

The Benefits of Brand Monitoring

As I have discussed in previous articles, it is critical for brand owners to monitor and protect their trademarks on an ongoing basis. While Nike and Best Buy have been in the news recently for [their trademark monitoring and enforcement efforts](#), trademark monitoring is not just for the mega corporations—all business owners need to monitor and protect their trademarks. [eTrademarkSolutions.com](#) provides efficient, cost-effective and easy-to-interpret trademark monitoring services to small and medium-sized businesses for monthly and annual flat rates.

Imagine this: One day a consumer comes to you complaining about a product they purchased recently, and demands a refund. You review your order history, and discover that you did not sell the product in the first place. However, the customer insists that they purchased the product from you, because they recognized your logo on the packaging. You do some research, and find out that a competitor has been using a trademark almost identical to yours for the past six months. When you contact the competitor, they refuse to change their logo, claiming that they adopted it innocently (although this is not a legitimate excuse), and anyway they purchased their domain name a long time ago, so they aren't sure that you actually have prior rights. Plus, they have sunk a lot of money into marketing, and they aren't going down without a fight.

Now imagine this: You receive notice that someone has purchased a domain name that is uncomfortably similar to your primary trademark. You contact the purchaser almost immediately informing them of your pre-existing trademark rights, and stating your intent to enforce them. The domain name lies dormant over time.

This is the value of trademark monitoring.

Benefit No. 1: Identify and Address Potential Infringers Before they Create Problems for Your Business

One of the primary functions of trademark monitoring is to discover and proactively address both active and would-be infringers who adopt trademarks or purchase domain names that are confusingly similar to your own. Federal law protects valid trademarks from unfair competition caused by consumer confusion, and monitoring the web for both knock-offs and unintentionally similar trademarks serves to protect and maintain a business's exclusive trademark rights.

In addition to being highly important from a legal perspective, preventing consumer confusion is also crucial to maintaining the business generally and to protecting the *value* of the brand. Trademark infringement disputes can easily value into the millions of dollars where one company's use of an infringing trademark siphons business from the rightful trademark owner. Even where litigation results in recovery of damages for lost profits, the damage from infringement caused by loss of opportunities

and a reduced customer base can continue to have debilitating effects for the business as a going concern.*

**Importantly, consumer confusion can result not only from the presence of identical competing trademarks, but also from the presence of trademarks that are confusingly similar or that appear related. As a result, a broad and strategically-planned trademark monitoring strategy is necessary to protect your business.*

As one can see, the best-case scenario for business owners is to stop infringement before it starts (or at least before it goes too far), and this purpose can be served through ongoing trademark monitoring. Infringers may be more likely to comply with simple cease-and-desist demands if they haven't already spent tens or hundreds of thousands of dollars promoting a brand they thought was theirs for the taking.

But, what if you don't have millions of dollars in business? Or, what if—for one reason or another—you think trademark infringement just can't possibly happen to you? Two things: First, you may not care now, but you may care in the future after your business begins to mature. By beginning early with a trademark monitoring program, you can help build and protect the value of your brand so that it is still capable of being enforced when the time comes. Second, there are several other important benefits to trademark monitoring as well, including monitoring *good* references to your brand, monitoring consumer reactions and competitors' conduct, and even monitoring competitors' trademarks to keep tabs on the industry.

Benefit No. 2: Addressing Consumer Reactions and Competitors' Representations

Consumer Reactions

By instituting a formal and comprehensive monitoring program, brand owners can keep tabs on and promptly respond to consumer sentiment expressed in forums, complaint sites and social media. This applies to both positive and negative references. On the positive side, an effective trademark monitoring program allows business owners to take advantage of positive consumer feedback to further develop their product/service lines and marketing strategies in line with demand. On the negative side, active monitoring can be critical to combating (and, to the extent possible, preventing) widespread circulation of damaging comments. The response should be different for valid and invalid comments, but either way a response is critical to protecting the value and goodwill of your brand.

From a purely legal perspective, this is important for a number of reasons, ranging from avoiding claims of "abandonment" of the business's trademarks to building a record in the event that a legal claim is filed.

Competitors' Representations

With regard to competitor representations, trademark monitoring serves a number of important functions as well. These representations can take the form of comparative advertising, negative

“reviews”, domain names, social media accounts, and PPC advertising keywords that show their websites instead of yours. Each of these constitute means by which a competitor can seek to either (i) damage your brand directly through negative imagery, or (ii) damage your brand indirectly by usurping (in many cases, improperly) the goodwill of your brand to their own benefit.

No matter the situation, by regularly monitoring this type of conduct, brand owners can maximize their ability to protect the value and goodwill of their brands.

Benefit No. 3: Monitoring Licensees and Franchisees

“Licensees” can take a number of forms: online affiliates, independent sales representatives, retailers, and distributors to name a few. Generally speaking, anyone who a business allows to represent or sell their products in the marketplace is going to be a “licensee.” Federal law requires trademark owners to monitor licensees’ use of their trademarks (it’s true, and few small business owners know this), and failure to do so can actually lead to a determination that the trademarks have been “abandoned.” Once a trademark is deemed abandoned exclusive rights are lost, and the possibility of regaining exclusivity is next to none.

Within this framework, monitoring of licensees serves a number of important functions—both legal and business. First, trademark owners must make sure that licensees are making proper use of their trademarks. Generally speaking, trademarks must be used as adjectives—not nouns or verbs (legally speaking, trademarks are “indicia of origin,” and as such must modify the product or service description, as opposed to constituting the description itself). Allowing licensees to use trademarks as nouns or verbs can lead to a determination that the trademark is merely a generic or descriptive term, which can ultimately lead to a finding of abandonment.

Second, trademark owners must monitor affiliates, sales reps and distributors to make sure that they are not engaging in misleading advertising, are not disparaging your trademarks in favor of a competing brand, and are also taking adequate measures to promote the brand. The contracts with these individuals should impose limitations and obligations in these regards, and trademark monitoring serves the companion purposes of making sure licensees are both meeting their contractual obligations and otherwise conducting their campaigns in an appropriate manner.

Other situations where trademark monitoring serves similar purposes are where a trademark owner grants “certifications” and needs to make sure certified entities or individuals are meeting their obligations, and in franchising. Among the host of obligations franchisors and franchisees have to one another, proper use and promotion of the franchisor’s trademarks is in the forefront.

Benefit No. 4: Keeping Tabs on Competitors

While the first three benefits of brand monitoring that I discussed focused on protecting and maintaining the value of a brand owner’s own trademarks, this benefit turns its eye toward the trademarks of your competitors.

Traditional trademark monitoring techniques can also be used to monitor the innovations and marketing strategies of your competitors. Monitoring their trademarks, domain names and social media activity (in addition to your own) allows you to keep abreast of recent updates and future releases for their product/service lines, and also lets you know what strategies they are using—either effectively or ineffectively—to promote their brands. This, obviously, can be extremely valuable information.

In addition, monitoring competitors' trademarks can also turn you on to other, less direct references and comparisons to your brand. If a competitor makes reference to “the other guy” or “the green and orange brand,” and “the other guy” or “the green and orange brand” is actually (and apparently) you, this is something you are probably going to want to know about. While not indicative of trademark infringement, these references may be part of false or misleading advertising claims that you do not want to let go unchecked. However, these sorts of indirect references are likely to go undetected unless you are monitoring your competitors' trademarks.

Conclusion

In summary, trademark monitoring services are critical to protecting, enforcing and maximizing the value of your company's brands. A sound and comprehensive trademark monitoring strategy will allow you to:

- Spot and promptly address instances of actual and potential infringement;
- Promptly respond to consumer reactions and competitor representations online;
- Make sure distributors, affiliates and other licensees are making proper use of your trademarks; and,
- Keep tabs on the competition and identify indirect references to your company's products or services.

Armed with this information, your company will be better positioned to protect its interests and, ultimately, maximize the value of its trademarks when it comes time to sell.

Fabian, LLC provides [trademark clearance, trademark registration and trademark monitoring services](#). Visit etrademarksolutions.com for more information, or follow the firm on Twitter [@jsfabian](https://twitter.com/jsfabian).

This article is provided for informational purposes only, and does not constitute legal advice.