



Brand protection law 101

No matter what you produce – whether its haircuts, hamburgers, web pages or (the proverbial) widgets, if you haven't got the competitors clawing at your coat tails ... its probably because they're out in front. No competition probably means that you've got a couple of weeks grace until someone else decides you're onto something.

That of course is where your branding comes in. And increasingly so. As it becomes easier to bring new products and services to market, the importance of your brand to set your product or service apart from those of your competitors increases.

Yet, most of us are still largely focused on strategies which protect our physical assets - security, maintenance, insurance etc, no business would be without them. But given the increasing importance of intangible assets, why then do we not pay the same, if not more, attention to their maintenance and protection?

Such a strategy should embrace a number of different inputs – a kind of holistic approach summed up in the phrase “use it or lose it”. Reference to the fact that intangible property protection is about proactive and consistent exploitation of the brand.

That proactivity must start well before you give your competitors a chance to see what you are up to and can take a number of different tacks:

Copyright – The great thing about copyright protection is that it happens automatically. As soon as you put something down on paper (or more likely in electronic form nowadays) as long as it is original, then you (as the author) can stop someone copying it. Copyright doesn't give you the right to stop others using your idea, just the tangible expression of it, so remember that you will not get any protection at all until you put that spark of genius into some tangible form. Make sure you keep all drafts, notes and iterations and date them so that it you need to you can prove when you had that eureka moment. Some people mail a copy to themselves so that it has a NZ Post date stamp on a sealed envelope or lodge a copy with their lawyer or another trusted agent.

Trademarks – If your brand or logo is distinctive, you can choose to register it at the Intellectual Property Office of New Zealand (IPONZ). Though a trade mark need not be registered, doing so is often the best way of protecting your product or brand. Instead of relying on the Fair Trading Act or common law rules of passing off, you do not necessarily have to have been trading using the trade mark to be able to stop someone using a similar name or brand. Registration at IPONZ also has a deterrent effect - it clearly indicates to everyone your ownership in the mark.

Design registrations – Though designs are generally protected by copyright, you can also register most original designs at IPONZ. The advantage in design registration over copyright protection is it gives you the right to stop others using your design even if they did not copy it but instead came up with the design independently. Because the design registration database is searchable it can also deter others from putting something into the market that might be too close to your design.

Use it properly – if you have a brand or logo (whether you've registered it as a trademark or not), use it consistently and show everyone that you are claiming exclusive ownership of it. For example, the letters [™] indicate an unregistered trademark – a name or brand that you are in the process of registering or which, for whatever reason, cannot be registered. © for copyright and ® for a registered trademark. Make sure that the brand is not diluted by incorrect use. If the name is in red with a carefully designed corporate squiggle all contained in a black square, then don't mix and match it every time you use it – or you may have difficulty establishing that you do really have a brand or trade mark worthy of protection.

Use the monopolies – domain names, 0800 or 0508 word numbers, personalised plates, company names, Google adwords, Twitter, Facebook, LinkedIn and other social networking usernames and tags. All of these to some extent can give you a de facto monopoly in a name and should be part of that overall strategy. Of course, this may need to go hand in hand with an SEO strategy that will also focus on keyword branding.

It is important to secure your name early even if you do not intend to use it actively. You can lose out either to someone with the same name or, more dangerously, to one of many organisations which have created a business out of registering names and then selling them (which is already starting to happen with social network usernames). This will often infringe your rights in the name in any case so legal action may get it back for you. But, it is far simpler not to have to go through the battle of winning your own name back or face a competitor using your brand to attract Google searchers to it instead of you.

Social networking/blogging – social networking sites such as Twitter, Facebook and LinkedIn, and blogs, are fast, simple and easy communications tools that can be used to share your brand with a potentially unlimited audience. Such channels can build strong online relationships but, again, brand use needs to be consistent. Because of the expectation of very quick response turn around, the danger of brand #fail is exponentially higher.

Website terms – for many businesses, it is their website that is the first and sometimes only point of contact with potential customers. Ensure that your website terms stipulate what other people can and cannot reproduce, the terms on which any information can be reproduced and your general trade terms. If you're happy with people copying anything, consider using a creative commons licence so that you at least get some kudos. As with social networking sites, it is important to act responsibly and not include any information that infringes other people's rights.

The thief from within – remember that for most businesses your most important assets walk out the door each night when they finish work. Make sure if they do not return the next day, your terms of employment contain appropriate restraints of trade, confidentiality clauses and provisions governing ownership of intellectual property. This is particularly important with contractors, and with employees who may be working from home or mobile platforms.

Confidentiality agreements/NDAs - when sharing information about your brand or product that is not in the public domain, before you *open your kimono*, make sure the person who is to receive your valuable information first signs a confidentiality/non-disclosure agreement or at least is made aware that you regard the information as confidential.

None of this is rocket science – however, the important point is that no one strategy works by itself – it's that holistic approach again.

Rick Shera is a partner and Angela Beros is a senior solicitor at top niche business law firm Lowndes Jordan, specialising in understandable ICT law advice for business people. Rick can be found online at <http://twitter.com/lawgeeknz>.

This article was first published on Business Blogs at <http://businessblogs.co.nz/2009/12/09/brand-protection-law-101>