

Building a Brand—The First in a How-To Series

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Legal Update

A “brand,” in the sense we are going to talk about, is a surprise-killer or suspense-ender. A brand tells you what to expect. For example, if you were going to a dance with MILEY CYRUS, you would go to the ballroom with one set of expectations; if you were going to have lunch with the DALAI LAMA, you would go to the restaurant with another, different set of expectations (or at least, one would hope so!).

But let’s begin at the beginning. Since a brand can be usefully viewed as a trademark on (marketing) steroids, we must begin our inquiry with the question, what is a “trademark?”

A trademark is any word, name, symbol, device, color, sound, scent, product configuration, or any combination of these things, that a person adopts to identify and distinguish his or her goods from those manufactured or sold by others and to indicate to the user or buyer the unique source of the goods, even if the name of that source is unknown. For example, when a shopper goes to the drugstore and buys HEAD ‘N SHOULDERS shampoo, she does not need to know that HEAD ‘N SHOULDERS shampoo comes from Procter & Gamble in order for HEAD ‘N SHOULDERS to be a trademark; it suffices if she understands that HEAD ‘N SHOULDERS shampoo always and everywhere comes from the same, single shampoo maker, whoever it may be. Brand names—CHEVROLET for cars, COKE for soft drinks—are the most commonly employed trademarks, and all brand names are trademarks. But not all trademarks are brand names consisting of words: your 3-year-old in her car seat likely cannot read, but she knows she likes to eat what you buy her under the golden arches.

A “trade name” is any name you pick to distinguish your business from everyone else’s business. So Henry Ford decided to name his motor company “Ford.” His trade name “Ford” became the trademark FORD when he physically plunked the word FORD on the first Model T to roll off his company’s assembly line. A trademark is such only if it is on the product or, if this is impractical (e.g., foodstuffs), on the product’s packaging. “Unilever” is the trade name of the company that provides us with trademarked SKIPPY peanut butter.

Service marks evolved from trademarks. They refer to marks used to promote intangible services, HILTON hotels, HERTZ rent-a-cars. All the legal principles for trademarks apply to service marks.

How Do I Start?

You know the one about the recipe for making rabbit stew: first, catch your rabbit...?

The recipe for branding yourself, and your product(s) or service(s), is similar: first, select your mark (trade or service).

In our next article, we will discuss how careful selection can improve the chances of your trademark’s evolution, first into a famous brand, and then, over time, its attainment of trademark nirvana: the cultural icon.

But beware: as always, be careful what you wish for. Trademark success carries within it the seeds of its own destruction! You have probably on one of these delightfully cool September mornings stepped back onto the house to grab a windbreaker. Remember how you fastened the left and right sides to ward off the chill? Why, yes, you say, I used the _____. Folks, what you used was once a fabulously successful registered trademark. So successful that it lost its source-identifying nature—the equivalent of death for a trademark—and “passed into the language.” You can look up “zipper,” f/k/a ZIPPER, in any dictionary. It’s just another word now. How are the

mighty fallen!

This advisory was prepared by Nutter's Intellectual Property practice. For more information, please contact your Nutter attorney at 617.439.2000.

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