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Online Brand Protection in Brazil: Five tips to build up an effective strategy

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This year we celebrated 521 years since “Brazil’s discovery”. During a navigational journey to India, Portuguese explorers found what today we call Brazilian ground. A place that, even since the beginning of its discovery, has so much to offer.

A scribe who had joined Pedro Álvares Cabral’s fleet, by the name of Pêro Vaz de Caminha, stated in a letter upon Brazil’s discovery: “*Even so, the ground here is so rich, and the waters are infinite. In such a way that it is gracious, and if one uses it, it will bear everything, due to the good waters it has.*” This statement stands true to this day, especially when in reference to business; for the good of Brazil, but also to the bad.

Today, Brazil is the largest economy in Latin America and a vital gateway for doing business in its neighboring countries. Following the world’s trend, there has been an exponential growth in national online sales, and companies of various types that have been investing in technology and e-commerce. On the other hand, also “due to the good waters Brazil has”, there has also been a dramatic increase in online infringement of all sorts, especially through “.br” websites, apps, marketplaces and social media.

As one of the most challenging places to do business in the world, developing an effective online brand protection strategy in Brazil is no easy feat. Nevertheless, for companies that do take the leap, conquering and preserving a piece of this immense and tech-savvy consumer crowd can be a great investment for anyone doing business in Latin America.

The growth of online sales

To be more specific, in 2020, the Brazilian e-commerce sales amounted to R\$ 126.3 billion (around USD 22.9 billion), more than twice the amount two years earlier. Also, according to the Mastercard SpendingPulse report, a retail sales indicator, Brazilian e-commerce grew by 75% in 2020 compared to the previous year.

Online sales gained 13 million new consumers in Brazil in 2020, with a total amount of 194 million purchases, according to a survey by Ebit/Nielsen. Stimulated by the restrictions imposed in reason of the Covid -19 pandemic, e-commerce reached 79.7 million customers last year, which represents an increase of 29% in relation to 2019. Of the new buyers, 83% said they would repeat the purchase over the internet, which only confirms the forecasts of future growth.

In this sense, as for the numbers documented in 2021 up to now, Brazilian e-commerce sales have already amounted to R\$ 41.92 billion (approximately USD 7.6 billion), and this year the sales are projected to grow upwards to R\$ 110 billion (around USD 20 billion)!

In view of these figures, major players in e-commerce have been investing heavily in the country, and even small and medium-sized enterprises (SMEs) have been betting heavily on this trend. The truth is that consumer habits have changed and e-commerce will only continue to grow.

There are many positive aspects about these statistics, but as digital channels gain importance, there have been also a notable increase in Intellectual Property infringements in the virtual world.

The rise of online infringement

For instance, in 2020, there was a 250% increase in the amount of counterfeit and irregular products presented in the online market. In addition, the Brazilian e-commerce experienced 600,926 fraud attempts in the first quarter of 2021 alone, an increase of 83.7% over the same period in 2020.

As a matter of fact, bad actors have become more sophisticated in their approaches, and abuses have considerably expanded to different platforms, such as social media, apps, and online marketplaces.

This type of infringement has the power to divert businesses, undermine the integrity and reputation of brands; reduces customer satisfaction, and affect sales and profits. In a worse case, depending on the sector affected, it can cause serious damage to the health and safety of the population.

In this scenario, creating an online brand protection strategy is critical to success, having weighty consequences for the brand's image and future.

5 tips to strengthen an online brand protection strategy in Brazil

In view of the above, here are some practical tips on how to efficiently protect a brand from online infringements in Brazil:

I – Avoid legal liability under local law – First and foremost, it is extremely important to keep in mind that each sector of the industry as well as each country has its own particularities and challenges. Thus, to create an effective strategy and avoid liabilities (e.g., lawsuits for undue takedowns), it is indispensable to consider local rules and exceptions to IP rights. For that purpose, choosing and working closely with specialized local counsel in each designated country can make the difference between a successful strategy that drives an organization to good results, and a poor strategy that wastes time, resources and effort.

II - Find the best tools – Another important step in implementing an effective strategy is to find the best enforcement tools. The right tool can not only help with monitoring and identifying potential infringing goods, but also can contribute to the enforcement and takedowns. Again, it is important to look for a tool that has been tested and adapted to the local realities.

III – Create bonds of trusts with local platforms - In Brazil, an important statute concerning online trademark infringement is the Civil Rights Framework for the Internet (Law 12.965/2014, also known as “Marco Civil da Internet” or “Brazilian Internet Law”). According to Section 19 of the Brazilian Internet Law, an internet service provider may only be held liable for damages arising from third-party content if it fails to comply with a court order demanding the removal of a content available at a specific URL. This means that internet service providers are not obliged to remove any infringing content unless the trademark owner seeks the judiciary and obtains a court order. Such a requirement is substantially different from the system adopted by other countries, and can make the process significantly more expensive and time-consuming.

In light of this particularity, local practice shows that engaging with key platforms directly, being persistent and pushing back against initial rejecting can be, in some cases, the best (and less-expensive) way to have links removed, especially in time-sensitive scenarios and in situations connected to fraud.

For that purpose, (i) signing-up for the platform's brand protection program; (ii) communicating (in their own language, if possible) on how collaborating with them to protect consumers; as well as (iii) engaging the platform at events and webinars are all great options to create a bond of trust.

IV – Include a copyright infringement claim – There are three exceptions to the rule established in Section 19 of the Brazilian Internet Law, and one of them relates to Copyrights. Thus, considering that, often, infringers use stolen logos, texts and photographs, filing a takedown request based on copyright infringement can remarkably improve the effectiveness of a claim.

V – Explore the available local legal paths – In the vast online territory, there are numerous ways bad actors can act. In order to defend against these actors and build-up a strong online brand protection strategy, it is greatly necessary to be aware of all the resources and ways to navigate against these challenges, particularly in Brazil.

Depending on the infringement, it is quite obvious that a simple platform-specific takedown request or C&D letter will not solve the problem. In many infringements related to domain names, for example, a Saci-Adm complaint (the administrative proceeding for the resolution of conflicts involving '.br' domain names) has shown to be a powerful and less expensive tool to fight malicious online actors. Under SACI, infringing domain names may be transferred or cancelled by a panel within two to three months of the filing.

Another effective way to handle infringers is to file infringement lawsuits. In Brazil, Trademark and Copyright infringements can be pursued as a civil matter, but can also be deemed a criminal matter in certain circumstances. Thus, filing court actions can not only have a deterrent effect, but also send a message to the broader community, adding value in earning a reputation as a diligent protector of the brand. In those cases, preliminary and permanent injunctions are available and could be notably useful, especially in cases related to active fraudulent domain names that redirect consumers to active fake websites.

Conclusion

In view of the above, considering the growing e-commerce landscape and the rise of online infringements in Brazil, it is important for businesses and companies to be vigilant and constantly develop new takedown techniques and strategies against bad actors. It is also vital to be aware of the particularities of each region and territory. This could turn out to be the key element of not only taking care of the brand's reputation, but also preserving these sophisticated kinds of consumers that are emerging in this now more than ever virtual world.

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