Non-traditional trademarks: tips for the 21st century

As today's brand owners look to harness the new reality of social media, they should take note of other transformational moments in industry in order to create their own non-traditional trademarks for this new marketplace

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The digital age and social media have brought striking changes to the marketplace, prompting deep analysis of current branding strategies. Both the digital age and social media are here to stay and will continue to transform how we do business and how we communicate with one another. Consumers are in constant contact with each other, developing their own voice. The way in which they gather and share information is evolving rapidly, while the devices used to share that information are becoming smaller, faster and more powerful. It is within this new system of instant, international communication that businesses must evaluate and develop their brand strategy for the 21st century.

As part of that analysis, businesses must identify the type of trademark that is best able to evoke their brand image and sell their product. Questions under consideration in the boardroom focus on the need to evaluate what it means to brand a product in today's marketplace. Should the brand and its trademark evolve in the new social media reality? If so, what is brand evolution? What are the evolutionary forces and what will or will not change? How do you identify the evolutionary components of a brand? What kinds of trademark will have the most impact on consumers in this new environment? Will companies need to move beyond the types of trademark readily accepted today? What will those trademarks look like?

While brand and marketing specialists, psychologists, survey experts and pundits analyse branding in today's marketplace and try to understand what branding means in the 21st century, companies may find it useful to look to some of today's most iconic brands and learn from their experience as they launched what were once "non-traditional" marks. With a clear vision and dedicated resources, these non-traditional marks have become accepted trademark forms, representing some of the most valuable brands in the world. As businesses determine their next branding steps in this new marketplace, they can learn from the way in which today's famous brands were created and transformed from non-traditional trademarks into iconic brands.

A classic case

The shape of a bottle as a trademark is something that consumers and trademark lawyers accept today without a second thought, but this was not always the case. The idea that the container holding the product could function as a trademark took a number of years to be readily accepted; many resisted the idea. Product packaging, including the containers that held the product, was seen as functional and not something that could be an indicator of the source of the product (ie, a trademark). In some instances, glass containers were recycled and one company might use another company's container when it was refilled. As long as the label on the refilled container was clear, there was no perceived problem.

However, one company led the way to demonstrate that unique product packaging could indeed indicate source: The Coca-Cola Company. The Coca-Cola® soft drink started out as a fountain soda in 1894. Recognising the potential for a major marketing and delivery shift, the company began commercial bottling in 1899 and was quickly successful. The Coca-Cola Company explains: "Over the next 20 years, the number of plants grew from two to more than 1,000 — 95% of them locally owned and operated. As the business grew, the development of high-speed bottling machinery and increasingly efficient transportation enabled bottlers to serve more customers with more products. Today, the Coca-Cola bottling system is one of the largest, most widespread production and distribution networks in the world."

By 1915 The Coca-Cola Company and its bottlers had begun to think about their product packaging — they wanted it to distinguish their product and to stop others from easily copying the bottle. They asked for examples of product designs and selected what has become known as the "contour bottle" design, which they introduced in 1916. Trying to protect the design of the bottle as a trademark was a creative and challenging idea because of the prevailing attitude that product design could not indicate source. To overcome this attitude and to establish protectable trademark rights in the design, The Coca-Cola Company developed advertising campaigns featuring its soda in the contour bottle. This advertising has been extensive and consistent since that time. For example, many will remember the advertisements with Santa Claus holding a Coca-Cola bottle or the polar bear advertisements with the signature logo that includes a picture of the contour bottle. The contour bottle is one of the relatively few product packaging designs granted trademark registration by the US Patent and Trademark Office (USPTO). According to The Coca-Cola Company, the design is one of the most recognised icons in the world. The company continues to demonstrate its brand-savvy approach with the introduction of the new smooth bottle, which retains the contour bottle shape while introducing a modern, smooth look and feel.

The history of the creation, launch and success of the contour bottle offers an excellent strategy for businesses today:

- Capture a transforming moment in the marketplace.
- Identify the most creative method to convey the brand message to the consumer and protect the brand identity.
- Develop the appropriate advertising and marketing strategy.
- Implement that strategy with commitment and focus.
- Establish trademark rights in a non-traditional mark through consumer recognition.
- Turn the non-traditional mark into an iconic brand.

Sound as a trademark in new media

Sound conveys emotions and feelings, often across languages and cultures. A multi-million-dollar industry has grown up around sonic branding, "with companies eager to capture the values and emotions associated with a product and pipe them directly into your mind" (*BBC News Magazine*, 21st June 2010). However, sound as a trademark was not always accepted. Even today, only around 30 jurisdictions grant trademark protection to sound marks — a small fraction of the nearly 180 jurisdictions where some form of trademark rights may be registered or otherwise claimed. However, some of the most recognised and valuable trademarks in the world are sound marks.

It was not all that long ago that film, radio and television were the "new" media, and audio signatures were a part of those industries from early on. For example, Metro-Goldwyn-Mayer began using the roar of a lion to announce the beginning of a movie in 1924, but did not file a trademark application to register the sound mark until 1985 (USPTO Registration 1395550). The invasion of television into homes between the 1960s and the 1980s can be considered one of the most transforming events of the 20th century. During this period television both matured and expanded; new technologies were introduced, such as satellite delivery of programming, and while there was little colour programming at the beginning of this period, by 1967 most US network programming was in colour and by 1972 half of all US households had a colour television.

The opportunities for communication and sharing of information were immense. Anyone who is old enough to remember watching television in the 1960s will remember the introduction of the NBC chimes on television. NBC began using the three notes on television in 1961 — a carry-over from the chimes that NBC Radio first used in 1927 (USPTO Registration 523616 (expired) for radio services and 916522 for television services, filed in 1970). With

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millions of viewers each week, advertisers could reach consumers on an enormous scale, using jingles and signature sounds that were heard, absorbed and hummed in millions of homes and offices.

In today’s digital age, particularly across social networking media, sound remains an excellent indicator of source. Intel recognised the value of a sound mark for use in association with technology products in 1994, when the Intel bong® sound mark was created. The five-note sound mark is an “audio sparkle” that layers seven sounds, including a tambourine, an electric spark and a hammer on a pipe. The initial sound in the mark serves to move cleanly from any audio element preceding the signature sound and to prepare the listener for the main motif, which comprises a mix of xylophone, marimba, bells and other sounds. The sound mark helped to establish Intel’s key brand attributes, including its reputation for cutting-edge technology. In recent advertising campaigns, the sound mark is sung, adding a new attribute to the Intel brand: fun.

To establish the sound mark as a trademark, Intel did much the same as The Coca-Cola Company had done in 1915. It identified a creative, non-traditional trademark as a key feature of its branding strategy. It anticipated how it wanted to communicate with consumers to convey its brand attributes. It then put resources behind the idea. Intel’s advertising campaigns have consistently carried the sound mark as an audio signature, not only through Intel’s own direct advertising, but also through the Intel Inside® licensing programme. As a result, the sound mark is one of today’s most famous marks, registered in multiple countries worldwide and heard every three seconds somewhere in the world.

Tiffany blue

Colour may also function as a trademark, although it is relatively difficult to establish colour alone as a trademark and some countries still do not recognise colours as such. However, Tiffany & Co spent more than 100 years successfully working to prove otherwise. Show nearly any shopper in the United States — and in many other countries around the world — a certain blue box, and he or she will immediately recognise the blue colour and know that it is from Tiffany & Co. Like the Coca-Cola contour bottle and the Intel sound mark, the Tiffany blue trademark is a story of creativity in selection of a non-traditional trademark and dedication in the promotion of the mark to develop a famous brand icon.

Tiffany first published its Tiffany’s “Blue Book” catalogue with the cover in the shade of blue now known as Tiffany blue® in 1878. By 1906, the Tiffany boxes in Tiffany blue were considered to be an international icon. According to *The New York Sun* in 1906: “Tiffany has one thing in stock that you cannot buy off him for as much money as you may offer; he will only give it to you. And that is one of his boxes. The rule of the establishment is ironclad, never to allow a box bearing the name of the firm to be taken out of the building, except with an article which has been sold by them and for which they are responsible. Glimpsed on a busy street or resting in the palm of a hand, Tiffany Blue® boxes and shopping bags epitomise the jeweler’s great heritage of elegance, exclusivity and flawless craftsmanship.”

Mr Tiffany understood the value of exclusivity; he also understood the value of using something different — something special — to reinforce the brand association with exclusivity. It was nothing short of ingenious to make the colour of the box a

trademark. After all, everyone knows that the best gifts come in small packages; and that still means a Tiffany blue® box.

Coveralls that became jeans

Today, no-one questions that a stitching design or a protruding piece of fabric can indicate the source of a product. However, that was not always the case. For many years, stitching designs were considered to be decorative only. Three-dimensional elements were not considered capable of functioning as trademarks. As a result, it was difficult to establish trademark rights and enforce them in these non-traditional marks, yet companies succeeded over time. One example is Levi Strauss & Co, which started to use what has become known as the "arcuate stitching" design in 1873 and the protruding red tab in 1936. Levi's consistently applied the arcuate design to jeans, even during World War II when the trademark was painted on the back of jeans because thread was required for the war effort. The company was relatively early in establishing a practice of producing jeans that carried a blank red tab — a protruding tab that does not also carry the Levi's® word mark on it. To establish consumer recognition in these non-traditional trademarks, the company has regularly run advertising campaigns that promote the images of the arcuate stitching design® and the red tab® trademarks. Through this consistent use and advertising, Levi's has developed consumer recognition to establish trademark rights in these non-traditional marks.

Other non-traditional trademarks and the future

The examples listed above are not the only non-traditional trademarks that have been (or will be) thought of. Today, many companies are using "motion" marks — trademarks that move — particularly in the technology and film industries. Others have tried to register scents and even holograms as trademarks; and others will develop new non-traditional trademarks that have yet to be imagined. Just as transformational change in the marketplace came about in the late 19th century and again in the 20th century, the 21st century is ushering in an age of rapid transformational change for businesses and their brands. Decisions on how to communicate with consumers and promote goods and services will be continually analysed. However, if a non-traditional mark is adopted, the commitment to the new trademark must be meaningful and consistent. With luck, a guiding hand and the right resources, that new trademark could become the next iconic brand of the 21st century. *iam*



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