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DR. SUSAN S. HARMELING

Randy Hetrick and TRX: Protecting Intellectual Property Rights (A)

Randy Hetrick looked at the box on his desk for the fourth time, and still could not believe what he was seeing. It was February 2013. As a former Navy SEAL, Hetrick was used to dealing calmly with stressful, unforeseen, and sometimes life-threatening situations. Even so, the contents of the box threw him. He modulated his breathing and told himself to remain calm and work the problem, just like his training had taught him.

A Unique Fitness System

Hetrick considered the journey that had gotten him to this moment. From 1987 to 2001, he had served as an officer in the U.S. Navy SEAL Teams, leading special operations platoons, becoming a



rising star, and eventually serving in the SEAL's super elite special missions unit. By 1999, he was leading a squadron of elite SEAL commandos, thereby assuming one of the most respected special operations leadership positions available. He loved the challenge and camaraderie of the SEALs, and was highly engaged in solving challenges that arose as part of military life. One of these challenges was staying in shape during deployment, when he and his colleagues did not have access to a gym. While he was a SEAL, he created a harness-based, compact, lightweight portable exercise system configured from discarded

parachute harness webbing; the design allowed the user to leverage his or her own body weight and gravity to achieve a full-body workout almost anywhere.

In 2001, Hetrick left the military and enrolled in Stanford University's Graduate School of Business. He had never thought of turning his harness system into a business. However, when he was at Stanford, Hetrick and a friend began using the harnesses at Stanford's athletic training center, where coaches in various sports approached him to ask about it. "After about a dozen coaches asked me to make them a set for their squad, I thought, what if there's a business idea here?" Hetrick recalled. During the summer between his first and second year of business school, he began evaluating the concept in earnest. "I turned my second year at Stanford into an incubator and recruited anyone who would talk to me." After about a year, Hetrick had the seeds of the business, and he began the work to launch it in June 2003, immediately after graduation. He named his product the "Total-body Resistance Exercise System," or "TRX." After discussion with experts in the fitness industry, Hetrick realized that his product offered something really unique, which he termed "Suspension Training."

The market potential for TRX was enormous. Retail, direct-to-consumer sales (through big-box retailers as well as specialty sports retailers like REI) were promising, as were opportunities to tap into the military and the commercial gym markets. Maximizing this revenue potential proved time-consuming, however, since using the TRX system involved a significant educational component. Over time, Hetrick created training cards and a travel package to be included in retail units, custom fitness guides for military users, and posters, guides, and videos for trainers. Eventually, online sales boomed as well.

These markets all contributed to TRX's strong revenue growth. TRX revenues grew from \$92,000 in 2004 to \$42 million in 2012. "We grew like gangbusters for six or seven years," said Hetrick. "From 2004-2010, we were growing in triple digits each year. In 2010, we started to see some of the natural slowdown in growth as the base got larger and larger – you can't grow in triple digits indefinitely. But we were still growing in really steep double digits from 2010 to 2012."

A Counterfeit Product

However, following years of high growth, TRX revenues suddenly flatlined in 2013. "An employee came to me and said, 'I think someone is counterfeiting our product,'" recalled Hetrick. "I laughed at the time, saying, 'What? We can barely sell these things! Nobody else is going to want to do all the crazy stuff we do to bring these straps to life.' I just didn't believe that anyone was going to counterfeit our product – it was too complicated to sell a product that had never existed before. No one knew how to use it – we had to become an education company in order to support our product."

Slowly, though, as revenue growth continued to stall, Hetrick began to realize that he had a problem. TRX had been using an outside counsel to advise on some intellectual property (IP) issues, but there was no one on staff whose official job was to focus on it. In 2012 he hired Marisa Christie, a paralegal by training, to be TRX's Manager of Intellectual Property and Brand Protection. "I came on board and immediately got involved in an organization called the International Anti-Counterfeiting Coalition (IACC) to access some expertise and resources," said Christie, who spent 2012 and 2013 learning the depth of TRX's counterfeit problem, which "was massive." Christie developed a process that allowed TRX distributors to report counterfeit issues to her, and then she and Hetrick would decide how much time and money to devote to each problem to achieve the biggest impact. The budget for counterfeit response was viewed by the company as a cost of doing business. "We were losing a minimum of 30% of our revenues on counterfeiting, so if we were spending some money to protect even a shred of that, it was worth it." Still, Christie said, it was like "playing whack-a-mole." TRX attempted to eliminate counterfeit threats as they popped up, only to be faced with multiple new threats.

Then, in early 2013, someone came in and set a box on Hetrick's desk. The box contained a counterfeit TRX system. "It was a really cheap, nasty version of our product," Hetrick recalled. It was called TRX. Most disconcerting of all: the front of the box had Hetrick's own picture on it. "Again, I was initially dismissive, thinking, 'What are these clowns doing?'" Then Hetrick started to see this counterfeit company's Amazon listing placement climbing due to increasing numbers of clicks and conversions to sales.

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According to Hetrick, certain characteristics make a product counterfeit-worthy. “To become an ideal target for counterfeiters, a product has several unique criteria: First, it has to be a consumer good that has strong market potential,” he explained. “Second, it has to have a high price point relative to the cost of manufacture. And third, it is ideally a ‘one size fits all,’ which reduces the need for high inventory.” This is why items like designer purses and watches make great targets, he added. “These three characteristics fit the TRX system perfectly, although I didn’t know it at the time. Of my many concerns when I launched this company, this one was not even on my radar.”

Intellectual Property in the Online Consumer Economy

Even so, one of the early decisions Hetrick had to make – one that many inventors have to address – is how much money to spend on IP protection, and when to spend it. “Early on, we didn’t have much revenue, but we needed to decide whether to invest in filing for patents and trademarks,” he said. “Once you start selling a product, you have about a year of exposure within which you should file patent applications.” In 2004, Hetrick spent a “ridiculous” amount of money relative to his funds at that point – about \$50,000 – to file the first utility patent applications and apply for the initial trademarks. At the time, most patent attorneys were dismissive of design patents as “too easy to work around,” Hetrick explained.

Even with patents, however, the challenge of preserving IP in the online consumer economy proved to be enormous, Hetrick continued. “The landscape has vastly changed since I launched TRX 14 years ago,” he said. “IP infringement has always been an issue for brands, but became a massive problem when commerce shifted to the online arena. Today, the main competitive challenge in consumer products is no longer legitimate competitors coming up with a better solution. Rather, the threat now is this sea of Chinese knock-off companies that have determined how to leverage the digital commerce platforms – Amazon, Craig’s List, Ebay, Alibaba – to infringe on IP.” As Hetrick explained further, “These knockoff companies can now ‘purchase’ the right to infringe another brand’s registered trademarks in Google’s paid Search Engine Marketing (SEM) program and Amazon’s sponsored ads (Ad Words) program. They pay Google and Amazon a small fee to allow them to steal the goodwill associated with leading brands by paying for adjacent placement whenever a customer searches for that brand’s term – and, ironically, the brands themselves receive no compensation whatsoever. It is totally insane!” Hetrick asserted that counterfeiters are “a decentralized, entrepreneurial group of thieves who operate with complete impunity. Through a sophisticated array of digital chicanery – a combination of fake review farms, false ad claims, misappropriation of registered trademarks, and co-opting of copyrighted images – they use the legitimate brand leader as a de facto sales and marketing engine. And they siphon away sales at the final point of conversion – based upon lower price – offering a cheaper product that often infringes patents, trade dress, or other rights. This criminal activity is putting many legitimate companies out of business.”

According to Hetrick, utility patents used to be critical, but the online economy has changed much of that. Design patents are now more valuable, because online platforms will generally enforce them without requiring a federally-litigated verdict. “Patent agents used to sneer at design patents because they are so easy to work around,” he said. “However, in the digital economy, design patents are the only thing the platforms will enforce, along with trademarks to a lesser extent. Utility patents are too complicated for platforms to enforce.”

At the same time, counterfeiters are getting better at what they do. “Counterfeiters used to be able to get away with low-quality knock-offs, thin cardboard boxes and flimsy materials used to make the product itself,” noted Hetrick. As time went on, however, the quality of the counterfeit products improved. “Counterfeiters figured out that if they improved quality, people would not immediately try to return the product.”

Hetrick asserted that the Chinese government might respond if a politically-connected entity is involved, but in general, IP infringement in China is culturally viewed as clever rather than dishonest. “There is a cultural bias in China toward making money at any cost, and they view the notion of intellectual property as a wholly foreign concept,” he stated.

In fact, the amount of money being lost to the American economy due to these fraudulent, primarily Chinese-based counterfeit companies is staggering. Counterfeit goods cost U.S. businesses \$225 to \$600 billion annually, according a 2017 report by the Commission on the Theft of American Intellectual Property, a private watchdog group.¹ Approximately 63% of counterfeit goods originate in China and 25% originate in Hong Kong.²

“We hired lawyers and sent cease-and-desist letters, but the Chinese companies just laughed at us,” said Hetrick. “We got no response. We organized some raids in China, but these were orchestrated to take down small manufacturers, who were probably paid to participate, and overall the raids were ineffective.”

International sales were also suffering. “Our international distributors were complaining that they were buying TRX systems at the real price but couldn’t sell them, because counterfeiters were pitching the same buyers using fake products,” said Hetrick.

While TRX was trying to identify and then badger the Chinese manufacturers, it was also addressing problems arising from online distribution and sales. Amazon’s policy is that anyone who has a product to sell can attach to the branded product’s page as an authorized reseller. Accordingly, at first, the TRX counterfeiters attached themselves as resellers using TRX’s Amazon stock inventory number. They sold the fake TRX product for 25% of the price of the genuine product – \$45 instead of \$180. This price differential drove sales of the fake TRX products up, while driving TRX revenues down.

“We tried to influence the Amazon process and have the counterfeiters banned from Amazon,” Hetrick recalled. “At Amazon’s request, we did perpetual test buys of the counterfeit products, waiting two weeks, verifying that they were fake, and then going through a long process with Amazon in which we filed documents supporting each of the test buy findings. Amazon would take down the infringing site, but fifteen minutes later, the vendor was back up by making a slight change in their name.”

Another problem was that the counterfeiters were allowed to buy TRX-related search terms, such as “TRX” and “Suspension Training,” both of which are long-standing registered trademarks of the company. “We have spent millions of dollars to educate prospective customers, cultivate a market, and create brand goodwill, but these guys just cut to the front of the line and steal it all,” said Hetrick. “The irony is that we even tried to corner the market on our own search terms on Amazon by bidding the highest, but Amazon won’t let us. Their corporate policy is that it is a good thing to have variety in the search rankings, so they prevent a company from buying up all the ad space around its own trademarks. I can get the top placement in the paid ad search results, and I might have to pay \$10 per click to own that spot. But Amazon will let another company, who may have spent just 10 cents per click bidding on my trademarks, win placement right beneath me; so functionally, we are in almost the same place.”

Hetrick noted that Amazon executives were initially very reluctant to acknowledge that counterfeit goods were a problem. Amazon earns 15% on the sale of each item, continued Hetrick, who asserted that a substantial portion – possibly up to 25% – of Amazon’s total revenue derives from sales of fake products. “As a practical matter, Amazon wants to fix the problem, but also has a financial disincentive

¹ “Counterfeit Goods Cost the U.S. \$600 Billion a Year.” *Inc.* February 27, 2017. Retrieved from <https://www.inc.com/associated-press/counterfeiters-cost-600-billion-a-year.html>

² Marks, Tod. “The True Cost of Fake Goods.” *Consumer Reports*. August 15, 2015. Retrieved from <https://www.consumerreports.org/cro/news/2015/08/the-true-cost-of-fake-goods/index.htm>

to do so,” he said. “Amazon disclaims any liability for anything sold by their vendors. Both Amazon and Google are violently opposed to any intellectual property legislation that might limit their sales.”

After “a lot of lip service and foot-dragging” with the Amazon brand protection team, Hetrick sent a letter to Amazon’s general counsel. “I said, ‘I’ve exhausted every procedural option I have. You have not resolved the problem. Your sale of counterfeit product constitutes contributory infringement and is killing my business. I don’t have the resources to sue you in court, but I do have the resources to sue you in the court of public opinion. If I don’t hear back from you within the week, I will begin engaging reporters and explaining how Amazon is the number-one threat to veteran-owned businesses in the United States.’ Darned if I didn’t get a call back right away. They finally responded to the squeaky wheel.”

This represented a turning point in TRX’s relationship with Amazon, one that Hetrick and team would not grasp the full magnitude of for several more years. Amazon assigned its Brand Protection Director to the task of turning the TRX relationship into an asset instead of a liability. Getting inside the Amazon machine helped the relationship between TRX and Amazon mature rapidly and to mutual benefit. “We effectively became a leading brand protection partner with Amazon to try to help the company better understand the nature of the problem it faced and work together to develop solutions to it,” said Hetrick. “They started to trust us. We were giving them a ton of insight into what these fraudsters were doing and the tactics they were using.” Hetrick believes that Amazon is absolutely earnest in its desire to protect the integrity of its platform and safeguard its customers. “The trouble was,” he says, “that the folks inside Amazon – all the way up to Jeff Bezos – had been so focused on providing a frictionless customer experience that they had been largely blind to what fraudsters might do with such an open, automated system.”

However, as Amazon started to enforce against counterfeit products more aggressively, the counterfeiters responded by taking the trademarked name – TRX – off their products. Then, legally, the product is not a counterfeit, even if the product violates the patents and is identical to the real product in every other way. “Amazon told us that, since it was no longer legally a counterfeit product, these companies could return to selling the product unless we went to federal court and got a judgment,” Hetrick recalled. Amazon indicated that, because patent law is inherently unstable, the burden is placed upon a patent holder to prove patent infringement; only when a legal judgment indicated that the patent was enforceable would Amazon be able to take action to remove the infringer from the platform. But with the trust now established through the brand protection partnership, Amazon made clear that it would enforce TRX’s verdict across all its platforms. “All I had to do,” Hetrick says, “was go win one.”

TRX identified several US-based companies who were infringing on the TRX trademarks and patents. The company brought suit against two of these infringers separately in 2013; both settled out of court with conduct remedies.

Then, in 2014, the counterfeiters changed their behavior away from producing counterfeit products and to producing knock-offs. “Counterfeiters are trying to position themselves as if they ARE you,” explained Hetrick. “They use your name and an identical design. In contrast, a knock-off is the evolved version of the counterfeit, but without the trademark. The counterfeiters learned what the big online marketplaces will and won’t enforce.” TRX started to see an explosion of knock-offs: the counterfeiters had taken their fake products, cut off the fake TRX badges, and put the product into a plain box. “They would sell it on Amazon with copied images of the real product, but the consumer would get a crappy strap in a thin cardboard box. Other US-based companies began producing similar products that infringed our patents but weren’t claiming to be TRX – they were claiming to be just as good but cheaper than TRX, and the Amazon algorithm enabled them to buy our trademarks as search terms and list right next to us.”

Hetrick says that by 2014, on any given day, there were dozens of online listings for nearly-identical products – all of which were accompanied by fake reviews. “There is a cottage industry of Chinese consulting firms that will allow you to fill out a form describing your product and the market leader; then they craft contrived reviews that say things like, ‘I’m a personal trainer in Los Angeles. I just discovered the Bob’s Trainer, and it performs so well, unlike the overpriced TRX’,” said Hetrick. “You can buy these reviews in bulk – 500 reviews for 50 cents each. These guys top up their reviews overnight.”

“I was submitting 250 reports on patent infringers to Amazon every day,” said Christie. “Each one is allowed to come back with name and design changes three times, according to Amazon policy, but they really end up not going away until I submit between 25 and 30 reports on each one. The unfortunate truth is, you cannot get a patent infringer taken down from an online platform without a jury verdict. Amazon doesn’t want to be a patent enforcer. They said, ‘If you bring us a jury verdict, we will take down a site.’”

At the same time, the knock-offs kept evolving and started to increase their pricing – instead of 25% of the price of the real TRX, they would charge 50-75% of the price. “They figured out that if they priced their product too low, consumers became skeptical,” said Hetrick. “If TRX cost \$180, they charged \$119. This gave them credibility. Consumers would think, ‘TRX is the branded version; I’ll just buy this alternative product – which looks the same in the picture – for \$119.’” With infringer sales on the rise and TRX’s online sales declining 20% per year, the situation was becoming dire.

“We’re Going to Sue”

One of the US-based companies, called WOSS Enterprises, had been on Hetrick’s and Christie’s radar for a while. “WOSS had a knock-off TRX product,” said Hetrick. “We knew they were hurting us because the search results for TRX generated lists for WOSS products. WOSS copied everything we did – colors, marketing niches, you name it – and sold for less than 50% of the price.”

“WOSS used to be on the seventh or eighth page of the Amazon search results,” said Christie. WOSS was using the TRX trademark, and over about two and a half years, Christie submitted 175 trademark infringement notices to Amazon about WOSS; however, Amazon wouldn’t act on her complaints about patent infringement because TRX did not have a legal verdict against WOSS. “It was cat and mouse. I would submit a notice, WOSS would get taken off, it would come back on, I’d submit a notice, and so on. As this was happening, WOSS started to make its way up the Amazon list until eventually, when I would type ‘TRX’ into Amazon, WOSS products would be first on the list. That’s when we realized that paradoxically, Amazon was a huge source of revenue for TRX, but it could also spell the end of us.”

TRX started sending cease-and-desist letters to WOSS, notifying the company that it was infringing on TRX patents and threatening to file a lawsuit. Eventually, Hetrick and Christie realized that WOSS was buying fake reviews that touted the WOSS product while disparaging TRX. “We still couldn’t get Amazon to remove WOSS,” said Christie.

Finally, in early 2014, WOSS went up against TRX for a large military contract – and won.³ “We had held those contracts for years, developed and cultivated by Randy thanks to his personal military experience,” said Christie.

This was the breaking point for Hetrick, who was infuriated. “I said, ‘We’re going to sue.’”

³ Although WOSS won the contract, it was never executed.

However, the TRX board was not altogether supportive of a lawsuit that might end in a trial. Litigating a patent involves “an insane amount of money and time,” according to Hetrick. It was unclear what the ultimate cost of the lawsuit would be, even if the case settled and never went to trial.

A second issue was that even if the case went to trial and TRX won, it might not collect on any damages that would offset the cost of filing a lawsuit. “Generally, the second you win, the people you are litigating against will declare bankruptcy and go out of business,” Hetrick said. “It can be a pyrrhic victory.”

A third factor is that winning a judgment against one patent infringer would get that infringer off of Amazon, but not necessarily any others. “WOSS was paving the way for other patent infringers to come out and compare themselves to TRX,” said Christie. “If we won against WOSS, Amazon would certainly agree to remove WOSS from the platform. But what about the 200 other knock-off ‘Suspension Training’ products that were being sold on Amazon? We couldn’t afford to sue all of them.”

A final issue was that TRX did not have a clear quantification of the harm being done to the company. Hetrick believed it was enormous – and the primary cause of TRX’s substantial decline in revenues – but not everyone shared that opinion.

Hetrick’s choice was stark. He could choose not to do anything, or he could spend millions to fight this copycat and risk an unsatisfying result that provided neither resolution nor satisfaction. “It was a brutal decision,” said Hetrick.