

THE LEGAL DEPARTMENT

Protect Your Trademarks

EACH YEAR, TOY companies pour billions into advertising campaigns to place products in front of store buyers, parents and kids. Unfortunately, the “dividends” from these investments often include competitors trying to ride on the coattails of their hot products—often by adopting similar names.

When competition results in trademark infringement, one of the first questions companies ask their lawyers is, “What can we get if our trademark is infringed?” The usual answer is “likely just an injunction.” In other words, if you win, you will have stopped the bad guy from using the name of your product. But companies are often surprised to learn that, frequently, that is all a successful trademark owner recovers. No doubt, an injunction is valuable. But is there more? What about damages?

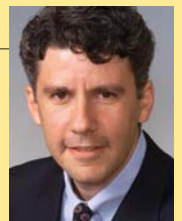
For a company to be awarded damages from an infringer, courts require a trademark owner to prove “actual confusion” about its products. This is a higher legal standard than “likelihood of confusion,” which cannot be proved by the results of the consumer surveys often conducted in trademark cases. In fact, “actual confusion” calls for concrete proof that purchasers or potential purchasers in the marketplace were actually confused about who was the source of the infringer’s products, or about whether the trademark owner in some way approved of, or was affiliated with, the infringer.

Leave a mark

What can a trademark owner do to increase the chances of recovering damages in litigation and recoup some of its investment? In short, implement internal procedures in your business for documenting consumer’s “actual confusion.” Instruct sales and marketing personnel, customer service representatives, and anyone else that has direct contact with your customers to create records of any reported confusion, obtaining key details such as who was confused, the consumer’s name and phone number, a list of which products were involved, the timing of the incident and the reason for the confusion. Was the consumer confused due to the similar names or packaging of the products? Or was it due to other factors not related to the trademarks involved? Without such details, confusion in the marketplace will not pass muster in court.

These guidelines can help a company substantially increase the value of its trademarks. And armed with the evidence developed by these practices, your counsel will have ammunition to pursue damages and beat the bad guys.

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In Praise of Reps

Sales: A model of civility in an uncivilized world

By Richard Gottlieb

Every once in a while I like to ask salespeople the following question: “Do you know a salesperson that has ever hit a buyer?” I usually get the kind of vacant pause that you see when you confront someone with an issue that they have never even remotely thought about. After a few moments they will, with an awkward smile, say, “No, I haven’t. Salespeople never hit buyers. Never!”

Though postal workers sometimes let loose—as do stock traders, pro athletes and coaches—salespeople, on the other hand, remain *aggressively* non-violent.

Now, I have to admit that over the years I have heard two stories, fourth-hand. One was about a cupcake salesman who confronted a pastry buyer in the parking lot and punched him in the nose. The other was about a salesman who, on the last day of his career, stood on a buyer’s desk and screamed at him for 25 years of abuse. It was his going-away present, of sorts, to the buying community. No one ever really puts any names to these stories, so I have always assumed that they are the sales rep’s urban legends.

I think we can therefore be pretty confident that

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there will be no trial of the century featuring a salesperson. Okay, no one cares about salespeople that much, but you still won’t see a frazzled salesperson fighting for his life on Court TV. No call will go out for a future Johnny Cochran. No “abusive buyer defense” will be argued. No “out-of-stock plea” will be copped. Salespeople never hit buyers.

Though I don’t think the sales profession is owed any special note of gratitude or applause (except perhaps from the buying community), I think it does make for an interesting question: Why do salespeople, who probably suffer more rejection in any given day than any other type of worker receives in a month, never get outraged? Why do salespeople, whose careers and incomes are in the hands of the person on the other side of the desk, never leap across that desk? Why would a salesperson be miserable rather than become hostile? What makes them *not* go crazy? How are they able to absorb so much daily rejection?

Anger management

Maybe the government should organize a team of experts that will study salespeople to see what makes them tick—or not tick, as the case may be—to figure out why they are the “anti-postal worker.” I began my career as a salesperson, and I was a pretty good one too. I later went on to manage, hire, fire, study, talk to, talk with, talk about, travel with, hang out

with, eat with—and yes, drink with—salespeople. So I think I know about as much as anyone does about them. No, I don’t have the answer, but I do have some observations as to why they are so resilient:

- Some have great egos (but aren’t egotistical) and are just at ease with themselves. They don’t need anyone else to tell them that they are worthy.
- Some are unfailingly optimistic. As Scarlett O’Hara says, “After all ... tomorrow is another day.” (Actually, when you think about it, it usually is.)
- Some find the constant rejection kind of funny. They have such great senses of humor that they can turn a tragic story into a comedy routine.
- Some are born with skin so thick that you might think somewhere back in time that just maybe one of their ancestors married an armadillo.
- Some are in the business solely for the money, and that trumps everything else.
- Some are so good that they are practically un-touchable. They just don’t get very much rejection. (I have seen them at work. They’re fantastic).
- Some are just plain in love with their buyers, like a guy who roots for the same losing team year after

year. They put up with the rejection, because they know they are really loved. And they know it because every once in a while they get a big order.

Some drink. Some quit the business. But no one blows up. Most salespeople do fine. The characteristic that they all have in common is the ability to be civil to someone they really don’t like very much. That’s why I say that salespeople are a model of civility in an uncivil world. Sadly, few take note of it. Rather, salespeople are too often seen as sort of wily buffoons—to be bested, to feel better than, or from whom to get a free meal or drink.

I hope that the next time someone is having a little too much sport with a member of the sales community, he or she stops for a minute and sees what it is that I see. Salespeople are probably the most civilized people in modern society. They may hate you, yet they shake your hand. They may detest you, but they break bread with you. They will disagree with you without being disagreeable. Most of all, they will look for the best in others in order to find the best in themselves.

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The largest ever U.S. trademark infringement judgement, \$143 million, was awarded to Trovan Ltd. in 1999 when a jury found Pfizer guilty of using the name to market an antibiotic. The judgement was later overturned. —The New York Times