

Initial considerations

- Make sure you take legal advice early on in the creative process. This will help ensure that whatever you create can be protected and does not infringe other people's brands or other rights.
- Take great care if you involve third parties, such as brand consultants or advertising agencies, in creating a brand. Make sure that they sign confidentiality agreements and transfer rights in their creative output (such as copyright) to your business.
- Carry out internet searches to check that the brand is not already being used by another business. Instruct a law firm to conduct further searches of the relevant registries if necessary.

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Summary:

An introduction to the legal basics of brand identification, ownership and exploitation.

For detailed advice on all Intellectual Property matters please contact:

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- Keep accurate records of the development process and date stamp these documents. This will help you provide evidence if any infringement claim is brought against you. For example, evidence that it was created as part of an original process, rather than copied.

Legal protection

Your business can use legal rights to protect your brand value:

- Copyright applies to original work such as creative or artistic output including a piece of writing, music, photograph, software or video clip. It provides automatic protection to original work against other people copying the work without permission.
- Trade mark rights arise through registration and/or use in a commercial context and can protect brand elements such as logos, slogans and colours.

Registration: why and where?

- Some elements of a brand can get greater protection if they are registered (for example, as a registered trade mark). Applications to register these rights will be tested, among other things, on their merits and against existing third party rights. In the case of trade marks, this includes a consideration of whether the mark is distinctive.
- Registration gives you the exclusive right to use the trade mark as registered and enforce that right against anyone using it without your permission. Unregistered rights are similar but are harder to enforce and therefore protect. For example, for an unregistered trade mark, your business will have to prove that it has the goodwill in the mark, which can be very difficult and expensive to establish.
- Registration makes enforcement a lot easier but it may be costly and time-consuming. Your business will also need to consider whether to register on a national or cross-border basis (for example, across the European Union). The issues are complex so you should take legal advice beforehand.

Using a brand

Once a brand has been created and protected, it is important that you use it consistently and do nothing that could cause you to lose protection:

- Draw up or review your existing brand guidelines. They should include clear rules on how the brand must be used throughout your business.
- Strictly enforce your brand guidelines internally and externally to build up the brand, its market presence and therefore its value.
- Even minor changes in the way your brand is used, for example, in font or colour, can create a new right that will need to be protected in addition to the rights you already have. Costs of protection, for example registration fees, can quickly mount up if you have lots of different variations of your brand.
- Use copyright notices © and trade mark symbols (™ for an unregistered trade mark and ® for a registered trade mark) where appropriate. They act as an early warning system to would-be infringers and will help your business when seeking to prove that a defendant knew about your right.
- Ensure that registered rights are used. Failure to do so can, in some cases, result in loss of protection.

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- Ensure that any renewal fees for registered rights are paid on time, otherwise you risk losing the protection of the registration.
- Check that any brands licensed in from third parties, for example a registered trade mark, are being used in accordance with the terms of that licence.

Exploiting a brand

A brand can be commercially exploited in a number of ways. The main methods are by licence or assignment:

- A licence is an agreement that gives another business the right to use your brand for a defined period in a defined territory. Once the term has ended, ownership and control of the brand returns to your business.
- An assignment is an agreement that sells your brand to another business. You lose control of it but receive a lump sum in return.
- Always take legal advice before allowing any third party to use your brand either formally or informally.
- A written agreement governing use of the brand should always be signed if you are considering entering into an agreement with a third party.
- Put guidelines in place governing the use of your brand by others (for example, subsidiaries, franchisees and distributors) and strictly enforce these guidelines. Your business should monitor use and ensure adherence to your brand guidelines.
- Your business can request that a third party obtain your prior written approval for use of your brand.

Enforcing a brand

Your business can lose brand protection if you allow people to use your brand on an unauthorised basis, however minor. Misuse of your business' brand by others will also weaken its value. Your business must therefore monitor infringement and actively pursue infringers:

- Keep accurate records of permitted third party use of your brands. Monitor use to ensure adherence to the terms of any agreement.
- Have a system in place for reporting unauthorised use of your brand or use of similar marks or brands.
- Make sure everyone understands the importance of reporting any misuse of your business' brand, even if the use is for different goods or services to your own.
- Take legal advice immediately if your business becomes aware of any misuse of your brand. In many cases, time will be of the essence to prevent damage to your brand and consequential sales losses.

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Do not infringe other people's brands

- Be very careful if you use another company's brand in any of your marketing. For example, your business should not use somebody else's logo on your website to make it look like they have endorsed your product.
- Your business can use a competitor's brands in your own adverts, subject to certain restrictions. For example, if you are comparing them with your own brand you must not insult or denigrate your rival's brand.
- Take legal advice if your business is considering using a rival brand in any of your advertising, particularly in view of the fact that the law has recently changed in this area.

For further advice on this subject contact Jon Fielden on 01424 438011 or by email: jmf@gabyhardwicke.co.uk.

If you would like to know more about this topic or our other legal services, please contact:

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