Integrating the crowd into trade marks

Crowdsourcing trade marks is becoming more popular and powerful, but care should be taken. Dydra Donath, Laetitia Lagarde, Lisa Pearson, Kate Swaine, Stella Syrianos and Kalina Tchakarova explain

1 MINUTE READ

The IP Outer Borders team of MARQUES, the European Association of Trade Mark Owners, follows emerging intellectual property issues and social and cultural changes affecting brands. One fundamental change is that consumers today feel they own, or at least co-own, their favourite brands. In this five-part series, members of the MARQUES IP Outer Borders Team examine different manifestations of this evolving dynamic between consumers and brand owners. This second article in the series looks at crowdscourcing of brands and product names. All the articles were first published on the IP Outer Borders Team page of the MARQUES website, which can be accessed at marques.org.

The term crowdsourcing was reportedly coined in 2006 by Jeff Howe and Mark Robinson, editors at Wired Magazine:

> Simply defined, crowdsourcing represents the act of a company or institution taking a function once performed by employees and outsourcing it to an undefined (and generally large) network of people in the form of an open call. This can take the form of peer-production (when the job is performed collaboratively), but is also often undertaken by sole individuals. The crucial prerequisite is the use of the open call format and the large network of potential labor.

Many brand owners are now using such an open call format and large network of potential labour to create new trade marks, including house marks, product marks and trade dress. Of course, even before it was called crowdsourcing, many companies outsourced the creation of new marks by tapping into the ideas and labour of the crowd, but the internet and social media have propelled crowdsourcing to a whole new level.

The benefits of crowd creation

While there exist several different types of crowdsourcing, such as crowd voting, crowd wisdom and crowd funding, our primary focus here is on crowd creation. Businesses globally view crowdsourcing as a modern, cheap and fast way to accomplish tasks they would ordinarily assign to agents, as well as a way to engage consumers, and ensure their fidelity to the brand.

Both companies and contributors benefit from crowdsourcing campaigns. By participating, crowd-workers have the opportunity to co-develop a product, a special get up or even a trade mark and belong to an elite circle of early adopters. Crowd-workers exercise their creativity, build their own portfolios of work, publicise their involvement through social media, and often are eligible for a prize or other incentives. Crowdsourcing campaigns also enable companies and crowd-workers to communicate and cooperate at eye level.

As explained by Jason Baer in "Six Laws of Collaborative Branding":

> Only the brands that actively engage their audiences in a conservation will survive. And this calls for more than friending our customers on Facebook or inviting them to a forum on our corporate website. It means surrendering some of the creative control and asking them to share their ideas. This isn't a bad thing. Customers who choose to engage with their brands become loyal brand ambassadors, and the work they create is far more credible than anything we could say about ourselves. If we don't ask them to participate, watch out, because they'll happily take matters into their own hands. …. So don't fight this phenomenon. Embrace it.

Examples of crowdsourced trade marks

Toyota

The basic idea of crowdsourcing trade marks is not new at all. One of the most famous examples is the Toyoda logo contest in 1936, which led the Japanese car company to change both its logo and house mark as shown in figure 1.

Figure 1

Toyota originated from the family name of the company's founder, Sakichi Toyoda. Early vehicles produced by the company were sold with a Toyoda emblem. In 1936, the company ran a public competition to design a new logo. Twenty-seven thousand people answered the call. The winning design consisted of the word Toyota — substituting a "t" for the "d" — because voiceless consonants sound more appealing than voiced consonants. In addition, employing *jikaku* (counting the number of strokes in writing characters to determine good and bad luck), the eight-stroke count of the Japanese word is associated with wealth and good fortune.

Lastly, the change also signified the expansion of a small independent company to a larger corporate enterprise.

The new design was registered as the trade mark of Toyota cars in April 1937, and Toyota Motor Company was founded later that year.

Coke and other nicknames

Another famous example of a crowd-sourced mark is the designation Coke, one of the most valuable trade marks in the world. Here, the brand owner did not solicit a new mark from the crowd; the crowd bestowed it, and it stuck. Around 1915, the public coined the designation Coke as a nickname for Coca-Cola. Initially The Coca-Cola Company actively discouraged use of Coke to refer to its products because of the term's association with cocaine. It took approximately 26 years before the Coco-Cola Company fully appreciated that the designation Coke had achieved secondary meaning and enjoyed widespread consumer recognition and good will as a source identifier for Coca-Cola products, and appropriated the popular nickname as its own.

Other examples of nicknames bestowed by the public that were later adopted as marks are Bug to refer to the iconic Volkswagen Beetle automobile and Mickey D to refer to McDonald's.

Human rights logo

In May 2011 a non-profit organisation called A Logo For Human Rights launched a campaign to create an internationally recognised logo to support the global human rights movements. The winning logo was created by Predrag Stakić from Serbia (figure 2).

Figure 2

The human rights logo combines the silhouette of a hand with that of a bird, and can also be viewed as a thumb (in white) grasping a dove. It is intended as a peaceful contribution towards strengthening human rights globally and, as such, is meant to be used across cultural and language borders. The logo is now available to everyone at no cost as an open source design. It can be used worldwide by everyone without paying or obtaining licences. The organisation encourages people to use the logo in new ways and to upload examples to its website.

Recent examples of crowd-creation

Taking a cue from the long tradition of using contests to create new branding indicia such as logos, jingles and slogans, many brand owners today are harnessing social media to create new products, trade marks and trade dress through crowdsourcing. Below are some examples, ranging from the most basic to the most sophisticated and complex.

Starbucks' white cup contest

Starbucks hit upon a simple idea to engage with its audience, and enhance the popularity of its well-known trade dress. It launched a design contest challenging Canadians and Americans alike to decorate Starbucks cups and share their creations through social media at WhiteCupContest. The prize? Twenty-five re-usable cups bearing the winning designs and a $300 Starbucks gift card, reinforcing the winners' brand loyalty and helping them spread the word. Starbucks also benefited from the campaign by building its community on Twitter. In order to claim a potential prize, contestants had to follow @Starbucks on Twitter for at least 60 days after the end of the contest, for winner notification purposes. Some of the winning entries are shown in figure 3.

Figure 3

Boeing's newest aeroplane

For the first time in history, Boeing encouraged people around the world to name its newest airplane. Through a marketing alliance with AOL Time Warner, people placed votes at a website devoted to the new jetliner. After tallying 500,000 votes in more than 160 countries, Boeing announced the winner at the Paris Air Show in June 2003: Dreamliner (Figure 4).

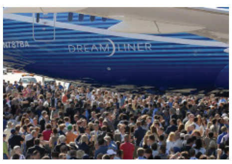

Figure 4

The three other top choices were eLiner, Global Cruiser and Stratoclimber.

Heineken's crowd-sourced trade dress and sustainable packaging initiatives

Heineken has used crowd-sourcing to engage consumers with its brand for over a decade. For example to celebrate its 140th year anniversary, Heineken created the platform yourfuturebottle.com, and challenged people to submit a design envisioning the connection between the brand and its consumers over the next 140 years. The winning design, which arranged all the continents of the world into the Heineken star, was available commercially in 2012 as a limited-edition holiday item.

In addition to asking consumers to redesign its trade dress, Heineken uses a crowdsourcing platform to reinforce one of its brand promises: sustainability. In 2012, Heineken launched its open innovation platform www.ideasbrewery.com. The platform first challenged innovators from around the world to share their ideas on the future of sustainable beer packaging, the re-use or recycling of it, new packaging materials, or new ways to distribute or transport the packaging in a more sustainable manner. Ideas were assessed on innovativeness, feasibility and number of votes from the audience. Ideas that best met the criteria then progressed to a second stage where Heineken innovators worked with participants to "bring the ideas to a next level".

The winning concept was an innovative Heineken-O-Mat device designed to motivate consumers to return/recycle bottles. It had a smart technology involved: when you return a bottle, you can scan it for prizes that are randomly assigned to the bar code on certain bottles (figure 5).

Figure 5

Ritter Sport new chocolate bar

Starting on December 13 2010, the Ritter Sport brand of Alfred Ritter GmbH & Co KG Waldenbuch, Germany, promoted a new kind of crowdsourcing event, giving the brand's fans full power over the development of a new chocolate, beginning with the recipe, to the design and the product's name.

The campaign reached 30,000 Ritter Sport blog readers and achieved lively participation on all brand platforms. On Ritter Sport's blog as well as on a special Facebook campaign page, fans were able to contribute and to vote. Ritter Sport responded cheerfully to even the most far-fetched submissions and posted them on its blog (figure 6).

Figure 6

Ritter then produced the winning chocolate, Cookies & Cream, shown in figure 7.

Figure 7

Because Ritter Sport knew how to protect itself from dubious winners, and to keep the terms and conditions transparent, no one was even disappointed when Cookies & Cream beat out Toast Hawaii, Blutwurst [blood sausage], Döner Kebab or Essiggurke-Senf [pickled gherkin – mustard].

Chiquita sticker contest

In the United States, Chiquita Brands has developed strong consumer recognition for the iconic blue and yellow stickers on its bananas and, over twenty years ago, had the foresight to secure a US trade mark registration for its ovular sticker design (without words), which is now incontestable.

In 2010 Chiquita Brands International Inc started a sticker contest on its website which asked visitors to design their own iconic emblems for the fruit. Fifty finalists were announced in August and the general public voted on the grand prize winners. The 18 winners which were chosen to adorn Chiquita bananas in stores across the USA are shown in figure 8.

Figure 8

Each of the 50 finalists got a Chiquita Banana T-shirt and two custom items printed with their selected design (figure 9).

Figure 9

The Chiquita Banana sticker contest was created to encourage consumers to interact with the Chiquita brand and to make the brand their own, because it is a fun way for consumers to engage with the brand through self-expression.

Nivea's crowd-sourced Black and White deodorant

Nivea, the best-known brand of the multinational skin care corporation Beiersdorf, tapped into the wisdom of the crowd in a far more sophisticated way to explore a new deodorant product. Nivea's R&D team had identified anti-perspirant stains as a high priority topic. It then partnered with the innovation agency Hyve to find a positioning gap and options for a new deodorant to fill it.

With the aid of netnography, the agency searched more than 200 community and social media platforms. Instead of asking direct questions and thus inevitably biasing the consumer's response, the netnography approach aims to observe and understand the emotional, social and cultural context of consumer's product experiences. In contrast to more quantitative web monitoring approaches, the core principles of netnography are listening to consumers rather than asking them, understanding rather than measuring consumers' attitudes and behaviours. The netnography method helped Nivea's R&D team immerse and orient itself in the consumer's world.

Following the netnography and a series of ideation and co-creation sessions with external stakeholders, a quantitative online co-creation study was carried out with a carefully selected sample of consumers in order to test hypotheses and ideas. In addition to evaluating the ideas, respondents were also given the opportunity to enrich and improve the ideas, raise questions or concerns and name potential fields of applications. Finally, users were asked to take on the role of a developer and gate-keeper and decide which ideas warranted further develop.

The massive input from consumers was systematically analysed and structured. Nivea then drew on these consumer insights to name and launch its new Invisible Black & White deodorant in 2011. The Black & White deodorant addresses two major consumer concerns: white marks on black clothing and yellow staining on white clothing: "Black stays black, white stays white for longer" (figure 10).

Figure 10

In order to guarantee the success of the product once it hit the market, Nivea kept interested crowd-workers involved through additional crowdsourcing initiatives. For example, Nivea sponsored a design contest with the German mail order company Zalando. By using a simple web-tool, hobby-designers could design dresses in black and white and exhibit them in an online gallery. Within four weeks more than 26,000 drawings were submitted, which the public then assessed to winnow down the field. Out of the best 20 drawings, a jury selected the winner, which was then produced in a limited edition (figure 11).

Figure 11

What makes a crowdsourcing campaign successful?

A variety of brand owners can benefit from crowdsourcing campaigns, especially companies dealing with fast-moving consumer goods.

According to Chaordix, one of the top 20 most innovative technology companies in Canada, crowdsourcing campaigns cannot succeed without the following essential ingredients: right purpose, right call, right crowd, right incentives, right model, right promotion, right community management and right technology.

The first factor, purpose, requires that the goal of the campaign is well-defined and the problem to be solved by the crowd well-structured. This prevents the project from derailing and gives the public clearcut perimeters within which to release its creativity. The desired input from the crowd should also be clearly identified, whether it involves ideas, funding, solutions to specific problems, or simply developing brand awareness.

Next, the call, or the question to be answered by the crowd, should be formulated in a way that is precise and stimulating. The crowd should be told what is and is not acceptable in terms of contributions, and the topic should be formulated in an engaging way.

The targeted crowd then needs to be carefully determined. Depending on the goal of the campaign, the crowd's involvement with the topic can range from interested to expert. An additional factor should be considered in the case of global campaigns: the receptivity of any foreign country where the campaign will be launched. According to a research paper published in the *Administrative Science Quarterly,* the choice of country where the campaign is launched has a significant impact in the amount of participation it will stimulate. The authors found that *cultural tightness* – the extent to which a culture is defined by strong social norms and is intolerant towards deviant behaviours – and cultural differences between the creator's country and the audience country affect the success rate of the campaign.

For the purpose of engaging the crowd, incentives are an essential ingredient. Whether it is cash rewards, the possibility of a partnership, exposure at an industry event or in the media, financing or systems of badges and points that make users stand out in their community, Chaordix suggests tailoring rewards that keep the crowd engaged and stimulate participation throughout the campaign.

This goes hand in hand with the right promotion. Successful campaigns often enlist the crowdsourcer's most loyal fans to spread the word to their networks and promote the campaign from within. It is advisable to reward them for their efforts.

Community management is also essential. This includes greeting new members, overseeing discussions and tempering any conflict arising during the campaign, keeping submissions on track and intervening to invigorate the crowd whenever there is a decrease in interest. Ideally, at least one person within the organisation should be designated exclusively for this task.

Finally, in terms of technology, the platform and online tools should be adapted to the evolving needs of each campaign. They should permit the crowdsourcer to visualise participation activity instantly, to extract participation statistics throughout the campaign and to maintain reward mechanisms such as point and badge systems.

Practical considerations

Often companies fear that competitors can secretly monitor open discussions with crowd-workers. This, however, can be prevented by choosing a closed platform to which only invited participants have access.

Another legitimate concern is the potential for crowd-slapping (when the crowd turns against the crowdsourcer). A remarkable example in this regard is the 2007 Chevrolet crowdsourced advertising campaign with a website allowing visitors to take existing video clips and music, insert their own words and create a customised 30-second commercial for the 2007 Chevy Tahoe. The experiment ended up with a pile of videos criticising the SUVs for their low mileage and their contribution to global warming. This concern can be mitigated to some extent by offering guidelines for submissions and reserving the right to screen entries before posting them.

Legal considerations

In addition to the practical considerations mentioned above, there are numerous legal issues that need to be considered in order to make a crowdsourcing campaign successful:

Labour law: There is a risk that the collaboration between the crowdsourcing company and the crowd-workers could unintentionally lead to a working relationship or employment under tax and social insurance laws. This is especially the case where the crowd-workers have to follow instructions of the crowdsourcer concerning the content, performance, time and place of the work to be done. In cases where German law is applicable, it can lead to claims for paid holidays, dismissal protection, and a pension, health care, unemployment and accident insurance benefits. Therefore:

- in order to avoid the appearance of an employment relationship, crowdsourcing campaigns should be clearly defined so that crowdsourcers do not need to provide crowd-workers with work instructions; crowd-workers should instead be able to carry out their tasks independently;
- no working material should be provided;

- performance-related compensation should be agreed upon in advance; and
- in cases where several jurisdiction are involved, it should be determined which jurisdiction's law applies.

Tax law: It has to be clarified whether the crowd-worker has to pay VAT and whether he or she has to issue a formal appropriate invoice. This is not generally the case if the crowd-worker for example is to be considered as a small entrepreneur.

Intellectual property law: In a number of the crowd-creation examples discussed above, the crowd-workers created copyrightable works, protectable designs or even patentable inventions. The question of who owns the rights in that work must therefore be considered under applicable laws. It is generally advisable to include in the participation terms and conditions of a crowdsourcing campaign an agreement that the crowd-worker transfer his or her IP rights and to execute any further documents that may be necessary to do so. In addition the crowd-worker should warrant that his or her work is a new creation and does not infringe any third party rights.

Also with regard to trade mark law it should be clearly stated in the participation conditions who has the right to apply for a trade mark of any sign created by the crowd-worker.

Contract law: Crowdsourcers typically contract with individual crowd members on a standard term basis (in the form of electronic click-through agreements). In several jurisdictions, companies are not free to draft such standard terms as they may like, because aside from enforceability issues, the terms will have to comply with consumer protection laws imposing restrictions. In England, for example, the relevant legislation includes the Unfair Contracts Terms Act 1988 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999. Contracts that fail to comply with this legislation may be considered to be null and void.

Terms and conditions: In order to minimise the risks of a crowdsourcing campaign the following points should be included in the participation terms and conditions:

1) Where possible, transfer of all rights to the company/crowdsourcer including the right to sue for infringement. Alternatively if the ownership of a crowdsourced work is of less concern, the company may consider taking a broad licence from the submitter.

2) Obtain releases to use a contributor's name, image, likeness and personally identifying information. Also address data protection concerning personal data of the crowd-worker. If nothing else, this may have a deterrent effect.

3) Even though it may not hold significant weight in the event of an infringement action, the company should require crowd-workers to provide a warranty or representation of originality and non-infringement for their contributions.

4) Similarly, the company may wish to consider requiring the crowd-worker to indemnify the crowdsourcer in case of infringement and misappropriation of third parties' rights.

The crowdsourcer should always check whether any third-party terms of use apply if it is using an on-line crowdsourcing platform

5) The company should make clear in writing that it does not accept confidential submissions, or those containing proprietary information belonging to a third party.

6) The crowdsourcer should also include appropriate provisions for the selected crowdsourcing method and any applicable legal requirements (for example, sweepstakes, employment or tax law).

7) The compensation offered by the crowdsourcer to the crowd-workers should be clearly disclosed.

8) The crowdsourcer should stipulate clear conditions for the participation in the crowdsourcing campaign (for example, age of the crowd-worker).

In addition, the crowdsourcer should always check whether any third-party terms of use apply if it is using an on-line crowdsourcing platform. Websites such as Facebook and Twitter have policies regarding how companies can use their platform to interact with crowd-workers.

Integration of the crowd

Many smart companies have already embraced crowdsourcing to involve consumers in their brands and tailor their products to consumer needs and desires. Looking ahead, it is safe to predict that crowdsourcing will continue to shape and influence the interaction between consumers and their favourite brands. The creation of new trade marks and trade dress, innovative products and marketing campaigns will be characterised by the integration of the crowd.

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