

# The Google doodle and other fluid trademarks

By Ilse du Plessis

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There was an interesting article in a publication called TBO (Trademarks and Brands Online) entitled [Fluid Trademarks: Keeping Them Watertight](#). So what are fluid trademarks?



(Image: Wikimedia Commons)

Fluid trademarks certainly aren't some obscure way of describing marks that are used for beverages. The term, rather, refers to trademarks that vary in use. The article says, "Fluid trademarks are those presented in an unconventional way ... an old logo may be recast in different colours, given some movement or merged with different images to make it more suited to the digital world".

The article says they are used very effectively by various companies: the owners of the vodka brand Absolut, whose distinctive bottle is used as a canvas for various different designs; the UK TV broadcaster Channel 4, whose "4" logo is deconstructed on screen in a host of different ways. But the best-known example is undoubtedly the Google logo. Because, as everyone who has a computer knows, the Google logo appears in many different guises, a phenomenon which has become known as the "Google doodle".

## Advantages

The article suggests that the practice of varying trademarks flies in the face of conventional branding practice, where consistency is everything. It suggests that only well-established and confident brands can pull this off: "Once a brand has established itself in the world and is sufficiently recognisable, it can afford to push the trademark's boundaries and play with it in different ways."

The article does acknowledge that the practice holds certain advantages, in the sense that it suggests that the brand is dynamic and contemporary, and it keeps consumers guessing and interested: "They allow brands to evolve and stay relevant."

So what intellectual property issues arise? The article suggests that if you are adopting new imagery in your trademark,

you must, of course, ensure that you have rights to that imagery, even if your usage will only be short-term. The imagery could, of course, be protected by copyright, or by way of trademark or design registrations. So if you are not creating the new imagery yourself (or having it created for you), you would be well advised to establish who owns the rights, and ensure that you get a licence. This is pretty basic stuff, of course, and it applies as much to variants as it does to the original trademark.

## **Trademark registrations?**

What about trademark registrations? Presumably, you will have registrations for the original trademark, but do you need to register all of the variants separately? It's hard to say, and much will depend on how often you make changes, and for how long you use the variants. As anyone who has ever registered a trademark knows, the process can be slow and, in cases where worldwide protection is required, very expensive. So the answer is as follows: ideally you should register every variant, but in many cases it may simply not be practical.

So what happens if you don't register a variant and that variant is copied? Will you have any right to sue? Much will depend on how close the variant is to the original trademark that's registered. If it's relatively similar, the copy of the variant will probably amount to an infringement of the registered trademark. Which, of course, suggests that it's important to make sure that your variants don't stray too far from the original, and that there are certain basic features that are present in all of the trademarks.

## **Proving copyright and the 'series mark'**

Even if you do not have a trademark infringement claim, you may still be able to sue for passing off if you can show a reputation in the variant of your trademark and a likelihood of confusion. You may even have a case of copyright infringement, but it is worth remembering that, as copyright is an unregistered right, it is harder to prove that you have copyright. Also bear in mind that, with copyright, you need to prove that there has been actual copying, not simply that there is a similarity.

It is also useful to know that in some countries such as the UK, you can register a series of similar trademarks in one registration (a so-called "series mark"). In practice this will, however, be relevant only if you know what variants you will be using when you apply to register your original trademark.

## **Get legal advice**

Another issue that comes up is this: can your trademark registration be cancelled for five years non-use if you do not use the main trademark over that period, but use only unregistered variants? Once again, it depends on how close the variants are to the original. The law says the use of a trademark with additions or alterations that do not substantially affect its identity may be OK. This reinforces the thinking that variations must be kept to a minimum.

So before you venture into the area of fluid branding, do consider the legal issues, and do get advice. Before closing, I would like to mention something that may be confused with the fluid trademark but is, in fact, something quite different: the moving or non-static trademark.

This is still quite rare, but it has been with us for quite some time (Sasol was using a "molecules" moving trademark years ago). Obviously, a trademark can move only in certain environments, such as online and TV advertising, but a "still" can be used on paper and on packaging.

A moving trademark can be registered despite the fact that trademark registers are static. You can represent it graphically by using a series of pictures showing the various positions of the moving object, perhaps with a written explanation - the company British Telecom once protected a rotating globe logo by way of a registration that consisted of all 286 images of the sequence, together with a lengthy explanation of what the trademark was.

As branding evolves, so does trademark law and practice!

Source: *The Times*, via I-Net Bridge

## ABOUT THE AUTHOR

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