

Value Your Brand

Shantanu Sood shares guidelines on creating valuable intellectual property assets

Good trademarks are invaluable to a successful business. Think Coco Cola, Apple, Google, Tata, Flipkart or Oberoi. These brands, or trade marks instantly connect you with each company's products and unconsciously evoke a variety of emotional responses ranging from trust, dependability, preference or utility to luxury, status or desire. Most importantly, they reinforce the company's image or brand in your memory and often play a decisive role when you go shopping.

Of course, the value of a brand depends on the quality of the products or services it represents but the converse is equally true. Products are just as easily defined by the brand's image. Good branding ensures visibility in

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a crowded market, often being the difference between stand-out products from just another option on the shelves. Consider the iconic Indian brand Tata. This 100 year-old brand

resonates with every Indian and is seen as a symbol of trust and quality. More often than not, a consumer is likely to choose a Tata product over others simply because of a positive association with the brand. That is the power and significance of a lasting brand

Creating a lasting brand requires strong intellectual property strategy combined with a long-term view. Whether you're a mega corporation or a small business startup, the fundamentals do not change. A good brand requires careful selection and regular investment of time and resources to flourish. However, with some strategic planning, you can build and protect your brand without breaking the bank. The following strategies can help you create, protect and manage

your trade mark effectively:

1) **Take your time to select a good mark:** A trade mark is the essence of your business strategy and defines your message to the world. Selecting the right mark can mean the difference between success and failure because the mark you choose must differentiate your products from competitors' and also have strong recall value. With so much at stake, it is essential that you take your time to select the right mark.

At the start of the exercise, you must define your business, its culture and the message you want to project. You must also undertake some research to understand your consum-



ers to ensure your message resonates with them. Ultimately, the mark you select must not only operate as a window to your company's ethos but also deliver a consistent message. Therefore, it is critical for you to have a clear idea of how you want to differentiate your business from your competitors' and ensure your company consistently adheres to its message.

When selecting your trade mark, resist the temptation to adopt a mark that closely describes your products. Such a descriptive mark may appear to save on marketing and advertising expenses but these are short-term benefits that come at the expense of the long-term strength of your mark. Over time a descriptive mark almost always gets lost in the crowded marketplace and businesses eventually discover they end up spending heavily in marketing and advertising to ensure visibility to the mark. A descriptive mark also lacks the ability to acquire a loyal consumer base because it is more difficult to recall.

Instead, it is always a good idea to select a mark that is unique or distinctive so that it easily differentiates your products from competitors' from the start. The most distinctive marks are fanciful such as Flipkart or Kodak that have no meaning other than as trade marks, or arbitrary such as Amul or Apple whose meaning has no apparent connection to the goods and services sold under it. True, it will require more effort in the short term in terms of marketing and advertising to establish a new distinctive mark in consumers' minds but in the long term the mark will be a more valuable asset. Furthermore, distinctive marks require lower legal budgets for protection and enforcement activities and are far more likely to grow and become 'famous or well-known marks'. It is no surprise that the world's largest and most valuable brands are all distinctive, fanciful marks.

2) **Engage and involve a good trade mark lawyer:** Engaging a good trade mark lawyer at the start of your branding exercise is of vital importance because the lawyer will be able to help you navigate potential legal pitfalls early on, saving valuable time and

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resources. A good trade mark lawyer is one who takes time to understand your business, your risk tolerance and is able to provide the right advice for your needs. The lawyer should be able to provide objective advice in a subjective scenario.

Initially, the lawyer will be able to weigh in on the suitability of selected trade marks i.e. advise on their descriptiveness or distinctiveness, and will also be able to carry out trade mark availability searches to prevent you from adopting a trade mark that is in conflict with another's. Be mindful of your lawyer's advice because choosing a brand that is protectable is as important as choosing one that reflects your business ethos. The longevity and value of the mark intrinsically depends on the degree of protection it is able to achieve. You may go through several alternatives before you zero in on the right mark, but the exercise is well worth it because you will end up with an asset that potentially represents a large part of your corporate value.

Later, the lawyer will assist in obtaining trade mark protection for your chosen trade mark and will be responsible for the health of your trade mark portfolio. The lawyer will also provide vital inputs in your marketing and promotional efforts to ensure the brand's integrity does not dilute over time. Amul is a good example of a mark that has consistently maintained its integrity over decades.

3) **Develop a trade mark protection and management plan:** Once the right mark has been selected and cleared for adoption, it is time to develop a plan for its protection and to create

your trade mark portfolio. Registering your trade mark is usually necessary to give your mark legal protection and to maintain its exclusivity. By law, the owner of a registered trade mark has the exclusive right to use it on goods and services for which it has been registered and is also entitled to prevent use of any confusingly or deceptively similar trade marks by others. Trade mark registration offers the highest level of legal protection in India and in many countries across the world, the only level of legal protection. A registered trade mark entitles you to initiate suits for infringement against copycats, counterfeiters or other violators to preserve the health of your brand.

Since the value of your brand is directly proportional to the level of protection it achieves, it is essential to discuss your business priorities with your trade mark lawyer. For example, letting your lawyer know what your market is, how you envision expansion into new markets and/or products, etc. will help him create a relevant trade mark registration strategy for you. The registration strategy should be tailored to suit your budgets and business plans while ensuring that you achieve the appropriate protection for your trade mark. Finally, monitor your portfolio regularly to ensure all trade mark registrations are well maintained and timely renewed.

4) **Maintain an archive:** One of the most overlooked aspects of brand management is the creation and maintenance of an historical brand archive. By the time most businesses get around to it, it is already too late. A good archive is one that closely documents your trade mark's trajectory from inception and is a treasure trove of very useful data and evidence. From an internal perspective, the archive lets you track your brand's development providing useful data that allows you to calibrate your brand as required. In addition, the archive becomes the single most important tool in enforcing your trade mark rights. When you sue someone for violating your trade mark, you will be required to provide hard evidence of your adoption and first use of your trade mark, the nature

of its use, the extent of its use, its notoriety and its reputation and goodwill in the marketplace, etc. to establish the strength of your trade mark. In many cases, this evidence is very difficult to find because old documents have either been misplaced or lost or were simply never preserved. Many good cases are lost for lack of hard evidence so it is good practice to start archiving your mark's development as early as possible.

For the archive to be relevant, maintain records of the circumstances surrounding the brand's creation, for example documents and details relating to selection, trade mark clearance, etc. It is also important to keep a record of milestones, as the first launch, first advertisement, first sale, territorial expansion, awards, articles, market surveys or research, etc. as also yearly advertising, sales figures, product brochures, sale network, enforcement actions, product samples, etc. In addition to digital records, keep original records, such as newspaper cuttings, representative samples of sales and advertising invoices, award

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certificates wherever possible because litigation requires the production of original documents in evidence.

5) **Be Proactive in enforcing your trade mark:** A trade mark is like any other property – the law may recognise your rights in it but the onus of safeguarding and enforcing your rights rest with you. It is essential to be proactive in enforcing your trade mark rights. Early detection of trade mark infringement and other misuse (such

as dilution, unfair competition, passing off, cybersquatting, etc.) is critical because failure to properly defend your trademark against infringers could diminish the strength of your trademark, and may even result in abandonment or cancellation of your registration and loss of rights. Ways to monitor your trade mark include watching trade mark journals for advertisement of potentially infringing marks, keeping a watch on markets for products bearing infringing marks, conducting internet searches, engaging investigative agencies for market surveys, etc. Once an infringing use has been identified, there are a variety of actions you can take, such as institution of opposition proceedings for trade marks pending registration, sending cease and desist letters, and finally initiating civil or criminal actions. Low-level infringers may not be cost-effective to pursue. Nonetheless, you should continue to periodically monitor such infringers and remain ready to vigorously enforce your rights if the infringement expands, causing increased or more imminent potential harm to you. Creating a reasonable yearly budget for protection and enforcement activities will help you maintain your rights without breaking the bank.

The foregoing legal strategies are some of the important ways that businesses can create lasting brands. There are of course, many other facets to a comprehensive trademark strategy but by following the above guidelines, businesses can create valuable intellectual property assets and also prevent legal problems before they arise. In the long run, if you are willing to spend the time and resources to understand and manage your brand effectively, you will have a significant competitive advantage over your competitors. ■



Shantanu Sood is Managing Partner and founding member of Quest IP Attorneys. He is an expert on Intellectual Property and Commercial laws and is a qualified attorney in India and the United States (New York).

