

FORETHOUGHT BRANDS

Protect Your Product's Look and Feel from Imitators

by Betsy D. Gelb and Partha Krishnamurthy

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Too many U.S. companies believe that being first to market with a design feature, whether it's registered as a trademark or not, is the best way to ensure that your brand is associated with it. That's a false assumption—and a dangerous one. Instead companies must ensure that consumers connect a product's look and feel with the brand. That means conducting targeted research on design features and, in many cases, spending more money to hammer home the brand association in consumers' minds.

A design feature is what's known legally as *trade dress*—any nonfunctional characteristic of a product's or package's appearance and feel, ranging from the pink color of Corning's insulation to the cowhide pattern on Gateway's computer boxes. Many companies don't know how much trade dress is worth and therefore can't make informed decisions about how much to spend to protect it from being copied. And firms, especially small and midsize ones, often don't register design features as trademarks because meeting official requirements can be costly and difficult. Often they believe that the chances of being copied are slim or that they can successfully sue an imitator because they originated a feature.

But the legal climate for brands changed in 2000, when the Supreme Court ruled that because Samara Brothers, a New Jersey-based wholesaler, could provide no evidence that consumers associated its children's-clothing designs with only one brand source, Wal-Mart could sell items that looked a lot like Samara's. A product's design feature can now be protected from imitation only if it has "secondary meaning"—if buyers see it as a marker of the brand. That meaning must be acquired through marketing.

Fortunately, it's not difficult for a company to get the data it needs to help build a bulwark against imitation. It can conduct a simple experiment to determine what percentage

of consumers associate a feature with the brand and whether the feature is valuable enough to be worth the effort of spreading that association to more consumers.

Say, for example, a maker of western boots with decorative stitching hires a research firm to conduct an experiment with current or potential buyers in five widely distributed malls, out of sight of the company's outlets. The researchers show half the shoppers the (unlabeled) decorated boots and the other half the same boots without the design feature. Then they ask the participants in both groups what they'd be willing to pay for a pair. The difference in the average price quoted by the two groups becomes the per-unit value of the stitching. Finally, they ask the participants to name the brand. Typically, few participants can do that—which may surprise the company.

Suppose the stitching added \$40 to the perceived value of the boots, but the fraction of people who could identify the brand was only five to 10 percentage points higher in the with-stitching group than in the without-stitching group. The company would need to create a campaign to strengthen the association between the feature and the brand. That might mean increasing the marketing budget as much as threefold, at least for a while, but it might also discourage imitators and improve the likelihood of success in a legal contest. A difference of at least 20 percentage points that can be attributed solely to the design feature is usually considered a solid defense against imitation if the company sues a competitor.

Research data of this type are becoming common in infringement lawsuits. But companies should be collecting data even if no imitators are on the horizon, because trade dress is an increasingly important asset. The rising value of brands is illustrated by the \$305 million in damages awarded to Adidas in May 2008 for imitation of its athletic

shoes—believed to be the largest amount ever awarded for trademark infringement. Valuable assets like trade dress can be managed rationally only if their value is fully understood. In effect, what you don't know will hurt you.

Betsy D. Gelb (gelb@uh.edu) is the Larry J. Sachnowitz Professor of Marketing and Entrepreneurship, and

Partha Krishnamurthy (partha@uh.edu) is a faculty research fellow and an associate professor of marketing, at the University of Houston's C.T. Bauer College of Business.

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