



How to Protect Your Intellectual Property from New Forms of Online Infringement and Attacks

Global infringement of intellectual property is growing for a number of reasons. First, an increasing segment of the population believes that what's available in the digital marketplace is free for the taking. Second, a number of countries across the globe are unable to combat infringement. Further, the ease of infringement, the anonymity of those who engage in it and the resilience of the infringers compounds the problem. How should brand owners respond? Here are some suggestions.

THE IMPOSSIBILITY OF CONTROLLING THE MESSAGE

Brand owners must accept the reality that they can no longer control the online message. In the pre-Internet days a brand had more options. It carefully crafted its message and used the few channels of communication that were available to disseminate it. If a customer had a problem with the brand, there was no way the customer could broadcast the problem to the world. The customer might write to the local better business bureau or chamber of commerce or complain to its local paper but that was about it. Echoing an old Burger King commercial, most brands had it "their way."

But now we are all publishers. Anyone with access to the Internet can reach a global audience with a two-sentence tweet. That means it is now impossible to control the message. Once the viral attack starts it gets larger. More people embrace it; more people talk about it; in other words, once the genie is out of the bottle it's gone. And someone else is now in charge of the message. And that someone else can be your enemy really quickly because they can spread the word in milliseconds. If you try attacking the person who started the attack, the response is often worse.

So what should you do if you are faced either with an online brand attack damning the quality of the goods or services you provide or if you are accused online of infringing another's work?

THE THREE C'S

You want to follow the three C's: confirm, confess and correct

You need to first investigate to see whether the attack or the accusation of infringement has merit. If it does, you want to confess and at the same time tell the world that you have corrected the problem.

Here is what you may want to say:

"One of our customers just posted a message complaining about x. Although we would have preferred that the customer talks with us first about the problem we have investigated and made some changes that will benefit all."

Or you could say:

"Someone just posted a message video; although we're not sure it was aimed at us, we loved it and it inspired us to modify our policies."

And here is how you should respond to a legitimate complaint about online infringement.

"One of our visitors just advised us that we are displaying a work that the visitor believes is protected by copyright. We respect the intellectual property rights of others and have taken down that copyrighted work."

WHY THE THREE C'S?

Why the three C's? The Internet does not let you hide from an attack. So you best try to turn it into a positive and embrace it. Customers will only be passionate about your brand if they feel good about it.

Further, your customers are often your best spokesmen and are trusted sometimes even more than your brand image and your brand marketing message. So if you are able to turn your detractors into your friends with respect and honesty, they may help bolster your bottom line and protect you online next time you are attacked.

AN EXAMPLE OF INAPPROPRIATE RESPONSES TO ONLINE ATTACKS

Here is one example of an inappropriate response to a viral attack.

The Cooks Source Response

A magazine called Cooks Source published a story about the evolution of the apple pie written by Monica Gaudio. The problem was that Cooks Source simply copied the story from another website without Ms. Gaudio's knowledge or consent.

When Ms. Gaudio found out about it, she asked Cooks Source for an apology and to make a small donation to the Columbia Journalism School.

The Cooks Source editor responded:

"But honestly Monica [referring to Ms. Gaudio] the web is considered public domain and you should be happy we just didn't lift your whole article and put someone else's name on it."

And:

"We put some time into rewrites, you should compensate me."

Cooks Source's response sparked a collective fury on blogging and social media sites or what some called "nerd rage."

Facebook removed the Cooks Source site because it received so many hits. Advertisers were urged to withdraw support for the magazine. The messages that bloggers posted can't be reprinted here.

The three Cs could have diffused this situation. Instead, Cooks Source is now out of existence.

OTHER CRITERIA TO CONSIDER BEFORE RESPONDING TO ONLINE COPYRIGHT OR TRADEMARK INFRINGEMENT

In addition to the three C's, here are some other criteria to keep in mind when making a decision about how you will respond to infringement.

1. If you are faced with a counterfeit situation, are consumers being damaged by the conduct in question? Babies in the U.S. were at risk a few years ago when counterfeiters imported toys made in China containing lead. In that situation, the U.S. toy industry had to respond.
2. Is your marketing message being eroded by the infringing conduct? In other words, is consumer confidence in your brand being damaged by the knock-offs?
3. Is the infringing conduct costing you money?
4. How valuable is your asset that is the target of the infringement; is the asset or product a key to your success or one that you intend to discontinue?
5. Are there equitable considerations that favor the infringer; for example, is the infringer raising an issue of public importance?
6. Are we dealing with a serial, well financed infringer or one who sees the attack as a passing fancy?
7. Do you need to send out a warning shot to keep others away?
8. People in glass houses should not throw stone; can the same attack you are defending against be made against you?
9. What's your budget; trademark and copyright litigation is expensive.
10. Does the infringer have a fair use defense?

The key takeaway is that the Internet puts you in a fish bowl and the millions of people who are now able to observe your conduct may broadcast your response. Overzealous enforcement can mean loss of goodwill and

damage to your reputation and brand image. So consider carefully these criteria before you respond.

For more information, please contact Andrew Berger, (212) 508-3167, berger@thsh.com, or your relationship partner at Tannenbaum Helpert. Andrew Berger is counsel to the firm and specializes in intellectual property litigation and licensing. He blogs on these subjects at *IP In Brief* at www.ipinbrief.com.