

Protecting promotional materials under IP law

The success of a product is determined not only by the characteristics of the product itself, but also by how the product is promoted. Prior to launching a new product, several important decisions have to be made about the promotional materials that will be best suited to adding value to the product.

Why are Coca-Cola, Google, Microsoft, or Nokia still considered to be the brands with the most added value in the global market? The promotional tools these companies employ have played a key role in their success stories. For example, Coca-Cola has been able to constantly reinvent itself and remain appealing to a broad range of consumers through its effective marketing strategies. Everybody remembers polar bears drinking Coke. Memorable advertising has gone a long way toward differentiating this particular beverage from others that are available on the market.

Intellectual property (IP) laws protect trademark, designs and copyright. But some elements of promotional campaigns are also covered by IP laws. The elements of a persuasive advertisement are likely to be reproduced or imitated by competitors or other companies seeking to take advantage of the fame of these advertising materials. Other companies may also reproduce,

in good faith, some parts of the promotional elements without knowing that it may constitute an infringement. Determining exactly what is protectable is therefore an essential component in developing an overall marketing strategy.

The advertising of a product, excluding the brand name chosen for the product, encompasses different aspects such as its creative content (pictures, videos, etc.), slogans for the advertisement or its music, business names, logos, product names, or domain names used in the ad, distinctive packaging, promotion on a web site, etc. IP protection may be sought for each of these elements through a variety of means.

The slogan of a product, which is generally short and contains a memorable phrase, can be protected as a trademark. Indeed, the Thai Trademark Act defines a mark as "a photograph, drawing, invented picture, brand, name, word, text, letter, numeral, signature, group of colours, shape or three-dimensional object, or any combination of these items".

However, a slogan will be considered to be registrable only if it is unique compared to other marks, if it is not identical or similar to registered marks, and if it is not contrary to the public order and other restrictions. For example, in Thailand "Light of your Life" for Singha

Light and "Nokia, Connecting People" for Nokia products have been registered.

The packaging of the product may also be protected, depending upon its characteristics, either as a two- or three-dimensional trademark, a design patent, or a work of applied arts under Copyright Law. For example, the Coca-Cola bottle is a well-known design patent that has been registered as packaging in different countries. It has been registered as a two-dimensional mark in Thailand. A three-dimensional mark must be distinctive, that is to say, different enough from other products to allow it to be differentiated from its competitors, such as the perfume bottle for *Le Male* from Jean-Paul Gaultier. Therefore, the form of these packaging designs must be very distinctive or different from other products in the market to obtain protection.

TV commercials or advertisements on signboards and magazines may also be protected. Copyright law covers sound and video broadcasting works. Although this protection is granted automatically when the author creates the work, recordation of the copyrightable work is recommended in order to establish evidence of date and ownership in case of infringement.

The main difficulty regarding the protection of a work under the copyright

law centres on the concept of the idea for the work itself. Indeed, a copyright only protects the expression of an idea and not the idea itself. For example, a company selling ice-cream may create advertising that focuses on hip-hop dancing. This TV commercial may be protected under copyright. Nevertheless, if another ice cream company includes hip-hop dancing in its commercial, infringement will not be established if the video contains a different dance sequence and other elements so as to permit viewers to easily distinguish the two TV commercials. Moreover, the music used in these TV commercials such as the jingle, as a musical work, may also be subject to protection under the Copyright Act if it does not reproduce another musical composition.

Consequently, if a company plans to launch a product, it is important to review the extent to which the promotional materials being considered can be protected under Thai IP law. In the same way, it should take steps to ensure that those promotional materials will not infringe the rights of other companies.

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