



BRAND Malpractice

By Terri Goldstein

Learn how to protect your brand against private label copycats.

The World Customs Organization reports that the trade in counterfeit retail goods is approximately 7 percent of all world trade, an annual expenditure total of \$725 billion. This illegal manufacturing activity was once exclusive to luxury brands such as Louis Vuitton, Coach and Gucci — companies that understand that their most important brand assets are their core identifiers of colors, shapes and symbols, and employ legal teams to combat such brand thieves.

However, copycat activity by private label brands in the CPG world is more difficult to curtail, for unlike other fair trade models, the same customer is also an informed competitor. As a result, despite widespread copycatting, it is often difficult for manufacturers to protect their brands, and CPG companies infrequently opt for legal action due to their economic partnerships with retailers.

Name brands continue to diversify as they race to keep up with shifting consumer needs. Campbell Soup Company alone will introduce 200 new products this year; Colgate now offers 34 varieties, and some 15 flavors of Mountain Dew exist. Even

though only 15 percent of these new products will be around two years after their launch, private labels are also rapidly diversifying to keep pace with national brands. Private label share of market has increased at a steady rate since 2009 across the major CPG categories, with drug, convenience and dollar channels showing signs of increasing private label momentum. In addition, while many food categories have been struggling, private labels have grown at a rate of 6 percent a year.

Private label has become a sticky trend. In 2011, a Nielsen research study¹ reported that 91 percent of consumers will continue to purchase private label brands even though the economy improves. The Aldi supermarket chain, which offers 118 private label brands, has generated \$82 billion in 17 countries from their lookalike brands. Aldi plans to open 50 percent more stores in the U.S. over the next five years and says, “We deliberately use familiar colors and designs to help shoppers find what they want.”

> BRANDS BEWARE

Today, more than ever, brands must avoid trade dress consumer confusion in the marketplace by developing strategically

SSs shelf sight sequence®

The **Sequence of Cognition** relates to the way in which the shopper's mind scans on-shelf products in five seconds or less.



SIGHT 1: COLOR

It's the first identifier shoppers notice — and recall.



SIGHT 2: SHAPE

After color, consumers notice holding and structural shapes.



SIGHT 3: SYMBOL

The third identifier that shoppers will see and retain.



SIGHT 4: WORD

A memorable brand name and a unique selling proposition, spelled out loud and clear will resonate loud and clear.



- Store brands adopt both product category and premium brand cues while maintaining lower price points. They do not subscribe to copycat activity as they understand the marketplace and wage a fair fight. As a result, they have become leaders in creating value and driving category growth.
- Private label brands are just the opposite, created solely to look like national brands. These imposters rely on design techniques to deceive consumers and are often poor imitations of their category leader, so it's no surprise that consumers are often confused. According to a British Brands Group research survey, 33 percent of consumers have accidentally picked up the wrong product because the packaging confused them, and 65 percent of shoppers said similar (private label) packaging could be confusing or misleading.



TM LAW 1: WORD

Words are Protected Most Vigorously!



TM LAW 2: SYMBOL

Symbols Are the Second Most Protected Asset



TM LAW 3: SHAPE

Shapes are More Difficult to Protect



TM LAW 4: COLOR

Color is the Most Difficult to Protect! Even though it is the Most Significant Variable!

TML sequence of trademark law



Traditional U.S. Trademark Law begins its assumptions in reverse to the Shelf Sight Sequence.®

It is well-known that consumers do not read while shopping but respond to a particular sequence of cognitive cues: Color is first, shape is second, symbols third and words last. The key takeaway here is that true brand vocabulary is primarily visual.

However, trademark laws protect words first, and the sequence of elements is completely reversed to how consumers scan products on shelf. Today, trademark law is likely to protect words more than colors, even when the core key identifier (i.e., the purple pill) is the most significant variable!

- + The top graphic shows how people shop, which is in opposite order of what trademark laws protect most (bottom).

memorable and highly protectable brand assets. Brand owners must adopt a proactive stance in their creation of brand assets, which can keep private label at bay without pursuing costly lawsuits against large retail partners.

First, it is important to understand the differences between store brands and private label brands:



To begin the protection process, it is fundamental for national brand owners to have a strong alliance between their design firm and an intellectual property attorney well versed in the arcana of trade dress protection laws and brand packaging. Brand managers that contractually sign with a design firm and an IP attorney are provided a triangle of protection of attorney-client privileged communication, which allows the design process to be withheld from discovery should the brand owner choose to protect its color, shapes, symbols or statements.

With all players in the loop, a collaborative brand asset road map is created to populate the design firm's creative brief. This should have the same rigor as any competitive SWOT while detailing the category color functionality codes, protectable shapes, symbols and copy. It is surprising how quickly, and inexpensively, an IP brand-centric attorney may provide a start-to-finish "protection picture."

In this manner, design recommendations are mindful, in real-time, of the protection of brand assets during each phase of the design development process. It's too late once the brand is being routed for approvals through the corporation, often at the concluding stages of the project, without adequate time to modify color selection, reshape a symbol, or adjust a sub-brand name or product claims.

Once your brand assets have passed the rigors of IP attorney scrutiny and been proven in consumer research, it is paramount to leverage the trademark status of the brand assets by disclosing these at trade appointments. Trademark (tm) rulings of the trade dress should be printed onto sales sheets and on the bottom of the package on final mechanical. Retailers appreciate such efforts

and will generally avoid colors, shapes, symbols or brand statements that imitate those of their suppliers. Finally, it's important that the design firm attend trade launches to explain the brand's potential scenario in detail.

It is possible to design a brand to succeed against the onslaught of private label activity, but marketers must do more than employ design and brand strategy skills. Ensure that you have a fierce protector behind your brands that will work side-by-side with your design firm to protect the brand every step along the way. A proactive stance can avoid brand malpractice from taking a big bite of your brand ROI. **BP**

¹ www.nielsen.com/us/en/insights/news/2011/global-private-label-report-the-rise-of-the-value-conscious-shopper.html

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