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*This guide was updated in October 2015 thanks to the help of volunteer lawyers.



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Trademarks

Millions of products are sold and offered to consumers in the U.S. Producers of these various products and services want people to distinguish their goods and services from other goods and services being offered by their competitors. This is where the usefulness of trademarks arises. Trademarks are words, phrases or symbols that identify a product or service, which are used by its manufacturer or seller to identify and distinguish their products or services from those of others.

What Is A Trademark?

A trademark is something used by a manufacturer or merchant to identify and distinguish its products and goods from those produced and offered by others. A trademark can be a word, phrase, symbol, logo, design, color, or even a scent. Trademarks are essentially “brands.” For example, “Coca-Cola” and “Pepsi” are both trademarks used to identify and distinguish different brands of soft drinks. Likewise, the “golden arches” or an image of Colonel Sanders are both used to identify and distinguish different brands of fast food restaurants.

A “service mark” is almost identical to a trademark, except that it identifies and distinguishes a service that is being offered, rather than a product.

Whenever this booklet refers to a “trademark” or a “mark,” it is referring to both trademarks and service marks.

Why Are Trademarks Valuable?

Trademarks are valuable to both the manufacturers and merchants who produce and sell the products and services (the business side), and to the consumers who buy them (the customer side).

On the business side, trademarks are important because businesses invest a lot of money, time and effort into developing a particular product or service that consumers will purchase over and over again. When this happens, the product or service has developed a good commercial reputation among consumers, also known as consumer “good will.” Once developed, consumer good will becomes a valuable asset of your business, which you must protect as you would any physical assets, such as your equipment.

On the customer side, trademarks are valuable since they allow customers to distinguish between the products and services of competing companies, and protect customers from any confusion that may arise if companies were allowed to use the marks of other trademark owners. They also allow customers to have an understanding of and rely on the quality of the particular product or service they are purchasing, and to avoid purchasing a product they do not want. For example, consumers of a product or service sold under a particular trademark know what quality and

value they will be getting for their money before they purchase the product or service. If competing companies, offering products of differing quality, were allowed to use the same trademark, consumers would not know what to expect when purchasing those products or services.



Trademark Laws

Trademarks are governed by both state law and the federal law of the United States. The following section provides a brief overview of the laws governing trademarks. Remember that this information, along with the other information in this booklet, does not constitute legal advice, and specific questions you may have should be directed to an experienced attorney with knowledge of the trademark laws.

State Laws

Individual states within the United States each provide their own registries of trademarks, along with their own rules, presumptions and remedies. States also generally have common law rules that apply to trademarks. These are rules that are not part of a state's written statutes or codes, but are nevertheless part of the state's laws, made by courts and judges over the years when they decide cases.

A state's laws are generally limited in application to conduct within that state's borders. Therefore, protection of trademark rights under a state's laws may not be enough to protect the rights outside that state. This is one major reason for federal trademark registration.

Federal Laws

The federal government of the United States has a right to regulate trademarks under the "Commerce Clause" of the United States Constitution. The Commerce Clause allows the government to regulate commerce between states and internationally.

The Lanham Act is the main piece of federal legislation governing trademarks. The Act sets out the procedures for federal registration, and also provides what criminal and civil complaints and remedies are available for violation of its provisions. The United States Patent and Trademark Office (the "USPTO") was also created under the Act. The USPTO is the main organization responsible for federally registered trademarks. (For more on federal registration, see below.)

Trademark Infringement

One of the most common legal problems involving trademarks is trademark infringement. Trademarks can be infringed when a person or business uses another's mark, or when a certain mark is so similar to another mark that they are likely to be confused by consumers when making purchasing decisions. Federal courts within the United States apply different, but similar, tests in determining whether a trademark has been infringed. Generally, in deciding whether there is infringement, courts will look to a number of factors including the similarity between marks in the way they look, sound, or in their meaning; competition between the products; how sophisticated the intended customers are (e.g., how likely are they to be confused by the similarities); and whether there is any actual confusion by customers in the marketplace.

Remedies for infringement can include money damages to the infringed party and/or injunctions against the infringing party. Injunctions may require the infringing party to stop using the mark, or take some other action to

avoid the infringement. In certain cases, the winning party may even recover its attorneys' fees from the losing party.



Choosing a Trademark

Given the importance of a trademark to a business, choosing the right mark is an extremely important process. A good mark will easily identify and distinguish a business's product or services from other competing or similar products or services.

Furthermore, a mark should be chosen well because not all trademarks are provided the same amount of protection by law. There are five classes of trademarks, in order from those that are generally given the most protection, to those given the least:

1. **Fanciful** – Fanciful marks are the strongest type of mark. These are marks that have been invented for the sole purpose of functioning as a trademark and have no other meaning, for example, “Pepsi” or “Kodak”;
2. **Arbitrary** – Marks that have no relation to the types of goods or services being sold, for example, “Apple” to describe computers;
3. **Suggestive** – Marks that suggest a characteristic of the goods and services, for example, “Coppertone” to suggest suntan lotion;
4. **Descriptive** – Marks that describe a good or service, for example, “Food 4 Less” to describe supermarkets. Note that surnames (such as “David’s Flowers” or “Goldman’s Groceries”) are considered descriptive marks; and
5. **Generic** – Marks that are actually the name of a product and thus cannot obtain trademark

protection for that product, for example, “Thermos” or “Aspirin”.

From the list above, fanciful and arbitrary marks are the strongest. Since fanciful and arbitrary marks are considered “inherently distinctive” and different, they are automatically able to function as trademarks. While suggestive marks are also considered “inherently distinctive,” and are automatically protectable, descriptive marks require “acquired distinctiveness” (also called “secondary meaning”) in order to be protected.

“Secondary meaning” requires a business seeking protection for a mark to prove that consumers actually link that mark with the business’s product. Thus, the descriptive, non-protectable meaning of the word or phrase is the “primary meaning,” but the source-identifying meaning of the phrase is its “secondary meaning” and can function as a trademark. Sometimes this may be difficult to prove, as factors such as the length of time and the amount of exclusive use of the mark will be considered, as well as how much the business has spent on advertising, and the amount of sales the product has generated under the trademark.

Finally, generic terms are not protectable. One cannot own a trademark of “Beer” for beer or “Burger” for a hamburger stand, because then it would be able to prevent others from simply identifying their own products and services. Businesses must also be careful not to have a previously protectable mark become generic over time through using the trademark to identify the general category of the product. This issue generally applies to long-existing and extremely popular marks,

like “Thermos” or “Aspirin” both of which used to be brands.

Remember that the more distinctive a mark is, the less likely competitors or other companies will be able to use it for a product of their own. Although distinctive marks may be harder to advertise and promote in the beginning since they are not familiar to the general public, in time they will be stronger than marks that are just suggestive or descriptive.

Ensuring the Trademark Is Available

Once a trademark has been chosen, a business must ensure that the mark chosen does not already belong to someone else. Since valid trademarks are protected by law, using a mark without checking to see whether the same or similar mark is already owned by another person or business would be unwise for several reasons.

First, using someone else’s mark (or something similar to someone else’s mark) can subject the business to legal trouble for infringement, as described above. Like the owner of a business, a house or a car, the owner of the trademark has a “proprietary,” or ownership, interest in the mark. Therefore, the unauthorized use of another’s mark may be considered infringement under either federal law or state law. In other words, it may very well be illegal.



Second, creating and building up a trademark is often a lengthy process, and entails a great investment and use of your business’s resources. Finding out later that the mark is already used by another or is too similar to another mark would be a waste of this investment and the precious resources that you have already dedicated, if the existing owner prevents your continued use of the mark.

Finally, you want your product or service to grow and build its own valuable reputation, and not simply be associated with someone else’s product.

Running the Trademark Search

To make sure the trademark is available, you need to run a trademark search. Simply avoiding marks that you already know exist is not enough. You can start with some preliminary searches on-line, using popular search engines such as “Yahoo” or “Google.” For example, typing in a popular brand would show you that the name is already in use when you see the brand’s website and products offered. You can also limit these searches to cities or states if your area of use is local. Then, for a more comprehensive search, look to the United States Patent and Trademark Office (“USPTO”) websites’ Trademark Electronic Search System at <http://www.uspto.gov>.

These preliminary searches are only a beginning step. If you find the mark you have selected is being used by another person/organization for the same or similar products or services, you know that you must go back to the drawing board and come up with another mark. If you do not find it, however, it is then advisable to run a professional search since the preliminary searches will probably not reveal marks that are similar but not identical to your chosen mark.

For example, if a mark exists for “Tasty Ice Cream,” and you try to establish a mark for “Tastee Ice Cream,” the preliminary searches might not reveal the similar mark. It would be much more trouble for you later to find out that you cannot use “Tastee Ice Cream” because “Tasty Ice Cream” is already a protected mark.

Many professional trademark search services exist, and you can usually have a professional search performed for a reasonable amount of money, which will inform you of any rights that others may have in your proposed mark. As with any other third-party services, you should take care to use a reputable and experienced company to run these professional searches.

Finally, if you are unsure whether the trademark of another individual/organization might prevent you from using the mark you picked out, you can contact a trademark attorney who can help you analyze the situation and decide on a course of action.



Acquiring and Protecting Trademark

After you have made sure that the trademark you propose to adopt is available, the next step is to acquire trademark rights. Remember, you need to establish trademark rights in order to get trademark protection.

In the United States, the first legitimate use of a mark in commerce will create rights in the mark. In other words, you will not need to register the mark to obtain any rights, so long as you are the first to use the mark properly. However, use of the mark (without registration) establishes only common law rights. As mentioned, this means that you have certain rights to the mark that are protected by the common law (i.e., law created by the courts and judges through their decisions in past cases) of the state in which you use the mark, along with certain federal protection. For additional rights and protection, you should register the mark.

Registered Marks

As mentioned, although you do not need to register a trademark in order to obtain trademark protection, it is still advisable since only registered marks receive all of the benefits of protection that state and federal laws provide.

Federal registration, while it may sometimes seem expensive, provides advantages. Some of the advantages to owning a trademark that is federally registered are that registration:

- notifies the public that the registrant claims ownership of the mark;
- in litigation, creates a presumption of the registrant's ownership, validity, and the right to use the mark in connection with the goods or services related to the mark (this means if you are involved in litigation over the mark, the court will presume that you own the mark, and have the exclusive right to use it; the other party will have the burden of proving otherwise);
- gives the registrant the ability to sue in federal court for actions related to the mark; and
- provides nationwide protection for the mark.

In addition to federal registration, you can also register a mark with a state. State registration is generally inexpensive; however, the benefits of state registration may not be that substantial. For example, state registration will not give you rights against someone who has registered or applied for registration of the same (or similar) mark federally. Further, a federally registered mark, even if not registered until after your state registration, may still have more rights than your mark in certain ways.

Use of Trademark Symbols

You can use the "TM" (trademark) or "SM" (service mark) symbols anytime you claim rights in a mark. These marks generally are used to indicate an unregistered mark.

You may only use the "®" symbol for federally registered marks. In other words, do not use the "®"

symbol unless the USPTO has approved your trademark application and registered the mark. Further, you may only use the “®” symbol on or in connection with the related goods or services that you have listed in the federal registration.

Filing an Application for Federal Registration

If you are considering federal registration, the following section provides some of the basics of the application process for your consideration. However, it is not a “how-to” guide, and does not cover all of the details and requirements that you must follow to successfully apply. Furthermore, it does not constitute legal advice on how to file. You must carefully read and follow all directions and guidelines provided by the USPTO in the application itself or seek the assistance of an attorney.

Duration of the Application Process

The federal registration process generally takes several months after filing the initial application, and may take as long as 18 to 24 months.

The review process by the USPTO itself may take 6 to 12 months.

Obtaining and Submitting the Application

You may submit your application on-line through the Trademark Electronic Application System (TEAS), using the USPTO website at: <http://www.uspto.gov/>.

The USPTO website provides on-line help to guide applicants through the process, as well as detailed information about the requirements for application (however, the process can sometimes be tricky for someone unfamiliar with the application and the required information, and if you have any questions, you can consult a trademark attorney). You may also

submit a paper application by mail or by hand delivery (request a paper application from the USPTO by phone at 800-786-9199), although the USPTO greatly prefers on-line applications. After obtaining the printed form, the mailing address to file a new application is:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Basic Required Information

Generally, the application must include the name of the applicant, a name and address for the USPTO to correspond with the applicant, a drawing of the mark, a list of the goods or services, the applicable filing fee, a specified basis for filing, a specimen (if claiming use of the mark) and a signature.



Filing Fee and Class of Services

The filing fee must be for at least one class of goods and services. The USPTO has a list of the classes (or categories) of goods and services in which marks are categorized. For example, “Clothing, footwear, head- gear” is one category, while “Textiles and textile goods, not included in other classes; beds and table covers” is another. If your application is approved, your rights in the registered mark are

applicable to products in the class for which you have applied.

Basis for Filing

The basis for filing the application can be either “current use” or an “intent to use.”

If you plan to use the mark in the future, but have not yet begun to do so, you may file your application based on a “good faith” or genuine intention to use the mark in commerce. The intent-to-use application allows an applicant to begin protecting a new trademark still in the planning or testing stages by ensuring that no other party registers a similar mark on similar goods or services just before the applicant’s own first use. If you file an intent-to-use application, you do not have to use the mark prior to filing the application. However, the mark will not be registered until actual, proper use has begun. When the applicant actually uses the mark in commerce, the applicant then must file a Statement of Use before the USPTO will register the mark – this must be done within a certain amount of time or the application will be abandoned.

Notably, to obtain federal registration, you must show that you are currently using the mark “in commerce,” and using the mark properly.

For purposes of federal registration, “in commerce” means in the ordinary course of trade, such as selling and buying, across state lines. Remember that the federal government of the United States has the power to regulate “interstate” (between states) commerce. Generally, the goods or customers of the business must pass between states, but sales to many out-of-state customers may also satisfy this requirement. Selling on the Internet generally

satisfies this requirement. If you do not know whether your business qualifies, you should seek the advice of a knowledgeable attorney.

“Proper use” for goods generally means that the mark must appear on the products or on labels, containers or packaging for the products, and in advertising and displays associated with the products. Proper use for services generally means that the mark must be used or appear on advertising or sale of the services.

“Proper use” also means that the mark should always be used as an adjective, and never be used as a noun, verb, or in plural. For example, if you register a mark for “XYZ” for ice cream, always use “XYZ” as an adjective. For example, you should say “XYZ brand of ice cream is the best ice cream” or “XYZ ice cream comes in chocolate, vanilla or strawberry.” Never say “XYZ is the best ice cream” or “XYZ comes in chocolate, vanilla or strawberry,” because the trademark is intended to identify the source of the products, not the products themselves. Such improper use may result in a loss of rights as the mark may become generic (like “Aspirin”).

Specimen of Use

The USPTO requires a “specimen of use,” or an example of your use of the mark in commerce, on or with the goods or services you identified in your application. A tag, label, packaging or display for the goods (or a photograph of the actual goods bearing the mark) is generally acceptable. Mere advertising (leaflets, brochures, invoices, order forms) will generally not be enough.

After The Application for Federal Registration Has Been Approved

Federal trademark registrations are good for 10 years. They may be renewed indefinitely for successive 10-year periods, as long as they are still being used. The trademark owner must file applications for renewal.

Trademark owners must also remember to file a Section 8 Affidavit of Continued Use (“Section 8 Affidavit”) between the fifth and sixth years after the mark is initially registered. If the owner then chooses to renew the trademark, before the expiration of the ten-year period, the owner must then file a Section 9 Renewal and a new Section 8 Affidavit of Continued Use. Thereafter, to maintain registration, the trademark owner must file to renew the trademark every ten years, which entails filing a Section 9 Renewal and a Section 8 Affidavit before the expiration of every subsequent 10-year period. This is part of “maintaining” a federal trademark registration. Since the government does not want a mark that is not being used to be tied up and unavailable to others, trademark owners must file the affidavit to show their continuing use. This step is very important since the registration will be cancelled if the affidavit is not filed.

Furthermore, after five years of registration, owners may file a “Section 15 Affidavit of Incontestability.” Incontestability means that others will generally not be able to contest or argue against the validity of the registration on most grounds.

Any registered trademark can be intentionally or unintentionally abandoned. Unintentional abandonment can occur when the owner does not act on or attempt to stop unauthorized uses of its mark,

or does not properly monitor users who have licenses to use the trademark.



Copyrights

Copyrights protect authors of original, creative works by giving the owners the exclusive right to use the copyrighted material or authorize others to do so.

What Is A Copyright?

A copyright is a type of protection granted by the laws of the United States (i.e., federal law) to authors of “original works of authorship.” These original works include literary (e.g., novels, articles and other written works, including computer software), dramatic, musical, artistic and certain other works.

It is important to note that a copyright protects the expression of ideas, and not the ideas themselves. That means that a copyright protects how an idea is put into words, or a picture, or a song, for example – its “tangible expression.” For example, one can own a copyright for the movie *Jurassic Park*, but cannot own a copyright for the idea of a movie about a dinosaur theme park.

Why Are Copyrights Valuable?

Copyrights are valuable because they give the owner of the copyright certain exclusive rights related to the copyright. This means that the owner may legally

exclude all others from taking actions covered by these rights. In turn, society as a whole benefits since copyright encourages creativity by offering authors protection for their efforts.

Rights of a Copyright Owner

A copyright owner obtains exclusive rights to do certain things related to the copyright, or authorize other people to do those things. “Exclusive” means that only that person can do the things provided by the rights. The copyright owner’s exclusive rights include:

- **Reproduction Rights:** reproduce the copyrighted work in copies or records;
- **Adaptation Rights:** prepare new works based on the original copy- righted material (known as “derivative” works);
- **Distribution Rights:** distribute the copies or records of the copyrighted work to the public by selling, renting, leasing or lending;
- **Performance Rights:** perform the copyrighted work in public and/or display the copyrighted work in public; and
- **Transfer Rights:** sell, lease or assign any of the above rights to third parties.

Creation of a Copyright

From the moment an original work is created in a set or “fixed” form, copyright protection exists, and the copyright is secured immediately.

For example, the minute you create an original drawing on paper, or write down or record an original song, you own the copyright for that work. However, if you merely have the image of the drawing or the tune of the song in your head and have not yet committed it to a “fixed” form (again, by writing it down

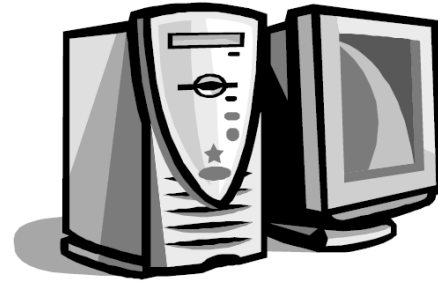
in sheet music, or recording it on a cassette tape or CD), no copyright exists since the work has not yet been “created” in a “fixed” form for purposes of copyright protection.

If you create the work over a period of time, what is “fixed” on a given date is the “created” work as of that date.

You do not need to publish the work or register your copyright with the United States Copyright Office to obtain and secure copyright rights.



However, you do need to register in order to file a suit for infringement or violation of the copyright (for works created in the U.S.), to stop the infringing party from using the work without your permission, or to recover any actual damages suffered from the use without permission. Further, the registration must have occurred prior to the act or acts of infringement to recover any statutory damages (certain damages that are provided under the copyright laws for infringement) and attorney’s fees if you prevail in a lawsuit.



What Works Are Not Protected By Copyright?

Not all works are protected. For example, works that are not “fixed” in a physical form of expression do not have copyright protection. Neither do names, titles, slogans or short phrases, lettering or coloring, or the listing of the contents or ingredients of something. Copyright protection does not attach to facts, ideas, procedures, methods, discoveries or devices, compared with descriptions, explanations or illustrations which are generally protected. Further, work that is based on or made up entirely of information that is public property cannot be copyrighted.

Also remember that just because you own a book or painting or any other copy or record representing copyrighted material, you do not have any rights under the copyright. Transferring the ownership of a physical object (e.g., the book or painting or other copy) which embodies the copyrighted material does not transfer any rights in the copyright itself.

Works for Hire

If, as an employer, you have employees who create works in the course of their employment, who is the author of those works? Under copyright laws, the employer - not the employee - is considered the author of the work. This applies to work created by

an employee within the scope of his or her employment, or to works that are specially ordered or specially made, so long as the parties agree in a written agreement that the work to be done will be a “work for hire.” Thus, employers should be sure to execute a written agreement with any independent contractors (i.e., non-employees who you hire to perform a certain task) hired to do work for the company so that the work to be created will be the employer’s property as a “work for hire.”

Joint Authorship

If there is more than one author of a joint work, the authors together own the copyright in the work (in other words, they are co-owners), unless they all agree to another arrangement. With a collective work (for example, a magazine or periodical), copyright in each separate contribution to the collective work is owned by the author of each separate contribution.

Each joint owner has the right to exploit the copyright without consent of the other owner (except in granting an exclusive license); however, the joint owner must account to other co-owners for any profits from licensing or use of the copyright.

Copyright Notice

You are no longer required to affix a copyright notice to works (ex. © 1989 John Doe). Although notice of copyright is optional for works that are published after March 1, 1989, it may be recommended for several reasons. Notice makes the public aware of the copyright protection given to the work, and identifies the owner of the copyright. Further, if the copyright is infringed in the future, the infringing party may not generally claim that he or she did not know the work was copyrighted as a defense, except under limited circumstances provided by law.

For most works, the notice should include the symbol “©,” or the word “copyright,” the first year of publication of the work, and the copyright owner’s name. For example, if XYZ owns the copyright to a given work, the work should be marked as “© 2003 XYZ” or “Copyright 2003 XYZ.” The notice should be presented in such a way that an ordinary person would be informed of it. If a work has not been published, the copyright owner may still give notice by indicating “Unpublished work © 2003 XYZ.”

How Long Does Copyright Protection Last?

The duration of a copyright can depend on a number of factors: the year the work was created, the year of publication, the country of origin, the number of authors, and whether the work was made for hire.

Generally, for works that were created after January 1, 1978, copyright protection for each copyrighted work lasts generally throughout the life of the author, plus an additional 70 years after the death of the author. As mentioned, protection begins at the time the work is created. For joint works (works with more than one author), protection lasts until 70 years after the death of the last surviving author. “Works for hire” are protected for the shorter period of either 95 years from publication of the work, or 120 years from the creation of the work.

Different rules apply to works created before January 1, 1978, since the laws applicable to these works were different and have since been changed.

Where a work is no longer protected by copyright, it is considered part of the “public domain.” An owner in copyright may also dedicate his work to the public domain. Anyone may exploit work in the public domain without obtaining permission.

Transferring Copyrights

The rights of a copyright owner may be transferred to another. Thus, the original author may not always be the copyright owner, since he or she may transfer his or her rights to another person or company. This person or company will then hold whatever rights were transferred. The current owner may choose to transfer all of the rights held by the owner, or just some of the rights.



A transfer of exclusive rights means that the person receiving the transfer has the right to be the only person able to use, produce or distribute the copyrighted material. Transfers of exclusive rights must be in writing and signed by the copyright owner.

A transfer of nonexclusive rights (a license) means that while the person receiving the transfer may use, produce or distribute the copyrighted material, others may also use, produce or distribute the copyrighted material, as long as they are also authorized to do so by the copyright owner. Transfers of nonexclusive rights generally do not have to be in writing, though it is recommended that they be in writing in order to fully ensure your rights are protected.

Rights may also be transferred by a legal act, or by being passed down through a will, or to legal heirs of the copyright owner.

While not necessary, transferees may choose to “record” their transfers with the Copyright Office, to inform the public of their rights under the transfer.

Registration of Copyrights

As mentioned, registration of a copyright is not necessary to obtain protection. However, certain benefits may attach to early registration. For example, as discussed earlier, lawsuits for copyright infringement require registration. Thus, you may not be able to stop others from infringing your copyright without registration.

If you choose to register a work, you need to file a completed application with the U.S. Copyright Office (<http://www.loc.gov/copyright>) along with a filing fee and a deposit of the work to be registered. Like a trademark application, a copyright application can be tricky for someone unfamiliar with how to prepare one. If you have any questions, consult a copyright attorney. The application fee is non-refundable, and the work deposited will not be returned. Registration can be made at any time during the life of the copyright. Your registration will become effective on the date the U.S. Copyright Office receives all these materials.



The information listed in this booklet is intended only as an overview of the process for federal registration. Should you choose to register, you should be sure to follow all instructions from the U.S. Copyright Office, or seek the advice of an experienced attorney.