

Ohm's Law: Death of a Trademark

By Hun Ohm*

You've done it. You toiled for years to perfect a revolutionary cross between yogurt, muesli and "something special," resulting in a new category of breakfast complement with a unique flavor and unexpectedly delightful consistency. After careful thought, you have chosen WIDESPREAD to be your brand, and your product has been a smashing success. Stores cannot keep their shelves stocked, and seemingly overnight your WIDESPREAD brand breakfast complement is on dining tables across the country and becoming a household name. Competitors have noticed, and they are desperately ramping up to penetrate what they call the WIDESPREAD market. Indeed, your presence has become so pervasive that it could be argued that your WIDESPREAD trademark is synonymous with the common name of the product category itself. And therein lies the problem for your trademark: genericide.

As you may recall, not all marks are created equal. They can range in terms of legal strength, from the strongest, "fanciful" marks (marks that are coined or made up words – think JOGIANCH for beer) down to "descriptive" marks (weak marks that merely and immediately describe a characteristic of the goods or services in question – think HOPPY for beer). Lurking at the very bottom (from a trademark strength perspective) are what are known as generic terms. These are terms that are the common name for a product or service; they are not capable of serving as trademarks and have no source-identifying significance (think BEER for beer).

Genericide refers to the process by which a trademark, often a strong, inherently distinctive trademark, gradually loses its distinctiveness over time to the point where it becomes the common name of the product, *i.e.*, a generic term. Interestingly, this can be a potential issue for brands for very successful, unique (*e.g.*, the first of its kind) products; widespread usage and exposure that accompany a product's runaway success could paradoxically lead to the death of a brand. Well known examples of genericide include terms such as CELLOPHANE, ASPIRIN and ESCALATOR, each of which were once brand names. However, in the absence of careful brand protection practices, these brands have come to be the very name of the type of product itself, and are no longer protectable in the United States as trademarks. In fact, they can be freely used by anyone in connection with the product.

In order to avoid this result, you should take care to properly nurture and protect your brand. A few practical steps could be helpful:

1. Use your trademark properly. A trademark should be used as an adjective, not as a noun or verb. Be sure to use a generic term in connection with your trademark. For example, "Give me a WIDESPREAD brand breakfast complement," and not "Give me a WIDESPREAD."
2. Distinguish your trademark from surrounding text. Use ALL CAPS, *italics*, first letter capitalization, or some other distinctive font feature to make your trademark stand out from surrounding text.
3. Actively police and enforce your rights in your trademark. If you see your mark being misused by others, you should correct or object to such misuse.

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4. Educate your consumers and the public. Proper trademark usage will naturally help educate your consumers with respect to treating your brand as a brand. However, if your trademark has been consistently misused and is in the danger of possibly becoming generic, consider active steps to re-educate the public about your trademark. For example, Xerox Corporation launched a clever educational ad campaign to make clear that XEROX was a brand name, and should not be used as a verb or noun. A classic line from the campaign is: “You can’t Xerox a Xerox on a Xerox. But we don’t mind at all if you copy a copy on a Xerox copier.” A lot of Xs in those sentences, but you get the idea. Although these educational campaigns can be expensive investments, the price could well be worth it to save an iconic brand from the trademark graveyard of generic terms.

You never want to have your product’s success result in your brand’s demise. Proper cultivation, use and enforcement of your trademark will help ensure that your WIDESPREAD brand continues to effectively enter your consumer’s mind without entering the public lexicon.

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