Trademark Primer

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ABSTRACT

Trademarks, in the broadest sense, encompass a range of indicators for goods and/or services, including service marks, collective marks, certification marks, trade names and trade dress. A trademark, which may be a name, symbol, feature, or design, functions as an indicator of source and identifies and distinguishes a good or service, enabling customers to ascertain the quality of the good (or service) based on the trademark. Unlike other forms of intellectual property rights (for example, copyrights and patents), the rights extended by trademarks are not generated from the creative activity of an author or inventor, but rather via their use in commerce, and it is the customer's association of the trademark with a specific product (or service) that is the key factor in establishing rights. The relative effectiveness of a trademark depends on its degree of distinctiveness. By way of classifying trademarks, a hierarchy based on strength of protection, from fanciful to merely descriptive, has been established. Whereas fanciful trademarks are inherently distinctive because they are terms invented solely for a specific purpose (for example, *Kotex*), descriptive marks (for example, *Chap-Stick*) must acquire secondary meaning to become protectable. In the United States, trademarks are protected by both state and federal laws. Although federal trademark registration is not necessary to assert trademark rights, it affords many advantages and benefits to the owner, and hence is by far the preferred means of protection. It is important to remember, however, that trademarks must always be maintained, protected, and correctly used. Their strength, and therefore value, is directly linked to public perception.

1. INTRODUCTION

This trademark primer is intended both to provide a general understanding for technology transfer practitioners and to introduce a protection tool for those who might, in the future, need to license trademarks for their own inventions or those of others. As trademarks are a distinct, legal form of intellectual property (IP), a working knowledge of trademarks will be useful for individuals who are active in the field of technology licensing.

While trademarks, patents, and copyrights all are referred to as IP, they do, of course, serve different functions: patents protect inventions, trademarks protect unique product or service identifiers, and copyrights protect original artistic or literary works. While the meaning of invention is generally known, the distinction between a trademark and a copyright is often confused. As an example, the contents (for example, format, photos, text) of a periodical are protected under copyright law, but the title of a publication (such as *Newsweek*) is protected under trademark law. More information about these topics can be found on the World Wide Web.[1]

Unlike patents and copyrights, trademarks (often called brands or marks) are regulated under federal and state laws. A mark may be registrable

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in the United States under the federal trademark legislation known as the Lanham Act (Title 15 of the U.S. Code of Federal Regulations). Federal registration provides protection throughout the United States. A mark may also be registrable in individual states; registration in a particular state is enforceable only inside that state. Registration is not required to establish rights in a mark; actual use in commerce is all that is necessary. A federal application can be filed in the U.S. Patent and Trademark Office (PTO) based only upon a good-faith intent that the mark will be used in interstate commerce, but a registration will not issue until actual use of the mark occurs in interstate commerce. Unregistered marks are protectable under common law but only in the market area in which they are actually used.

2. TERMINOLOGY

2.1 *Trademark*

A *trademark*, or *brand name*, is any word, name, symbol, device, or any combination of these elements that is adopted for use in commerce by a manufacturer or businessperson to (1) identify the company or person's goods or products, (2) distinguish those goods from goods manufactured or sold by another person or company, and (3) indicate the source of the goods carrying the trademark.

Examples of what may function as a trademark include the following:

- a word or group of words, such as a slogan (Tide®, Cabbage Patch Kids®, Don't Leave Home Without It®)
- a logo, symbol, pictorial representation, or design (Nike's Swoosh symbol, McDonald's golden arches, the five interlocking Olympic rings)
- a combination of a word or words plus a symbol, pictorial representation, or design (the word *Nestea* plus its design, the phrase *Cabbage Patch Kids* plus its design [see Figure 1])
- numerals, letters, or combinations thereof (Levi® 501® Original Jeans, IBM®, V8® [juice made by Campbell Soup Co.])
- the shape of a container or other packaging (Coke's bottle shape, the conical shape of the top of a Cross pen, the shape of Toblerone chocolate packaging)
- color (The Home Depot's orange, Owens Corning pink insulation)
- sound (MGM's lion roar, NBC's chimes)
- scent ("the high impact, fresh flower fragrance reminiscent of Plumeria blossoms" owned by Celia Clarke, doing business as Clarke's OSEWEZ)

2.2 *Service mark*

A *service mark* is similar to a trademark; however, the service mark is used in the sale or advertising of services, rather than goods. A service mark is used to identify the services of one person and to distinguish them from the services of others, (McDonald's® and Office Depot®). Service marks are afforded the same legal protection as trademarks and are registrable in the same manner and have the same effect.

2.3 *Trade name*

Normally, the name of a business entity is not registrable unless it is also used as a trademark or service mark, that is, in conjunction with the

Figure 1: Sample Trademark



goods and/or services of the business entity. A *trade name* is usually identified by its ending in the term Company/Co., Corporation/Corp., Incorporated/Inc., or Limited/Ltd. (for example, McDonald's Corp. [trade name] versus McDonald's® restaurants [service mark]). Trade name infringement is actionable under federal and state laws.

2.4 *Trade dress*

Trademark protection has been expanded by courts beyond words, slogans, symbols, and other devices to protect distinguishing, albeit unregistered, features of products. While *trade dress* originally referred exclusively to a product's packaging or dressing that was not protectable by registration, the concept has grown to include product designs, for example, the decor of a chain of Mexican restaurants ("a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings, and murals") and even sales techniques, such as Original Appalachian Artworks' simulation of adoption procedures and provision of birth certificates for the Cabbage Patch Kids® dolls.

To recover damages for trade dress infringement, a plaintiff must prove by a preponderance of evidence that (1) the trade dress has obtained secondary meaning in the marketplace (that is, that the primary significance of the trade dress, in the minds of the public, is to identify the product's source rather than the product itself); (2) the trade dress of the two competing products is confusingly similar; and (3) the appropriated features of the trade dress are primarily nonfunctional.

2.5 *Domain names*

A *domain name* is a name that identifies one or more Internet addresses and is part of the URL for a Web site (examples are *.com*, *.org*, and *.net*). Domain names do not act as marks in identifying the source of goods or services, however, where a domain name is used as something other than merely an address, it becomes a trademark or a service mark. For example, in *Amazon.com*, the domain name (*.com*) is functioning as a service mark because *.com* is part of the identity of the service of the Amazon.com Web site. For example, when the term *Google*® is used on the home page of Google or is used in advertising or promoting the Web site, it is being used to identify the source of specific services and, therefore, is acting as a service mark. Similarly, the domain name *Amazon.com* also functions as a service mark because it, along with the service mark *Amazon*®, is used in advertising to designate the source of the services.[2]

2.6 *Certification marks*

Certification marks certify that products or services manufactured or provided by others have certain qualities. Vidalia® of Vidalia onions provide an example. According to Georgia's Department of Agriculture, "*The certification mark is intended to be used by persons authorized by the certifier and will certify that the goods in connection with which it is used are yellow Granex type onions and are grown by authorized growers within the Vidalia onion production area in Georgia as defined in the Georgia Vidalia Onion Act of 1986.*"[3]

2.7 *Collective marks*

Collective marks are used by members of a group or organization to identify the goods it produces or services it provides. An example of a collective mark is *ILGU*® (International Ladies Garment Union).

3. SELECTION AND ADOPTION OF A MARK

3.1 *Types of marks*

A hierarchy of marks exists within this protection system, with the more distinctive marks being afforded a wider scope of protection than the less distinctive ones. The order of marks from most distinctive to least distinctive is: fanciful mark, arbitrary mark, suggestive mark, and descriptive mark (see Figure 1). It is best to select a mark that is fanciful, arbitrary, or suggestive. As one might expect, the more distinctive the mark, the better the chance of protecting and registering it.

A *fanciful mark* is one that is created solely for the purpose of functioning as a mark and has no other meaning. Examples are *Xerox*®, *Pentium*®, *Kodak*®, *Exxon*®, *Clorox*®, *Kotex*®, and *Polaroid*®.

An *arbitrary mark* is one that comprises a common word or symbol that is arbitrarily applied to the goods or services in question such that the word or symbol does not describe

or suggest the product. Nor would the words normally be associated with the product. Examples are Command® (hair-care products), Shell® (gasoline), Apple® (computers), Ice Cream® (chewing gum), Guess?® (jeans), and Die-Hard® (batteries).

A *suggestive mark* is one that suggests, but does not describe qualities or functions of a particular product or service. If the qualities are not instantly apparent from the mark, but with an exercise of imagination could convey the characteristics or qualities of the product or service, the mark is "suggestive." Examples are Crosstalk® (software), Stronghold® (nails), 7-Eleven® (retail store services), Coppertone® (tanning products), Rapid Shave® (shaving cream), Gleem® (toothpaste), Roach Motel® (roach bait), Woolite® (wool cleaner), and Honey Maid® (graham crackers).

Arbitrary, fanciful, and suggestive marks are inherently distinctive and are given a high degree of protection.

A *merely descriptive mark* generally affords the narrowest scope of protection. The descriptive mark immediately identifies or brings to mind the characteristics, qualities, ingredients, functions, composition, purpose, attribute, use, or other features of a product or service. A merely descriptive mark is not protectable because the word or words comprising the merely descriptive mark should be available for all competitors to use. It is sometimes difficult to distinguish a suggestive mark from a merely descriptive mark. A merely descriptive term is protectable only when it holds a secondary meaning or distinctiveness, that is, the consumer accepts and recognizes it as denoting only one source (product or service) and the term is synonymous with that product or service (and, thus, functions as a mark), rather than merely being a descriptor of the goods or services. Courts will often look to the following when deciding whether a term is merely descriptive:

- the amount and manner of use of the term in advertising
- the volume of sales of products/services bearing the mark
- the length and manner of the term's use
- the results of consumer surveys

Marks that have been found to be merely descriptive include: Chap-Stick® (chapped lip treatment), Shear Pleasure® (beauty salon), Hair Color So Natural Only Her Hairdresser Knows for Sure® (hair coloring), Beef and Brew® (restaurants), Hour after Hour® (deodorant), and Raisin-Bran® (cereal). To illustrate, the term *brilliant* would be merely descriptive for diamonds, suggestive for furniture polish, and arbitrary for applesauce.

Finally, *generic terms* are the common name of a class of things and are, by definition, incapable of indicating source and can never function as a trademark or service mark (examples of generic terms are *blended whiskey, computer software, mouse, disk,* or *keyboard*).

In some cases, generic terms are those that, at one time, functioned as trademarks but that, as a result of widespread use, lost their ability to function as a source identifier and came to mean, to the general public, the product itself (specifically) rather than merely one

Figure 2: Types of Marks



manufacturer's brand or version of the product. Such loss of distinctiveness in a trademark, so-called genericide, happens when a mark, via misuse, becomes a generic term (for example, Frigidaire® becomes equivalent with refrigerator) and thus, ceases to indicate the source and falls into the public domain where it is thereafter owned by no one.

Such former trademarks are numerous, including: *aspirin, cellophane, cola, cornflakes, cube steak, dry ice, escalator, high octane, kerosene, lanolin, linoleum, mimeograph, Murphy bed, nylon, raisin bran, refrigerator, shredded wheat, thermos, trampoline, yo-yo, monopoly,* and *zipper*. As an example, the term *escalator* was first used as a trademark (Escalator® [moving stairs]) but, over time, the public stopped using the term as a trademark (an adjective, or modifier, such as in *Escalator® stairs*) and started to designate any moving stairs, regardless of the manufacturer, as *escalator* and thus, the trademark term became the name of the product.

3.2 *Preadoption investigation*

Once a mark is selected, but prior to its use, a thorough search should be undertaken to determine whether the mark is available for both use and federal registration. Sources of information on existing registered marks are discussed below.

3.2.1 *Records of the U.S. Patent and Trademark Office*

A prospective trademark user is charged with constructive notice of any identical or confusingly similar mark that is federally registered. A search of the PTO records can be conducted online on the PTO database,[4] by hand in the office records, or by means of the Trademarkscan® database[5] (File 226)[6] of Dialog services. Also, File 116 (brand names) of Trademarkscan can be searched.

Private search companies undertake record searches for a fee. These companies include:

- Thompson & Thompson[7]
- Dialog[8]
- Questel/Orbit[9]
- Micropatent[10]
- Corsearch[11]

The companies will search the federal register and pending application records as well as phone directories, yellow pages, industrial directories, and state trademark registers in an effort to determine if a particular mark or a similar mark is already in use.

Also, if use of the mark is contemplated in any foreign countries, the trademark and service mark records of those countries should be searched. Searching of trademark records of countries such as Canada (File 127), France (File 657), Germany (File 672), and the United Kingdom (File 126) can be performed on the Trademarkscan database.

3.2.2 *State trademark records*

The Trademarkscan database (for state records, File 246) can be utilized to search the trademark and service mark records of all states.

Related information can be accessed using Internet searches. Network Solutions' Web site[12] provides a convenient search tool to determine if a proposed mark is being used in a domain name and who owns it (the "WOSIT" button). One can also use a browser to search for directly conflicting Web sites or for business names across the country. The following sites are useful for such searches:

- Big Book[13]
- Switchboard[14]
- GTE Superpages[15]
- World Pages[16]
- ZIP2[17]

3.3 *Misconceptions*

Below is a list of some common misconceptions about trademark protections:

- The fact that an individual has incorporated, qualified to do business under a name, or registered the name in the assumed name records of a particular state does not automatically bestow to that individual the right to use the name as a mark.
- A person does not have an absolute right to use his or her own name as a trademark or service mark (for example, Old McDonald would likely be barred from using his surname as a trademark and

service mark for his own national chain of fast food hamburger franchises).

- Registration in one state (or jurisdiction) of a mark for use as a trademark or service mark does not necessarily allow use of the mark elsewhere.
- Even though a mark appears in an abandoned application or an expired registration, the owner of that mark may still be using it, and, thus, have protectable common law rights against a subsequent user.

4. REGISTRATION OF A MARK IN THE PTO

4.1 *Process*

It is not necessary to obtain either a state or federal registration to be able to protect a mark, as rights in a mark are based upon use, not registration, of the mark. Generally, the owner of a mark is considered to be the first person or company to use a mark, or to file an intent-to-use application in the PTO, for a particular product or service or for related products and services. However, registration of a mark in the PTO is highly recommended, as registration confers significant nationwide benefit upon the owner, even if the actual use in commerce of the mark is limited to a small geographic area—the term *commerce* is broadly construed to mean any commerce that may lawfully be regulated by the U.S. Congress.

The Trademark Act (15 U.S.C. § 1127) defines use in commerce as follows:

The term use in commerce *means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this Act, a mark shall be deemed to be in use in commerce:*

(1) on goods when (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

4.2 *Advantages of registration*

Registration of a mark on the Principal Register[18] of the U.S. Patent Office allows an owner to:

- prevent registration of the identical or confusingly similar marks
- secure injunctive relief and damages against infringers nationally in federal court (whereas unregistered marks may be protectable only in the specific market where they are used)
- assert the registration in federal court as prima facie evidence of the validity of the registration, of the ownership of the mark, and of the right to exclusively use the mark in commerce
- have the mark treated as incontestable after five years' use
- eliminate the defense of innocent adoption by anyone using the mark after the date of registration, thereby affording nationwide protection to registered marks, regardless of the areas in which the mark is actually used
- prevent the importation of goods bearing infringing or counterfeit marks by recording the mark with U.S. Customs

4.3 *Actual use versus intent-to-use applications*

A dual-application system exists in the PTO that permits the filing of trademark/service mark applications based upon an intent to use the mark, as well as applications based on actual use of the mark in commerce. However, while an application may be filed based on a bona fide intent to use the mark, the applicant will still have to make actual use of the mark in commerce before the mark can be registered.

The intent-to-use procedure encourages the early filing of an application because, while the application is pending, the applicant will have the benefit of constructive-use priority. Thus, subject to the mark actually being registered, the applicant will have prior rights in the mark against all others nationwide (except for those who used the mark before the application was filed, or who filed an earlier application, or who had priority based on a foreign application).

4.4 *Term of a federal registration*

Federal trademark/service mark registrations are valid for a period of ten years and are renewable for ten-year periods as long as the mark remains in actual use.

Additionally, between the fifth and sixth year from the date of a federal registration, the registrant must file a declaration or affidavit that the mark is still in use as of that date (as of the sixth year after registration). An affidavit of use must also be filed in the year prior to the end of each registration term. Failure to file such a statement will cause the registration to be canceled by the PTO.

4.5 *State registrations*

A state registration does not confer the same rights and benefits as a federally registered mark. For example, a state registration is enforceable only within that state while federal registration provides nationwide protection and constructive notice.[19] Usually there is no need to seek a state registration if the mark is registered in the PTO. A state registration should be obtained only if the mark is not registrable in the PTO.

5. INFRINGEMENT OF A MARK

Protection of a mark, whether registered or not, involves actions against other marks that are likely to cause confusion. For a trademark owner to prevail against an accused party, neither the respective marks nor the respective goods or services need to be identical. Instead, likelihood of confusion (the test for trademark infringement) is determined by considering the following factors:

- the strength or weakness of the plaintiff's mark
- similarity of the marks in sound (for example, *SO* found confusingly similar to *Esso*), appearance (*Old Forester* infringed by *Old Foster*), or meaning (*Tornado* for wire fencing held confusingly similar to *Cyclone* [wire fencing])
- similarity of the product or services
- likelihood that the prior owner will bridge the gap between the parties' respective products or services
- presence or absence of actual confusion (actual confusion obviously being the best test of whether there is a likelihood of confusion occurring between two conflicting marks)
- defendant's good faith in adopting the mark
- sophistication of the potential purchasers (buyers of expensive goods may be more discerning purchasers and less likely to be confused between two similar marks for the same goods)
- channels of trade (the goods/services are sold, or are not sold, in the same marketing channels to the same general class of customers)
- similarity of the advertising media

6. THE "CARE AND FEEDING" OF MARKS

Trademarks and service marks are valuable assets, so their proper use, maintenance, and protection should be a paramount concern of the owner. It is critical to avoid misuse of a trademark, which can destroy the legal significance of the mark, for example, misuse leading to genericide, with the unfortunate outcome of a valuable trademark becoming a generic term. There is also the necessity of maintaining trademarks so as to avoid any possibility of creating unfavorable commercial impressions; solid, strong, and maintained trademarks are source indicators that attract business. Proper usage for trademarks and service marks will go a long way to protect marks and prevent genericide:

- Always use the mark as a proper adjective that modifies a noun, such as Cabbage Patch Kids® dolls, Levis® jeans, Xerox® copy machines.

- Never use a mark in the possessive form, in the plural form, or as a verb.
- Avoid prefixes, suffixes, additions, or deletions of the mark.
- Distinguish the mark in use from surrounding text such as a distinctive typeface, quotation marks, all capital letters or, at the very least, capitalize the first letter of each word of the mark.
- For marks registered in the PTO, use the symbol of registration, namely, ®, or the phrase *Registered in the U.S. Patent and Trademark Office or Reg. U.S. Pat. Tm. Off.*
- For unregistered marks, use either the informal notice TM or SM (or the corresponding symbols) or an asterisk indicating *A trademark/service mark of XYZ Company*.

The following ditty was a prize-winning submission at the Coca-Cola Co., which should be kept in mind to promote the proper usage of any mark:

Three laws bind the Kingdom of Coke.
This trio must never be broke:
The "C" should be tall,
Not possessive at all,
And the plural should never be spoke.

7. LICENSES

Never allow a third party to use your mark without entering into a written license agreement, which, at a minimum, enables you to monitor and control the nature and quality of the goods or services in connection with which the mark is being used by the licensee. Otherwise, you may end up with a *naked license*,[20] which could negatively affect the distinctiveness of your mark, possibly leading to the de facto abandonment of the trademark. Also, provide in any license agreement for the licensee to notify you of potentially infringing marks so that you may police your mark, as unauthorized uses of your mark will similarly negatively influence your scope of protection.

An assignment of a mark must be in writing and, whether registered or not, must include "*the good will of the business associated with the mark*" or the assignment is invalid. The basis for this provision is that a mark is merely the symbol of good will (that is, the owner's reputation for quality in connection with the goods or services sold under the mark). An assignment of a mark without the accompanying good will is an assignment in gross[21] and is invalid. Also, an intent-to-use application cannot be assigned as there is nothing to assign until the mark is in actual use.

8. CONCLUSIONS

When properly managed, maintained, protected, and used, trademarks are a valuable form of IP rights. In a comprehensive and coordinated IP strategy, trademarks can augment other forms of IP rights protection, for example, patents and trade secrets, and therefore should not be overlooked as additional options in a layered IP portfolio. A single product, such as crop variety, can have multiple forms of IP rights protection, including patents, trade secrets, and trademarks. It is therefore important to understand what a trademark is, how to select a strong mark and establish rights, the importance of registration, and the necessity of policing the trademark, whether to maintain the integrity of licensees or to identify potential infringers. Finally, strong trademarks are distinct and specific indicators of source. Protecting this function, an owner never wants to find his or her mark in a dictionary. That would mean the mark had joined the ranks of the unfortunate victims of genericide, like the yo-yo. ■

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1 For copyright information, go to www.copyright.gov; for patent information, go to www.uspto.gov/main/patents.htm. The U.S. Patent and Trademark Office has a very informative Web site at www.uspto.gov/web/menu/tm.html.

2 See www.uspto.gov/web/offices/tac/notices/guide299.htm.

3 Registration No. 1,709,019.

4 www.uspto.gov.

5 http://library.dialog.com/bluesheets/htmlaa/blo246.html.

6 See library.dialog.com/bluesheets/html/blo226.html.

7 www.t-tlaw.com.

8 www.dialog.com.

9 www.questel.orbit.com/patents/.

10 www.micropat.com/trademarkwebindex.html.

11 www.corsearch.com.

12 www.networksolutions.com.

13 www.bigbook.com.

14 www.switchboard.com.

15 www.superpages.com.

16 www.worldpages.com.

17 www.zip2/com.

18 A trademark or service mark may be registered with the united states patent and trademark office on either the principal or supplemental registers. Arbitrary, fanciful, and suggestive marks are on the principal register, while suggestive marks with secondary meaning are on the supplemental register: "A certificate of registration of a mark upon the principal register provided by this act shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate." 15 u.s.c. § 1057 (b).

19 Constructive notice is a notice to the public of the registrant's claim of ownership of the mark.

20 Naked licensing means the licensing of trademarks without that trademark owner's retaining the right to approve the said use of the mark in connection with the licensee's goods or services. As a result, the trademark would be deemed abandoned (*Barcamerica International USA Trust v. Tyfield Imports, Inc.*, 289 F.3d 589-598 [9th Cir. 2002]).

21 Assignment in gross: A mark is a symbol of the mark owner's goodwill in the goods or services associated with the mark. The rule both under the common law and the Lanham act is that a mark cannot be assigned apart from the goodwill in the mark. An assignment in gross is an assignment of a mark without the associated goodwill. This rule is intended to protect the public from the deception that might arise if the assigned mark becomes associated with goods or services of a different nature or quality than was previously the case. An assignment in gross is invalid, and the assignee acquires no rights by such an assignment. See www.inta.org/index.php?option=com_content&task=view&id=174&itemid=132&getcontent=1.