

Rebranding: legal, regulatory and ethical issues



Introduction

According to Mintel, the total UK market for deodorants was estimated at £459 million in 2008. Unilever's 'Lynx' brand for men had estimated sales of £92 million during the same period giving it a market share of 20% (Bainbridge, J., 2009). Unilever Cosmetics has recently acquired a stock of low cost deodorant for men from South America. The proposal is to rebrand this deodorant and market it through retail outlets in the UK under the brand name 'Stynx'. It also proposed to use a celebrity endorsement within the product advertising. Unilever's current contracted celebrity, Gordon Oliver, is not considered suitable for this role and the proposal is that an altered image of the footballer David Beckham be used to endorse the product. The product branding and celebrity endorsement strategies are designed to take market share from the Lynx brand and thus establish Stynx as a credible male deodorant brand in its own right. By adopting this strategy and by pricing the product competitively, Stynx expects to make a significant return on its original investment.

Objective of the Report

This report identifies and critically examines the legal, regulatory and ethical issues associated with the proposals outlined in section 1.0 above. In the light of this analysis the report also makes recommendations as to how the advertising of the proposed 'Stynx' brand should proceed and how that advertising can be supported and leveraged by deploying additional marketing strategies.

Legal Issues

There are a number of legal issues that can affect the nature and content of advertisements as well as the use of celebrities within advertisements. If an advertiser creates an advertisement that is misleading, it may be unlawful in a number of different ways. It may, for example, constitute ‘ a malicious falsehood’ or ‘ infringe a registered trademark’. A trademark is defined as ‘ a distinctive design, picture, emblem, logo or wording (or combination) affixed to goods for sale to identify the manufacturer as the source of the product and to distinguish them from goods sold or made by others’ (Hill G. N. et al., 2005). The Lynx name is a registered trademark of the Unilever Group (Unilever, 2009) and, as such, it is capable of being infringed by another product that attempts to ‘ pass off’ its brand name as the Lynx brand.

The Law of ‘ Passing Off’

The law of ‘ passing off’ is a common law tort that has been created by the judiciary. It relates to a misrepresentation made by one business which damages the goodwill of another business. Typically, this will involve passing off the goods or services of one business as those of another. In most cases businesses will have protectable rights under the law of passing off in relation to trade marks, brand names, slogans and other elements of advertising in which they have accrued goodwill (Ali, I., 2005). There is a distinct probability that the proposed ‘ Stynx’ brand name will be seen as ‘ passing off’ the ‘ Lynx’ brand name because the names are so similar and the products using the names are both male deodorants. There are three main points that need to be satisfied to qualify as passing off for legal action. These points were defined by the House of Lords in the famous legal case of ‘ Reckitt & Colman Ltd v Borden Inc’ (1990) 1 WLR 49, sometimes also <https://assignbuster.com/rebranding-legal-regulatory-and-ethical-issues/>

known as the 'Jif Lemon' case. The three points defined by the judges in this case were i. There is goodwill in the defendant's brand name. This will undoubtedly be the case in terms of the 'Lynx' brand which has been registered as a trademark since 1985 and is the UK's number two deodorant brand (after 'Sure'). By definition, therefore, it has accrued a considerable amount of goodwill evidenced by its sales and market position. ii. The offender's brand name has misled consumers into believing that there is a connection with the defendant's brand name. This is classic 'passing off' and, as stated earlier there is no doubt that the Stynx brand name will mislead consumers into believing that it is either 'Lynx' or has a close connection to it. iii. The action has resulted in damage to or a likelihood of damage to, the defendant's goodwill. The nature and quality of the Stynx product is vastly inferior to the Lynx product and has a different smell. This will certainly cause damage to the defendant's goodwill if customers unintentionally buy the Stynx brand thinking it to be Lynx. It will obviously be necessary to consult Tyrelever's solicitors over this issue but the initial research above indicates that Tyrelever would be in a very weak position in terms of its ability to defend any legal action by Unilever in terms of passing off.

Contract Law

Whilst it may be undeniable that Gordon Oliver's skin complaint and weight gain does not make him the ideal 'face of Stynx' there is the issue of his contract to consider. There is no clause in the contract that allows Tyrelever to terminate said contract due to physiological changes on the part of the other party to the contract, namely Gordon Oliver Tyrelever's contract gives

Gordon Oliver 'exclusive rights' to the endorsement of Tyrelever cosmetic brands. The current contract does not expire until 31 December 2009 and is subject to a six month period of notice for it to be terminated by either party.

Copyright Law

With regard to the use of an image of David Beckham in the advertisements for Stynx then there are issues of copyright law infringement to consider.

The copyright to the photograph that Tyrelever plans to use will be held by the originator of the image, namely the photographer, or his or her agent.

Copyright law is a powerful legal tool used to prevent the unauthorised appropriation and use of, amongst other things, images. In the UK, courts can impose an unlimited fine and even up to ten years in prison on copyright infringers. Initially in the USA, and now in the UK too, lawyers have successfully extended the use of 'trademark' and 'passing off' laws to protect their celebrity clients (Lydiate, H 2004). The legal case that brought this issue to the forefront in the UK involved the Formula One racing driver, Eddie Irvine who successfully sued Talk Radio (now Talksport) for the unauthorised use of his image in its advertising. A picture of Eddie Irvine was digitally altered by Talk Radio to show the racing driver holding a radio which also included wording that gave the impression that he was endorsing the radio station (Lysandrides, J., 2005). In terms of the proposed unauthorised use of an image of David Beckham then he already has a number of endorsement contracts including one with Gillette. It is likely that David Beckham's lawyers will be able to successfully refer to the Irvine case in the event of the unauthorized and digitally alerted use of his image in advertising for Stynx. In addition, the ASA code requires advertisers to gain

written permission from those whose image it is going use in advertising, especially in respect of endorsement. This applies whether the image is altered or not. Failure to comply with this aspect of the code could lead to the involvement of the Office of Fair Trading and Ofcom in respect of printed and broadcast advertisements respectively (CAP, 2007).

Regulatory Issues

Whilst contravening regulations does not incur the same potentially damaging penalties as contravening the law, there are, nonetheless, serious consequences for the infringement of regulations.

The Department for Business, Enterprise and Regulatory Reform (BERR)

The BERR has introduced new regulations (in force from 26 May 2008) to crack down on unfair trading sales and marketing practices. The new Regulations are called the Consumer Protection from Unfair Trading Regulations 2008 and they replace the Control of Misleading Advertisements (Amendment) Regulations 1988 (as amended in 2000 and 2003).

Misleading Advertisements

If the BERR considers that an advertisement misleads consumers or is aggressive or unfair to consumers, then it may refer the case to the Advertising Standards Authority (ASA) whose role is 'to ensure that all advertisements are legal, decent, honest and truthful' (ASA, 2009). The ASA performs this task by referring complaints to its Committee of Advertising Practice (CAP). The advertising codes administered by CAP contain: 'wide-ranging rules designed to ensure that advertising does not mislead, harm or offend. Advertisements must also be socially responsible and prepared in line with the principles of fair competition. These broad principles apply

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regardless of the product being advertised' (ASA, 2009). So, the CAP rules are very explicit and it is the references to 'misleading the consumer' and the 'principles of fair competition' that are most likely to be a cause for concern for Tyrelever.

Unfair Trading

As well as covering misleading advertisements the Consumer Protection from Unfair Trading Regulations 2008 prohibit unfair trading practices generally. There are some 31 specific areas of unfair trading that are encompassed by the regulations including aggressive and misleading sales practices. Local authorities have the power to ask Trading Standards Officers to investigate complaints by consumers of unfair trading practises. The general caveat for the regulations state: 'To breach the majority of the Regulations, the misleading action or omission must cause, or be likely to cause, the average consumer to make a different transactional decision e. g. make a purchase which he would not otherwise have made' (Trading Standards Institute, 2009). Complaints from consumers about being misled into making a purchase they might otherwise not have made due to confusion between 'Stynx' and 'Lynx' is a very real possibility.

Ethical Issues

As well as legal and regulatory concerns, there are ethical issue to consider. Firstly, if the fact became known that Tyrelever acquired the deodorant product from South America, where it was produced using child labour (hence the knockdown price), then this could severely damage Tyrelever's reputation. Equally, if Tyrelever was to proceed with the planned branding and advertising of the deodorant then, as well as legal and regulatory

penalties, it will be viewed as an unethical and untrustworthy business that relies on misleading and illegal advertising to sell its products. This proposed advertising campaign, by association, will also undoubtedly damage the reputation and efficacy of other brands in the Tyrelever portfolio. More and more businesses are adopting ethical and socially responsible policies in terms of their marketing activities. The term 'ethical' has become a highly topical and 'catchall' word which has come to be associated with basically any product or service that does not harm people or flora and fauna. Being ethical is all about respect and Tyrelever would be showing huge disrespect to its employees, consumers and to David Beckham if it proceeds with the advertising campaign as currently proposed.

Recommendations for a Way Forward

In view of the potential legal, regulatory and ethical pitfalls associated with the proposed advertising campaign, it is recommended that an alternative way forward is adopted. The following part of the report outlines some alternative strategies that could be deployed to launch the Stynx brand effectively without the risks associated with the original idea.

The Stynx Brand

It has been shown that by deploying this brand name it is highly likely that Unilever will bring and win a case of 'passing off' against Tyrelever. Consequently, a new name should be sourced for the product and registered as a trademark.

Celebrity Endorsement

The risk of damaging litigation in using David Beckham's image is too high to warrant proceeding. Even if it were possible to persuade him to endorse the
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product the cost of such an endorsement would be prohibitively high and certainly not affordable for Tyrelever. Although Gordon Oliver is a 'minor league' celebrity, he has become known as 'the face' of Tyrelever through his previous exposure on other brands for the business. Tyrelever should honour Gordon Oliver's contract. His image can easily be digitally enhanced (with his permission, of course) to minimise the detrimental effects of his skin disorder and weight gain. The professional use of celebrities in advertising has been found to measurably improve its effectiveness. All of the evidence demonstrates that, when done professionally, the use of celebrities in advertising can be enormously profitable for brands. For example, the use of Jamie Oliver in Sainsbury's advertising has produced a return on investment of 27: 1 in incremental revenue (IPA, 2009). Also, 13% of the prize-winners in the Institute of Practitioners in Advertising's (IPA) Effectiveness Awards have used celebrities as a major part of their advertising concepts. So, to improve the effectiveness of the advertising it will be necessary to leverage Gordon Oliver's involvement in the campaign. For example, Tyrelever could

- i. Use him as a presenter at company events – this may necessitate a contractual amendment.
- ii. Get him involved in charitable work (children's charities) and use public relations to generate news stories around this involvement. This will, by association, also help to show that Tyrelever supports the rights of children and is against child exploitation in the factories of South America.
- iii. Make him the 'brand character' of the campaign (rather than have Gordon playing himself) in the advertising by using his natural acting ability at playing character roles. A good example of how this is has worked successfully is the use of Rowan Atkinson for Barclaycard (Pringle, H., 2004) The more the celebrity becomes

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involved with the brand and the business, then the more the consumer will engage with the brand.

Corporate Social Responsibility

A programme of staff (and celebrity) involvement in socially responsible projects around Tyrelever's operational headquarters should be planned and implemented as soon as possible. The detailed planning is outside the scope of this report and should be considered separately. Also, Tyrelever should cease to source any more products from countries that are known to use child labour. By doing deploying these two strategies and by using public relations techniques to promote them to stakeholders Tyrelever can start to build a reputation as a socially and ethically responsible business.

Summary and Conclusions

This report recommends that the advertising campaign as originally envisaged, does not proceed for the reasons detailed. By not proceeding, Tyrelever will be able to avoid almost certain litigation and regulation infringement. Both of which could lead to significant financial penalties and reputation damage. In addition, the original proposals have been seen to be unethical and socially irresponsible, which will be detrimental to Tyrelever's long term future. There is an opportunity for Tyrelever to market the deodorant in a legal, decent and honest way and thus not full foul of the law or the regulators. At the same time Tyrelever can enhance its reputation and leverage its sales by adopting a socially responsible and ethical stance which will have incremental benefits for all of its products. -ends-