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Protecting Brands in the Modern Marketplace

Introduction

In today's ever-evolving business climate, brand protection has become increasingly crucial for businesses. With the advent of technology and proliferation of e-commerce platforms, the avenues for brand exploitation have expanded exponentially. While brand protection has always been important, the modern marketplace presents novel challenges that businesses must significantly address and overcome to maintain their competitive advantage and protect their reputation.

In this article, we examine the importance of brand protection in the modern marketplace with particular focus on the role of intellectual property (IP) in the protection of brands, IP challenges encountered in the modern marketplace and proffer insights on how companies and businesses can effectively safeguard their brands.

Why is Brand Protection Important?

Brand protection refers to the strategies and measures employed by a company or organization to protect its brand's integrity, reputation, and value. Brand protection is crucial for the protection of a business' image and reputation as the brand of a business constitutes the invaluable asset of any business. The implementation of effective brand protection strategies fosters the maintenance of the position of a brand in the market and ensures the sustenance of the business competitive advantage.

A brand essentially serves as a distinct identity for a business. It is important for companies to have a brand protection strategy in place to prevent the unauthorized use of a business' trademark, name, logo, and other IP rights. Safeguarding a brand is important to retain the trust and confidence customers have in the products and services of a company or business.

A brand's reputation, although built over the years, can be tarnished easily by counterfeit products, passing off and/or trademark infringement. Thus, in creating effective brand protection strategies, a company or business should (a) ensure that the IP portfolio of the company or business is duly registered and maintained in strict compliance with applicable IP laws, (b) implement anti-counterfeiting and anti-piracy measures, (c) implement systems to monitor potential violation of IP rights, and (d) address any violation expeditiously and efficiently.

The Role of IP in Brand Protection

IP plays a pivotal role in protecting brands of companies and businesses. The obtention of IP rights in respect of a brand safeguards that brand from unauthorized usage and imitation and grants exclusive ownership and control over intangible assets, such as trademarks, copyrights, patents, and designs.

In Nigeria, these rights are legally recognised and protected under various legislations such as the (a) Trademarks Act, Cap T13, Laws of the Federation of Nigeria (LFN) 2004 (as amended) (the "**Trademarks Act**"), (b) Copyright Act, 2022 and (c) Patents and Designs Act, Cap P2, LFN, 2004. These legislations establish the procedures for protecting IP rights in Nigeria, outline remedies available to IP rights owners in the event of infringement and prescribe penalties for infringers.

Particularly, trademark laws play a significant role in the protection of brands. By section 67 of the Trademarks Act, a trademark refers to a mark used or proposed to be used in relation to goods or services for the purpose of indicating a connection between the goods or services and a person who has the right to use the mark, which may include the shape of the goods their packaging and combination of colours. A trademark is a brand, device, logo, label, name, signature, word, letter, numeral, or any combination thereof.¹ Accordingly, trademark protection can be obtained for any word, device, logo, brand, signature, letter, label, or any combination thereof, used in connection with the marketing, sale and purchase of goods and services produced or offered by a company or business.

¹ Section 67 of the Trademarks Act.

Trademark registration affords the trademark proprietor or owner the exclusive right to use the trademark and as such, all other persons are prohibited from using the mark without the consent or approval of the registered trademark owner or proprietor.² A registered trademark also provides territorial protection, allowing the trademark proprietor or owner to enforce its rights against infringers throughout a jurisdiction *i.e.*, Nigeria. Further, for businesses operating internationally, trademark registration can be secured in multiple jurisdictions, thereby providing broader brand protection across different territories.

The registration of a brand under the Trademarks Act enhances the credibility and trust of a brand. A key function of a trademark, which is a badge of origin, is to establish brand recognition and build consumer trust. By consistently exploiting a trademark, businesses can build goodwill to obtain a solid and distinctive brand identity. Trademarks help to prevent consumer confusion and enable consumers to identify goods and services.

Infringement occurs where a person uses a trademark identical or confusingly similar to a registered trademark owned by another party, in a manner that is likely to cause confusion regarding the source of the goods or services in the minds of consumers, in the course of trade.³ Where a trademark has been infringed upon, the trademark owner has several options in enforcing his or her rights, the trademark proprietor can write a cease-and-desist letter to the infringer to refrain from further infringing upon the rights of the trademark owner. Further, the trademark owner may institute an action in court and seek reliefs or remedies such as damages, injunctions, and account for profit.

As regards other areas of IP, copyright protects original works such as literary, artistic, audiovisual, sound recordings and musical works.⁴ Copyright confers on the author or copyright owner, the exclusive right to reproduce, publish, perform in public, distribute the copyright owner creations. Thus, companies and businesses can prevent unauthorized copying or distribution of copyrighted works owned by their brands to reinforce brand exclusivity.

Also, patents grant inventors exclusive rights over novel inventions, processes, or technologies. Companies need to register their patents with the Patents and Designs Registry to protect their innovative methods and processes.

Common Law Protection of Brands

Common law also plays an important role in brand protection, as businesses can rely on their reputation and goodwill in specific markets to challenge potential brand disputes by instituting an action for passing off in the Federal High Court⁵. See *Niger Chemists v. Nigeria Chemists*⁶. In *I.T. (Nigeria) Ltd v B.A.T. (Nig.) Ltd*,⁷ the court set out the elements of the tort of passing off as follows: (a) the plaintiff must have acquired a reputation in respect of the trademark, (b) the infringer engaged in acts capable of misleading the customers of the plaintiff or members of the public, and (c) there exists a likelihood of deceit, that is, the infringer intended to deceive the public.

Common law rights over trademarks are established through usage and recognition within specific or geographic areas without formal registration. However, they offer limited protection compared to registered trademarks under the Trademarks Act. By section 3 of the Trademarks Act, save for the rights of a person to institute an action in court for passing off, no person shall be entitled to institute an action to prevent or to recover damages for the infringement of an unregistered trademark. The tort of passing off is therefore, the only remedy available to a trademark owner with an unregistered trademark. Registered trademarks however offer stronger legal recourse in the event of infringement.

² Section 5 of the Trademarks Act.

³ Section 13 of the Trademarks Act.

⁴ Section 2 of the Copyright Act.

⁵ Section 251(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) confers exclusive jurisdiction in respect of IP matters (including passing-off) on the Federal High Court.

⁶ [1961] 1 All NLR 171.

⁷ [2009] 6 NWLR (Part 1138).

Challenges to Brands Protection in the Modern Marketplace

The rise of e-commerce platforms and social media has resulted in increased online infringement of IP rights. While technology has revolutionized commerce, it has also introduced unique risks to brand owners. The growth of e-commerce platforms has facilitated the rapid spread of counterfeits by making distribution across various jurisdictions easier, which threaten the reputation of businesses. Counterfeiting adversely affects brand equity and goodwill. While brand exploiting and counterfeiting has existed for decades, technology has resulted in the widespread of the problem.

E-commerce platforms provide a wider reach for counterfeiters, enabling them to distribute counterfeit products with ease, thereby undermining the integrity of legitimate brands. Digital piracy has now become a common phenomenon with individuals downloading and distributing copyrighted works such as music, photographs, and software digitally without authorization. Digital piracy also encompasses the use of trademarked devices, logos, names, symbols, or any combination without the consent of the trademark owner. Through fake domain names and social media profiles, infringing parties can imitate and infringe upon trademarks thereby hurting the reputation and goodwill of brands and businesses.

Online infringement presents a serious challenge for businesses and content creators. Individuals use websites, social media channels, e-commerce platforms and other digital channels to exploit the IP rights of other persons for personal gain or to deceive or mislead consumers. Online infringement not only damages brand reputation and revenue but also poses a threat to consumer trust in the online space.

Strategies for Effective Brand Protection

Companies should ensure that their IP portfolios are adequately protected by ensuring that their trademarks, patents, and designs etc., are registered, and maintained. Further, companies and businesses should have a dedicated IP team that will be responsible for monitoring editions of the Trademarks Journal published by the Trademarks Registry to ascertain if filings adverse to their registered trademarks have been made, and if so, take appropriate steps to promptly oppose such applications within 60 days of the issuance of a Trademark Journal.

Businesses should raise awareness among consumers about the distinction between genuine and counterfeit products and the risks associated with purchasing counterfeit and/or infringing products. This will reduce the demand for counterfeit/infringing products and discourage counterfeit purchases. By implementing online monitoring systems, actively reporting (to social media platforms and law enforcement), and proactively leveraging legal remedies, companies and businesses can combat counterfeiting and digital IP infringement.

Conclusion

It is recommended that companies and businesses safeguard their brands to ensure customer trust. IP remains an important tool for effective protection of brands in the modern market place. By implementing strategic measures such as securing and maintaining registration of their IP portfolio, and combating challenges such as counterfeiting and online infringement, companies can effectively protect their brands, and enhance their competitive advantage in the modern marketplace.

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