

ADVERTISING AND INTELLECTUAL PROPERTY RIGHTS – A KEY TO COMPANIES' COMPETITIVENESS

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Abstract: In order to be competitive marketing has a tremendous role, companies' interface with consumers is essential, companies have to make use of advertising and intellectual property rights, and these are not at all easy things to be done. Being competitive means not only ensuring for yourself the necessary intellectual property rights, in order to move forward, but also to respect others' rights, in order not to lose what you previously won. Our paper aims to present the main ways of competing through these elements and to analyze the present ways of winning in a competitive environment.

Keywords: competitiveness, intellectual property, advertising, marketing, unfair competition.

Companies are competitive only if consumers can recognize that. Of course this is something that takes time, and needs companies' efforts to really understand consumers' behavior and permanently adapt to fit their requirements. Sometimes people think marketers are the only interested party in consumers' behavior, as they want to influence and change it. Intuitively, it is wrong that any organization should try to manipulate people's behavior. The truth is marketing can promote all the products, with the condition that targeted people consider those products relevant for their needs, if they never tried them before. They will try for the second time the product only if their first trial was positive.

Building the company's image is not easy, but if it is really built, this leads to real benefits and also it is not easy to destroy it. Many times quality of products is what leads to a favorable image. However, this is not enough. The desired market share is obtained through efforts to make your products known, to make people distinguish your products from similar ones offered by others and to permanently develop them, including with respect to technology.

Many times companies' prestige and advertising activities are related to intellectual property rights, that first have to be obtained (substantial money efforts are needed for this) and then have to be used in order to generate cash that can cover your previous investments and also mean remaining with additional incomes, needed by future efforts.

Intuitively we all know what intellectual property is. We know that the inventor of a machine, the author of a book or a melody „own” in a way or their work. The

consequences come from this and we cannot just copy or buy a copy of another's work without taking into consideration his/her rights. Every time we buy such protected articles, a part of what we pay should go to the „owner” as a reward for his/her time, money, efforts and mind that led to that result.

What is Intellectual Property?

The best beginning in defining intellectual property is a proper understanding of the word „property”. The main characteristics of most property types refer to the fact that the owner is free to make use of it as much as he/she wants to (in the limits of law, of course) and has the right to exclude others from making use of it. The term „intellectual property” refers to those property types that are the result of human mind, of creativity.

There are two important things regarding intellectual property:

- (1) the one who generates it can gain rights as a result of his/her work;
- (2) these rights can be licensed to others.

Why intellectual property rights exist? The first reason is that it is fair that a person who gave time and effort in an intellectual creation to have a benefit as a result of his/her work. The second reason is that by offering protection to intellectual property such efforts are encouraged and the industries based on this kind of work can develop, because people see this work brings them financial gains.

The most important aspects that define intellectual property rights refer to:

- copyright
- related rights
- trademarks
- geographical indications
- industrial design
- patents
- protection of new varieties of plants.

Additionally there is the legislation regarding unfair competition, as the market fair-play cannot be ensured simply by protecting intellectual property rights. We consider unfair competition is unfortunately quite often seen by us just by looking at companies' advertising.

Copyright

As copyright concerns only a small part of the total companies, we will not insist too much on it.

In essence there are three types of rights a copyright holder might have:

(1) **The right of reproduction** – It is the right of the owner to prevent others from making copies of his/her works. They need an authorization of the author or other owner rights. It covers any kind of reproduction, for example printed books, printed copies, photocopies, recorded tapes, programs on CD-s, DVD-s, or other forms of stocking information, etc. There are some exceptions to the general rule, known as „limitations” on rights. For instance, many national laws allow individuals to make single copies of works for private, personal and non-commercial purposes. This could become a big problem, as the unauthorized copies of works may be indistinguishable from the source, because of the technology.

(2) **Rights of public performance, broadcasting and communication to the public** – The right of public performance means that the owner of copyright may authorize live performances of a work (the presentation of a play in a theatre, for

instance). In addition we call „public performance” performance by means of recordings. The right of broadcasting covers the emission by wireless means, by radio, television, or satellite. When a work is communicated to the public, the signal diffused by wire or cable can be received only by persons that have access to equipment connected to the wire or cable system.

(3) **The right of translation and adaptation** – You have it if you translate a work (for example a book) from one language to another or if you change by adapting that work (for example when you transform a book into a movie or into a play). In order to reproduce and publish a translation or adaptation we have to obtain the authorization from both the owner of copyright in the original work and the owner of copyright in the translation or adaptation.

Of course all these mean some economic rights. There are also the moral rights that should be also taken into account.

There are five categories of enforcement provisions: conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices. We will explain the last three of them with an example for each:

Criminal sanctions: Someone sells CD-ROMS with software. Criminal sanctions punish the ones who willfully commit acts of piracy of copyright and related rights on a commercial scale, by imposing substantial fines and by sentences of imprisonment and deter further infringement by orders for the seizure, forfeiture and destruction of infringing goods and of what was used to commit this offense.

Measures to be taken at the border: Maybe that seller of CD-ROMS tries to make the alleged infringing goods to disappear into circulation following customs clearance. The owner of rights applies to customs authorities. Thus he has a reasonable time to commence judicial proceedings against the suspected infringer. Anyway, the owner of rights has to satisfy the customs authorities that it is a *prima facie* evidence of infringement, has to provide a detailed description of those CD-s for recognizing them and has to provide a security to indemnify the importer, the owner of the CD-s and the customs in case those CD-s turn out to be non-infringing.

Measures, remedies and sanctions against abuses in respect of technical devices: In Romania HBO (television channel with movies) is a very good example. There are technical devices that are used to prevent the reception of encrypted program except with use of decoders. Actually there are infringements of copyright by manufacturing and distributing illegally decoders, but these decoders don't make the image to appear on the screen very good.

Related Rights

There are three groups of beneficiaries of related rights, namely performers, producers of recordings and broadcasters.

Performers (for instance, singers, dancers, actors, musicians, etc.) – They give life to works and have a justifiable interest in legal protection of their individual interpretations. Performers are provided the rights to prevent recording, broadcasting and communication to the public of their live performances without their consent and the right to prevent reproduction of fixations of their performances. Of course, it is about equitable remuneration. It is prevented just without it.

Producers of recordings (for instance, record companies) – We all know that their creative, financial and organizational resources are necessary to make recorded

sound available to the public in the form of commercial phonograms. They have a legitimate interest in having the legal resources necessary to take action against unauthorized users (making and distribution of unauthorized copies – piracy, unauthorized broadcasting or communication to the public of their phonograms). They have the rights to authorize or prohibit direct and indirect reproduction, importation and distribution of their phonograms and copies, and the right to equitable remuneration for broadcasting and communication to the public of phonograms.

Broadcasting Organizations – They have an important role in making works available to the public and have a justified interest in controlling the transmission and retransmission of their broadcasts. Many times they have exclusivity – for instance for a football match. They have the rights to authorize or prohibit rebroadcast, fixation and reproduction of their broadcasts.

Trademarks

A trademark is a sign (a word, a logo, a letter, a number, a slogan, a sound, a color, even a smell) that an individual trader or company uses to distinguish its own goods or services from the goods or services of competitors. This is of course a simplified definition, but it explains the essentials of a trademark.

It is indeed advantageous to protect a trademark:

For companies: Of course, companies spend a lot of money for their trademarks and they have to rely on trademark laws for preventing other people from using them.

For clients: A trademark usually ensures a consistent level of quality and helps clients to return to a desirable product or to avoid an undesirable one.

The most common way of protecting a trademark is to have it registered in the Trademark Register. (In some countries an unregistered trademark is protected after it has acquired sufficient distinctiveness and a reputation in the marketplace). The first possibility (registration) is better because the trademark in the second case is very vulnerable, many firms can lose a lot waiting – reputation means considerable time after the initial launch.

There are two main requirements of a trademark in order to register it under the terms of Madrid Agreement:

(1) **Trademark should be distinctive** – It must be able by its nature to distinguish goods and services. If we talk about a natural juice of oranges and lemons, we can't have the trademark "Orange & Lemon", because the competitors have to be able to use these words to describe their own goods, but we can have the trademark "Orlem", a combination of the first letters of these words, and we can have the trademark "Orange & Lemon" for something else, for instance for textiles, because this way we would have a very distinctive trademark, as oranges and lemons have nothing to do with textiles.

(2) **Trademark should not be deceptive** – Trademark cannot say that the goods for which it is used have certain qualities when they do not. For instance, we cannot have the trademark "Real Leather" for products that are not made from leather. A deceptive trademark would be also a trademark that claims a certain geographical origin for the goods from other regions, for instance, the name Bordeaux for wine that is not really from the Bordeaux region.

Trademarks are very important factors in increasing companies' competitiveness. Without them, the companies cannot build the so-called "brand loyalty".

Geographical Indications

A geographical indication shows that certain products have a certain regional origin. Many times we hear of another term, "appellation of origin". However it is not quite the same thing and we should know this. Appellations of origin are specific types of geographical indication (the geographical indication is the broader term). A geographical indication shows that certain products have a certain regional origin: "Made in Romania" is a geographical indication. An appellation of origin specifies that a certain product has certain qualities, which are due essentially or exclusively to its place of origin: Dorna Mineral Water – it is said/assumed that has some qualities referring to local mineral substances because it comes from there.

Industrial Design

An industrial design is that aspect of a useful article, which is ornamental or aesthetic. It refers to the appearance of an object. It may consist of three-dimensional features such as the shape or surface of the article, or two-dimensional features such as patterns, lines or color.

We apply industrial designs at many different products of industry or handicraft: watches, jewellery, fashion and other luxury items, industrial and medical implements, house ware, furniture and electrical appliances, vehicles, architectural structures, practical goods, textile designs, leisure items, etc., almost everything.

In most countries an industrial design has to be registered for being protected under industrial design laws and the general conditions needed for registration of an industrial design are novelty and originality. Novelty and originality are different from country to country. Anyway, registration of an industrial design is not the only means of protection. Sometimes and under certain conditions, it is possible to protect industrial designs under copyright law or the law against unfair competition.

Industrial design protection means benefits for the owner, for the consumer and for the economy as a whole. **The owner** of the design benefits through the industrial development of his products and the protection helps to ensure a fair return on investment. **The consumer** benefits because this protection leads to fair competition and honest trade practices, to more aesthetically, attractive and diversified products. **Economy** benefits, because this protection contributes to the expansion of commercial activities and enhances the export potential of national products.

Patents

Patents provide protection for technological advances. The aim is to encourage economic development by rewarding intellectual creativity. Through patents, progress in changing technologies finds incentive to improve. Patent protection provides a reward not only for the creation of an invention, but also for the development of an invention to the point at which it is technologically feasible and marketable.

The benefits of a patent refer to the fact that the owner of a patent can exclude all others in the territory covered by the patent from making, using, selling or importing the invention. Of course the owner of the patent can't use the invention if it is something illegal, but he can prevent others from marketing and benefiting from the

invention for a period of years (typically 20 years from the date on which the application is filed).

The patent holder is responsible for taking the initiative to enforce a patent. Detection of potential or actual infringements has to be done by the patent holder. In most cases, it is sent a polite letter giving notice of the existence of the patent. Usually it leads to a successful licensing agreement, which means, of course, a benefit for the owner of the patent.

Characteristics that an invention must have in order to be patent protected are:

- (1) It must be new or novel;
- (2) It must involve an inventive step (an advancement enough for being considered “non-obvious” by a person having ordinary skill in the art);
- (3) It must be capable of industrial application (the invention must be able to be used on a certain scale in practice).

A patent protects new and useful inventions. Of course, there are some exceptions, **things that are not patentable**. For instance, somebody discovers a new star. Of course, it is something new and useful, but it is also something that already existed in nature. Another example could be a perpetual motion machine, because it defies the laws of nature.

Not only patents protect an invention. Actually there are two ways of protecting an invention: trade secret protection and patent protection.

Trade secret protection means to keep the technology secret, to keep the information concerning the invention confidential. This is an advantage, but there is also a disadvantage – maybe someone will learn to make your product and then you will not have protection anymore. However Coca Cola is an example of “keeping the secret”. They benefited a lot from trade secret protection, they could not have benefited such a long time from a patent protection.

Patent protection has the disadvantage of the full disclosure of the technology to the public, but it also has a big advantage: for the period of the patent it doesn't matter whether someone else knows how to make your product, you have protection.

It is not possible to get a ‘worldwide patent’, because there are many difficulties, the costs are high. For instance there are the cost of all the examinations of the same invention that have to be conducted in different countries under present arrangements, the cost of translation and the cost of maintaining a patent (there is a substantial annual fee).

There is an international agreement administered by WIPO, the Patent Cooperation Treaty (PCT), for the filing, searching, publication and examination of international applications.

Protection of New Varieties of Plants

Giving plant breeders protection for their work is an incentive to the development of improved plant varieties for agriculture, horticulture and forestry. The breeders make substantial investments in these fields and the protection means recovering costs and accumulating the funds necessary for further investment, so we can see an improvement of the quality and performance of plants of all types.

The holder of the breeder's rights has the right to prevent the following actions without his/her authorization: production or reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting,

importing, stocking for any of the above purposes. The minimum duration for protection is 25 years for trees and vines and 20 years for other plants.

The characteristics of a new plant variety that would enable it to be protected are:

Novelty – ensuring that the variety has not already been exploited commercially;

Distinctiveness – it has to be distinguishable from any other variety well known at the time of filing application;

Uniformity – the plants of a variety should be the same or very similar;

Stability – the variety should remain the same over a period of repeated propagation;

Satisfactory denomination – it has to be its generic designation.

Unfair Competition

The market fair-play cannot be ensured just by protecting intellectual property rights. Unfortunately too many times we can see problems of unfair competition just by looking at companies' advertising.

It is true that by defining unfair competition as all acts of competition “contrary to honest practices in industrial or commercial matters” ” (art.10 bis (2) of the Paris Convention) or something similar to this, we cannot understand exactly what it is about. “Honesty” in competition is just the reflection of social, economic, moral and ethical concepts of a society, therefore it is different from country to country (and sometimes even in the same country). Moreover, it changes in time and there is always a new form of unfair competition, since there is no limit in creativity of competition. Any attempt to cover all types of unfair competition at present and in future in a definition – that in the same time defines the prohibited behaviors and is flexible enough to adapt to new market actions – has failed up to now.

The most notable of these acts of unfair competition are the causing of confusion, discrediting and the use of misleading indications. So the unfair competition means the attempt of somebody to succeed in competition without relying on his own achievements in terms of quality and price of his products and services, but rather by taking undue advantage of the work of another or by influencing consumer demand with false or misleading statements.

There is a need for laws in this field, because self-regulation has not proved to be a sufficient safeguard against unfair competition. In order to prevent unfair competition effectively, self-regulation must, at least in certain areas, be supplemented by a system of legal enforcement.

There are 6 major categories of unfair competition:

Causing confusion – for instance an organization calls its fast food “My Donald”; the consumers may believe it has something to do with McDonalds; an other example could be the shape of bottles very close to the shape of bottles of Coca-Cola Company (related to industrial designs);

Misleading – creating a false impression of a competitor's own products or services; for example saying about his own product that doesn't contain a substance, when in fact the similar products of the competitors do not contain that substance, too;

Discrediting competitors – any false allegation concerning a competitor that is likely to harm his commercial goodwill; for example saying that X Company doesn't produce the goods at the international quality standards, when in fact it does;

Disclosure of secret information - important information is given to a competitor without the permission of the owner of the information – for instance, the recipe of a medicine;

Taking undue advantage of another's achievements (free riding) – we can observe a lack of research, investment, creativeness and expense on the part of an imitator, who copied the achievement of another in spite of the fact that other ways of competing were available; for example, using a similar brand for dissimilar goods or services;

Comparative advertising – a positive reference to another's product (the one's own product is as good as the other) or a negative reference (the one's own product is better than the other); for example, saying about one new, unknown soft drink that is as good as Coca-Cola; or saying about a detergent that is better than others.

Conclusions

Companies' competitiveness has to be reached by working on many plans simultaneously. Companies have to make use of all types of intellectual property rights, in order to move forward, to respect the others' rights, in order not to move backward, and to work on all economical, technological, managerial and marketing issues.

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