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The Why Clipper

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Why Register?

Registering copyrights and trademarks early provides several advantages in protecting your intellectual property.

Early registration of copyrights and trademarks provides both substantive and procedural advantages, which may significantly increase your assets and the protection of your intellectual property.

Registration provides a legal presumption that the information on the certificate is correct. If your intellectual property is involved in a dispute and you own a registration, the other side must obtain sufficient evidence to overcome those presumptions. Without registration, you must produce sufficient evidence to support your claims.

Priority dates, ownership, and legal sufficiency are three key disputes you may not need to fight when you own a

registration. The dates of application filing, first use of a trademark, and of creation and first publication of a copyrighted work critically determine which party has priority and thus superior rights. In time, the documents and witnesses that can substantiate priority claims become unavailable. Documents may be lost or destroyed. Some witnesses die, others develop adverse interests.

Intellectual property disputes often arise between employer and employee, inventor and licensee, firm and vendor. In these typical situations, it is best to obtain signatures and evidence from others early, when their interests are more strongly aligned with yours. In time, memories fade, and often fade disproportionately.

Proving that you, and not your licensee or supplier, are the entity that owns the trademark or copyright is facilitated by a registration. Disputes often arise between parties that previously had cordial business relations, even formal written contracts. Yet when relations turn sour, even apparently simple facts may be questioned by your adversary.

A work must contain sufficient "original authorship" to receive copyright protection. For merchandisesuch as toys, decorated plates, and collectable crystalan adversary can question whether there is sufficient authorship in the artistic work separable from the utilitarian function of the useful article. A copyright registration presumptively affirms your rights, and places the burden on your adversary to overturn the decision and expertise of the federal Copyright Office.

The courts do not recognize everything as trademarks that people use as trademarks. Proving that potential purchasers think of a trademark as indicating the source of the products and servicesrather than as describing the products, ingredients, or componentscan consume time and money. This can be the difference between a protectable trademark and a freely copied phrase or design. Especially for words already appearing in the dictionary, having the expertise and decision of the United States Patent and Trademark Office on your side helps.

Registration also helps prevent disputes. Your federal trademark registration provides public notice of your trademark rights. The federal trademark register is routinely searched by those considering adopting a new trademark. Your prompt registration permits others to avoid unintentionally adopting a trademark confusingly similar to yours.

Before November 1989 you had to actually use your trademark before you could even

apply for federal registration. The federal application process could easily take over nine months. With the new Intent-to-Use provisions, you can now apply for a federal trademark registration before you invest in actually marketing the products and services with the trademark. However, unlike the earlier trademark law when minimal token trademark use would support a federal application, now bona fide use in the ordinary course of business is necessary to promote an intent-to-use application to actual trademark registration.

Having the burden of disproving the legal sufficiency for a copyright or trademark can easily cost your adversary over fifty thousand dollarsand save you a like amountshould litigation occur. Moreover, with a registration issued before the infringement began, legal costs and attorneys' fees may be awarded to you by the court. Such threshold expenses are often the reason infringers quickly settle disputes, stopping their sales and paying settlement damages. Without a registration, you have a high initial cost to enforce your rights; with a prior registration, the adverse party has the high initial cost to try to disprove your claimed rights. *K&K*

Why Be Fair?

A reputation for fair, honest, intelligent dealing smoothes negotiations over rough spots.



As attorneys and counselors, we are often requested to help solve problems, to help prevent problems, and to help negotiate solutions. Sometimes intangible rights to intellectual property are involved, sometimes the question is apparently how to divide the money pie. Whatever the specific, we seek to present and promote fair solutions.

A fair solution is at least one from which all parties leave feeling good, without later hidden costs. A fair solution is not maximum profit to one party with maximum cost to the other. Attempting to squeeze out the last possible penny usually increases psychological resistance and decreases rational bargaining. Basic economics teaches the law of diminishing returns, at some point it costs more than a dollar in effort to extract an additional dollar from the situation.

Often additional value can be created by recognizing the true interests of the parties. What one side wants may be of relatively little importance to the other. Even with the same dollar figure, timing may be critical to one side for its cash flow, yet flexible within several years to the other side. In many business dealings, the bottom line cost is only one of several material considerations.

Psychological rewards such as recognition and status and corporate political considerations may weigh as heavily on the decision maker as strict dollar cost.

Repeat encounters are usual in today's commercial dealings, both with the organization and with the particular people. Deceptive practices in today's negotiation are likely to taint future relations for many years. Mistrust engenders myriad misperceptions and suspicions; it hobbles negotiations. A reputation for fair, honest, intelligent dealing smoothes negotiations over rough spots. Moreover, even the best intentioned business sometimes makes mistakes. A reasonable settlement today may prevent harsh demands tomorrow.

Thus, we seek fair and good solutions for our clients, without forcing the other side into an impoverished corner. We prefer the parties soon return to normal business dealings rather than remain mired in penny-ante bickering.

We will zealously defend our client's rights as licensor, licensee, plaintiff, or defendant but our goal is to effectively and promptly solve the problem. *K&K*

Why Search?

Why Watch?

Early searches can alert you to problems, providing both time and competitive marketing information.

Early searches for proposed trademarks, copyright purchases, and patentable inventions can alert you to problems months ahead of public marketing or investment, and can provide both time and competitive marketing information. An early search report can provide either the confidence to nudge a fledgling idea into a successful commercial program or the warning to stop a doomed project.

With the new Intent-to-Use provisions, a competitor can now apply for a federal trademark registration before actually marketing the products and services with the trademark. If the competitor then does bring the product to market, its federal priority is likely to date from the date of application filing with the trademark office. Thus, even if you were to bring your product out a full year before the competitor, the competitor may have superior trademark rights. Even if the two trademarks aren't identical, if they are confusingly similar you can be forced to stop your use of the trademark.

If you are considering a purchase where copyrights are involved, it is prudent to search the recorded ownership with the United States Copyright Office. Too frequently the original author or artist may

have neglected to register the copyright. Worse if unknown to you publication may have been done with improper copyright notice, potentially dedicating the work to the public domain. Recent Supreme Court decisions of the work for hire doctrine have significantly altered the balance of ownership, and necessary evidence, between employer and independent contractor. For works registered before 1978, a valid copyright registration may have been initially granted, but the copyright may have been lost for failure to properly file a renewal. When the original owner dies before the renewal is granted, the widow(er) or estate has important rights which may transcend any prior agreement. Finally, many important copyright properties have a long history of sales and security assignments. Before investing, you want to know the property is free of security interests recorded with the US Copyright Office or elsewhere and that your seller is the recorded owner of the property.

Before filing a patent application it is prudent to obtain a confidential search of the disclosed invention. Often the patent search will indicate prior art around which your patent application may be drafted.

Even when you are deeply immersed in the relevant art and markets, such a search may provide important information on your competitors and on additional market opportunities. Partially blocking patents may be licensed or purchased, for example.

The best time to search is early, before significant financial and emotional resources are invested in the project. The more information you can provide for us, the better targeted our search can be. For trademarks, we should know the proposed mark; the goods and services with which you may use the mark; the meaning(s) if any of the mark in English or any other language including whether the mark may be a surname, geographic area, or component of the product or service; any similar marks used by others known to you; whether you may license others to use the mark; and whether you ever intend to use the mark outside the United States.

For copyright searches, it is helpful to have the exact title, author's name, and approximate date of first publication or creation. For patent searches, a patent number and brief description of the invention will narrow the search of issued patents; for patentability we need a description of the invention.

Trademark watching services, when requested, will advise you of any marks noticed which appear confusingly similar to your marks for related goods and services. Trademark searches provide a snapshot at one point in time. For important trademarks such as your corporate name and leading brands, you will want to know whenever someone proposes using a confusing similar trademark. Watching services often can provide early notification when a trademark application is filed with a government

agency, as well as later notification after an application has been approved by the trademark office and is published for possible opposition. Trademark watching services are available for the United States, and for many foreign countries.

Similar watching services can be requested for a specific area of patents, whether restricted to issued patents in the United States or broadened to patents and sometimes applications in foreign countries. Applications for patents in the US are secret until a patent is actually issued, but many foreign countries publish patent applications 18 months or so after initial filing, whether or not a patent ultimately is granted.

We monitor general legal developments in our areas of practice trademarks, copyrights, patents, computers; food, drug, and medical devices; domestic and international licensing. Your trade associations may monitor legal and industry developments that affect particular business. Unless you explicitly request us to do so, however, we do not undertake to monitor such developments for you. Watching services are one means of monitoring. *K&K*

Why Confidential?

Evidentiary privilege, the ability to withhold relevant information from litigation is not absolute.

Communications with legal counsel are generally confidential and privileged, protected from routine exposure during litigation. The courts grant this special status to the attorney-client relationship to foster candid communication. Both the constitutional right to counsel and efficient conflict resolution require that counsel and client feel free to honestly explore facts, evidence, opinion, and feelings.

Some documents have a higher likelihood of being involved in a dispute. A trademark search opinion advising of dangers in the use of a mark needs more protection than a routine transmittal of a trademark registration, a public document. We mark more sensitive documents as Confidential, to alert you and your staff to the need for more delicate handling and to prepare for possible disputes.

Although attorney-client communications are generally privileged from routine exposure during litigation, you can waive that privilege by divulging the communication beyond those few in your company with a need to know and the fiduciary responsibility to maintain the confidentiality of the information.

Evidentiary privilege, the ability to withhold relevant information from litigation is not

absolute. An attorney may not help a client commit a crime; although an attorney may counsel and defend a client after a crime has been committed. If a criminal harm is likely to be committed, an attorney may have a duty to warn authorities to avoid death or serious bodily injury. The privilege becomes more complex with potential conflicts of interest, a corporate counsel initially representing both the corporation and an employee, for example. And if a client introduces a matter into litigation directly relevant to the attorney-client privilege (such as the defense of prior legal opinion against a willful infringement claim), the privilege may be waived for those matters. Our judicial system created the special evidentiary privilege to encourage complete, candid communication with legal counsel, with physicians, and with religious advisors. Safeguard your privileged communications and your commercial trade secrets; both are valuable assets. *K&K*

Why Contract?

Documenting important agreements decreases the likelihood of later misunderstanding or selective forgetting.



A written contract is advisable whenever you can anticipate adverse consequences if the agreement is broken. Most agreements can be taken to court for enforcement, even if not in writing. Oral agreements may be enforceable. Even simple behavior may create a binding agreement. Documenting important agreements decreases the likelihood of later misunderstanding or selective forgetting. A written agreement also reminds the parties of their obligations, making compliance easier. For corporate transactions, a written agreement can be an efficient way to communicate duties and deadlines to your own employees.

Written agreements are necessary to complete certain legal transactions. Copyright transfers should be in writing to be enforceable. Trademark assignments may not be recorded if they are not in writing and specifically identify the trademark, registration number, and country of all marks conveyed. In many countries there are no trademark rights without registration, and no registration without fully identified written assignments. Patent applications may be

invalidated without written assignments from all involved inventors.

People move, can't be found, go out of business, die, or develop adverse interests. Signatures may become impossible to obtain after the fact. Sometimes parallel documentation may be reconstructed at additional expense, but other times critical rights can be irretrievably lost without proper documentation.

The hallmark of a trademark is the owner's reputation and quality control. If you let another business use your trademark without a proper trademark license you risk losing your own trademark rights. A proper trademark license educates the licensee what it must do to uphold your quality standards while it provides evidence of your ownership and use of your trademarks.

Written agreements with prospective employees can preserve your rights to inventions they make and safeguard your proprietary trade secrets. Reasonable noncompetition agreements can sometimes be enforced against key former employees. Clear employee agreements remind employees to protect your confidential business information marketing plans, customer preferences, and technical trade secrets.

Written agreements are especially important for international business. Foreign countries are not governed by US law. You cannot assume that rights and obligations will be recognized under foreign law as they are in

the United States. For example, in many countries a distributorship cannot readily be terminated. Before initiating foreign sales, you should ensure your trademarks are protected there and you have lawfully anticipated business terminations.

Virtually all agreements end sometime; good agreements anticipate termination and the disposition of rights. A written agreement can help the parties anticipate how residual assets should be distributed. Informal consensus may appear sufficient for an optimistic new venture, but agreement becomes much harder later when the business is rich and famous, or in debt and notorious.

In this country, a good contract is in plain English and covers the significant risks either side can reasonably anticipate. No one can anticipate all possible contingencies. For many purposes, depending on the amount at risk and the commercial sophistication of the parties, a brief written agreement may be practically better than a lengthy obtuse form document. No written contract can guarantee that all promises will be kept, but a clear contract appropriate for the transaction can memorialize the parties' expectations and risk allocation. *K&K*

Why Global?

Written laws, enforcement procedures, and common expectations differ in foreign countries.

Most law is national; law stops at the border. Yet increasingly, business is international. Written laws, enforcement procedures, and common expectations differ in foreign countries. Recognizing this is critically important in counseling today's business.

The United States Constitution was a unique document when drafted in 1787. It recognized the federal power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors the exclusive right to their respective writings and discoveries" and the federal power to regulate interstate and foreign commerce. These provisions provided the foundation for uniform federal patent, copyright, and trademark laws, prominent exceptions to the open competitive economy of the United States and much of the world.

Intellectual property is given generous protection in the United States. Some foreign countries provide virtually similar rights, others are narrower or broader in certain particulars. Although most industrialized countries provide some copyright protection, the scope, duration, and remedies differ. Especially for computer software and useful articles, US copyright principles cannot be relied on in other countries.

For example, Canada recently amended its Copyright Act. Mass produced, useful articles created before June 8, 1988 are not protected by copyright in Canada. If protection is to be obtained, it must be by an industrial design patent, issued within one year of the item's first commercialization to Canada. A US company may lose its property rights in best selling items simply by selling one copy to a Canadian firm or by exhibiting at a US trade show at which Canadians attend.

Just as it often takes a native speaker to understand the nuances of a foreign language, foreign laws cannot be accurately understood divorced from their cultural context and practical enforcement. Over the years, we have developed relations with particular foreign counsel in most countries of the world. Our foreign counsel provide the local administration and honed judgment that further enhance and protect your intangible assets.

If you anticipate doing business outside the US or if you wish to maintain your rights or increase revenues outside the US, consult with counsel early. If you would be bothered by unauthorized uses of your trademark outside the US, consult with counsel now. Trademark watching services are available for the US and many other countries, giving early notice of trademark applications and publications for opposition. *K&K*

Why Investigate?

Forewarned is forearmed.

Discreet, brief investigation often pays significant rewards. Investigation beyond the immediately available information is often helpful in selecting a new trademark, in licensing, in sales or purchase of intellectual property, and in early litigation negotiations.

Before adopting a new trademark, it is prudent to have a search conducted of related trademarks. It is unlawful to use a trademark that is confusingly similar to a trademark previously adopted and in use by another. Trademark searches usually focus on public records: federal trademark registrations and applications, state trademark registrations, and prominent unregistered uses as shown in trade directories.

An unused trademark may still appear on the federal register fifteen years after the mark is no longer in use. If a trademark search discloses potentially blocking trademarks and if you are not sure that the mark is still in use, a discreet investigation of actual use is advised.

Sometimes trademark registrations are granted for a wider range of goods and services than are actually used with the mark. For example, two decades ago the United States Trademark Office issued registrations for "computer software." With major growth in the computer industry, registrations now are required to identify the specific kind of software. An old registration with a broad

description of goods may be blocking although the actual use of the mark is much narrower.

In our experience, blocking registrations are often deadwood, paper registrations of trademarks no longer in use. Discreet investigation may show that the company is no longer in existence and that trademark rights were not assigned to any successor business, or that although the owner is still in business, it no longer uses the trademark.

The legal test for trademark abandonment is nonuse together with the intent not to resume use. However, after two years of nonuse, the trademark owner has the burden of proving that it still has a reasonable, good faith, intent to use the mark.

If a trademark owner becomes aware that another is interested in its unused trademark, it may begin some trademark use to preserve its rights, either to keep trademark rights for itself or to increase its bargaining position in licensing or selling the trademark rights. Therefore, investigations into possible trademark abandonment are usually conducted discreetly, without false statement but also without disclosing the ultimate purpose behind the inquiry.

Both in the United States and in many foreign countries, trademark registration may be facilitated by a properly worded consent by the owner of a similar mark for similar goods. When businesses whose livelihood depends on their marketing decisions consent to trademark use, a trademark office may

defer to their judgment, and conclude that there is little likelihood of confusion. In some foreign countries it is common for the requesting party to pay the legal expenses of the consenting party.

In any negotiation, the more you know about the other side and its true interests and situation, the more informed your strategy and the better your bargaining position. On-line computerized databases now provide prompt access to financial reports, news stories of the past several years, stockholders reports, security interest filings, and litigation results. Credit reports of corporations are less regulated than of individuals. Since the general economy and specific company conditions may change over several months, such background information is helpful both at the beginning of negotiations and for a later update.

If extensive litigation is contemplated, the report of a private investigator may be helpful. There is no substitute for knowledgeable and discreet observation of the actual practices of a business: what the office looks like, how the telephone is answered, how salespeople comment on competitive goods. Whether locally, elsewhere in the United States, or overseas, for high-stake situations additional investigation should be considered.

Investigation of your own business should be considered in parallel with the investigation of an adversary. If the stakes are important enough for you to gather such additional intelligence, the other side may have a

similar view. Attorneys can deal with almost any set of facts, but surprises create additional problems. Forewarned is forearmed.

Licensing and sales of intellectual property often require estimating the value of intangibles what a reasonable royalty is, whether an advance payment should be nonrefundable, how much an option to license should cost, and many other issues. Successful negotiation often requires both an understanding of the true interests of the parties and the industry standards and norms against which reasonableness is often judged.

Nascent businesses often have little bargaining power against established corporations. Yet even for the first time author desperately wishing for a publisher, recognition of actual interests and business realities is helpful. Even the most bureaucratic organization is likely to accept reasonable adjustments in proposed agreements when supported by realistic business purposes. *K&K*

Why Comply?

"Let the buyer beware" has been replaced by federal and state mandates for honest commercial practices.



Good marketing complies with the law. Marketing should be truthful; factual assertions should have prior substantiation. Although deceptive practices are centuries old, the rules have changed. "Let the buyer beware" has been replaced by federal and state mandates for honest commercial practices.

Don't hide and don't lie summarize current regulations. The manufacturer or distributor of most consumer products must be identified by name and address. If your business operates under other than its legal corporate name or your personal name, most states require you to file an assumed business name statement. You probably want to ensure the name you actually use in business is also listed in the telephone directory.

The Federal Trade Commission requires that you have prior substantiation for any factual claims you make in marketing. Advertising a fact without prior substantiation subjects you to liability, even if later research could support that fact. Implications as well as explicit statements need to be truthful and nondeceptive.

Beyond broadcast media and print ads, what your sales staff says needs to be truthful, substantiated, and nondeceptive. While it's harder for a competitor to prove what your sales person said in the field, it's also harder for you to disprove allegations of misconduct. Consistent managerial insistence on proper formal and informal marketing is the best defense against claims of misconduct.

Consumers are less likely to rely on traditional puffing, and such exaggerations may escape regulation. When a claim is general rather than specific, incapable of measurement, and expresses an opinion rather than a fact, it may be found as permitted puffing. However "Free" or "cents-off" representations, sweepstakes, incentive games, and guarantees are regulated.

In addition to the general requirements for truthfulness and prior substantiation, many industries have particular additional rules: consumer appliances; home entertainment products; textiles fiber products; household furniture; jewelry; infomercials; hardware fasteners. Recently nutritional and health claims for foods and environmental claims have received regulatory attention.

Comparative advertising demands strict scrutiny, since your competition has a strong interest in defending itself. With growing recognition for a right of publicity, testimonials and endorsements need proper authorization. The estates of dead celebrities

may still control use of a person's name or likeness.

The federal Food and Drug Administration regulates food, drugs, cosmetics, and medical devices. Products must not be adulterated nor mislabeled. In addition to exact regulations for the label attached to the regulated product, advertising and associated point of sale materials are considered labeling. Prior notification or approval from the FDA is needed before certain classes of drugs and medical devices may lawfully be marketed in the US. FDA regulations extend to foreign manufacturing facilities for products eventually reaching the US.

Should you be the defendant in a product liability suit, violation of regulatory compliance laws will not help your case. Should you wish to sue a competitor, regulatory noncompliance makes you vulnerable for damaging counterclaims. Even if you were to prevail in the main infringement action, for example, noncompliance can substantially weaken your negotiating position, at great cost.

The government has insufficient resources to catch all unlawful activity. The bulk of commercial misconduct is reported by competitors and disgruntled workers.

Noncompliance subjects you to financial liability. More harmful, noncompliance can result in bad publicity, product recall, and product seizure. Businesses often prize the valuable goodwill they have developed over the years. One news story alleging deceptive

marketing practices or a recalled product can fatally damage a product line.

Not all unlawful acts receive governmental attention. Just as not all overparked cars receive tickets, not all regulatory violations are discovered and prosecuted. Nevertheless, we recommend clients comply with all reasonable regulations, and seek to revise unreasonable regulations. *K&K*

Why Audit?

Many businesses own more intellectual property than they realize.



Successful businesses create intangible assets and liabilities. While it's common to inventory stock and to audit financial records annually, a periodic audit of your intellectual property and liabilities may be just as necessary.

An intellectual property audit is an opportunity for you to review what you own, assess how well it is protected, and tidy up the formalities that can make the difference between profitable property and loss of rights: trademarks, copyrights, patents, designs, advertising clearance procedures, federal regulatory authorizations such as with the FDA, employee agreements, international transactions and protections, new marketing plans, expected competition.

Many businesses own more property than they realize. A good trademark is worth money. Even trademarks used on abandoned products may have value. All trademarks need not be registered to have value. Likewise you may own copyrights for works your employees create or for artwork you purchase. Inventions and trade secret know-how may have taken years and thousands of dollars to develop, yet be fragilily stored in the minds of key employees.

Intangible assets may be recognized on your balance sheet. How aggressively you wish to recognize your intellectual property is a decision to be made with your accounting counsel, but a rational decision cannot be made without knowing what you own.

An intellectual property audit may also be a good time to access your succession plan. Whether for health, financial, or personal reasons, no one can be counted on to stay with a company forever. Ideally, succession planning is a consideration in the initial business formation. Practically, new business startup concerns postpone many matters.

An intellectual property audit may also reveal significant potential liabilities, which may be reduced with quick action. The law cannot protect against all misfortune. Insurance provides a way to pay a fixed, smaller premium to avoid a larger, uncertain liability. A professional insurance review can be an important element of your intangible asset audit. *K&K*

Why Now?

Good counsel can deal with almost any facts, it's the late surprises that create costly problems.

Virtually all legal liabilities can be significantly reduced and legal rights strengthened when early attention is directed to them. Good counsel can deal with almost any facts, it's the late surprises that create costly problems.

Both startup businesses and multinational corporations sometimes find marketing campaigns launched without prior trademark searches, artwork purchased without written assignment of copyright, advertisements placed without clearance, key employees hired without written nondisclosure and noncompete agreements, or businesses purchased without written assignment of full intellectual property rights. Whatever the oversight, the remedy is easier the sooner you discuss it with counsel.

Business expansion is limited by the available resources, especially time and money. We recognize that some marginal rights may have to be sacrificed to ensure the long-term viability of a growing business. Yet some critical rights cost only a line of print to preserve. Don't abandon important intellectual property rights needlessly. Early, brief legal counsel can help you integrate your intangible assets and potential worldwide rights with your business plan, preserving intellectual property and reducing liabilities.

Some of the hardest times to seek outside counsel are when you suspect a bad business decision was made. Yet independent, candid opinion may be critical in times of doubt or crisis. We offer clients our confidential legal opinion tempered by our practical experience and your business goals. We're proud of the close, confidential relationships developed with our clients. Avoiding irrelevant formalisms, we provide practical, personal, intelligent advice. *K&K*

Why Chat?

A stitch in time saves nine is as true today as in Benjamin Franklin's day. Early identification of potential legal issues can save you time, gain you income, avoid litigation, and preserve your rights. When you develop a new product or service, extend a brand, design a new label or advertisement, hire a key employee, begin a new venture, or buy or sell a business, we encourage you to contact an attorney. A brief telephone chat can often identify valuable rights that can inexpensively be preserved and potential pitfalls to be avoided. *K&K*

Notice: Laws Change. The law is constantly changing. Moreover, no general discussion can incorporate all the specific facts of your particular situation. For particular legal questions, consult an attorney. For questions regarding this Clipper, consult [Daniel Kegan](#). ©1993, [Kegan & Kegan, Ltd.](#) All Rights Reserved.