

## Brand Management

This newsletter sets out the practical steps that will help a business protect, use and exploit any brands that it owns.

### **What is a brand?**

A strong brand helps distinguish a business' products from its competitors'. It adds value to the 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 the Interbrand survey Best Global Brands 2014, the top three global brands by value were:

- Apple (worth \$118,863 million).
- Google (worth \$107,439 million).
- Coca-Cola (worth \$81,563 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.

**If you would like to discuss any of the matters raised in this newsletter please contact:-**

Andrew Wheldon  
[aw@blackgraf.com](mailto:aw@blackgraf.com)

Mark Austin  
[mda@blackgraf.com](mailto:mda@blackgraf.com)

**Tel: 020 7586 1141**

*The information in this newsletter is not meant as a substitute for advice on particular issues and is written in general terms. You should seek specific advice before taking any action based on the information in this newsletter.*

Black Graf LLP 100 Baker Street London W1U  
6WG

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*This newsletter outlines the law as it stands at the date of writing in April 2015.*

## Initial considerations

- Take legal advice early on in the creative process. This will help ensure that whatever is created can be protected and does not infringe other people's brands or other rights.
- Take great care when involving 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 the business.
- Carry out internet searches to check that the brand is not already being used by another company. Instruct a law firm or a trade mark attorney to conduct further searches of the relevant registries if necessary.
- Keep accurate records of the development process and date stamp these documents. This will help the business provide evidence if any infringement claim is brought against it. For example, evidence that it was created as part of an original process, rather than copied.

## Legal protection

A business can use legal rights to protect its 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 a business the exclusive right to use the trade mark as registered and enforce that right against anyone using it without the business' permission. Unregistered rights are similar but are harder to enforce and therefore protect. For example, for an unregistered trade mark, a 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. The 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 take legal advice beforehand.

### **Using a brand**

Once a brand has been created and protected, it is important that the business uses it consistently and does nothing that could cause it to lose protection:

- Draw up or review existing brand guidelines. The guidelines should include clear rules on how the brand must be used throughout the business.
- Strictly enforce brand guidelines internally and externally to build up the brand, its market presence and therefore its value.
- Even minor changes in the way a 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 the business already has. Costs of protection (for example registration fees) can quickly mount up if a business has lots of different variations of a 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 the business when seeking to prove that a defendant knew about the right.
- Ensure that registered rights are used. Failure to do so can, in some cases, result in loss of protection.
- Ensure that any renewal fees for registered rights are paid on time, otherwise the business risks 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 a brand for a defined period, for defined products or services, in a defined territory. Once the term has ended ownership and control of the brand returns to the original brand owner.
- An assignment is an agreement that sells a brand to another business. The original brand owner loses control of it but receive a

lump sum in return.

- Always take legal advice before allowing a third party to use the business' brand either formally or informally.
- A written agreement governing use of the brand should always be signed if the business is considering entering into an agreement with a third party.
- Put guidelines in place governing the use of the business' brand by others (for example, subsidiaries, franchisees and distributors) and strictly enforce these guidelines. The business should monitor use and ensure adherence to brand guidelines.

### **Enforcing a brand**

A business can lose brand protection if individuals are allowed to use its brand on an unauthorised basis, however minor. Misuse of a business' brand by others will also weaken its value. Businesses must therefore monitor infringement and actively pursue infringers:

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

Do not infringe other people's brands

- Be very careful if the business uses another company's brand in any of its marketing. For example, a business should not use another trader's logo on its website to make it look like that trader has endorsed the business' product.
- A business can use a competitor's brands in its own adverts, subject to certain restrictions. For example, if the business is comparing them with its own brand the business must not insult or denigrate its rival's brand.
- Take legal advice if the business is considering using a rival brand in any of its advertising.