

Stock Tickers, Trademarks And The Potential For Conflict

By **Bruce Goldner and Lilybelle Davis**

A watershed moment for many companies is when they list on a public exchange. From the meticulously prepared roadshow to the celebratory opening bell, a company going public goes through great lengths to ensure it puts its best foot forward in its introduction to public investors. The stock ticker symbol that a company adopts and the possibility that the ticker may contribute to trademark infringement may not initially be a top consideration for a company or its counsel. However, trademark conflict can arise if a company's stock ticker symbol is confusingly similar to another company's brand. The good news is that there are practices to avoid what could potentially become a costly and embarrassing roadblock. The following provides a brief overview of stock ticker symbols, case law concerning stock ticker symbol trademark infringement, and options for companies and their counsel to consider when selecting a stock ticker symbol to lessen infringement risk.



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Choosing a Ticker

Stock ticker symbols, which uniquely represent companies on public exchanges, must be selected with care to provide a shorthand by which public investors can identify and trade a stock. The U.S. Securities and Exchange Commission effectively gives a company reasonable discretion when picking its stock ticker symbol. The SEC guidelines simply require that the choice of a ticker symbol be original (i.e. not replicate another company's stock ticker symbol) and appropriate.

The New York Stock Exchange allows companies submitting their primary ticker requests, which can be completed online through the NYSE Listing Center, to include two ranked alternative options. In contrast, Nasdaq requires only one symbol choice. The exchanges generally do not deny a company's preferred option.[1]

Companies frequently choose the acronym for their name as their ticker symbol (e.g., MMM for Minnesota Mining and Manufacturing) or, if a company's name or brand already is an acronym, choose the acronym itself (e.g. IBM). Some companies opt for a more creative symbol. Southwest Airlines is attributed with beginning this trend in 1971 when it listed as LUV, inspired by its first scheduled flight from Dallas Love Field. Other notable fanciful ticker symbols include BID for auctioneer Sotheby's, FUN for amusement park operator Cedar Fair and HOG for Harley Davidson. Nasdaq enables more creative space since symbols can be up to five letters long, while NYSE ticker symbols generally have a three-letter limit.

When Stock Tickers Conflict With Trademarks

Although the number of reported trademark conflicts is limited, there have been instances where stock ticker symbols have been alleged to infringe on trademarks. When a company's stock ticker symbol is similar to another company's established brand or ticker symbol, courts have used this similarity as a basis to find infringement.

In *Maxnet Holdings Inc. v. Maxnet Inc.*, the case turned on the defendant's use of a confusingly similar stock ticker symbol. No. CIV. A. 98-3921, 2000 WL 714664 (E.D. Pa. May 31, 2000). The court stated that "the overall impression conveyed by the marks used by Defendant — MAXNET and MXNT — suggests a commonality of ownership or control among the parties ... [T]he MAXNET mark and Defendant's use of the MAXNET name and the MXNT NASDAQ symbol is confusing." *Id.* at *9. Notably, the plaintiff presented evidence of actual confusion — the plaintiff had received hundreds of inquiries regarding stock sold under the defendant's stock ticker symbol after a spam email was sent out discussing the defendant's stock and potential investment opportunity. *Id.* at *2, 10.

In *Waterman-Bic Pen Corp. v. Beisinger Industries Corp.*, the plaintiff sought to enjoin the defendant from using BIC, the plaintiff's trademark, as the defendant's trade name, trademark and ticker symbol on the National Stock Exchange (now the NYSE) on the grounds that the ticker symbol infringed the plaintiff's mark. 321 F. Supp. 178 (S.D.N.Y. 1970). The court issued a preliminary injunction against the defendant's use of the mark, finding that the defendant's use of the plaintiff's mark as a ticker symbol contributed to likelihood of confusion. The court noted that:

[T]here is a high degree of similarity between the trade-marks in physical appearance and suggestion, coupled with the strength and novelty of plaintiffs' mark. Next, despite the sharp difference in the underlying product, the use of "BIC" as an exchange symbol by defendant does not reflect that distinction; nor do defendant's advertisements disassociate the stock from plaintiff corporations. We find a real possibility that both the investor in defendant's stock and the purchaser of defendant's products may assume, in an era of extreme corporate diversification, that defendant is a part of plaintiffs' corporate structure.

Id. at 180.

Similarly, in *Acxiom Corp. v. Axiom Inc.*, the court found that the defendant's use of a stock ticker symbol similar to the plaintiff's mark created a basis for trademark infringement. 27 F. Supp. 2d 478 (D. Del. 1998). Plaintiff Acxiom Corp., a provider of marketing database information, claimed that defendant Axiom Inc., which operated in a similar line of business, infringed its trademark on the basis of consumer confusion by both the similar names of the companies and their similar stock ticker symbols. In finding infringement, the court credited the plaintiff's expert witness who testified that Acxiom and Axiom both trade on Nasdaq and share identical pronunciation of their spoken names:

Bliss testified that investors rely in large part on information communicated orally in the form of person to person communication, financial information services and other media. He testified that "[a]s a result of the phonetic and graphic similarity of the corporate names and [stock] ticker symbols, the two companies have created a situation that there's a likelihood of confusion, mistake or error in the securities industry marketplace."

Id. at 489 (alterations in original). The court also noted that even though investors are not purchasers of the parties' products, evidence of investor confusion can be considered when assessing trademark infringement under the Lanham Act. *Id.* at 501.

In sum, although the choice of a stock ticker symbol generally in and of itself has not been

grounds for a finding of trademark infringement, such a symbol in combination with other factors — such as a similar overall branding and related goods and services offerings — have been found to violate a third-party trademark right. Specifically, the case law creates a basis for such a claim given that (1) a ticker symbol can create and/or be a part of a consumer confusion claim, (2) courts have held that the ticker symbols are an extension of a company's trademark and (3) investor confusion has been found by courts to be relevant to a likelihood of confusion inquiry.

Some Reasons Not To Worry

In spite of the above case law, there are a number of reasons why the choice of a stock ticker symbol by a company may not present a significant infringement risk. First, ticker symbols perform a narrow and specific function, i.e., a shorthand for investors to identify securities in which to invest. Accordingly, because ticker symbols do not generally function as brands themselves, and in fact merely reference a company with its own name and brands, ticker symbols are inherently less likely to be a basis for consumer confusion. Moreover, investors are generally a sophisticated consumer set, given that the decision to invest in a company's securities typically is one not based on impulse but rather is entered into with familiarity with the underlying company, its business and its future prospects.

There are a number of court decisions that have found no trademark infringement in connection with a stock ticker symbol. In *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, the court noted that "it seems unlikely that investors would be confused by the parties' similar marks or somewhat similar stock symbols ('CKP' and 'CHKP' for Checkpoint Systems and Check Point Software, respectively)." 269 F.3d 270, 300 (3d Cir. 2001). The court did not accept that investors would be duped by similarity between the two ticker symbols given their attention to detail in trading stocks. *Id.* But, the court noted that the plaintiff did not offer any evidence of actual confusion and only de minimis evidence of initial interest confusion. *Id.* at 298.

Similarly, in *Basic American Medical Inc. v. American Medical International Inc.*, the court rejected the defendant's argument that "there may be confusion because of the stock symbols of the respective parties. Inasmuch as the stock of the two companies is traded on different exchanges, the number of letters in each symbol is different, and the pronunciation of the common letters is not the same, we once again conclude that there is no likelihood of confusion." 649 F. Supp. 885, 892 (S.D. Ind. 1986) (commenting on the respective stock ticker symbols, which were "BAMI" on Nasdaq and "AMI" on the NYSE). Moreover, the court was not persuaded that "mom and pop" investors buy and sell stock by symbol, as opposed to the underlying company name.

Best Practices

The trend appears to be that when comparing the plaintiff's and the defendant's stock ticker symbols against one another, the courts find no confusion because the relevant consuming public (i.e. investors) can distinguish among ticker symbols. But when (1) the defendant's name or trademark is similar to the plaintiff's name or trademark and (2) the defendant's ticker symbol is similar to a plaintiff's trademark, courts may find that the ticker symbol forms a basis for and contributes to a trademark violation.

Accordingly, when deciding on a ticker symbol — particularly when the symbol does not mimic or closely resemble the company's name or brand — a company and its counsel should consider conducting a trademark clearance search on the ticker symbol prior to adoption. Such a proactive approach should provide a company and its counsel with one less issue to concern themselves with during the critical and all-consuming process of going public.

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[1] A publicized stock ticker symbol denial was received by Furr's/Bishop's Inc., a Texas-based cafeteria operator hoping to distance itself from its failing holding company, Cavalcade Holdings Inc. The NYSE denied Furr's/Bishop's Inc. request for the ticker symbol FBI because of likely confusion, and the company consequently used CHI as its ticker symbol. In addition, as a general practice, companies typically will submit several proposed ticker symbols, as the various exchanges compare proposed ticker symbols across other exchanges and will not approve a ticker symbol that mirrors one already taken on an exchange.