In essence brands or trade marks are words, names, slogans, symbols, logos or other signs that identify and distinguish the source of a product or service. Trade marks are also powerful marketing tools, however as a result of their success they are also at risk of becoming lost at the hands or "mouths" of their consumers.

A victim of their own success: what is brand genericide?

The term “brand genericide” has been used to describe the process where a trade mark brand owner, sometimes unknowingly, participates in the destruction of the distinctiveness of its trade mark. Indeed, trade mark history is full of examples of marks - often for innovative products - that have become generic: Linoleum, Escalator, Shredded Wheat, to name but a few. The well-known phenomenon of "genericism" affects various industry sectors, including the food and beverages industry: NESTLE, M&M’s, COCA-COLA, TABASCO all had to deal with the risk of genericism in one way or another. Read on for practical tips which will to prevent your trade marks from becoming a common descriptive name and potentially entering the public domain.

How does it happen?

Provided it is used and policed properly, a trade mark or "brand" should be able to retain its essential function of denoting trade origin. It is only once improper use of a trade mark, either by the owner or by third parties, starts to cause consumers to use a mark as the "name" of a product or service, that the mark "distinctiveness" is at risk. Marks are at high risk where there is no generic term per se, i.e. where the trade mark owner is the "inventor" of a new product or service and where the mark is at risk of being adopted as the product name in everyday language. Somewhat ironically two of the biggest risk factors are the popularity of a brand and the proprietor itself. A contributing factor appears to be how consumers instinctively tend to pluralise brand names and/or turn them into verbs (so-called "verbing up").

Why does it matter?

Brand genericide can have severe legal consequences and ultimately result in the loss of the trade mark itself. European trade mark law expressly recognises that a proprietor may contribute to the demise of his mark by inappropriate behaviour and/or a lack of policing. A trade mark can be "revoked" by third parties if "in consequence of acts or
inactivity of the proprietor, it has become the common name in the trade for a product or service in respect of which it is registered”.

Similar rules exist in other jurisdictions and are therefore important for owners of global brands. Under U.S. law, for example, genericide is seen as a form of legal abandonment of a registered trade mark. In the U.S. a registered trade mark can become the generic name for the goods or services on or in connection with which it is used where the owner fails to use the mark correctly on its goods or services and in advertising, fails to prevent infringements and generic uses, or fails to educate the public as to the proper generic name for the goods or services”. Once a mark is generic, it is in the public domain for use by everyone, including the original owner’s competitors. A (legal) reversal of this process is difficult at best and in many cases impossible.

**How to stop brand genericism?**

The risk of losing a trade mark to “genericide” is amplified in the digital age we live in. However, where a mark is at risk of becoming generic, it is crucial that brand owners intervene as early as possible, as the law focuses on the trade mark owners acts or inactivity. Trade mark owners should be disciplined and ensure that all employees, licensees and any other persons permitted to use the mark observe the following brand survival rules:

- Use trade mark symbols: ™ (for unregistered marks) and ® (for registered marks), which serve as notice to third parties. Note, however that it is a criminal offence in the UK to use the ® symbol where a mark is not registered.
- In advertising and other communications, trade marks should always be differentiated from any accompanying text to allow consumers to distinguish between the mark and generic product names.
- Use a non-proprietary term or an alternative generic name (“M&M’s chocolate”); together with the mark.
- Enforce correct grammatical usage and avoid variations (e.g. spelling changes, abbreviations, plurals) since they signal that improper usage is acceptable. Don’t “verb up”.
- Misuse of the mark in the media, dictionaries and directories should be dealt with promptly and systematically, which includes sending letters of complaint and keeping records of the responses. Unless they fall under Article 10 EUTMR (Reproduction of EU trade marks in dictionaries), such letters may not be enforceable but they can assist in defending a third party cancellation attack.
- Educate consumers, employees, licensees and affiliates. Consider deploying social media strategies to teach consumers how to talk about their brand. This is nothing new of course: in the early 1900s Coca Cola famously used advertising to dissuade the public from asking for a “coke”. Their slogan campaign was “Ask for it by its full name- then you will get the genuine.” Other famous education advertisements include Nestlé’s slogan “Using NESCAFE incorrectly makes it hard to swallow” to prevent misuse of its NESCAFE trade mark as a common “generic” descriptor for soluble coffee.
- Consider the potential (media) consequences of a complaint, especially in a social media context to avoid the so-called Streisand effect.

**Take away**

Owners should ensure that they use and police their trade marks effectively from day one. Effective prevention of trade mark genericism means that a (registered) trade mark will not only maintain its distinctive character and intrinsic “brand value” but also that it remains enforceable against infringing third parties.
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