



The trademark ecosystem 2020

The trademark ecosystem is changing. Robert Reading reviews recent research that offers insights into infringement, technology and the shifting trends in brand protection

We live in a world where – thanks to social media and online retailing – brands and marketplaces are more accessible than ever. It is easier than ever before to create a brand, and easier than ever for brands to reach national and international audiences. This accessibility however is creating challenges for brand owners as the marketplace is becoming more and more crowded and it becomes increasingly difficult to carve out a niche and avoid collisions with other brands.

Trademark applications – necessary to protect a brand in each marketplace around the world where it has a presence – reached new record levels in 2019. Over 11 million trademark applications were filed around the world, with over 7 million applications filed in China alone – the tenth year in a row that global trademark filing activity increased. As 2019 drew to a close there were over 83.5 million active trademarks on global registers; the number is likely to approach 100 million within the next two years.

For brand protection specialists the growing number of brands and corresponding growth in trademark applications at Intellectual Property offices around the world means that it is becoming more complex to screen, clear, register and watch trademarks.

These processes need to be carried out thoughtfully because not doing them, or not doing them properly, can have severe consequences, including failure to secure a mark, infringing on another organisation's intellectual property, possible litigation, and customer confusion. In addition, it's also vital to watch trademarks to prevent other brands from infringing on your intellectual property.

Obtaining protection for a brand – and maintaining protection requires a significant investment of skills, time and money, and the landscape is changing faster than ever. To understand the changing challenges and issues that are

impacting trademark protection, CompuMark commissioned independent research into the trademark ecosystem, surveying 351 trademark professionals, both in-house and external counsel, across five countries.

Global trademark filing activity

Trademarks are a vital form of intellectual property protection for start-ups and multinationals alike. There has been significant and consistent growth in the number of trademark applications filed each year since the global economic slowdown in 2008 — 10 years of double-digit growth driven in particular by the exponential rise of trademark activity by Chinese brand owners. This growth is reflected in the research, with 79% of respondents saying that they maintained or increased their trademark filing activity in 2019.

Given the rising incidence and cost of trademark infringement, investing in better tools seems like a clear path forward

There has also been increased interest in marks with a visual element – perhaps in part due to increased online activity where visual appeal is an important part of getting noticed. 56% of respondents reported that they filed more image marks in 2019 than in previous years. 78% of respondents also reported that they are filing for industrial designs as part of their protection strategy.

Challenges

In order to qualify for protection as a trademark, a brand needs to be unique within its niche – avoiding confusion with other brands is a key element of brand identity. Ideally this means conducting thorough searches prior to adopting and registering a new brand to avoid conflict with existing brands in the space – however there are some practical issues that means that this is not always possible.

The majority of respondents reported that they conducted searches for fewer than half of the brands they launched in 2019. Respondents cited a number of challenges that make searching difficult – too much data (49%), not enough time (44%), not enough resources (38%) and not having the right tools and technologies (35%).

Because not all marks could be searched before filing a trademark application, respondents reported that the main factors determining if a search should be carried out were the overall investment in the brand (28%), budget (22%) and the importance/tier of the brand (18%).

Respondents provided similar answers when deciding how they monitor (watch) their brands to defend against potential infringement. The majority watched fewer than 50% of the marks within their portfolio, with the investment in the brand and budget being major considerations.

Infringement is on the rise

Trademark infringement can be a very expensive challenge —whether that's changing a name, logo or marketing material for a launch, or taking legal action against an infringing mark. For example, in January 2019 luxury jewelers Tiffany & Co. were awarded \$US 21 million in damages and costs when a New York court ruled that Costco had infringed their TIFFANY trademark in relation to diamond rings.

With trademark registers seeing more applications every year, markets are becoming ever more crowded, and collisions are seeing a corresponding upward trend.

When CompuMark first surveyed trademark practitioners in 2017, 74% reported that they had experienced issues with infringement during the year. In 2018 that proportion had risen to 81%, and the latest report reveals that in 2019 85% of respondents had experienced trademark infringement in the past 12 months. Significantly, 30% of respondents reported that they had experienced more than 10 cases of infringement in 2019.

It is important to note that infringement is not just being experienced in traditional channels, like business and brand names, but also social media names, industrial design, web domains and advertising campaigns. What this means for trademark professionals is that it is no longer enough just to monitor patent and trademark office (PTO) databases, but further afield too including common law sources. Organisations need to be diligent everywhere in order to keep their key brands safe, as the threat of infringement can appear from multiple different angles

The impact of infringement

While instances of infringement are rising, it is the consequences that have a real bearing on brands. In the 2018 survey almost one-third of respondents (30%) reporting having had to change the name of a brand as the result of an infringement – in 2019 this proportion had jumped significantly to 46% of trademark professionals surveyed.

Changing a brand name has wide-reaching implications: cost, reputational damage, and consumer trust. It can impact a wide range of areas, such as website design, advertising campaigns, marketing materials, and packaging.

Three-quarters of respondents reporting taking legal action against infringers in 2019, with 40% spending between \$50,000 and \$250,000 in their most expensive action, and 12% spending over \$250,000 on a single case.

Customer confusion due to infringers was reported by 45% of respondents in 2019, with 38% stated that their business had lost revenue and 37% felt that the reputation of their brand had been damaged by cases of infringement during the year.

The role of technology

The process of creating and protecting a trademark involves a number of potentially complicated steps: name creation/logo design, searching for potential obstacles, filing a trademark application and obtaining registration, monitoring for infringement and taking action if necessary. It is clear from this year's survey that trademark professionals believe that technology is playing an increasingly important role in this process.

49% of respondents said that technology is the primary way to improve both the clearance process and the way brands are protected, arguing that technology is more important than increasing resources (46%), larger budgets (45%), more time (40%) and better collaboration between departments (40%).

Looking specifically at how technology could help, 50% suggested that the benefit would come from real-time access to trademark data, 50% nominated better analytics to assist decision making, and 46% stated better reporting.

Trademark professionals believe that technology can help make them more productive, with artificial intelligence and machine learning in particular being identified as a potential automation tool. There is strong interest in technology that is user-friendly and speeds up processes while at the same time improving accuracy – this finding in contrast with the regularly aired view that AI poses a threat to legal professionals.

Trademark searching and watching were identified by respondents as specific areas where AI could speed up existing processes, and predictive analytics was suggested as a way that technology could assist the decision making process for trademark professionals.

There is also an opportunity for Intellectual Property offices to benefit from advances in machine learning. 93% of respondents believe that applications for trademarks containing an image would increase if IP offices had a more reliable examination process in place – something that technology could assist.

Name creation

As trademark registers become more crowded it may become more difficult to create truly innovative and unique names and logos for new brands. Brand creation is generally handled by marketing within an organization, with trademark professionals being involved when clearance searches are required.

When asked about collaboration between the marketing and legal teams during the name creation process, 42% of respondents reported that trademark professionals were an integral part of the process, while 41% reported being consulted on an ad hoc basis. Reassuringly only 15% of trademark professionals felt that there was little collaboration between legal and other departments.

90% of respondents reported that they spent at least 4 hours providing alternative naming options to marketing colleagues or clients during the naming process, with only 1% reporting that they were not asked to assist with providing alternative names.

Education

One area that was identified as a potential weakness within organizations was education in relation to intellectual property. Only 30% of respondents reported that their organisation had a formalized training program in place to educate marketing, with 24% having processes in place for working with brand owners. 22% rely on ad-hoc training, and 21% reported training was conducted as *"learning by doing."*

C-suite engagement

As an illustration of how fundamentally important trademarks are to most businesses, 58% of respondents stated that top level managers responsible for running the business are actively involved with the trademark process, and a further 25% reported that members of the C-suite are not actively involved but recognize the importance of protecting Intellectual Property.

Conclusion

The trademark ecosystem is changing. There are more marks than ever before on trademark registers around the world and it is becoming increasingly challenging to search, file and watch a portfolio of trademarks. Higher budgets and better technology can certainly help in mitigating the risk of infringement, as being able to properly search and watch marks is a vital part of brand protection.

Finding a unique mark is becoming more difficult but there is optimism that the application of artificial intelligence and machine learning to the trademark protection process could reduce the effort required by professionals to find

solutions. Given the rising incidence and cost of trademark infringement, investing in better tools seems like a clear path forward. ■

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