



An Economic Analysis of Brands

By David C. Hilliard

“Creating [a brand] reputation requires expenditures on product quality, service, advertising, and so on. Once the reputation is created, the firm will obtain greater profits because repeat purchases and word-of-mouth references will generate higher sales and because consumers will be willing to pay higher prices for lower search costs and greater assurances of consistent quality ... If the law does not prevent it, [a] free riding [competitor] will eventually destroy the information capital embodied in a [brand], and the prospect of free riding may therefore eliminate the incentive to develop a valuable trademark in the first place.”

– Landes and Posner, Trademark Law: An Economic Perspective, 30 J. of Law & Econ. 265, 270 (1987).

The expenditures in creating a brand reputation are influenced by the distinctiveness of the brand, but the firm may obtain greater profits initially by adopting a descriptive or suggestive brand. Factors include how long the brand will be used, how and where it will be used, the ease of discontinuance on short notice and the firm's aversion to risk.

A **ARBITRARY BRANDS**, such as Apple for computers, neither suggest nor describe an ingredient, quality or characteristic of the product or service with which they are used. Arbitrary brands initially cost more to advertise because they do not communicate an attribute or quality of the product or service. They take longer to create a reputation and this delay may, especially for new products or services, enable competitors to obtain a foothold in the market. Arbitrary brands are easier to clear however, and in the long run are easier to protect and may generate greater profits.

B **SUGGESTIVE BRANDS**, such as Ticketmaster for event ticket procurement services, suggest an attribute or quality of the product or service without actually being descriptive of it. Suggestive brands are difficult to clear, register and protect because similar brands often are in widespread use, but may initially cost less to advertise because they are often more memorable and instantly communicate a desired attribute or quality of the product or service to the consumer.

C **DESCRIPTIVE BRANDS**, such as Investacorp for financial services, communicate the ingredients, quality or nature of the product. The distinction between suggestive and descriptive brands is scarcely pike-staff plain (Eveready for flashlight batteries and related products). Descriptive brands are accorded a narrow scope of protection, but can be difficult to clear unless there is widespread use of similar brands by third parties (a crowded field) in which the members of the field are equidistant. If ten adverse brands may create a 10% risk of losing at trial, two or three may create an 80% risk. Descriptive brands cannot be registered without secondary meaning and must coexist with fair use and continuing use by competitors of the same and similar descriptive terms.

There are advantages and disadvantages to arbitrary, suggestive and descriptive brands depending upon their intended purpose and duration of use. An arbitrary brand may be inappropriate for the quick launch of a short-lived product or service. Firms prefer suggestive brands for ease of communication, but they are more difficult to protect. Competitors may use descriptive brands before secondary meaning develops so that the brands' information capital never develops. Brands that combine arbitrary brands, such as housemarks, with suggestive or descriptive brands may provide the best immediate and long term advantages (Microsoft Windows).

Similarly, brand clearance procedures should take into account the purpose and duration of use intended for the brand. The costs of clearance and acquisition of conflicting brands, especially worldwide, as well as of policing, litigation, injunctions and damages can outweigh the perceived advantages of even the most desirable brand and are a critical part of the firm's risk analysis. The firm may want short term clearance and be willing to stop using a brand or slogan if challenged. Counsel should be involved from the outset in the naming process and help determine the type of brand needed or whether any brand is needed at all. Firms should be made aware of the key factors, as depicted on the following chart:

ARBITRARY BRANDS

- least communicative of product attribute or quality
- takes longer and is more costly to build reputation
- easy to clear
- easiest to register
- broad scope of protection
- investment in brand favors long use
- can extend use beyond product category
- less risk of conflicts

SUGGESTIVE BRANDS

- communicative and memorable
- cheaper and quicker to build reputation
- can be difficult to clear (may require purchase of rights of others)
- difficult to register due to conflicts
- narrow scope of protection
- less costly to discontinue
- use may be limited to product category
- higher risk of conflicts

DESCRIPTIVE BRANDS

- most communicative
- instant recognition but little exclusivity
- difficult to clear but can be easier to clear in a crowded field
- registration difficult and requires proof of acquired secondary meaning
- protection typically limited to same and similar brands and goods or services
- least costly to discontinue in the short run
- extension of use typically limited to goods or services with same descriptive properties
- higher risk of infringement suit in the middle of product launch unless crowded field

Brands can be over-sold. When a product or service becomes so successful that the consumers adopt the brand as the very name of the product or service itself, as distinguished from one firm's version of the product or service, then the brand loses its information capital and is available for others to use. Firms need to be reminded of the counter-intuitive notion that the most powerful and successful brands are at risk of genericide, particularly those that identify breakthrough or new or dominant products or services. Examples of brands that became generic in this way are aspirin, cellophane, escalator and thermos. Counsel should be involved early in the naming process and guard against this result by applying for intent-to-use registrations, combining brands in use with descriptive or generic words, avoiding descriptive or generic misuse of brands in firm marketing materials, and policing third party misuse.

Firms schooled in economics tend to be put off by the mysterious science of the law. But firms can improve their effectiveness by combining the principles of economic analysis with legal reasoning.

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Pattishall, McAuliffe counsels clients in a broad range of intellectual property fields, providing litigation representation and advocacy, strategic planning for brand protection, counseling on internet business development, due diligence for the sale or acquisition of trademarks, advertising clearance and representation in advertising disputes, copyrights, trade dress, trade secrets, right of publicity, social media practices, and implementation of domestic and international trademark protection and brand development strategies.

Since its founding in 1883, the Firm has defended some of the most valuable brands in the world.



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