



Consistency—It's Not Just for Branding

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For good reason The Brand Ascension Group stresses the importance of three factors for instilling and maintaining your brand: relevancy, consistency and distinctiveness. I'm going to give you an intellectual property law attorney's perspective as to why one of these factors—consistency—is also legally important. To do that, first I'll digress and give you a primer on trade dress and trademark law.

Aspects of your business identity, or brand, are legally protectable under trade dress and trademark law. Trade dress protection extends to the commercial impression of a business, specifically, the non-functional features of the business expressed in the total image and overall appearance of the goods or services it offers. An excellent example of trade dress is UPS and the ubiquitous brown color that permeates its operations from packaging to uniforms to delivery trucks. In fact, UPS has employed this important trade dress element in its advertising with the slogan "What can Brown do for you?" Brown is an important element of the UPS brand.

If another company were to imitate UPS' trade dress in a manner that would cause confusion among consumers, then UPS would have an action for trade dress infringement against that competitor. A new or an existing entrant in the delivery business that decides to adopt brown as its signature color is sure to have UPS paying it a not-so-friendly call.

Consistency in the use of your company's trade dress is important, not only to expressing your brand, but also to legally maintaining your brand. For the law to recognize trade dress, the aspects of the trade dress must be consistently applied and continuously used. For example, McDonald's trade dress in its restaurants is instantly recognizable to consumers through consistent use of building shape, interior layout, color scheme, décor, packaging, menu offerings and so on. The restaurant wouldn't even need a sign for you to know it was a McDonald's restaurant. Now, let's say you have 12 restaurants in a metropolitan area and they all have the same name, but they each have a different menu offering, décor and building exterior in both shape and color. Your customers would know you owned all of these restaurants, because they all operate under the same name. However, they'd probably be very confused as to what to expect at any one restaurant they may patronize. Why? Your brand, and thus, your trade dress, is inconsistent. These disparities dilute your brand and negate any trade dress protection you may be able to claim.

Trade dress and trademarks are complementary legal cousins that serve different legal purposes. The purpose of

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a trademark is to indicate the source or origin of a good or service. A trademark may be a word, symbol, name, device or any combination thereof. A trademark owner has the exclusive right to use his trademark in conjunction with his particular goods and services.

Only trademarks which are descriptive, suggestive, arbitrary or fanciful (in order of increasing legal strength of a trademark) are entitled to legal protection. Generic terms (the word for the good or service itself) are not entitled to trademark protection, because these terms must remain available for all to use in identifying their goods or services. Examples of generic terms are telephone, car, dry-cleaning, etc.

The legal strength of a trademark is often inversely related to the appeal of the trademark to your marketing team. Why? Because of the ability of the trademark to instantly convey to a consumer what the good or service is. As you'll see in the discussion which follows, descriptive marks require no consumer education, suggestive marks require some consumer education and arbitrary or fanciful marks often require extensive consumer education. The marketing plus of a legally strong trademark though is the increased value and heightened awareness in the marketplace of your brand.

A descriptive trademark describes the nature or quality of the goods or services and is subject to limited legal protection; provided the owner can demonstrate the trademark has secondary meaning, meaning the public has come to identify the descriptive trademark with a particular source. An example of a descriptive trademark is Half Price Books® for retail store services featuring books. See the immediate connotation to the consumer? Inexpensive books. No explanation needed.

A suggestive trademark suggests the nature or quality of the goods or services. Examples of suggestive trademarks are Coppertone® suntan oil and Edge® shaving cream. These marks have a less immediate connotation to a consumer, but do readily convey that Coppertone suntan oil will give them a nice, perhaps unhealthy, tan and that Edge shaving cream will give them a smooth, close shave.

An arbitrary trademark applies an existing term with intrinsic meaning in a different context. Examples are Apple® computers and Palm® PDAs. Without the advertising campaigns that went along with these product launches, the consumer would have no idea what either an Apple or a Palm were. These trademarks were worth the effort and, as a result, are very strong marks in the marketplace. We all have a different perception of an Apple computer versus a Dell PC and of a Palm versus a Blackberry.

A fanciful trademark is coined anew for use as a trademark; it is a word that didn't exist before. Examples are Exxon® gasoline and Kodak® film. Imagine the consumer education that Kodak had to undertake when it went into business—not just for its Kodak brand, but also for the film and photography industry. Again, the effort was worth it: look at how strong its brand and trademark are today.

So why should you care if you consistently use your trademark from a legal perspective? Just as for trade dress, for the law to recognize a trademark, the trademark must be consistently applied and continuously used. Additionally, it is the responsibility of the trademark owner to maintain and enforce his trademark rights. If he doesn't, he risks losing those rights. As a result, owners need to be particular as to how their trademarks are used, which is why proper, consistent use is important in your branding and marketing.

There are several factors for proper usage. First, a trademark should always be used as an adjective, never as a noun, verb, plural or possessive. Trademarks are properly recited as: <Trademark> brand <good or service>. In common parlance, the word "brand" may be dropped, but the trademark should still be paired with a noun. For example, you blow your nose into a Kleenex® brand tissue or wear a pair of Levi's® jeans. Conversely, you don't Rollerblade® in the park (misuse as a verb; proper use would be skating with a pair of Rollerblade in-line skates), and you don't make a Xerox® of a document (misuse as a noun; proper use would be making a copy with a Xerox photocopier).

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Why should a trademark owner care whether its trademark is used as an adjective?

For an owner to do otherwise creates the risk of the trademark becoming generic and generic marks are not entitled to legal protection. The classic example of a trademark that became generic is aspirin. Yes, aspirin was originally a brand name for salicylic acid medication. Although trademark misuse is common, it's still not correct and not an excuse for you to use, or to allow others to use, your trademark improperly.

Trademark owners do public relations campaigns to educate consumers on proper use of their trademarks to combat genericide. Both Xerox Corporation and Kimberly-Clark Corporation (Kleenex) have conducted such campaigns. Think of Google and its phenomenal success. The trademark Google is often used as a verb. I'm sure you've said many times to others searching for information, "Just Google it." Makes you wonder if the Google trademark may face genericide in the future.

Yet another reason why you should care and take heed to consistently apply your brand. Consistency—it's not just for branding. It's your legal friend and ally in the competitive marketplace.



Brenda Speer has been practicing law since 1989 and has honed her area of emphasis, intellectual property law (patent, trademark and copyright), through both private law firm practice and in-house legal department service. In October 2004 she re-entered private law practice in Colorado Springs, Colorado, as a solo practitioner and provides legal counsel to artists, entertainers, innovators and companies in the creative, technological and business arts. Her passion is protecting the creative works, inventions, proprietary information and trade identities of her clients. Contact Brenda at: www.blspeer.com or 719.381.1708.



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