DELIBERATE PRODUCT DIFFERENTIATION:
Creating Unique Products and Valuable Intellectual Property

By Joshua L. Cohen, Esq.
success is about standing out, not fitting in. That’s why Tiffany & Co. adopted robin’s egg blue packaging and Levi Strauss protects its iconic jean pockets. This is not done merely for the sake of being different or even simply better; it is rather for selling products that truly differ from competitive offerings. Put simply, companies know they can outperform rivals if they can establish a difference that they can sustain.¹

This is the essence of intellectual property; the protection of which is essential to success in our competitive marketplace. Intellectual property rights protect innovations, sustain differentiation and keep unique products unique.

Such product differentiation and associated intellectual property rights are best pursued deliberately and without relying on happenstance. A framework (summarized later) helps accomplish this by making product differentiation an organic byproduct of planned innovation. It helps produce products that are unique from the intellectual property perspective—they stand out in the marketplace, they benefit from strong intellectual property rights and they avoid conflicts with the rights of others.

THE VALUE OF DIFFERENTIATION

Product differentiation is the coveted distance between an innovative product offering and competing products of others. It is also the quality that establishes a valuable bond between a product and its consumers. In other words, it provides a compelling reason for consumers to select your product over another.

Innovative products can stand out in many ways. Examples of successful differentiation range from UPS brown to the bubble-gum scent of Midwest Biological’s machining oil.² Every day, we see differentiation embodied in creative product and packaging designs, new services, performance-related product features and brand identity. It may appeal to consumers’ practical needs—delivering superior performance, efficacy, value or other fruits of technological innovation. It may also satisfy pure desire. Differentiation is especially powerful in the realm of product design. This is why we immediately recognize Honeywell’s round thermostat and Zippo’s iconic lighters.

Product differentiators—no matter their form—create valuable person-product relationships. Corporate executives appreciate these differentiators and recognize them as important assets. Today, the “swoosh”
Planning to Differentiate

Planned differentiation involves important steps at the front end of innovation. The following steps establish that plan and make it integral to the design effort.

- **Formally incorporate milestones for differentiation into staged product development processes.** By incorporating predefined milestones into each stage of the development process, appropriate actions are completed before the process graduates to the next stage. Though milestones are necessarily tailored to particular processes and design challenges, specific steps are planned to promote product differentiation and execute intellectual property strategies.

- **Assign intellectual property counsel to the development team from the start.** This applies whether intellectual property counsel is within or external to the company. With the guidance of counsel, development teams can execute strategies for creating, protecting and promoting strong product differentiators.

- **Determine up front how the design should stand out in the marketplace.** At the outset, consider the types of prospective differentiators that can be employed: Will the decision to purchase the product be driven by aesthetic appeal? Or will the purchase decision instead be motivated by practical considerations, like functionality, cost or quality? What sorts of design elements will form a powerful consumer-product relationship and promote brand loyalty? Put simply, the preferred manner(s) of differentiation should be selected deliberately at the outset.

- **Draw inspiration from prior examples of successful differentiation.** Innovators can explore a large field of differentiated consumer products, ranging from the Absolut vodka bottle to Zippo’s lighter. Learning from prior successes allows the development team to identify avenues for powerful differentiation.

Delivering Differentiation

These steps will help the development team deliver strong differentiators as a natural byproduct of well-managed development processes:

- **Conduct a search of relevant product designs to determine the state of the art.** Differentiation is best created with a clear reference point, namely, the relevant state of the art. This provides a starting point for developing new product offerings or expansions into new business opportunities. Central to this effort, intellectual property counsel identifies, screens and interprets relevant patent literature and products for presentation to the development team.

- **Incorporate differentiators into new product concepts on purpose.** Armed with knowledge of prior and competitive products, the development team generates concepts that include features capable of promoting differentiation. Prewritten infusion of differentiators into the design solution ensures that uniqueness will be a deliverable of the development process.

- **Select design concepts having the strongest opportunities for differentiation.** A screening of design concepts typically occurs as the feasibility of early-stage concepts is considered. When screening, differentiation should be among the specific selection criteria. Intellectual property counsel helps the team to screen out design concepts that lack significant uniqueness vis-à-vis prior or rival designs and identify those designs that have greatest potential for strong protection in the marketplace.

- **Ensure that differentiation is considered throughout the development process.** Innovators and marketing professionals should be prepared to explain, at each development stage, how selected design features will strengthen the consumer-product bond. And intellectual property counsel should be prepared to explain why selected features are deemed protectable and also free from conflict with any known intellectual property rights of others.

PLANNING TO DIFFERENTIATE

Design thinking helps integrate important business priorities, like strategic intellectual property rights, into innovation. It applies focus on defined business objectives by encouraging innovators to “back into” new products that achieve those objectives.

Cross-functional product development teams are important components of the design thinking toolbox. They are nearly universally used by best-performing companies to execute business-oriented product development efforts. The design thinking toolbox also includes staged-design processes. The well-known Stage-Gate® process is a structured five-stage, five-gate model, but even loosely defined processes progress through sequential phases.

These tools of design thinking—cross-functional teams and staged design processes—play an important role in creating designs that differentiate. With the guidance of intellectual property counsel, design teams are poised to develop and execute strategies for creating, protecting and promoting strong product differentiators and intellectual property rights.

DELIVERING DIFFERENTIATION

With a plan in place, the design team is poised to act—at set stages of the design process—to deliver differentiation. The team should seize opportunities to incorporate differentiators into new design concepts and should do so deliberately. It can select design concepts having the strongest opportunities for differentiation and ensure that differentiation is considered throughout the development process.
Differentiation is best created with a clear reference point; namely, the relevant state of the art. This provides a starting point for developing unique product offerings or expansions into new business opportunities.\(^a\) Central to this effort, intellectual property counsel identifies, screens and interprets relevant patent literature and products for presentation to the development team.

By requiring differentiation as a deliverable of the development team and its process, the resulting product is actively vetted by key stakeholders, including intellectual property counsel, to ensure that the resulting product will be truly unique. Product differentiation thus becomes an inevitable byproduct of well-managed development efforts. See Delivering Differentiation sidebar.

**PROTECTING DIFFERENTIATION**

Being first to market with an innovative product provides a short-term edge, but it erodes quickly if followers can compete unimpeded. Successful product designs are inevitably emulated or outright copied.

Strategic protection of intellectual property rights is, therefore, essential to sustaining competitive advantages. Intellectual property counsel sets strategies to secure comprehensive intellectual property rights, utilizing all available modes of protection,\(^b\) including protection in countries such as those where a product will be sold, made or licensed. Even a single product like Honeywell’s thermostat—covered at various times by design patent, utility patent and registered trademark rights—may be protected by a cocktail of intellectual property rights.

By recognizing intellectual property protection as a valuable commercial asset, companies can pursue design ownership—the enviable state of being armed to prevent others from using a unique product design while being free to use it without infringing the rights of others.\(^c\) By protecting product differentiators comprehensively, and by mitigating infringement risks proactively, the development team ensures sharper differentiation and a stronger intellectual property position. See Protecting Differentiation sidebar.

**PROMOTING DIFFERENTIATION**

Product designers, marketing professionals and intellectual property counsel can together promote long-term differentiation. Active promotion of differentiation is crucial to sustained commercial advantage.

This is best achieved by coordinating communications regarding the product design and its differentiation. This includes intra-company communications that reinforce the status of product features as differentiators. It also includes external communications, such as advertising and marketing campaigns, that remind consumers of differentiating features (just as we all have been repeatedly reminded by advertisements that Nexium is the “purple pill”). Differentiation is reinforced by promoting product differentiation not only at product launch but also throughout the product’s lifecycle.

By communicating internally and externally about design elements with one voice, companies can reduce any risk that miscommunications will compromise intellectual property protections. Coordinated communications simultaneously strengthen product differentiation and avoid compromise to intellectual property assets. See Promoting Differentiation sidebar.
CONCLUSIONS

In a commercial sense, innovation is much more than a creative endeavor chasing new technology and design advances. It is a business initiative that, when successful, secures strategic commercial advantages, generates valuable intellectual property assets and feeds the bottom line. Proactive and purposeful differentiation can beneficially transform product innovations into long-lasting commercial assets.

Just as a good squash racquet provides a place for ideal striking contact with the ball, product differentiation has its own “sweet spot.” It offers power, control and consistency—a place where differentiation offers the greatest strategic value. The sweet spot of product differentiation lies at the intersection of three complementary qualities of “uniqueness,” including:

• Uniqueness that appeals to consumers and satisfies their desires and needs—giving consumers a reason to select one product over another;
• Uniqueness that qualifies for strong intellectual property rights (by design patent, utility patent, trade secret, trade dress and trademark protection) that sustain the commercial advantage of differentiation; and
• Uniqueness that mitigates the risk of infringing intellectual property rights of others.

From the intellectual property perspective, the greatest opportunity for value lies at the sweet spot where these three qualities of uniqueness intersect. Product innovations at that intersection stand out in three ways as illustrated in Figure 2: They demand consumer attention, they are protected by intellectual property rights and they are free of infringing others’ rights.

The value potential of strong, premediated product differentiation compels innovators to produce designs that stand out in the marketplace. Successful innovators differentiate and do so deliberately—they know that success is about standing out, not fitting in.

ENDNOTES

4. For those not familiar with the term design thinking, suffice it to say that it relates generally to a methodology for approaching problems like product development challenges.


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Figure 2: Sweet Spot of Product Differentiation. Source: Cohen 2012 Presentation.