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MARKETING & BRANDING

Your Brand Matters – Benefits of a Sound Trademark Strategy

Successful businesses share many common traits including the ability to execute a well-reasoned business plan and effectively market and sell their products and/or services. Surprisingly, many companies neglect to incorporate these business tenets when selecting trademarks for their products and services. Utilizing a comprehensive branding strategy can help increase sales of company products and services, extend the associated product life cycle and increase overall company market value. From a legal perspective, strong trademarks also increase the breadth and types of protection available to the company's trademarks. In today's increasingly competitive and expanding marketplace, the importance of differentiating a company's products and services and strengthening its competitive barriers cannot be overstated.

To illustrate the value of a comprehensive brand strategy, this article follows three fictitious companies (Winco, Allsoran, and Lastin), and their corresponding products and trademarks. Assume that Winco and Allsoran are each about to launch new beverage containers capable of varying the temperature of the container to heat or chill the stored beverage to a desired temperature.

Trademarks Defined

Allsoran reasons that by choosing a trademark that describes the function of its new product, customers will better understand the new product, thereby jump starting product demand and sales. Allsoran chooses a *descriptive* trademark, *TEMP-ADJUST CUP™*. This trademark identifies a characteristic, quality, purpose or some other aspect of a product or service. A *descriptive* trademark does not automatically qualify for trademark protection unless it can be shown that the public has associated it with a single source, and that it has been continuously and exclusively used by the owner to identify its products or services for at least five years.

In contrast, Winco selects the *fanciful* trademark, *GOLDI-LOCKS™* along with a silhouette of a smiling little girl, to evoke Goldilocks and her desire to choose items that were "just right." A *fanciful* mark is invented for the sole purpose of functioning as a trademark (e.g., words that are either unknown or are completely out of common usage). An *arbitrary* mark uses words that are in common use but, when used to identify particular products or services, do not suggest or describe a significant ingredient, quality or characteristic of the product or service. Winco could also have selected a *suggestive* trademark that, when applied to the goods or services at issue, requires imagination, thought or perception to reach a conclusion as to the nature of those goods or services. A *suggestive* trademark differs from a *descriptive* trademark, which immediately tells something about the goods or services. Although a company can register a *suggestive* mark, without proof of secondary meaning, it does not have the same scope of protection as an *arbitrary* or *fanciful* mark.

Understanding Product Lifecycles

It has long been recognized that every new product traverses through various stages during its lifecycle. Although experts may differ as to the number of stages and the nomenclature used for each of these various stages of the product lifecycle, they seem to agree that each product passes through the: (i) **Introduction Stage** – during which product development occurs; (ii) **Growth Stage** – during which the product is introduced and demand is created; (iii) **Mature Stage** – during which public awareness and sales volume increases; and (iv) **Decline Stage** – during which public interest has peaked and sales and profits decline. The lifecycle of a typical product resembles a bell curve.

Businesses strive to shorten the time and costs associated with the introduction and growth stages and move quickly into the mature stage; where product demand and awareness grow rapidly, resulting in increased sales. Ideally, the decline stage of the lifecycle is delayed as long as possible based upon ongoing product demand and sales. It is also desirable that the decline stage be as gradual as possible to maximize the benefits of the company's investment during the initial stages and to provide the company with as much time as possible to introduce a subsequent generation or a new replacement product. As illustrated below, choosing the proper trademark for a product and adopting an effective brand strategy can help improve and extend the product lifecycle, and assist not only in the launch of subsequent generations or new replacement products, but also enhance other products within the company's product line.

Growth Brings Competition

As Allsoran's and Winco's products continue to progress along their respective lifecycles, it is likely that competitors will enter into the marketplace. In this case, Lastin, recognizing the potential market size, launches its competing product under a *descriptive* trademark *HOT&COLD VARI MUG™* trademark. Given the broad legal protection afforded the *GOLDI-LOCKS™* trademark, Lastin selected a trademark that was not confusingly similar to the *GOLDI-LOCKS™* trademark and instead, for the same reasons as Allsoran, chose a *descriptive* trademark.

During this growth stage, each company continues to market and promote its product in an effort to differentiate its product from the competition and generate brand loyalty from the consuming public. It is at this stage of the product lifecycle where Winco's *fanciful* trademark selection should begin to pay dividends. As customers become more familiar and more particular about which variable temperature container product they purchase, brand loyalty and name recognition begins to take place. Customers also continue to be confused between the products sold under the *TEMP-ADJUST CUP™* and *HOT&COLD VARI MUG™* trademarks. In part because of the confusion associated with these *descriptive* marks, the consuming public begins to associate that "just right" feeling with the variable temperature container sold by Winco under the *GOLDI-LOCKS™* fanciful trademark. As a result, assuming that all other factors are comparable (i.e., price, quality, etc.) sales of the *GOLDI-LOCKS™* product should begin to outpace that of its competitors.

Normally within months or at best a few years, all three products will approach the end of the growth stage and enter the maturity stage of their respective lifecycles. Brand loyalty should now be firmly entrenched in Winco's *GOLDI-LOCKS™* product, while consumers will likely remain confused between its competitors. This should allow Winco to become the dominant company within the marketplace, thereby slowing its eventual move into the decline stage of its product lifecycle as compared to Allsoran's and Lastin's products. This migration of the Allsoran and Lastin products into the decline stage will be further accelerated if either of these two products experiences a quality control problem that negatively impacts public perception of either product. Due to ongoing public confusion between products, both products are likely to suffer reduced sales from the negative press relating to either company's

product. Winco should be insulated from this negative perception because of its unique trademark, thereby further enhancing goodwill associated with its *fanciful* trademark.

Introducing New Products

As the products enter into the decline stage, each company is likely focused on introducing either a subsequent generation of variable temperature container product or new replacement product. Winco should have a distinct advantage over its competitors with any such product launch because any product bearing the *GOLDI-LOCKS™* trademark should piggyback off of the name recognition and goodwill associated with the trademark. The result will be a reduced investment by Winco in launching the new product coupled with rapidly increase demand and sales – at levels much higher than would be attainable without brand recognition.

Furthermore, because of its brand recognition, Winco can more easily introduce other products that complement its original product. For example, a new coffee grinder could be called *MAMMA BEAR™* and a new coffee maker could be called *PAPA BEAR™*. Since consumers are familiar with Winco's product, it would be easy to translate the value associated with the *GOLDI-LOCKS™* fanciful trademark onto its other products. Winco could also introduce a second generation variable temperature container under the *BABY BEAR™* trademark. By so doing, each trademark within the product line would play off of and enhance the value of each of its products. Each trademark will also enhance the overall theme of the *GOLDI-LOCKS™* trademark and the overall branding strategy of associating the "just right" emotion with Winco.

Unfortunately, Allsoran's *TEMP-ADJUST CUP™* and Lastin's *HOT&COLD VARI MUG™* descriptive trademarks do not readily translate to a coffee grinder or a coffee maker allowing neither company the same benefit of being able to translate any goodwill associated with their original trademarks onto the new products. Consequently, Allsoran and Lastin must begin anew with naming and attempting to build recognition and demand for their new products. This puts both competitors at a distinct disadvantage to Winco who can take full advantage of the goodwill associated with its *GOLDI-LOCKS™* trademark to accelerate the recognition, demand and loyalty associated with its new products.

Real World Examples

One of the world's most popular operating systems is Microsoft's Windows® software. Over the years, Microsoft® has been able to launch a series of new versions of Windows® software (namely Windows® 95, Windows® 98, Windows® 2000, and more recently Windows Vista®). Microsoft® has been able to successfully leverage the goodwill associated with the Windows® mark to introduce subsequent generations of its product to great fanfare and sales. Similarly, Nike® has been able to not only successfully launch generations of its NIKE AIR® shoes, it has been able to expand the trademark to cover an entire line of products (e.g., Air Jordan®, Air Max®, Air Trainer®, and Air Flight®). With the launch of each generation of shoes, Nike® has been able to leverage and enhance its brand recognition and customer loyalty. It has used this leverage to extend the brand to cover an ever-increasing line of Air® products, generating yet further brand recognition and customer loyalty.

Legal Benefits of Strong Trademarks

Once a trademark has been federally registered, competitors are prohibited from using trademarks that are confusingly similar to their competitive products. Given its use of an arbitrary mark, Winco has the broadest scope of trademark protection available under the law relative to its competitors. In contrast, because Allsoran's and Lastin's descriptive trademarks are not able to be registered for at least five years, during that period, they will have little or no trademark protection and an ever-expanding list of competitors that can introduce products under confusingly similar trademarks, thereby not only further confusing the public to erode any goodwill associated with the trademarks selected by Allsoran and Lastin but, equally important, further distinguishing and enhancing the value of the Winco trademarks.

Winco also obtains all of the legal benefits that come with a federally registered trademark. For instance, even though the *GOLDI-LOCKS®* product may only have been introduced into a few western states, it has presumed priority in all remaining states throughout the country. Conversely, Allsoran and Lastin only have priority in those states where they have actually used the product in commerce and only as of the date of such use in commerce within each such state. Other important elements of a federally registered trademark are the ability of the registrant to potentially obtain an injunction against an infringer during the lawsuit, recover the infringer's profits, recover any damages sustained as a result of the infringing activities and recover its own costs in bringing the law suit to enforce its trademark rights. Moreover, if the court determines that the infringer intentionally adopted the identical or confusingly similar mark, it has the ability to triple the damages awarded to Winco.

Although adopting a comprehensive brand strategy and selecting strong trademarks may require a greater initial investment of time and resources, the potential advantages more than justify any extra commitment of resources. To that end, every company should attempt to select trademarks that are arbitrary or fanciful and implement a brand strategy that allows for subsequent generations of its products and potential expansion of its product lines.

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