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Trademark Law

Is Unilever's Popsicle trademark melting away?

By Vanessa Kaster, Esq

Whether or not you are using the word 'popsicle' this summer might seem like a silly question...but it's no laughing matter for Unilever (ironically, 'Good Humor' is the name of Unilever's subsidiary through which it acquired rights to the Popsicle brand and trademark). These days Unilever is working overtime to protect its trademark 'Popsicle' from losing its distinctive trademark status before it slips too far into the public's summer vocabulary.

In the United States, trademark protection vests words and phrases which are registered as trademarks with special status that gives their owners a significant amount of control over their use. Controlling the use of a trademark can be a delicate balance between growing a brand to become a household name and losing a trademark if it becomes so popular that it becomes a generic term. Entrepreneurs' dreams probably never include the reality that their most creative and successful trademarks can easily be lost by becoming so popular that they become generic.

When a trademark becomes generic, this means that the trademarked term has become synonymous with the product or service that it identifies. This happens when the public starts using the trademark term as a noun to identify all products or services with the same or similar characteristics regardless of the production source. Grammatically, the correct way to use and protect a trademark is for the trademark to be used as an adjective and not a noun or a verb. For example if someone says, "I want a Popsicle ice pop", the trademark is being used correctly as an adjective. On the other hand if someone says, "I want a Popsicle", the trademark is being used as a noun which is a generic use.

The threat of the public's use of a trademark as a generic word is often an unforeseen downside to having an innovative and popular product. Popsicle is an example of a trademark which is teetering between being a famous, household brand of Unilever and a generic word which the public uses to describe all frozen treats on a stick.

The word Popsicle originated as a trademark. In fact, the word Popsicle did not exist until the grandfather of all Popsicles, Frank Epperson, created the word Popsicle back in the early 1920s as the name and trademark for his frozen treats on a stick. According to the Popsicle brand website, when Frank Epperson was 11-years-old, he left a "mixture of powdered soda, water and a stirring stick in a cup on his porch. It was a cold night, and Epperson awoke the next morning to find a frozen pop." Initially Frank called his

frozen treat an 'Epsicle', but as he aged and the frozen treat gained in popularity the name changed to "Pop's sicle" and then eventually to Popsicle. This story of the creation of the word Popsicle is important since it shows that it is a made-up word. Generally, trademarks derived from made-up words are the strongest trademarks because they have no meaning except as a brand and consequently are excellent source indicators.

Ironically some of the strongest trademarks of this 'made-up word' variety, which are also known as fanciful trademarks, are also the most vulnerable to becoming generic terms. Public over use and misuse has led to the demise of many famous trademarks. For example, the words videotape, escalator, cellophane, linoleum and margarine are a few examples of distinctive trademarks that have become generic terms due to long term misuse by the public. It's unlikely that the public had any idea what it was doing. It was merely the erosive effect of lazy speech patterns. Lazy speech patterns, however, can destroy a trademark when the trademark term is consistently used to identify all products or services with the same or similar characteristics regardless of the production source. Once a trademark becomes generic, then the trademark owner no longer has exclusive use of the trademarked term upon which their brand is based and competitors can begin to freely use the generic term to promote, market and advertise their own competing products.

What can Unilever do to preserve its trademark status for Popsicle? Gorilla-style vocabulary warfare is called for to try to get the public to associate Popsicle as only one of many different varieties of 'ice pops', and not as a synonym for ice pop. It seems that Unilever is taking this task very seriously and has recently requested that an artisan ice pop shop in Brooklyn stop using Popsicle as part of their trade name on their website and in their blog postings. Similarly, running an internet search on the term "Popsicle" brings up many official references to the term being a registered trademark which is undoubtedly a testament to Unilever's efforts to establish "Popsicle ice pop" as the preferred use of the trademark. Equally interesting is that Popsicle is also listed as a trade name in the 1983 publication of the American Heritage Dictionary and in an earlier 1973 Standard College Dictionary, published by Funk & Wagnalls.

Whether Unilever will succeed in preserving their Popsicle trademark will depend on how successful they are in convincing the public to start saying "Popsicle ice pop" and stop using Popsicle as a noun to refer to all frozen treats on a stick. Unilever seems to be putting forth a huge effort to save their Popsicle trademark from becoming generic, whether this will be enough to trump the lazy speech of summer vacationers remains to be seen. Listen closely the next time you are at the snack bar to what people are saying when they order their favorite frozen treats. Undoubtedly, Unilever wants them to be ordering "Popsicle ice pops".

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