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Firms play tough game to defend a good name

By Eric Schellhorn | Correspondent of The Christian Science Monitor

SAN DIEGO - Back in 2002, when PepsiCo, Inc. needed a slick, fashion-forward name for its new, ice-blue cola, company marketers decided they needed a little outside expertise. So they turned to Catchword, an Oakland, Calif., marketing firm whose exclusive niche is engineering product names and pithy tag lines.

After poring over some 1,500 of Catchword's suggestions and testing the best of them with consumers, Pepsi's decisionmakers arrived at what Catchword's Laurel Sutton readily admits was the "duh" option. The beverage giant chose the name it had been using as shorthand since the blue cola's conception: "Pepsi Blue."

"They were looking to target hip young people - skate-punk kids - so we had tried some more in-your-face options, things that might have been more cool-sounding. But in the end, we realized that Pepsi Blue was the perfect name," says Ms. Sutton, a partner at Catchword. "It appealed to the target audience, and it solidified the product's positioning and marketing."

Not all product-naming exercises are so easy. Indeed, the craft of grafting language onto a company, product, or service is becoming increasingly challenging and expensive, say Sutton and other marketing professionals. Even names as obvious as "Pepsi Blue" and tag lines as straightforward as McDonald's "I'm lovin' it" or T-Mobile's "Get more from life" require so much time and effort that corporations have become zealous in defending what they view as their intellectual property.

But as corporations step up such aggressive tactics, they threaten to take control of swaths of language in a way never seen before. While bosses will still be able to say "You're fired!" - whatever Donald Trump's success in trademarking the phrase - small companies and even consumers may stop using certain words on T-shirts or in blogs for fear of retaliation - even when the law is on their side.

"Overzealous companies often try to assert trademark ownership in inappropriate ways to stifle free speech," says Kembrew McLeod, a communications studies professor at the University of Iowa and author of the forthcoming book "Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity." "The real harm comes from self-censorship in a world where [companies] fire off cease-and-desist letters, and where we and our employers back down from lawsuits, even when they're baseless."

The stakes can run high. Microsoft, for instance, is vigorously defending its ubiquitous Windows trademark from what it views as an infringement by a San Diego software firm called Lindows, which markets an alternative computer-operating system. Last summer, Fox News made headlines when it attempted to prevent humorist Al Franken from using its "Fair and Balanced" tag line in the title of his bestselling book.

In addition, ZonePerfect Nutrition, a unit of Chicago-based Abbott Laboratories, is using the courts to try to stop Zone Diet creator Barry Sears from introducing a line of similarly named nutrition products this year. And Mr. Trump's efforts to trademark "You're fired," an utterance that became his signature on his reality TV program "The Apprentice," is embroiled in a legal dispute with an Illinois woman who owns a pottery shop with the same name.

Overall, the number of trademark-related lawsuits filed in the US is rising - 3,672 last year, up 6 percent from a year earlier, according to the Administrative Office of the US Courts.

In this fiercely territorial environment, companies' quest to characterize, differentiate, and distinguish their products and services from others has made the business of choosing the right name and accompanying catchphrase an increasingly sophisticated process.

"Even 20 years ago, naming was typically done by people who founded their own companies, or by ad agencies, or by product managers in-house," says Sutton, who has a master's degree in linguistics from the University of California at Berkeley. "Either that, or you had descriptive names such as International Business Machines or General Electric. Now, though, the marketplace has become so crowded that it's just hard to find really good names that are available for use. Ninety-nine percent of the time, something's been done already."

New name search

The quest for uniqueness has led many companies to adopt fanciful, almost impressionistic names: Verizon, Altria (formerly Philip Morris), and Accenture (formerly Andersen Consulting) are among the best-recognized examples. Pharmaceutical companies, meanwhile, have raised the practice to an art form with contrivances such as "Viagra" and "Zolofit."

The advantage of devising a name that didn't previously exist is the relative ease of trademarking it and the likelihood of being able to acquire an accompanying Internet domain with a ".com" suffix.

The downside, explains Sutton, is that such new words don't necessarily communicate much of anything about what a company does. "Names that are easy to trademark aren't necessarily easily understood. You need to explain them to the world at large, and that takes money."

And the more money companies spend to forge distinctive identities for themselves through ambitious marketing and advertising, the more they expect to be able to exercise control over the words and images that help define their businesses in the consumer's mind.

"Companies today put a lot of effort, time, and money into creating identities for themselves," says attorney David Given, a trademark expert with the San Francisco law firm Phillips, Erlewine & Given LLP. "There's been a general consciousness-raising over the past 10 years about intellectual property rights, and I do think companies have taken more seriously - and have sought to protect more rigorously - their portfolio of such rights."

More trademarks sought

After a downturn that roughly tracked Wall Street's slump, trademark filings are on the rise again. Last year, the United States Patent and Trademark Office received 267,218 trademark-registration applications - a nearly 30 percent dip from the total in 2000, at the crest of the dotcom boom, but slightly higher than the figure for 2002.

The increase in trademarks and the aggressive efforts to protect them are sparking new concerns related to free-speech rights.

"Twenty years ago, this whole area of the law wasn't even called 'intellectual property,' it was called 'copyrights, patents, and trademarks,'" says Marvin Johnson, an attorney with the American Civil Liberties Union. "The problem is, once you take on a term like 'property,' these things have different connotations. Companies start to think of this type of property as real property, the kind you can pretty well do what you want with. And there's been a subtle shift over the last 20 years toward trademark and copyright holders - the pendulum has swung more and more in their direction."

But that doesn't mean the courts are moving in that direction. A handful of recent high-profile court decisions - including a US district court judge's refusal to grant a request by Fox News for an injunction against Mr. Franken's book - actually tend to favor First Amendment considerations over commercial interests, argues Professor McLeod. What concerns him are the sometimes bullying tactics corporations and other organizations with deep pockets use to muzzle speech they don't like.

"Artists and critics usually don't have a bottomless well of money to spend on litigation," he says. "People think twice about doing anything that could cost them their house."