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Trademark – Protect It or Lose It

By Robert L. Wells

Death and taxes are not the only things certain in life. If you come up with a wonderful moneymaking product, idea or enterprise, somebody is going to try to copy it or steal it from you. To complete the list, it's as sure as sin, death and taxes.



Trademarks are a little way the law tries to help a producer reap at least the reputation-related rewards associated with a desirable product or service. Trademark law, very simply, protects distinctive symbols, pictures, or words that sellers affix to distinguish and identify the origin of their products. In other words, they may copy the functional part of your product if its not patented or steal your idea if they can figure it out, but trademark law *tries* to help you make sure the public will at least know it's somebody else's product and not yours.

Stated another way, if you do it right, they can't steal your reputation. In trademark law we call it "trading off your goodwill." But, if you don't do it right, and stand vigilant against infringers, you may find some enterprising copycat trying to reap the benefits of your reputation by confusing your potential customers.

Doing it right means starting at the beginning. First, your trademark needs to be distinctive. Why? That's just the rule – don't argue with the lawyer. Besides, it doesn't make sense to let you start out with a mark that is already confusing with someone else's mark, does nothing but describe the product or uses some generic name. For example, the guy at the fair cannot trademark and protect the name Chocolate Covered Banana. Even if he manages to get a federally register trademark for the name, the law won't let him stop the guy at the next booth from using Chocolate Coated Banana.

This may sound simple, but the practical side is a mess. Too often, a company wants to start marketing a new product by making sure a name suggests or describes the product. It may be good marketing for a new product, but it's a bad trademark move. So long as the product doesn't do well, all well in the trademark world as no one will copy you anyway. The minute sales of your product shoot through the roof, it's time to call the lawyers if your trademarks are weak. If you don't believe me, spend a little time browsing the shelves in the grocery store and wonder why all those colorful vitamin bottles look almost identical to each other or the store's generic products have names that sound so similar to the real product. Your success will result in someone packaging the product like your product, coloring the labels-like your labels and choosing a name as close as possible to your name.

It's very simple, the more distinctive your trademark, the more likely the law will protect you from the copycats. Why do you think they chose the name Exxon instead of American Gasoline or Gasoline Express?

Protecting your trademark also means deciding what you want to protect – the name, the shape, the colors? If it's just the name, protection begins by making sure there's no others out there who are already using a similar mark. Trademark searches are available at reasonable prices for anyone serious enough about a trademark to want protection. If someone has a mark that sounds like your mark, looks like your mark and pre-dates your mark, they can stop you from using your mark, registered or not. It's not unheard of for a competitor to search for and purchase such marks in trademark wars. I've had the pleasure of assisting a newly rich guy through that very very expensive battle.

After you've been careful enough to create a distinctive trademark, determine there are no identical marks and plan for a successful business, you have to decide how much protection you want to buy. Under trademark law, you have the power to stop the use of trademarks that are likely to confuse the public. By subscribing to an inexpensive trademark watch service, you can be notified of almost any attempt to register a mark that is remotely similar to your trademark.

If you're a small businessman, you've undoubtedly thought that lawyers just don't understand how small businesses work. Big business can hire lawyers, research filings and beat up on some little guy in Montana. Small businesses have limited assets for development, marketing, staffing and the kid's education. If the product is not a great idea, why waste the money fighting legal battles. That's why most really small businesses adopt descriptive unprotectable names or change marks when the corporate giant files

the lawsuit, real infringement or not.

But, if a small business wants protection from infringers or harassment from a large company, this whole process of adopting and protecting a trademark can be scaled to fit the small venture. The business must understand the basic rules and the risks. The biggest mistake is to think that just because you claim or register a state or federal trademark that you have any protection.

The really cheap but risky way is to develop a very distinctive name, do an amateur search on the Internet and start placing TM after your mark to designate that you claim non-registered common law rights.

The best small business approach is to have a limited professional trademark search conducted of your potential mark, get some advance counseling and apply for a federal registration. It's a lot cheaper than changing a product's name after some lawyer in Arizona threatens you with annihilation for infringing on a mark you've never heard of.

If you're successful in getting a federally registered trademark, the law will require you, in certain instances, to put the world on notice that you claim protection for the trademark. That's what the little ® is all about. Then, with a subscription to a basic trademark watch service, you'll be put on notice of new registrations that might look or sound like your mark. A simple demand letter to potential infringers can usually protect your rights.

Trademark law is a protect it or lose it game. The key is knowing the rules. Then, it's a matter of playing the protection game. If you want to know more, hire a lawyer.

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