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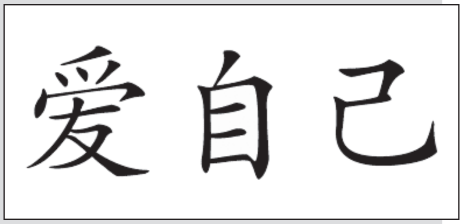
JANUARY 2013

New Year
new look!

Introducing our first edition of *Pattishall Insights,* with more photos, graphics and new features to keep you current on IP law developments as well as firm happenings.



Chinese Characters

Behavioral Economics and Brand Management

By Jessica A. Ekhoff

Brand owners instinctively understand how valuable a powerful trademark can be. Trademarks reduce consumer search costs by making it easier for buyers to identify products made by their favorite companies, and help consumers distinguish between competing goods.

According to an emerging field known as behavioral economics, however, trademarks are capable of doing much more. Behavioral economists rely on a mix of principles culled from cognitive psychology and other social sciences to imbue trademark law with a nuanced understanding of how consumers make choices.[1] According to the behavioral economics perspective, a strong trademark can be an invaluable resource for companies seeking to develop or promote their brand.

The Mere Exposure Principle

"It has been demonstrated that the mere repeated exposure of a stimulus is entirely sufficient for the enhancement of preference for that stimulus."[2] A good example of this principle at work can be found in R.B. Zajonc's "Chinese ideograph" study. During the study, Zajonc split his participants into two groups. He showed one group five ideographs (Chinese characters) five times each, and showed the other group twenty-five different ideographs once each. Although no one in either group knew what the ideographs meant, the people in the group that had seen their ideographs repeatedly rated them much more positively than the second group rated their less-familiar ideographs.[3]

Trademark owners can harness the power of the mere exposure principle for their benefit. Highly established brands, such as Pepsi and Ford[4], can continue to advertise and ensure their target customers remain intimately familiar with their marks. New entrants to the market can structure their advertising to be front-loaded, making consumers familiar with their trademarks before their competitors' marks. Either way, the more often consumers see a company's mark, the more they will subconsciously view it favorably, thereby increasing revenues for the mark owner.

1. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1476 (1998) (quoting Gary Becker).
2. R.B. Zajonc, *Mere Exposure: A Gateway to the Subliminal*, 10 Current Directions in Psychol. Sci. 224, 225 (2001).
3. *Id.* at 226.
4. The Pepsi and Ford trademarks are owned by Pepsico, Inc. and Ford Motor Company, respectively, and are displayed herein only for purposes of illustrating the discussion.

The Signaling Function

Trademarks, regardless of the type of goods to which they are attached, allow consumers to proactively shape their social identities. Two behavioral economics principles, the bandwagon effect and the snob effect, illustrate how consumers purchase certain branded goods as a way to signal their desired identities to others.[5]

The Bandwagon Effect

The bandwagon effect captures the "extent to which the demand for a commodity is increased due to the fact that others are also consuming the same commodity."[6] In short, people have a psychological drive to fit in.

A good example of the bandwagon effect is Netflix[7], the rental-by-mail DVD company. "In an unsettled, fast-moving world, we're all searching for stability and familiarity, and product rituals give us an illusion of comfort and belonging. Isn't there a sense of security in being part of, say ... the Netflix community- in knowing that there are millions of other people out there who ... cue up a new list of movies every Friday night, just like you do?"[8] When consumers join the Netflix bandwagon, then routinely see a bright red Netflix envelope in their mailbox every few days, they get not only the benefit of watching their favorite movies, but also a reinforced sense of belonging to a group. Brand owners should consider whether they are using their marks in ways that allow consumers to feel like they are a part of a specialized community, thereby increasing demand.

The Snob Effect

The snob effect works in the opposite direction as the bandwagon effect. This effect captures the extent to which the demand for a product decreases due to the fact that many other people are consuming the same good.[9] This effect represents some consumers' desire to be unique; to separate themselves from the masses. Unlike the bandwagon consumers, who seek to fit in with a specific group, other consumers seek just the opposite. Think of the music aficionado who turns up his nose at his former favorite band when it signs on to a mainstream music label and is no longer "underground," or the fashionista who favors but then abandons previously unheard-of labels when they become popular with wider audiences. Companies that cater to niche markets can capitalize on the snob effect by adopting trademarks their fans can display in order to signal to other members of the small community that they, too, are one of the few "in the know."

There is much that behavioral economics can teach trademark owners about brand management. When making decisions about adopting, using, or protecting a trademark, brand owners should bear in mind just how psychologically powerful a properly-managed mark can be.

"BRAND OWNERS SHOULD BEAR IN MIND JUST HOW PSYCHOLOGICALLY POWERFUL A PROPERLY-MANAGED MARK CAN BE"

5. *See* H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q. J. Econ. 183 (1950).
6. *Id.* at 189.
7. The Netflix trademark is owned by Netflix, Inc. and is displayed herein only for purposes of illustrating the discussion.
8. Martin Lindstrom, Buyology: Truth and Lies About What We Buy 99 (2010).
9. H. Leibenstein, 64 Q. J. Econ. at 189.

TOP 10 PATTISHALL BLOG POSTS of 2012, Based on Viewer Metrics

Go to http://blog.pattishall.com, to read the posts in full, and sign up for email notification of new posts.

When it Comes to Parody Twitter Accounts, Laughing Them Off May Be Your Best Move, Andrew R. W. Hughes, November 27, 2012

Motley Crue Successfully Moves for Dismissal of Suit Involving Copyright in "Too Fast for Love" Album Artwork, Jeffrey A. Wakolbinger, October 15, 2012

Who owns a trademark? Jeremy Lin wins Linsanity, as Anthony Davis fights for his unibrow, Paul A. Borovay, Summer Associate, July 25, 2012

What Do Kim Kardashian And Your Random Facebook Friend Have in Common? A Right of Publicity That May Be Worth Money, Meg C. Lenahan, Summer Associate, August 8, 2012

Using An Employee's Personal Social Media Accounts Without Her Authorization To Market Employer May Create Liability Under Trademark And Electronic Privacy Laws, Phillip Barengolts, January 5, 2012

Using An Employee's Personal Social Media Accounts Without Her Authorization To Market Employer May Create Liability Under Trademark And Electronic Privacy Laws, Janet A. Marvel, September 10, 2012

What's In A (Domain) Name? What A Cybersquatter Calls A Web Site By Any Other Name Would Not Sell For A Million Dollars Or Provide A Platform For A Three-Year Old's Artwork, Phillip Barengolts, February 23, 2012

Does CRACKBERRY Parody BLACKBERRY? TTAB Says "No", Janet A. Marvel, March 1, 2012

Fourth Circuit Overturns Laches Defense Victory for Clear Channel, Phillip Barengolts, March 27, 2012

Bare Trademark Rights? Naked Cowboy's Infringement Action Against CBS Dismissed, Janet A. Marvel, March 16, 2012

firm UPDATE

APPOINTMENTS

Jessica A. Ekhoff

Jessica has been elected to the New Arts Forum Junior Board for Urban Gateways, which provides education in music, dance, theater, literary arts, visual arts, and digital media, to students in low-income schools.

PRESENTATIONS

Ashly Iacullo Boesche

Ashly moderated "Your Attack on the Affidavit," a Chicago Bar Association Continuing Legal Education program, on January 11, 2013.

Jonathan S. Jennings

On February 11, 2013, Jonathan will guest lecture on "Identity Rights and Privacy Law" to a class on Communication Law & Ethics at DePaul University.

On February 22, 2013, Jonathan will moderate the trademark and copyright session of the 57th Annual Conference on Developments in Intellectual Property Law organized by The Center For Intellectual Property Law at the John Marshall Law School. Pattishall, McAuliffe is also a sponsor of this event.

Jonathan will moderate a table topic session on "Right of Publicity and Social Media" at the INTA Annual Meeting on May 7, 2013.

Joseph N. Welch II

Joe will present an "Overview of 2012-2013 Federal Court, State Court and TTAB Decisions" at the Practising Law Institute in New York City on April 18, 2013.

PUBLICATIONS

Belinda J. Scrimenti and Janet A. Marvel

Belinda authored a chapter on State Law Remedies for Trademark Infringement and Unfair Competition and Janet co-authored a chapter on Extraordinary Circumstances and Relief in the Second Edition of the *Trademark Infringement Remedies* treatise, published by the ABA Section of Intellectual Property Law and Bloomberg BNA in December 2012.

Jonathan S. Jennings

Jonathan's article entitled "Right of Publicity Meets Social Media" will be featured at a workshop during the ABA Forum on Communications Law's 18th Annual Conference on February 7-9, 2013.

Jonathan was quoted in the January 4th, 2013, edition of the *Chicago Daily Law Bulletin* on right of publicity issues in the story entitled "Blagojevich Wife Files Suit Over Ad."

NOTEWORTHY

INTA Pre-Annual Meeting Reception

Pattishall, McAuliffe will host an INTA Pre-Annual Meeting Reception on February 20, 2013, at the University Club of Chicago.

*firm*HONORS

Illinois Super Lawyers 2013

David C. Hilliard has been selected as one of the Top 100 Illinois Super Lawyers. This is the seventh consecutive year that David has been named in the top 100 list.

In addition, Robert W. Sacoff, Joseph N. Welch II, Brett A. August, Jonathan S. Jennings, Janet A. Marvel and Bradley L. Cohn have been designated Illinois Super Lawyers. Phillip Barengolts has been named an Illinois Rising Star.

U.S. News & World Report

Pattishall, McAuliffe has been designated a 2013 Tier 1 Trademark Law Firm in Chicago by *U.S. News & World Report*.

International Who's Who of Business Lawyers 2013

David C. Hilliard, Robert W. Sacoff, Joseph N. Welch II and Belinda J. Scrimenti have been recognized in the *International Who's Who of Business Lawyers 2013*.

Marquis Who's Who in America

David C. Hilliard, Robert W. Sacoff, Joseph N. Welch II, Jonathan S. Jennings and Thad Chaloemtiarana have been recognized in the 2013 Edition of *Marquis Who's Who in America*.

Martindale-Hubbell AV® Preeminent Rating

Robert M. Newbury, David C. Hilliard, Robert W. Sacoff, Joseph N. Welch II, Brett A. August and Jonathan S. Jennings have again each received an AV® Preeminent rating from the Martindale-Hubbell Bar Register.

American Lawyer Media and Martindale-Hubbell

David C. Hilliard, Robert W. Sacoff, Joseph N. Welch II, Brett A. August and Jonathan S. Jennings were selected as 2013 Top Rated Lawyers in Intellectual Property.

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