

Keep Them Thinking With Your Trademark

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In the fast-paced world of technology, getting your product to market at the right time can be critical to business. With that goal in mind, marketing departments far and wide seek to find that trademark that will hit home immediately with its intended audience. Far too often though is the unintended consequence that the selected trademark is one that is not immediately protectable.

Generally speaking, trademark rights are afforded on a first-in-time, first-in-right basis. The first person to adopt and commercially use a mark is considered to be the senior user of that mark in connection with those goods and/or services for which it is used, so long as the mark is not confusingly similar to another's mark. This however does not happen in a vacuum because to be protectable, trademarks must have the requisite strength.

Trademarks are assessed for strength on the trademark continuum. From weakest to strongest, the continuum's categories of trademarks are generic, descriptive, suggestive and arbitrary or fanciful.

Generic marks are truly not trademarks since they are simply the generic word for the good or service. Think apples, oranges, and bananas, all of which are words in the public domain for those particular fruits. Generic marks are not protectable.

Next, and while not immediately protectable, are descriptive marks. Descriptive marks describe the good or service with which they are being used. Marketers love them for exactly that reason, but from a strength perspective, they do not have the requisite distinctiveness to render them protectable upon adoption. Descriptive marks can build the requisite distinctiveness by attaining secondary meaning in the marketplace through continuous and substantially exclusive use (usually five years), but that can seem like a lifetime for any business.

While not having the most strength, suggestive marks are immediately protectable as they are considered to be inherently distinctive. Oftentimes, suggestive marks do contain some minor level of description of the good or service offered, but require the consumer to make a mental leap to

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reach a conclusion as to the exact nature of the goods or services. Common examples of suggestive marks include Microsoft, Airbnb, Coppertone, and Chicken of the Sea.

The marks having the highest level of protection are those considered arbitrary or fanciful. Arbitrary marks have no connection to the respective goods or services. Examples of arbitrary marks include Apple for computers, Rifle Paper Co. for artwork and paper products, and Oracle for computers. Fanciful marks are simply made-up. Examples of fanciful marks include Kodak, Xerox, and Exxon.

The stronger the mark, the higher level of protection. While it may seem somewhat counterintuitive, when selecting a mark, choose one that is protectable and sets you apart from your competition.

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