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AGRICULTURE & THE LAW

PACKAGING THE BRAND

One cannot overstate the importance of packaging to your overall brand. The most successful agriculture companies leverage their packaging brands as premium consumer value-adds to differentiate their commodities and gain a competitive advantage in the market. Marketers use creative elements and innovative packaging to set their products apart from the pack, build individual brand identity and assure commercial success. This often opens up future business opportunities, such as the sale of a brand or business.

But this does not happen overnight—it is the product of a carefully planned and executed branding and protection strategy. At the core of such branding strategy lies intellectual property (“IP”) protection.

Maximizing Brand Value

Farmers are no strangers to IP protection, being among the most sophisticated developers and users of technology and know-how. But there are myriad forms of IP present in a shifting legal landscape, and most of us are more concerned about production and final product, rather than protecting a package. However, the package holds untold value potential which must be identified, nurtured and protected via IP legal channels, in order to realize the full competitive value of the brand.

Forms of Intellectual Property in Packaging

Packaging IP law deals primarily with patents (covering utility or designs), trade secrets (confidential information and know-how), copyrights (creative content) and trademarks (anything that identifies the source of goods or services). Within the area of trademarks resides a subset of protection known as trade dress, distinctive characteristics of a product or package which qualify for exclusive legal protection as against unauthorized use by others.

There are various advantages and disadvantages surrounding the various forms of IP protection. Utility patents, for example, can be rather expensive to acquire, maintain and enforce. Furthermore, while innovative or ornamental aspects of packaging can qualify for patent protection, such protection is not a right to practice the invention or use the ornamental design, but rather a right to exclude others from doing so (cue: the litigators), and such protection has a finite term. Trade secrets can be highly useful, but in the ag packaging context, there is the significant risk of reverse engineering, which is a completely lawful method to strip away trade secret enforceability.

For such reasons, it is packaging trade dress—a potentially

infinite, highly flexible mode of IP protection for packages—which is the focus of this article. Trade dress is a subset of trademark protection for product and packaging features, for which registration is relatively inexpensive to obtain.

Packaging Trade Dress Protection

Packaging trade dress protection is easier to obtain than product trade dress protection, as the courts have recognized that packaging plays a central role in consumer perception as to the source of a given product or service. Thus, distinctive packaging designs, colors and shapes are often the subject of trade dress registration at the federal level.

Federal Registration for Packaging

Any distinctive packaging or packaging feature can and should be registered at the U.S. Patent and Trademark Office (“USPTO”) *as soon as possible* to solidify your asset(s) and begin to enjoy the myriad benefits attendant to registration. Applications for registration are often strategically filed immediately after a packaging design has been conceived, even years prior to the initial rollout, on the basis of “intent to use”—which can afford the owner upwards of three years of “runway” before a given packaging design comes on the market. Once the package is being used in interstate commerce and federal registration is obtained at the USPTO, a further registration through U.S. Customs and Border Patrol is available and often recommended as a protective measure against potentially infringing importations.

The Advantages of Registration

The importance of packaging trade dress registration cannot be overstressed. Federal registration affords very significant advantages to the brand owner, including: (1) constructive notice to others regarding your claim of ownership; (2) qualification for registration with U.S. Customs; (3) the ability to use federal registration notice, “®”, to deter infringers and provide for enhanced damages;

and (4) the legal presumption of ownership and validity of the trade dress in question.

This final item (4) is of huge practical importance in the context of enforcement and litigation—without the presumption, a brand owner must prove ownership and validity of its trade dress. This can entail a massive operational exercise in proving up historical sales of products in the given package, as well as, the geographic territories, dates of sale and purchase information required in order to prove one's unregistered ("common law") trade dress rights to the satisfaction of the court. Thus, there is an enormous tactical advantage, deterrent and potential cost savings attendant to federal registration which is initially somewhat difficult to perceive.

Foreign Registration

Finally, nowhere is registration more important than the rest of the world. In much of the world outside of the U.S., intellectual property rights—and in particular, trademark, trade dress and other design rights—arise from registration, not use in the marketplace. Thus, in these jurisdictions it is the first to file an application which gains the superior right, not necessarily the party who first develops

a package design. Via international treaties such as the Paris Convention, domestic entities can obtain their U.S. priority filing date in numerous other countries within six months of filing the U.S. application. This can be an invaluable mechanism for preserving one's earlier filing date in much of the world, where the application filing date trumps all else in terms of packaging IP rights.

The Big Picture: Asset Development

As with trademarks, the inherent value of trade dress ultimately depends upon consumer recognition (i.e., "goodwill"), which in turn is a function of the degree of one's marketing efforts and the length of time of a given package in the marketplace. Over time, trademarks and trade dress can grow from relatively inexpensive assets, to the most valuable form of IP—essentially a "crown-jewel" asset for your business which is heavily factored into its valuation and provides for future opportunities in terms of licensing, co-branding, and ultimately—mergers and acquisitions.

What packaging assets remain unidentified and unprotected in your operation? Seek competent IP counsel to

advise, and if appropriate, to register your packaging assets as soon as possible for optimal market position.

Want More?

For more of the latest information on packaging law and design, including intellectual property and the importance of protecting your brand, food labeling compliance and the risks of litigation, offerings in packaging materials and choosing them wisely, and design techniques that set your product apart and engage consumers, come to one of the three upcoming presentations of The Produce Packaging Seminar, free of charge to WGA members: www.producepackagingseminar.com.

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