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The "Bet the Company" Moment: Think Trademarks

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Have you ever heard the phrase "bet the company"? Most people think of it as a business move or challenge that threatens a core product or service. Most do not associate it with launching a new brand. And yet the "bet the company" moment happens each time an organization is created, launches new products or services, rebrands itself, or extends its brand to different areas/industries. These moments have one thing in common: a brand that can succeed or fail based largely on its ability to be protected under trademark law. When a critical new brand cannot be protected or infringes another's rights, it compromises your ability to send a unique and consistent message to consumers. Launching a key brand can truly be a "bet the company" moment.

Some assume that establishing a brand is similar to setting up a new legal entity with a state. In fact, establishing a brand under trademark law could not be more different. When setting up such an entity, if no other party has the same name or DBA in that state, you generally get it. Under trademark law, however, establishing a brand depends on whether that brand is available for use and registration under a tough legal standard: likelihood of confusion. This takes into account brands that are similar and not just identical. There must not be a likelihood of confusion between that brand and all the other brands that already exist nationwide. Applying this standard involves a multi-factor legal analysis that considers more than just the brands themselves; the analysis takes into account, for example, the similarity of the underlying products or services. Further, for organizations seeking to provide products or services internationally, a similar analysis must take place in every market where the organization intends to act.

If an organization fails to meet the standard and infringes another party's rights, the entity usually faces three options: (1) move to a new brand, (2) pay licensing fees, or (3) buy the other side out. This infamously happened to NBC in the 1970s. At the time, NBC reportedly paid \$1 million to design a new logo (for which it was the butt of jokes on *Saturday Night Live*). Then was sued for trademark infringement; the new logo was virtually identical to the mark owned by Nebraska's chain of PBS affiliates. To settle the dispute, NBC reportedly paid near \$1 million in cash and equipment.

The same three options can confront an organization that fails to properly apply to register its brand, when another party files first. This happened with Apple's iPhone brand in 2001 with Cisco (they eventually settled their dispute). Also, Apple reportedly paid millions in China alone, to solve a registration problem to ensure that their iPhone mark covered mobile phones in that first-to-file country.

When key brands must be changed abruptly after launch, the goodwill associated with the brands is lost. This loss can be magnified by bad press over the branding change. Most organizations do not have the NBC's or Apple's reservoir of goodwill or resources to quickly rehabilitate goodwill when it is lost.

The cost of trademark litigation is always a key consideration. For an average trademark infringement suit that does not settle early (where <\$25 million is at stake), the median litigation cost can run up to \$775,000 inclusive of all costs. (See the 2011 Report of the Economic Survey from the American Intellectual Property Law Association (AIPLA).) It is important to note that this does not include the cost to change brands or pay a monetary judgment for damages. The overall cost of a trademark challenge/infringement suit can be millions of dollars in a worst-case scenario, especially in a case where an organization/executive is indifferent to, or disregards, another's trademark rights.

Understandably, organizations are in a hurry to succeed and do not want legal work to delay the business process. But a "bet the company" legal moment occurs each time an organization is created, launches new products or services, rebrands itself, or extends its brand to new areas/industries. To succeed at these "bet the company" moments, it is important to fully vet and protect your key brands under trademark law's demanding standard and not view this process as a simple filing of forms to record a name.