BIZCOMMUNITY

Legally protecting your brand name in the social media age

By Shan Radcliffe

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The advent of social media has provided brands with an undisputed marketing opportunity - a direct customer engagement platform, where brands can build their identity and loyalty, and promote their goods and services to their heart's content. But all good things come with a price, and brands face numerous risks by way of trademark infringements, fake news, and cyber squatters, to name a few.

Shamin Raghunandan, a partner at Spoor & Fisher, chatted to us about the IP infringement risks brands face and the importance of its protection in the age of social media.

What are some of the most common trademark and IP infringements that occur on the web, and more specifically, via social media?

Major risks in the social media space from a trademark and IP infringement perspective include:

- Content posted by users or competitors that infringe a brand owner's trademark.
- 'Username squatting' has become increasingly prominent in the social media space. This is when someone other than a brand owner registers a username incorporating a brand, with the intention of either misleading consumers or coercing the brand owner into buying the username at an inflated price.
- Social media pages may also be created by an imposter claiming to be the business, with the intention of tarnishing the brand and misleading the consumer.
- The sale of counterfeit goods (fake goods deliberately made to look genuine) has become common in recent years. There are many closed groups operating on Facebook which promote and sell counterfeit goods. Instagram, a photo sharing platform owned by Facebook, is also used by counterfeiters to market their goods.
- Truth in the era of fake news has also become a factor. Fake news or false accounts of bad experiences with the brand can also be used to bring a brand into disrepute.

How should brands go about dealing with such an infringement?

When infringement or misuse is detected, the business will need to find a balance between managing its supporters and the possibility that negative publicity could result from taking an aggressive approach - legal documentation can be dissected, published and go viral within minutes. Sometimes, engaging with the offender and requesting the unauthorised use to stop, may be enough. In some instances, no action may be the best recourse. The Coca-Cola Facebook page has over 107 million followers but was first created by a fan. The company dealt with it by cooperating with the fan to run the Facebook page but it is the now the official handle of The Coca-Cola Company.

It is still important to enforce unauthorised uses of a trademark against infringers or social media squatters. Enforcement efforts should be prioritised based on the business, the brand and the specific risk involved. Besides the traditional methods of sending a cease and desist letter and court proceedings, all major social media sites have takedown tools available through online forms. Brand owners can submit a complaint with the social media platform and request that the infringement or offending post be taken down.

Brand owners should be mindful of how the wrongdoer might defend their actions. An example of this is parody or imitation, and Twitter allows parody impersonation if it is clearly stated that the profile is fake. There may also be cases where freedom of speech outweighs brand reputation.

Developing a clear social media policy which is easily accessible is a must for businesses with a social media presence. Robust guidelines should be put in place to protect the brand's use, whether by employees or third parties, and ensure it is consistent across all social media platforms. Social media sites are under no obligation to police and detect infringing activity. A few employees or an independent monitoring service should provide regular check sites for damaging content. Searches through Google Alerts can generate regular results and TweetDeck can provide alerts when people are tweeting about a business.

What should brands be doing to protect their IP and trademarks from violations in the first place?

First and foremost, all trademarks should be registered in the core countries in which they do business. A trademark is usually a word, a slogan or a logo (or any combination) which identifies the products or services. Social media sites are more likely to remove offending material or suspend accounts if a complaint is based on a registered right.

However, it is no longer realistic to merely carry out a trademark search and apply for trademark registration. One way to limit the risk is for brand owners to proactively build and maintain their own social media presence on sites which make the most sense for their brand. It is not necessary to engage with consumers on every social media platform especially if it is not suitable for a particular brand. The key is to premeditatedly obtain defensive registration of brands as usernames, usually at no cost, so it is not available for registration and potential misuse by others. This prevents a loss of time and expense in trying to reclaim a username once someone else has registered it

What's the best way to protect IP: trademarks, patent, copyright or trade secret?

Attaining the necessary protection for your ideas is the most important step you can take to help ensure its future. The

following points highlight the types of protection in relation to IP:

Trademarks:

A trademark identifies the brand owner of a product or service. Trademarks are best protected by registration in respect of all products and services and countries of interest. When selecting a trademark it is important to choose a unique mark. As a rule of thumb, words commonly used should be avoided. The stronger or more distinctive the trademark, the easier it is to register and stop authorised use. To give notice to others of rights, it is important to use markers, ® (for a registration) and ™ (for a pending application).

Patents:

A patent is an exclusive right granted for an invention. A patent may be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade and industry or agriculture. Newness in patent law is part of the legal test to determine whether an invention is patentable. It is imperative that the patent is kept secret and not used before filing a patent application. However, before a patent application is filed, there is an idea. There is no effective way to protect an idea as it is the material embodiment of the idea that can be protected. Confidentiality and non-disclosure agreements can help keep an idea a secret but getting people to sign these documents can prove difficult.

Copyright:

Unlike other forms of intellectual property, copyright does not need to be registered in South Africa, except for cinematograph films. Copyright describes the rights that creators have over their literary and artistic works or sound recordings, among other categories. Copyright does not protect ideas, only its material form. Protective measures that can be taken to include a copyright notice, using the marker © on a work, followed by the name of the copyright owner and year the copyright work was first created. Detailed record keeping, such as copies of the various editions of the work, log books and agreements, helps support when copyright was first created.

Trade Secrets:

Trade secrets involve manufacturing or industrial secrets and commercial secrets which gives a business a competitive edge. The subject matter may include distribution methods, consumer profiles, lists of suppliers and clients, and manufacturing processes. Trademarks and patents are protected through registration whereas trade secrets are protected by non-disclosure and confidentiality agreements. The trade secret owner should also take reasonable measures to keep the information secret, by restricting access to a limited number of people.

ABOUT SHAN RADCLIFFE

Shan Radcliffe is the editor of Bizcommunity HR, Education and Legal.
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