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Trademark enforcement outside the courtroom: four underrated tools your clients may be overlooking



Michelle Ciotola and Ali Caless of Cantor Colburn LLP, explain how the United States Customs and Border Protection, trademark watch services, online infringement and modern trademark clearance can be utilized to amplify the strength of a brand and protect against infringement.



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Publicity rights posthumously

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Diversity, equity, and inclusion with Suzanne Wertheim.

Chapter 2: challenges and overcoming

In this six-part series Dr. Suzanne Wertheim, of Worthwhile Research & Consulting, talks to *The Trademark Lawyer* about diversity, equity, and inclusion: what it means; the current challenges; DEI in law; gender bias; and what we can all do to improve.

What challenges do you think are still very present for equity and diversity?

All of them.

I think literally all of them. But because I'm a good problem solver, and you can't fix everything at once, I focus on triage. I work to find what the most important problems are – and I'll do that triage for companies.

I'll go into a company and I'll do what I call a 'culture audit', where I run in-depth interviews with individuals and with small groups. This lets me find out what the biggest bias-related problems are in a way that's very safe. I anonymize people's comments, I am external to the company, I don't have any skin in the game of the politics of the company, and I have a Ph.D. – so it's easier for me to be taken seriously when I present my bias-related findings. And I work hard to protect my sources from retaliation. I'll write up a report and present it to people like Vice Presidents, C-suite executives, and the head of Human Resources. And I'll do the triage work for them, like a medical doctor. I'll say – you've got 10 different issues, but these are the three you should pay most attention to. And, here are my 10 recommendations, but let's work together in a strategy session to figure out which are most important, and the order you should do them in. After a culture audit and a strategy session, my clients are on solid footing: they know their most serious issues for employee experience, and they have a prioritized action plan to address them.

Let me go back to your question and apply a triage process, because there isn't time to talk about *everything*... I think, very honestly, one of



Dr. Suzanne Wertheim

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the biggest challenges when it comes to bias is the lack of education about what it is to be human, to have a human brain, to have a human body, and to interact with other humans. We don't really get that training in our schools, and we often don't get it in our colleges or universities. But our human brains, which are located in our human bodies, profoundly affect how we move through the world and how bias sneaks in and then stays. So, I think a lot of people would feel better and more open to things if they understood that 100% of humans are biased, and that our brains are set up for bias. Our brains are amazing in so many ways. And they keep us alive by making snap judgments, which is part of human safety and evolution – but it also invites bias. And our selective attention and snap judgments mean that it's hard to see when bias is happening and interrupt it.

Another thing is that people don't recognize that bias is at multiple levels. From an anthropological perspective, we run analyses at different levels of social organization. The top level is the macro social: you can call it a national level, state level, shire level or province level, etc. In other words, a massive group of people who can't possibly all know each other. Then the next level down is the institutional level, which may be a school system, a university, a company, or a professional association like a legal association. What is your institution doing? What are the rules and norms and expectations for the institution? Then there are interpersonal interactions: what's happening when I'm talking to people one-to-one or in very small groups? I can see everybody; I know what's going on. Then

there's the personal, individual level: what's happening inside my brain? And how am I presenting myself to the world?

Bias shows up in every one of these levels, but in the workplace I find that sometimes people are getting overwhelmed by the societal level. Here's the world, and it's really messed up – well, I can't fix that! Then they're also told how much bias they have in their brains – Oh my God, I'm a terrible person! I'm filled with unconscious bias!

In fact, in the workplace I think it's most useful to focus on the middle two levels: what's happening at the institutional level – in your organization, in your department – and what's happening in everyday interpersonal interactions. This is what people have control of and this is where they can really dig in and feel good about making changes. So, in the world of diversity, equity, and inclusion, there's a lot of important work talking about things that go on in the world, which is really necessary to understand the historical and present-day context. But I also suspect that a constant focus on the societal level can make people feel so overwhelmed that they think that there's no hope.

I want to give people that ability to determine what level they should be thinking about and working on so they can start making real changes with impact on the workplace around them. A lot of people are coming from a place of insufficient knowledge because they just weren't taught useful frameworks and tools. My grad-school experience changed my whole world. I felt like the skills I learned gave me X-ray vision. I saw deeper structures, deeper patterns. Through my workshops, I try to give other people X-ray vision as well.

Still another enormous challenge is bridging what we call the 'knowing-doing gap.' A lot of training and talks bring people to the very starting point for DEI. This training raises awareness that bias is a problem. And then people leave the training and nothing changes because there wasn't enough to move them to the next place, where they take action. Our brains are so complex, and can hold so many contradictory beliefs, that it makes it hard for us to change. We know that we should be doing better, but it's also easy to keep on doing the same thing.

So the next big thing in training needs to be follow-ups that lead people into action and change. I've been building follow-up and accountability structures into my work, and I'm less and less willing to just drop into a place and do an awareness-raising talk on its own. Instead, I'm building packages that accompany intro-level training. In the workshop, I walk them through what bias is, what it looks like, how

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companies are replicating bias, and how to talk productively about bias. And then, a few weeks later, there are follow-ups that move people from just *knowing into doing*. This includes simple steps such as having a buddy that they partner up with to talk to, having small groups where they talk to each other, have accountability structures, having penalties for managers who allow problems to continue, and having bonuses built in for people that work to correct things.

And by correct things, I don't just mean get diversity numbers up. DEI is way more than just numbers. A lot of people concentrate on getting hiring numbers up and they don't actually check the retention rates. What is the experience of these underrepresented people after they are hired? When we interview these 'numbers,' they're telling us they're probably going to leave in a few months because it's become clear that there's no way for them to thrive or succeed in that organization. They feel the only way for them to succeed is to leave. Companies may focus on numbers, but is there a revolving door of people from under-represented backgrounds that will be gone within six months or a year because the bias hasn't been fixed? Spending all your time and money on diversifying your hiring is a waste if you haven't done any work to debias your culture.

How do you think we can overcome these aspects?

It is a global and multifaceted effort. So until we're getting fixes at every level of social organization, we're always going to be fighting upstream for any one level. The force of the society around you comes right into your workplace. It's not like you walk in to your work and do everything in a vacuum.

I work with the media sometimes and I feel very strongly that the media needs to be more responsible in their reporting, both in what they choose to cover and then how they cover it. I get brought in to advise media outlets on how to de-bias their coverage and word choices. In the US, the media has been reporting on people rioting and people protesting. Who is described as rioting and who is described as protesting? Very often, skin color plays a role in which word the media will use. For example, in the aftermath of Hurricane Katrina, which created a terrible crisis in the American South, there were news photos that circulated where some people were described as 'finding food in a grocery store' and other people were described as 'looting a grocery store.' They were doing identical things, wading through chest-high water carrying food, but the white people were described as 'finding food' while the Black people were described as 'looting.' I'm sure that

“One of the most useful things we can do is get people to a place where they feel comfortable talking about things, and where they understand that they’re going to make mistakes.”

people in the media think they’re not biased, and that most of them consciously believe that Black people are just as good as white people. But then their language choices clearly express their unconscious bias – and then replicate it and pass it on to their readers or viewers. So the media needs to be much more responsible and take real action to debias their reporting.

In terms of social media (and I’m talking to you from a location where I can easily drive to Facebook, where I’ve worked with Google, where LinkedIn is down the road – I’m at the epicenter of tech platforms that permeate people’s everyday lives) they do a very, very, very bad job of shutting down what should be described as ‘outside of the code-of-conduct’. Many of these platforms don’t have good codes of conduct and they don’t have good codes of ethics. And even if their codes are well-written, they are usually not implemented. For example, social media for the most part does not de-platform people who advocate for violence, or even who actually create violence. Here in the US, for example, there was a Facebook group of white supremacists and, during the Black Lives Matter protests, they said, “come to Wisconsin and bring your guns.” And a 17-year-old white supremacist heard that call, crossed state lines, and shot two peaceful protestors to death. These are groups that people were talking about and reporting for a long time, but Facebook ignored them. The outcome of bias is death more often than we think.

I recently worked with educators who are going to create and run anti-bias workshops for the entire court system for California, from judges on down. They brought me in to guide them on best practices and to advise them on how to deal with resistance and avoid common pitfalls for this kind of training. The judicial system and lawyers are so foundational when it comes to

justice and fair treatment, in the courtroom in particular but in all kinds of legal work, that identifying bias and removing it from legal practice is central to real societal improvement.

Finally, in addition to widespread education on bias, we need to develop structures that really hold both individual people and organizations accountable. And there need to be external forces that make it more painful to continue with the status quo than to change. I think this is kind of pressure, including formal policies and regulation, is going to be necessary in order to effect real change.

For example, in the US there are some organizations that are requiring better diversity numbers and real anti-bias practices for companies that they use, like their software vendors or their legal firms. I’ve heard a few examples of companies saying things like, “if you do not, by X year, change the fact that almost all of your partners in your law firm are white and are male, you are going to have to show us what concrete actions you’re taking to change it, or we will find a more diverse firm.” I believe that this is going to be one of the most powerful forces for change. When there are severe economic consequences to not doing the work, then more people will finally be motivated to buckle down and finally work on changing the unfair and unjust status quo.

Join us in *The Trademark Lawyer* Issue 5 for Chapter 3.

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