



INTELLECTUAL PROPERTY

The newsletter of the Illinois State Bar Association's Section on Intellectual Property Law

Dangerous delusions: Do it yourself, or don't

By Daniel Kegan,¹ <daniel@keganlaw.com> Copyright © Daniel Kegan 2009. All Rights Reserved

Many once-arcane intellectual property (IP) procedures are now accessible to lay businesspersons and citizens. The Internet provides instruction for almost everything, sometimes accurately. Widespread use of personal computers in many nations combined with cost-reduction pressures have encouraged government agencies to replace many paper forms by online applications, sometimes mandatory, or with higher fees for paper.

While many intellectual property activities can now be performed by laypersons, not all should. Which tasks need experienced IP legal counsel and which can as efficiently be performed by lay persons and general legal practitioners depends on several factors, including the abilities and risk propensities of the layperson, the expected financial and emotional significance of the endeavor, and the projected competitive environment.

This article discusses the four main areas of intellectual property—trademark, copyright, patent, and trade secrets—as well as corporate,

contract, insurance, and litigation matters, and offers some tips for those who lean toward Do-It-Yourself (“DIY”).

Trademarks

Search

A trademark is word or other symbol that distinctively indicates the source of a good or service. Many businesses and nonprofit organizations create trademarks for the organization itself and often additional trademarks, or brands, for particular goods and services. A good trademark is readily remembered by prospective customers, distinctive, and not confusingly similar to other trademarks for similar goods and services. Major trademark processes include selection creation, search, clearance, use, registration, maintenance, and enforcement.

The US Patent and Trademark Office (PTO), <www.uspto.gov>, maintains the Trademark

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MINNESOTA NICE: Lessons from the poker table

By Robert Kegan, <robert_kegan@harvard.edu>

I had an extremely enjoyable and interesting experience at a poker table recently. I happened to be on the road on my birthday this year, and I gave myself the present of spending the day at the Canterbury Card Club, the Minnesota poker room, about 40 minutes south of the Twin Cities.

I sat down at an \$8-16 Hold’Em game and proceeded to slowly but surely build up one of the biggest collections of chips I had ever amassed in a poker game. For the uninitiated, “\$8-16” means

that the stakes level is set and limited throughout this game. You can never make a single bet less than \$8 or more than \$16. The average “swing” in a game like this is a few hundred dollars. Most people, in other words, are going to play for several hours—the normal length of a serious player’s session—and they are going to lose or win no more than two or three hundred dollars. Five hundred dollars would be a sizable amount

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Electronic Search System (TESS), online available records of active and lapsed trademark registrations and applications. Search errors may be over-inclusive as well as under-inclusive. Not only identical trademarks but also similar marks may bar federal registration and provide grounds for infringement liability. Yet even two identical trademarks may lawfully coexist if for unrelated goods or services, for example computer software and sun glasses.

In the USA trademark rights are created by priority of use, federal registration creates additional advantages. (In many foreign jurisdictions registration is required for trademark rights.) Most of the individual states also provide for registrations of trademarks used in that state, e.g., <http://www.cyberdriveillinois.com/departments/business_services/trademark.html>.

If a trademark is in use in the United States, its owner may have rights even without federal registration. Therefore, search of unregistered trademark uses should be considered. Special laws protect some trademarks beyond ordinary trademark rights: e.g., OLYMPIC and the Olympic Ring design, the Red Cross design. 18 USC 706; 36 USC § 380; e.g., 18 USC § 707, 36 USC §§ 27, 36 (Boy Scouts, Girl Scouts, 4-H Clubs).

Most computerized searching uses keywords; common corrupted spellings are likely to automatically also retrieve phonetically identical terms: e.g., COKE and KOKE. However, searches on meaning are more difficult. 6 and UP might not disclose 7 and UP, MOONSTROKE might eclipse SUNSTROKE.

Evaluating a potential trademark requires at least business, legal, and linguistic perspectives. The legal evaluation focuses on confusingly similar trademarks for related goods and services and priority of use. Linguistic evaluation seeks to avoid terms which may appear pejorative in languages of concern. Business evaluation, often the province of the client, evaluates what is expected to "sell" in the target market.²

DIY: Search. Performing a good trademark search is difficult. Evaluating (clearance) a trademark search is harder. A lay search may readily eliminate some potential trademarks; but clearing a trademark for use

is more difficult. If significant financial investment or revenue is expected, an experienced trademark attorney should provide a trademark search and clearance opinion.

Registration

Trademark applications may be filed online, <<http://www.uspto.gov/teas/e-TEAS/index.html>> with the PTO. Federal trademark examiners seek to strictly follow federal law, the Lanham Act, 15 USC §§ 1051 et seq, and regulations, 37 CFR Part 2. Several common words have quite precise legal meanings for federal trademark applications: trademark, use, specimen. Moreover, the particular words chosen for the description of goods and services can make the difference between an application sailing through examination or being rejected and bogged down in multiple office actions and application amendments. Use of the PTO's Acceptable Identification of Goods and Services Manual, <<http://tess2.uspto.gov/netahtml/tidm.html>>, can reduce government application fees and facilitate examiner allowance.

Crafting the scope of a trademark application, its goods and services description, can be a delicate balance between over-inclusion and under-inclusion. Too broad and your claim may encroach on a similar trademark for linguistically included related goods and services. Too narrow and you may permit the PTO to grant registrations to others infringing close to your trademark.

Some foreign jurisdictions permit trademark applications with very broad claims, such as chemicals (Class 1), cosmetics (3), pharmaceuticals (5), machinery (7), electrical apparatus (9), paper goods (16), clothing (25), toys (28), staple foods (30), business (35), telecommunications (38), computer (42), and personal services (45); the USA does not. Many foreign jurisdictions permit trademark registration without use, the USA generally does not. A trademark application may be amended to limit the goods and services, but not to expand them.

Federal trademark office actions refusing registration tend to be lengthy, composed of legal boilerplate paragraphs, and confusing to those not experienced with the process, the regulatory rules, and trademark law.

Federal trademark priority can be ob-

tained by filing an intent-to-use (ITU) application and having that application mature to an issued registration. However, ITU applications require additional government fees, and acceptable use must be declared within about three years. Whether and when to file ITU or to defer until there is lawful trademark use is an important foundational question. Remember that the Lanham Act and the case law define trademark "use," and for federal trademark applications use requires use in commerce regulated by Congress, 15 USC § 1127.

DIY: Registration. For a strongly distinctive trademark for a few easily described goods or services, with small expected financial consequences, a lay federal application may be appropriate. If the way to likely overcome the PTO's initially refusing registration is not readily apparent to the lay applicant, an experienced trademark attorney should be promptly consulted. While most office actions provide several months to respond to an office action, some responses require research, obtaining evidence and affidavits, and thus disfavor rushed responses.

Maintenance

Government trademark registrations require maintenance. In the USA, a Declaration of Use is required in the fifth year after registration and in the final year of each decade after registration, or the registration will be cancelled. For many registration deadlines, there is a six-month grace period, with additional fees. If your business administration reliably docket requirements five and ten years in advance, a lay trademark applicant might remember to make the required maintenance filings.

Several scam businesses solicit federal trademark registrants to pay large fees for listings in private trademark registers, which have no practical use other than profit to the private publisher. Other questionable businesses solicit registrants with offers to prepare maintenance documents. In most of the observed incidents, these offers may lull the registrant into missing critical opportunities to ensure that the current trademark use is legally consistent with the registration. A false maintenance filing subjects the reg-

istration to cancellation of the entire class of goods or services. *In Re Bose* (Fed Cir. 08-1448, 31 Aug 09).

Trademark designs/logos and trademark type fonts often change over the years. Some minor changes create no problems; for some medium changes the trademark registration can be amended to conform to current use, and some changes are so material that a new trademark application may be required.

Intellectually property applications should be made in the name of the proper entity, or a resulting registration may be invalid, with unenforceable rights. *Nova Design Build Inc. v. Grace Hotels LLC*, 87 USPQ2d 1692 (ND IL 2008). Trademark maintenance filings may be especially vulnerable, since the PTO's basic search database, TESS, does not automatically update ownership changes from the PTO's assignment database.

DIY: Maintenance. Trademark registrants need to maintain an accurate long-term docket of due dates, be wary of trademark solicitations, and consult with an experienced trademark attorney if there are any changes in the style of the trademark or in the goods and services marketed under the trademark. When using any information source, remember that both human clerical and automated computerized data input may create errors. Appropriate redundant validity checking from independent sources may be warranted.

Enforcement

Federal trademark applications allowed by the Trademark Examiner are published weekly by the PTO in the Tuesday Official Gazette, <<http://www.uspto.gov/Web/trademarks/tmog/>>. Any person who believes they would be damaged by the registration may within thirty days of the publication file an opposition. 15 USC § 1063. Trademark oppositions are governed by the Trademark Trial and Appeal Board (TTAB) of the PTO, and generally follow the Federal Rules of Civil Procedure.

The TTAB, an administrative agency, is not authorized to award money damages nor legal fees and costs, whether to the prevailing party or as sanctions. Fed.R.Civ.P. 11, 37; cf. 15 USC § 1117, 17 USC § 505 (copyright), 35 USC §§ 284, 285 (patent). Moreover, the TTAB only decides whether a federal trademark registration should be, or for cancellation proceedings continue to be, registered. The TTAB cannot prevent use nor issue any

injunction. Cf. 15 USC 1116 (trademark), 17 USC 502 (copyright), 37 USC 283 (patent).

Most business proceeds without major dispute. Most business disputes are resolved without litigation. Most litigation settles before trial. Still, dispute resolution diverts management attention and organizational resources. Moreover, litigation is uncertain and risky. (In some terminologies, an uncertain event has a probability, while a risk is so unpredictable no probability can be assigned.) Litigation is expensive. The American Intellectual Property Law Association (AIPLA) *Report of the Economic Survey 2009* reports litigation costs for small intellectual property cases (under \$1 million at risk) ranging from \$200,000 to \$1,200,000 and for large IP cases (more than \$25 million at risk) from \$1 to \$8 million. (More detailed data below in the Litigation section.)

Executives often seek to confer directly with potential adverse parties, whether infringers or claimants of infringed IP. While many executives have interpersonal and negotiation skills, or simply seek to save the cost of an initial legal evaluation, initial direct discussions are ill advised. Anything said to an adverse party may be used against the speaker; and if the dispute continues, likely will. Disputants are known for taking things out of context and presenting evidence that appears twisted and false to the other side. Moreover, unlike the mandatory Miranda warning given by police in custodial interrogations, no warning need be given in civil matters. Cf. *Miranda v. Arizona*, 384 US 436 (1966); US Const amend V & VI; cf. *New York v. Quarles*, 467 US 649 (1984) (Public safety, clear and present danger exception to Miranda warning requirement).

DIY: Enforcement. Owners of intellectual property should establish personal and organization procedures for reasonable monitoring of their industry and environment for potential infringements. Incidents of concern should be promptly reported to corporate counsel or IP counsel if such a relationship has already been established. The executive urge to directly communicate and 'solve the problem' without legal advice should be resisted.

Internet Domain

Most businesses, nonprofit organizations, and many individuals and families now use the Internet for e-mail and Web browsing; many have or seek their own domain. Inter-

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Published at least four times per year.

Annual subscription rate for ISBA members: \$20.

To subscribe, visit www.isba.org or call 217-525-1760

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net domains provide the addressing system for e-mail and the Web. Top level domains (TLDs) include the common generics (gTLDs) .com, .org, .net, .edu, and .gov, and two-letter country codes (ccTLDs). Immediately to the left of a top level domain is the second level domain, which is licensed to, not owned by, the domain registrant. Organizations often choose their (second-level) Internet domains identically with their company name and major brands.

Most e-mail now uses the Simple Mail Transfer Protocol (SMTP), in which e-mail addresses have two parts: the local-part to the left of the at-sign, @ and the domain name to the right. For example, <center@cbpp.org> is the e-mail address of Center on Budget and Policy Priorities; its Web site homepage is <<http://www.cbpp.org>>.

Issued Internet domain registrations for the .com, .org, and .net top level domains may be searched at Whois sites. Whois was designed to provide contact information for Internet domain registrants, administrative contacts, and technical contacts, e.g., <<http://www.betterwhois.com/>>. However, an Internet domain may be registered through a proxy, hiding the beneficial registrant's name and contact information. Evaluating potentially confusingly similar Internet domain names becomes more difficult for anonymous beneficial registrants without operating Web sites since no information, goods, or services are disclosed.

The Internet Corporation for Assigned Names and Numbers (ICANN), <<http://www.icann.org>>, is currently considering the extent to which proxy and privacy Whois services are used for abusive and/or illegal purposes, <<http://gnso.icann.org/issues/whois>>, 12Sept09. Remember that the Internet is international, subject to some extent in each nation to those local laws, and that the First Amendment is limited to the USA. *Yahoo!, Inc v. La Ligue Contre le Racisme*, 169 FSupp2d 1181 (ND CA 2001). An Internet dispute may "implicate issues of policy, politics, and culture that are beyond the purview of one nation's judiciary." Id at 1186.

Use of a term within an Internet Web page address (Uniform Resource Locator, URL)³ that may be seen as confusingly similar to another's trademark is less clearly an actionable infringement; prudence would suggest competitors trademarks not be so used.

The law of keyword advertising is developing. When an Internet Web user enters a

search request in their browser, some search engines return paid ads keyed to purchased keywords, in addition to Internet pages responsive to the search request. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F3d 1036 (9th Cir. 1999); *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F3d 808 (7th Cir. 2002) (keyword metatag); *Perfumebay.Com Inc. v. Ebay, Inc.*, 506 F3d 1165 (9th Cir., 2007); *Resscuecom Corp. v. Google Inc.*, 562 F3d 123 (2nd Cir., 2009). Early consultation with an Internet-oriented trademark attorney is highly recommended before placing or contesting keyword ads, metatag use of trademarks, potential trademark confusion within a URL address, and related internal-Web site content.⁴

DIY: Internet Domain. That an Internet domain name is available for registration does not insulate the registrant, or beneficial registrant for proxy registrations, from trademark liability and marketplace confusion—a practical consideration apart from legal liability. Internet domain name selection should be approached with parallel concern for establishing a protectable trademark and avoiding trademark infringement. Internet keyword advertising, lower-level use of terms confusingly similar to trademarks, and internal-Web site content issues may be complex issues in evolving areas of the law.

Corporate

The application processes and registration issuance criteria all differ for Internet domains, federally registered trademarks, and state corporate and entity establishment. Identical second-level domain names may be registered in any of the more than a dozen generic top level domains and over 240 country code top level domains. Moreover, as long as an applied-for second level domain name is unique in a top level domain it may be registered. *tiffany.com*, *tifany.com*, *tiffany.com*, and *tiffany1.com* could all be issued to different registrants, despite the high likelihood of confusion.

Corporate names generally need only be "distinguishable" from other entity names within the entity registers of a given state. 805 ILCS 5/4.05.⁵ In Illinois, Articles of Incorporation may be filed online, <<http://www.ilsos.gov/corparticles/>>, and for an expediting surcharge will be reviewed by the department of Business Services within 24-business hours of online receipt.

Ownership of intellectual property should

be clarified before a government filing is made. Especially in close corporations and other small business entities there can be confusion between what the principal owns and what the business owns. Filing under the improper name can have unpleasant consequences for ownership, taxes, asset preservation, and litigation. (*Tracie Martyn, Inc. v. Tracy Artman*, (TTAB, Opposition 91,173,009, May 1, 2008) (Trademark applicant not owner of trademark at filing date, application void *ab initio*).

DIY: Corporate. Grant of a state corporate name does not insulate the corporation from trademark infringement claims, nor provide rights to stop entities in other states from using confusingly similar, and even identical, corporate names in other states. Before investing in a corporate name, a legal trademark clearance opinion is recommended. Additionally, appropriate Internet domain name(s) should be registered. Before any government filing, clarify if the business of the corporation should, and does, own the intellectual property.

Copyright

In the United States, the owner of a copyright has the exclusive right to do and to authorize for the copyrighted work: reproduction, derivation, distribution, public performance, public display, and for sound recordings public performance by digital audio transmission, all subject to fair use limitations and numerous detailed exceptions and specifications. 17 USC §§ 101, 106, 107, 108-122. Copyright protection original works of authorship fixed in any tangible medium of expression, for copyrightable subject matter. 17 USC § 102. In no case does copyright protection extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery. 17 USC § 102(b).

The copyright "author" of a work may not be the individual human creator. The corporate "employer" may be the author of a "work made for hire" if the work is prepared by an employee within the scope of their employment or a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them before completion of the work that the work

shall be considered a work made for hire. 17 USC § 101. "Employee" is determined by the facts of the situation under general (not state-specific) common law agency principles. *Community for Creative Non-violence v. Reid*, 490 US 730 (US, 1989).

The Copyright Office now has an online application process (for most forms), and encourages its use with lower application fee and faster registration, <<http://www.copyright.gov/eco/>>. Newer, and less user-friendly for occasional users than the PTO online application system, online copyright application benefits user and government.⁶ Online search of copyright registrations and assignments after 1977 is also available, <<http://www.copyright.gov/records/>>.

Copyright ownership begins the moment "pen lifts from paper," when a copyrightable work is fixed in a tangible medium of expression; registration is not required for ownership. However, copyright registration is generally required for *enforcement* of copyright rights. 17 USA § 412.

In contrast to the standard "American rule" that each side pays its own litigation costs absent statutory authority for fee shifting, for copyright cases a court has discretion to award prevailing parties reimbursement of costs and reasonable attorney fees. 17 USC § 505; *Fogerty v. Fantasy, Inc.*, 510 US 517 (1994). When the prevailing party is the defendant, who by definition receives no award, the presumption in favor of awarding attorney's fees is very strong. *Assessment Technologies of WI, LLC v. Wiredata, Inc.*, 361 F3d 434 (7th Cir. 2004). However, no awards are permitted to plaintiff when infringement begins before the effective registration date, unless registration is made within three months of first publication. 17 USC §§ 505, 412. The copyright statute of limitations for civil actions is three years after the claim accrued, and five years after the cause of action arose. 17 USC § 507.

Copyright "publication" is the distribution of copies or phonorecords of a work to the public by sale or other ownership transfer, or by rental, lease, or lending. 17 USC § 101. Offering to distribute to a group of persons for further distribution, public performance, or public display also constitutes publication. Id. A public performance or display of a work does not of itself constitute publication. Id. Whether sole online distribution is copyright "publication" is currently uncertain.⁷

A deposit of the work in which copyright

is claimed is generally required for copyright registration. 17 USC § 408(b). Deposit requirement for works transmitted online are under development. Copyright Circular 66. Computer programs claiming trade secrets, typically source code, have special deposit requirements. Copyright Circular 61, Copyright Registration for Computer Programs.

Errors in an issued copyright registration may be noted by filing Form CA; the Supplementary Copyright Registration augments but does not supersede that contained in the earlier registration. 17 USC § 408(d).

A "derivative work" is a work based upon one or more preexisting works. 17 USC § 101. Computer software is often a derivative work, with version 2 based upon version 1, or version 1.4.1.4. Web sites are often accumulating content, and thus reflect multiple copyright works. Revisions to works published on separate days are considered separate works, and each requires its individual registration; databases⁸ and serials and newsletters have modified requirements. Copyright Circular 66, Copyright Registration for Online Works.

To be copyrightable, a derivative work must be different enough from the original to be regarded as a new work or must contain a substantial amount of new material. Copyright Circular 14, Copyright Registration for Derivative Works, <<http://www.copyright.gov/circs/circ14.pdf>>.

The new material must be original and copyrightable in itself. The copyright for a derivative work covers only the new material appearing for the first time in the work; it does not extend to any preexisting material. Id. Where a copyright protected work is used unlawfully, that is without the permission of the copyright owner, copyright will not extend to the illegally used part. Id. Only the owner of a copyright may authorize another to create a derivation of that work. Id. Both the preexisting material and the new material added need to be separately identified in the application for registration of a derivative work. Id.

DIY: Copyright. To preserve the ability to seek reimbursement of costs and attorney's fees for copyright infringement, application for copyright registration, with appropriate deposit material, should be made within three months of publication. Despite the impulse, don't file suit without an issued copyright registration. *Nova Design Build Inc v. Grace Hotels LLC*, 87 UPSQ2d 1692 (ND

IL 2008)(*"Nova I"*) (infringement complaint dismissed for lack of issued registration). Before making a copyright demand, definitely before filing suit, ensure that the intended plaintiff is the registered claimant of the copyright work, that the copyright application correctly recites the nature of the work, properly identifies any unclaimed preexisting work, and is correct in all particulars.

Application for a sole-authored, standard literary work produced in paper, such as a manuscript or book, often requires no professional guidance. If the work to be registered is derivative, ensure the copyright claimant has proof of authorization to make the derivation. Applications for Internet and computer program works can be complicated. When there are significant financial or emotional consequences of failing to protect a copyrightable work are significant, experienced copyright counsel should likely be consulted. For businesses generating multiple copyrightable works a year, such as giftware, greeting card, and photography, after the first few professionally-advised applications, an internal administrative assistant can often prepare and file copyright applications for similar goods.

Patent

In exchange for the timely patent application and eventual public disclosure of the inventor's best mode of practicing a new and nonobvious invention, the federal government may grant the inventor(s), or their assignee, a monopoly, of about 17 years, on importing into, and the making, using, and selling of the invention within the United States. 37 USC § 271. No patent shall issue if the invention was commercialized or described in a printed publication more than one year before the application is filed with the US Patent Office, the one-year bar. 37 USC § 102. Many foreign jurisdictions prohibit patent applications after any commercialization or printed publication. The Internet may be a printed publication; commercialization conditions and exceptions, such as experimental use, explicated in the case law.

A USA patent application requires: a) specification describing the invention and the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to make and use the invention, and shall set forth the best mode contemplated by the inventor of carrying out the invention; b) concluding the specification shall be the claims

which particularly point out and distinctly claim the subject matter of the invention; c) a drawing where necessary for the understanding of the invention; and d) verification that the applicant(s), believe themselves to be the original and first inventor of the invention and statement of the inventor(s) national citizenship. 37 USC §§ 111-113, 115.

A “provisional” patent application may be filed without claims and without the certifying oath, permitting the regular patent application to be filed up to a year later. 37 USC § 111(b). However no new matter, other than the claims, may be introduced in the regular application; the provisional application, if filed, must fully, clearly, and exactly describe how to make and practice the invention.

Patent rights are limited to the jurisdiction issuing the patent. It may be commercially prudent to file patent applications in other jurisdictions where the invention may be marketed or manufactured, or where competitors may seek to market the invention. Patent applications in foreign jurisdictions require additional government filing fees, typically fees for local patent agents, and often require translations. Seeking foreign patents under the Patent Cooperation Treaty (PCT), coordinated by the World Intellectual Property Organization (WIPO), can somewhat reduce costs and defer some filing deadlines, <<http://www.wipo.int/pct/en/>>.

In the United States, generally the inventor(s) must personally sign the patent application. 37 USC §§ 116-118. Patent applications are initially secret within the PTO, but are published 18 months after the earliest filing date for which a patent benefit is sought, unless the application is no longer pending, is subject to government secrecy under 37 USC § 181, is a design patent application, or the applicant requests upon filing no publication and certifies no parallel patent application has or will be made in any foreign jurisdiction. 37 USC 122.

The patent application process is highly technical. Given society’s disfavor of most monopolies, the government does not casually grant patents. The PTO does provide information for inventors, <<http://beta.uspto.gov/patents/process/index.jsp>>, as does Nolo Press in its helpful *Patent It Yourself* book (13th edition, April 2008), <<http://www.nolo.com/products/patent-it-yourself-PAT.html>>.

A utility⁹ patent application is more expensive than a trademark or copyright application. September 2009 government filing

fees for copyright application ranged from \$35 (electronic) to \$65 (paper); for trademark application ranged from \$275 (electronic, standard goods and services descriptions) to \$375 (paper); for utility patent application, search, publication, and issuance about \$1,300 for a small entity (owner of patent rights less than 501 employees, including affiliates, fees for non-small entities are double, 37 CFR § 127), for utility patent maintenance fees \$3789. Patent applications have additional fees for more than three independent claims, more than 20 claims, multiple dependent claims, and other fees.

DIY: Patent. Commercialization or disclosure in a printed publication (including the Internet) more than one year before a patent application is filed invalidates any resulting issued patent. An intelligent, verbally articulate inventor committed to taking the time to learn the patenting process, researching earlier similar inventions and patent applications, and drafting, and redrafting, a patent application can substantially reduce the need for patent attorney work. However, drafting the patent claims is one of the most difficult language tasks, and patent attorney involvement is highly recommended.

Trade Secret and Non-Compete

Trade secrets are defined by state law. A trade secret generally includes information that is sufficiently secret to derive economic value, actual or potential, from not being generally known to others and is the subject of reasonable efforts to maintain its secrecy or confidentiality. 765 ILCS 1065, Illinois Trade Secrets Act. As with many other contracts, an agreement to keep confidential another’s trade secrets maybe oral. *Learning Curve Toys, Inc. v. Playwood Toys, Inc.*, 342 F3d 714 (7th Cir. 2003).

New business ventures often request non-disclosure agreements (NDAs). As a restriction against the free flow of commercial information, and often including employment restrictions, NDAs are typically narrowly construed by the Courts. *Southwest Forest Industries, Inc. v. Sharfstein*, 482 915, 919 (7th Cir. 1972) (“All doubts must be resolved in favor of natural rights and against restriction”). The restrictions of an NDA/non-compete agreement should be reasonable, in terms of the duration, geographic scope, and other restraints. Reasonableness and rules of contract interpretation vary by state.

Often both parties considering a NDA

have their own preferred forms. Totally apart from content, many parties prefer to use their familiar form, rather than evaluate another’s. However, even a form by a major corporation has no intrinsic guarantee that it is appropriate for the concerned states nor for the involved parties.

DIY: NDA & Non-Compete. While a duty to maintain confidentiality may be found from oral comments or even simple conduct, an appropriate written NDA is typically preferred. As with most written agreements, a written NDA reminds the parties, and the successors to the negotiating individuals, of their responsibilities. Oral words may be misremembered or forgotten. However, a NDA does not guarantee confidentiality. An NDA serves to clarify and remind of confidentiality obligations, and provides evidence for a lawsuit if unlawful disclosure is discovered. More important than obtaining a signed NDA is selecting trustworthy persons to work with.

Contract

A contract is a legally enforceable promise. While written contracts are often preferable, contracts can often be created by oral comments or behavior, including the course of dealing and custom in the trade. 810 ILCS 5/1-201 (b)(3), 1-303; UCC 1-205; *I.A.E., Inc. v. Shaver*, 74 F3d 768, 37 USPQ2d 1436 (7th Cir. 1996) (implied nonexclusive license to use copyrighted drawings, thus no infringement). However, some agreements do require a writing, typically involving marriage consideration, land interest transfer, a will’s executor, a surety, sale of goods above a certain value (now typically \$500), and contracts which cannot be performed within one year, 740 ILCS 80 (Statute of Frauds); 810 ILCS 5/2-201 (UCC 2-201).

Many individuals and small businesses create their own agreement documentation by copying others’ contracts. However, most proposed agreements have been crafted to favor one party, and often include many default provision carried over from past negotiations but immaterial to the current endeavor. A reasonable adverse party should modify or eliminate inappropriate boilerplate provisions, and compromise provisions of strong but adverse concern to the parties.

Many professions and activities are regulated by local, state, and/or federal government. Common is the need for a license. Illinois’ Division of Professional Regulation licenses, or registers, myriad professions, from

Accountant to Wholesale Drug Distributor, <<http://www.idfpr.com/dpr/>>.

Contracts for activities governed by license may be unenforceable if no license was in effect during those activities. *Orthodontic Centers of Illinois, Inc. v. Michaels*, 403 2d 690 (ND IL 2005); *Kaplan v. Tabb Associates, Inc.*, 657 NE2d 1065, 276 Ill.App3d 320, 212 Ill. Dec 720 (1st Dist, 1995). When a statute declares that it shall be unlawful to perform an act and imposes a penalty for its violation, contracts for the performance of such acts are void and incapable of enforcement. *Aste v. Metro. Life Ins. Co.*, 312 Ill.App3d 972, 980, 245 Ill.Dec. 547, 728 NE2d 629,635 (1st Dist. 2000). However, where the legislation was enacted as a revenue measure rather than to protect the public, the contract may be enforceable. *Ransburg v. Haase*, 224 Ill.Ap.3d 681, 684-85, 167 Ill.Dec. 23, 586 NE2d 1295, 1297 (3d Dist. 1992).

An employment agreement provision that an employee assign to the employer the employee's independently developed inventions unrelated to the employer's business, even when no time, equipment, supplies, facilities, or trade secret information of the employer was used, may be unenforceable. 765 ILCS 1060, Illinois Employee Patent Act.

DIY: Contract. Before casting the first stone or complaint, a prospective plaintiff should ensure its own legal house is as spotlessly clean as feasible. *John* 8:7. Upon being sued by a regulated plaintiff, a defendant should research plaintiff's regulatory compliance. Before most agreement negotiations, clarify for yourself your strong needs and separately your weaker preferences; consider asking the other party to modify or explain provisions you dislike or consider potential deal-breakers. Before signing an agreement read it, and ensure you understand the meaning of each word. For new endeavors and those with significant financial or emotional significance, have an attorney experienced in your industry or the type of agreement review it; attorneys are trained to "spot legal issues" that may not be manifest to others.

Insurance

Sometimes business insurance will pay for defense of an intellectual property case, and sometimes for a damage award if the plaintiff prevails. *Native American Arts, Inc. v. Hartford Casualty Insurance Co.*, 435 F3d 729 (7th Cir. 2006) (Quality trademark); *Taco Bell Corp.*

v. Continental Casualty Co., 388 F3d 1069 (7th Cir. 2004) (Chihuahua dog advertising idea). Much depends on the particular wording of the complaint, the particular wording of the insurance policy (often "advertising injury" and exceptions), and the particular state law involved. Most insurance policies require prompt notice to the insurer of a potential claim; delayed notice and the insurer may not need to defend nor pay damage awards. However, whether a particular policy covers defense of a particular lawsuit can require a complex analysis, one that may be beyond the typical experience of an insurance agent and require specialized analysis of both insurance and intellectual property law.

Insurance generally pays for negligent acts, but not intentional conduct. *Cincinnati Insurance Co. v. Eastern Atlantic Co.*, 260 F3d 742, 746 (7th Cir 2001) (spectre of illusory coverage by excluding all intentional torts except unintentional intentional torts). A complaint may include allegations of defendant's intentional, willful misconduct in seeking punitive damages in addition to compensatory damages, but such allegations may decrease the likelihood of defendant's insurance coverage.

A plaintiff may wish the defendant to have insurance coverage, to increase the resources available to settle the case early or to pay more of a court judgment. Alternatively, a plaintiff may wish the defendant not to have insurance coverage, to make defense of the case more expensive to the defendant itself, increasing pressure for an early and more plaintiff-favored settlement. An insurer may have a duty to defend, even if the case results in no duty to indemnify. *Western States Insurance Co. v. Wisconsin Wholesale Tire, Inc.*, 51 USPQ2d 1527 (7th Cir. 1998).

Before tendering a defense to an insurer, a defendant should assess how likely that tender will increase their future insurance premiums. In some cases, notification of a claim even without tender of the defense might increase future premiums. Estimates should also be made of the likely range for the time duration and cost of the litigation. Such litigation estimates can only be rough, for they depend on how aggressive the adverse party is, how muddled the facts are, how easy the evidence can be obtained, how much discovery evidence will be involved, as well as who the jury is, the health of the judge, and other factors.

DIY: Insurance. Plaintiffs should evaluate whether they want to increase or decrease the likelihood the complaint may trigger insurance coverage for the defendant. Defendants should promptly advise their trusted insurance agent of a possible claim, and then also report in writing any actual claim, but whether a defendant, or counterclaim defendant, should tender the defense of the case to the insurance company and its hired attorneys requires careful evaluation.

Insurers are required to provide an adequate, average defense. For some tasks--such as delicate medical surgery and disputes concerning essential intellectual property--many people want better than average professional work.

Litigation

Priority

Most intellectual property rights are based on a priority, and the one with priority--of the correct kind--usually wins. Government registrations create *prima facie* evidence of a priority date, and thus may early and inexpensively persuade without litigation a knowledgeable and reasonable potential defendant to stop an asserted infringement. 15 USC § 1115(a) (Lanham §33).

In the United States, first use of a distinctive trademark provides a priority; filing a federal intent-to-use trademark application provides a contingent priority which vests if the registration issues. 15 USC § 1057(c) (Lanham §7c). In many foreign jurisdictions, priority is based on registration with the government trademark registrar, use without registration provides little priority, although highly famous marks receive additional protection.

Lack of priority may doom a federal dilution claim, 15 USC § 1125(c) (Lanham §43(C)), and a federal cyberpiracy claim, 15 USC § 1125(d) (Lanham §43(d), as well as an ICANN Uniform Domain Name Dispute Resolution Policy (UDRP) proceeding. <<http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>> (19Sept09).

Copyright does not prevent independent creation of similar works, but having a copyright registration before a copyright infringement preserves the right to statutory damages and the possibility of an award of attorney fees. 17 USC §§ 504(c), 505. In a judicial proceeding, a copyright registration made before or within five years after first publication of the work is *prima facie*

evidence of the validity of the copyright and of the facts stated in the certificate. 17 USC § 410 (c). Thereafter the evidentiary weight accorded the registration certificate is within the court's discretion. Id.

In the US, first to invent may receive patent priority, in much of the rest of the world first to apply for a patent receives priority. However, first to invent and second to file invites patent litigation, typically a patent interference. 35 USC § 135. There is movement, but not yet a statute, for the US to "harmonize" and give priority to the first to apply.

DIY: Priority. Before making an intellectual property demand, ensure you have a reasonable basis for claiming priority. For United States SA trademarks, rights extend to confusingly related goods and services. Even with copyright priority, copyright rights cover expression, not ideas or *scènes à faire*. Many copyright claims also require proof of access and copying. Patent rights are limited to the patent claims and what a court will find as a rightful "equivalent." Premature assignment of an intent-to-use trademark application may void trademark rights. 15 USC § 1060(a)(1) (Lanham § 10). Improper application claim of ownership, improper later assignment, or bankruptcy can lose a priority. 11 USC § 365 (Executory contracts); *Thompkins v. Lil' Joe Records Inc.*, 81 USPQ2d 1791 (11th Cir 2007). Some IP priority rights lapse if the government registration is not maintained.

Discovery

Since the Federal Rules of Civil Procedure were adopted in 1938, federal litigation has provided for discovery, the process permitting the parties to seek relevant information to avoid trial surprises and prove positions. Fed.R.Civ.P. 26 (b). Discovery is a major cost of litigation (see below). The Internet and Electronically Stored Information (ESI) make some discovery easier, but also may increase the volume of materials to be reviewed. Fed.R.Civ.P. 26 (b)(2)(B). Some discovery costs may be reduced by active research by the party itself. However, uncontrolled lay discovery may create serious liabilities, including making illegally obtained evidence inadmissible.

Several federal status restrict covert and deceptive computer and information access. Electronic Communications Privacy Act (ECPA), 18 USC § 2510 includes the Wiretap Act, regulating the intentional interception

and disclosure of communications, and the Stored Communications Act, regulating intentional access, attainment, alteration or prevention of access to facilities storing electronic communications. The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computer systems, which may include access with inappropriately obtained, or guessed, passwords.

The Illinois Eavesdropping Act prohibits eavesdropping, which may include intercepting electronic communications. 720 ILCS 5/14. Generally, all parties to a conversation must consent to its recording, law enforcement officials have some exceptions. *In re Marriage of Almquist*, 704 NE2d 68, 71 (Ill.App. 3d Dist 1998).

Anything involving medical patents, insurance company trademarks, electronic health system software, and more may invoke the restrictions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). 42 USC § 201; <<http://www.hhs.gov/ocr/privacy/>> (26Sept09). Bankendorf, Elliott & Sherry Rollo. *The Higher HIPAA Hurdle*, 46 ISBA Intellectual Property, #3, p. 10, March 2007.

DIY: Discovery. A party in litigation generally knows its industry and some relevant facts of the case better than its attorney initially will. Active participation in discovery by non-attorneys may more efficiently surface relevant information. However, lay discovery need to be authorized and supervised by an attorney to avoid possible inadmissibility, sanctions, and ethical violations.

III. R. Professional Conduct, Rules 4.2 (communication with person represented by counsel), 4.3 (communication with unrepresented person), 8.4(a)(2) (induce misconduct in another).

The goal of most legal work is not to win a lawsuit but to avoid disputes. Even if involved in a lawsuit, both parties reduce costs and can sooner return to "business as usual" if the case is reasonably settled rather than going through a full trial, and perhaps another few years for an appeal.

Costs

Litigation is expensive, even ignoring management distraction and possible bad press. The American Intellectual Property Law Association (AIPLA) *Report of the Economic Survey 2009* reports (at I-132 to I-123) the average (mean) and 75th percentile cost for a trademark Opposition or Cancellat-

tion, before the Trademark Trial and Appeal Board of the US Patent and Trademark Office are \$64,000 (mean) and \$80,000 (75%) through discovery and \$117,000 to \$150,000 (mean/75%) for the inclusive proceeding.

A small trademark infringement case (less than \$1 million at risk) cost \$214,000/\$250,000 (mean/75%) through discovery and \$384,000/\$500,000 for the inclusive case. A medium trademark infringement case (\$1-\$25 million at risk) cost \$503,000/\$625,000 through discovery and \$857,000/\$1,125,000 for the inclusive case. A large trademark infringement case (more than \$25 million at risk) cost \$1,008,000/\$1,250,000 for the inclusive case.

The AIPLA *Economic Report* (at I-138 to I-139) gives the average (mean) and 75th percentile cost for a small copyright infringement case less than \$1 million at stake cost \$195,000 (mean) to \$250,000 (75%) through discovery and \$366,000 to \$450,000 (mean/75%) for the inclusive case. A medium copyright infringement case (\$1-\$25 million at risk) cost \$479,000/\$600,000 through discovery and \$826,000/\$1,200,000 for the inclusive case. A large copyright infringement case (more than \$25 million at risk) cost \$951,000/\$1,000,000 through discovery and \$1,696,000/\$2,325,000 for the inclusive case.

The AIPLA *Economic Report* (at I-128 to I-129) gives the average (mean) and 75th percentile cost for a small patent infringement suit (less than \$1 million at risk) as \$498,000 (mean) and \$500,000 through discovery and \$967,000 to \$1,200,000 for the inclusive case. A medium patent infringement case (\$1-\$25 million at risk) cost \$1,794,000//\$2,500,000 through discovery and \$3,109,000/\$4,500,000 for the inclusive case. A large patent infringement case (more than \$25 million at risk) cost \$3,731,000/\$5,000,000 through discovery and \$6,250,000/\$8,000,000 for the inclusive case.

The AIPLA *Economic Report* (at I-142 to I-143) gives the average (mean) and 75th percentile cost for a small trade secret misappropriation suit (less than \$1 million at risk) as \$291,000 (mean) to \$400,000 (75%) through discovery and \$495,000 to \$650,000 for the inclusive case. A medium trade secret misappropriation case (\$1-\$25 million at risk) cost \$935,000//\$1,256,000 through discovery and \$1,611,000/\$2,500,000 for the inclusive case. A large trade secret misappropriation case cost \$2,121,000/\$2,563,000 through

discovery and \$3,479,000/\$5,000,000 for the inclusive case.

Attorney Fee Awards

The "American Rule" is that each party in a lawsuit pays its own attorneys' fees and case costs, except when a statute permits fee shifting or sometimes when one side's litigation behavior has been proved to willfully flaunt court orders, violate procedural rules, harass the other party, or engage in other bad faith conduct. *Alyeska Pipeline Service Co v. Wilderness Society*, 421 US 240, 95 SCt 1612, 44 LEd2d 141 (1975); Fed.R.Civ.P. 11, 37; 28 USC § 1927.

There are exceptions for cases that generate common funds or in which statutes permit awards of fees, but 28 USC § 1927 is not such a statute. It allows an award of fees only when an attorney "multiplies the proceedings...unreasonably and vexatiously"... The statute simply permits a court to transfer any award of fees from a client to the offending lawyer. *In re TCI Limited*, 769 441, 445 (7th Cir. 1985).

Suits are easy to file and hard to defend. Id. at 446. Litigation gives lawyers opportunities to impose on their adversaries costs much greater than they impose on their own clients. The greater the disparity, the more litigation becomes a predatory instrument rather than a method of resolving honest disputes. Id. at 446. When lawyers yield to the temptation to file baseless pleadings to appease clients, however, they must understand that their adversary's fees become a cost of their business. Id. Fed.R.Civ.P. 11, 37; 28 USC § 1927.

Trademark cases permit attorney fee shifting for "exceptional cases," 15 USC § 1117 (Lanham § 35); copyright cases permit attorney fee shifting for the "prevailing party," 17 USC § 505; patent cases permit attorney fee shifting in "exceptional cases," 35 USC § 285. Some civil rights and private-attorney-general statutes provide for mandatory fee shifting awards to prevailing parties, but commercial IP dispute typically shift fees at the discretion of the judge. Fee awards are usually limited to "reasonable attorneys' fees" and courts often discount even well-documented records of legal work, work that the client had agreed to pay.

Pro se Representation

Non-lawyers can often represent themselves in court, appearing "pro se" (for oneself). 28 USC 1654. For minor traffic matters or small claims court, pro se representation

by one who has researched the law, gathered appropriate admissible evidence, and utilized the "self-help" resources of the court, pro se representation can be efficient and satisfying.¹⁰ At least since 1966, Illinois has recognized a pro se exemption to the unauthorized practice of law. *King v. First Capital Financial Services*, 828 NE2d 1155, 1167, 215 Ill.2d 1, 293 Ill.Dec 657 (2005). Corporations may represent themselves, through managerial employees, in small claims actions. Id.; 705 ILCS 205/11.

However, contrasted with counseled appeals, a larger percentage of pro se appeals are resolved procedurally rather than on the merits (after hearings or submission of briefs). Courts of Appeals Facilitate Handling of Pro Se Cases, The Third Branch, July 1995, <<http://www.uscourts.gov/ttb/julttb/prose.htm>>. In federal court, pro se litigants accounted for over a quarter of filed civil actions. Table S-23. Civil Pro Se And Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2007 <<http://www.uscourts.gov/judbus2007/tables/S23Sep07.pdf>>, cited by Wikipedia, 14Sep09, <http://en.wikipedia.org/wiki/Pro_se_legal_representation_in_the_United_States>. Generally, corporations and other corporate entities may not represent themselves in court, but require legal counsel.

Honesty and candor are required in court. *Artmark Chicago, Ltd. v. E Mishan & Sons*, 26 USPQ2d 1201 (ND IL 1992) (\$1.3 million default judgment for discovery abuses). Judges are often more lenient with pro se litigants initially not following all the technical court rules. However, a litigant appearing as pro se but actually using a shadow attorney for counsel should at a minimum promptly so advise the court. A corporate entity, required by court rules and explicit order of the court, to be represented by counsel, ought not do the legal work itself and have a friendly, albeit fraudulent, attorney appear as counsel. *Ptak Bros. Jewelry, Inc. v. Ptak*, 2009 WL 807725 (SD NY) (Defendants sanctioned with default judgment for misrepresentations to the Court, including a Ninth Amendment defense despite its inapplicability and counsel's later admitted ignorance of its provision, and other willful acts).

Some people use language precisely. They mean what they say and say what they mean.¹¹ Most humans are sometimes imprecise in their language usage. Humans make mistakes. Hannah Arendt, *The Human Con-*

dition (1958) (on mistakes and forgiveness). Judges are human. Judges preferences and orders, especially if given orally from the bench or when drafted under time pressure, may not permit some ambiguity.

However, it is poor practice to ignore the spirit of a judge's order, relying on hyper-technical, linguistic argument. *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 2009 WL 2047617 (ED TX, 10July2009) (attorney asked prospective jurors' voir dire hypothetical, prohibited by in limine court order ("are there any of you who have a problem with a company that puts its headquarters offshore on a Caribbean island in order to avoid paying U.S. taxes?" when court order precluded patent infringement defendants from presenting any evidence regarding O2 Micro's motivation for incorporating in the Cayman Islands.) It is also poor practice to ignore what a judge says, especially in a written order or opinion. *Rhodes v. MacDonald*, (4:09-cv-106, MD GA) (Opinion, 16Sept09; Order 18Sept09) (show cause why \$10,000 sanction should not be ordered for attorney ignoring admonition against frivolous pleadings to further political "birther" agenda); see also, *General Conference Corp. of Seventh-day Adventists v. McGill*, 91 USPQ2d 1843 (WD TN 2009) (finding willful failure to comply with order after agreement to mediate unexcused by later inconsistent assertion religious beliefs prevented compliance).

DIY: Litigation. Be truthful and candid with the Court. Pro se litigants should use the available self-help resources, ensure all case claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law, that factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information. Fed.R.Civ.P. 11(b).

Conclusion

The basics of intellectual property law are simple: don't steal and don't deceive. See *Exodus 20:15-16* (Thou shall not steal; Thou shall not bear false witness against your neighbor); cf. *Lemon v. Kurtzman*, 403 US 602 (1971) (three-prong test for constitutional-

ity under First Amendment, Establishment Clause). However, distinguishing theft from copyright fair use or lawful comparative advertising requires knowledge of the relevant law. Additionally, most legal rules have exceptions, and exceptions to the exceptions, and often further exceptions. *Respect Inc v. Fremgen*, 897 FSupp 361 (ND IL 1995) (limited liability of printers in copyright infringement case). Moreover, popular culture contains many false beliefs about intellectual property.¹²

Federal, state, and local governments have embraced the Internet as a means to provide greater openness and transparency while reducing, after initial computerization costs, clerical costs. As but one example, the Federal Trade Commission has recently extended its 1980 endorsement and testimonial advertising regulations to the Internet and blogs. <<http://www.ftc.gov/opa/2009/10/endorstest.shtm>> (6Oct09). Many intellectual property legal tasks can now be directly performed by a small business, administrative assistant in a large corporation, or general practitioner attorney. However for matters with non-trivial financial or emotional consequences, early review by experienced intellectual property counsel remains prudent. An ounce of prevention is worth a pound of cure. ■

1. The author appreciates the helpful pre-publication review and comments by Steve Baron, of Mandell Menkes LLC.

2. Tom Bridge suggests marketers selecting brands should have at least five years experience teaching junior high school—those students can twist almost any word or phrase.

3. One convention has the Internet route to a server divided by dots, with the file path within the server divided by slashes, /.

4. Many foundational Internet confusion cases have been filed and decided focused on keyword meta tags. However, Google and other technologically-current search engines haven't used keyword meta tags for years, because keyword meta tags are too easy for lay users to abuse in seeking top ranking search results. <http://en.wikipedia.org/wiki/Search_engine_optimization>; <http://googleWeb_mastcentral.blogspot.com/2009/09/google-does-not-use-keywords-meta-tag.html>; <http://www.google.com/support/Web_masters/bin/answer.py?hl=en&answer=35291> (23Sept09).

5. Sec. 4.05. Corporate name of domestic or foreign corporation.

(a) The corporate name of a domestic corporation or of a foreign corporation organized, existing or subject to the provisions of this Act: ... (3) Shall be distinguishable upon the records in the office of the Secretary of

State from the name or assumed name of any domestic corporation or limited liability company organized under the Limited Liability Company Act, whether profit or not for profit, existing under any Act of this State or of the name or assumed name of any foreign corporation or foreign limited liability company registered under the Limited Liability Company Act, whether profit or not for profit, authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner provided in this Act or Section 1-15 of the Limited Liability Company Act, except that, subject to the discretion of the Secretary of State, a foreign corporation that has a name prohibited by this paragraph may be issued a certificate of authority to transact business in this State, if the foreign corporation:

- (i) Elects to adopt an assumed corporate name or names in accordance with Section 4.15 of this Act; and (ii) Agrees in its application for a certificate of authority to transact business in this State only under such assumed corporate name or names. ...
- (b) The Secretary of State shall determine whether a name is "distinguishable" from another name for purposes of this Act. Without excluding other names which may not constitute distinguishable names in this State, a name is not considered distinguishable, for purposes of this Act, solely because it contains one or more of the following:

- (i) the word "corporation," "company," "incorporated," or "limited," "limited liability" or an abbreviation of one of such words; (2) articles, conjunctions, contractions, abbreviations, different tenses or number of the same word....

Sec. 4.10. Reserved name. The exclusive right to the use of a corporate name or an assumed corporate name, as the case may be, may be reserved by:

Sec. 4.25. Registered name of foreign corporation. Any foreign corporation not transacting business in this State and not authorized to transact business in this State may register its corporate name, provided its corporate name is available for use as determined by the Secretary of State in accordance with the provisions of this Act.

6. Due to continuing security concerns, all US Postal Service and private carrier mail is screened off-site before arrival on Capitol Hill, adding days to delivery time. To avoid damage to heat-sensitive screening, boxes rather than envelopes should be used for electronic media such as CDs, DVDs, videocassettes, and audiocassettes, photographs, slick advertisements, color photocopies, microform, and similar objects. <<http://www.copyright.gov/mail.html>>.

7. "It is unclear whether online availability for the user constitutes publication of the work under the copyright law. The Copyright Office does not determine whether a particular database is published or not. Instead, that decision is made

by the copyright owner." Copyright Circular 65. In copyright litigation, the judge or jury may decide, or eventually Congress may define.

8. Database content, published or unpublished, covering up to a three-month period within the same calendar year may be combined in a single registration application. Copyright Circular 66; Circular 65, Copyright Registration for Automated Databases.

9. The United States also grants plant and design patents. 37 USC § 161, 171.

10. Chicago-Kent College of Law sponsors the Self-Help Web Center on the sixth floor of the Daley Center, Chicago. It serves as a starting point for litigants navigating the unfamiliar and complex court system on their own. <<http://www.kentlaw.edu/cajt/shwc.html>>. The Illinois State Bar Association (ISBA) provides the public with general legal information about the law, health, family, home, car, money, work, estate, military personnel, and disaster preparedness, <<http://www.illinoislawyerfinder.com/legalinfo/>>. The American Bar Association (ABA) provides general informational resources, <http://www.abanet.org/public.html?ptc=global_publicresources_lead>. Non-lawyer organizations generally cannot provide legal advice on particular cases.

11. Dr Seuss (Theodor Geisel), *Horton Hatches the Egg*, 1942 ("I meant what I said and I said what I meant. An elephant's faithful one hundred percent.")

12. E.g., mailing one's self a copy of a writing provides any copyright advantage. It's not an infringement if you cite the source. It is a copyright infringement to use public domain works without attribution (plagiarism perhaps, but not infringement). There's no contract if no writing is signed. Obtaining a corporate name from a Secretary of State prevents trademark infringement. That the mass media often confuse trademarks, copyrights, and patents, with their differing kinds of protection and defensible uses, miseducates the public.

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MINNESOTA NICE: Lessons from the poker table

Continued from page 1

of money to win or lose in a game like this. Consider that a professional player is aiming to win no more than one or two “big bets” an hour in any game he or she might play. This means that a professional player would feel he was doing just fine raking in between \$16 and \$32 an hour. Let’s say, for simplicity’s sake, his hourly expectation is about \$25. If he plays for six hours his “par” performance is to win \$150.

All of this will help you to understand just how unusual a result it was that, when I got up from the table six hours later, I had \$2,580 in chips in front of me. Since they happened to be \$2 chips, I had, physically, over 1,200 chips in front of me. I had to have a casino employee help me bring all the boxes of chips I had accumulated over to the cashier’s window when I left.

While I certainly had a lucky run of cards sent my way that day, and I probably did make fewer dumb decisions than usual, neither of these is the real reason I won so many chips. I’m going to tell you the reason, but you might want to see if you can figure it out yourself by listening to the players at my table. Now it is very rare, when playing at a poker table, that other players will make comments about the fortunes of another player during a session. If someone is losing a lot it is impolite to mention it (and you don’t want the player to become uncomfortable and leave). If someone is winning a lot it is also rarely commented upon, though here, I think, for different reasons. Acknowledging how well another player is doing feels to most players like accepting a situation they want to believe is fluid and still subject to change. When you are competing with someone, and they are winning, and the game is still going on, you still believe you have a chance to overtake them; it’s no time for congratulation or admiration. Occasionally, if someone runs into a streak of misfortune, or a little rush of consecutive wins, you will hear a brief and solitary comment (to the loser: “That’s a bad beat, buddy,” or “We’ve all been there,” said sympathetically; to the winner: “Pot after pot! Cut that stuff out!” or “Time for someone else to win!” said mostly with good humor). But the subject ends there. It does *not* become an ongoing topic of conversation at the table—ever.

Unless, apparently, you happen to amass \$2,580 in \$2 chips. The other players have a

few, little cylindrical towers of chips in front of them. You have something that looks closer to an architectural model of a shopping center built out of chip-size Legos. Your collection of chips is so wide the players on your left and right feel you are encroaching on their territory on the felt. It is so deep it is threatening to enter the pot of an ongoing hand. It is so high, you have to arch to look over it so you can see the common community cards being turned over in the middle of the table.

The unusual sight of so many chips in front of one player eventually becomes too much for the other players at the table. They break the unwritten rules of table etiquette and begin talking about your fortunes. “So are you lucky or are you really this good?” the guy on my right asks, with friendly sincerity. “I mean, I’ve never seen anything like this, so I’m just wondering.” People don’t necessarily expect me to answer this, and they begin to answer it themselves. They talk about me as if I am not there. “Well, it has to be some combination of the two,” one says. “You can’t play this long and win this much just on luck alone.” “What I don’t get is that he never starts out with the winning hand,” another says, “but he gets there in the end. If I played those hands I’d be broke.” “Yeah, has to be dumb luck,” another says. “Well, I’ll say this,” yet another chimes in, “he plays a very, very wide range of starting hands.” “Yes, but he plays them pretty well.” It goes on like this, without a word from me, exactly as if I am sitting there in a translucent sound-proof booth.

Now, from a competitive standpoint, it is just fine to have your opponents telling you exactly how they are thinking about your play. A big part of poker has to do with creating impressions of your play—that will be favorable to you—in the minds of your opponents. But rarely do you know *for sure* how they are actually reading you. If they are just going to come right out and let you hear exactly what they are thinking—because they have become so annoyed individually by your success that it is comforting to them to dissect you collectively like a public specimen—all well and good.

But on this occasion I found myself utterly fascinated by their thinking. I began to lose interest as a competitor (winning that many chips may do that to you), and more interested from a more accustomed role, that of a

student of the mind.

Everything they said was right:

I was having very good luck.

I was playing my hands pretty well.

I was often starting out behind, with an inferior hand, and then overtaking them at the end.

I was playing a very wide variety of starting hands.

They were bothered by what was happening and they were trying to get to the bottom of it. Steadily mounting stacks of chips over six hours is a disturbingly robust phenomenon, and they were thinking very hard, “What is this guy doing?” They were pooling their own good observations and sharing their answers.

But they were *not* asking themselves a different kind of question, “What are we doing that is allowing him to do what he is doing?” “How does someone *get away with* playing a wide variety of starting hands, hands that are often inferior to others’ at the start?” If you are a poker player you may have figured out the answer to this question. Whether you are or not, it may help if I tell you why I sat down at the \$8-16 table at the Canterbury Card Club.

The Canterbury Card Club is one of these great poker rooms that are more frequently showing up all over America with the resurgence of interest in the game. I’ve played there many times because I have family in Minnesota. It has *many* tables. It has *many* different stake levels of play available at the different tables. It has *many* regulars who all get to know each other because they are playing against each other all the time. The highest stake game at the Canterbury Card room is the \$15-30 game, twice as rich as the next step down, the \$8-16 game I was playing in. People who tend to play at the \$15-30 table play there because they like that game best. It was my good fortune to sit for six hours at an \$8-16 table filled with people who liked to play *that* game best. Apparently there was always room for the \$15-30 player to find a seat at the \$15-30 table. He didn’t have to bide his time in the \$8-16 game while he was waiting for a seat in his preferred game. This was my real birthday present, not Lady Luck.

Why do you think people at the \$8-16 table prefer playing there? If you ask them why they don’t play in the \$15-30 game (and I have asked many people this), what they tell you is *not* that the stakes are too high. They

say some version of, "I've tried it; the game is too fast." "It's too crazy." "Too aggressive." Exactly. Watch the \$15-30 game for an hour, and then watch the game I was in, and you will see one big difference. In my game there is *rarely* a raise "before the flop" (the first bet, when you are only looking at your two starting cards, and no community cards have yet been overturned). In my game, not only is a raise before the flop rare, but there are almost *never* multiple raises before the flop. In the \$15-30 game this is happening *nearly all the time!*

If that style of play feels uncomfortable or "crazy" to you, you will naturally, and probably without quite realizing it, drift to a game where this kind of craziness does not go on, and you can happily play your preferred style with a group of people who will play with you day after day in your preferred style because that is their preferred style too. All will be well—unless someone comes along who can take advantage of this style of play. Every poker book will show you the narrow range of hands that are playable at the beginning of the hand, a range that can vary a little depending on your seating position at the table on that particular hand. (Because the deal

rotates, your position keeps changing even though you remain physically in the same seat.) But when you are playing at a table averse to raising at the start of a hand, *you can just go ahead and throw that book away.*

You can play a much wider range of hands because you are rarely going to have to pay a lot to see "the flop," the first three community cards. "He plays a wide range of hands." "He never seems to start off with the best hand, but he still ends up winning." They say these things with such bewilderment, as in, "How does he do it?" But this isn't really about what "he" is doing; it's about what they are doing—or not doing. They aren't raising before the flop. They aren't re-raising before the flop. If they had done that, I would have had to throw away *all* those marginal starting hands that turned into winners.

Poker takeaway: In a good-sized poker room, filled with regulars, most people are playing exactly the game they prefer to play. Stay away from the highest stake game. Play one level down. You will likely find a much less aggressive style of play here, where the risk of entering a hand is much reduced. Whether they know it or not, people are playing here *because it is less aggressive.* You can

play a much greater variety of starting hands. You still need to discipline yourself to get away from marginal hands after the flop. But you will get to see a lot more flops, improve a lot of hands at very little cost, and take down a lot of pots with hands you ordinarily should have thrown away at the start.

Poker Lesson/Life Lesson: If you are playing in a game (the game of poker, of life, or anything in between) and someone is "running over the table" for a good long time, *you are almost always making some contribution to your defeat and his good fortune.* It is easy to get caught up in your feelings toward that person—envy, anger, bewilderment. Forget about him or her. Ask yourself, "What am I, or we, doing that is enabling the person to 'win'?" ■

Robert Kegan is the William and Miriam Meehan Professor of Adult Learning and Professional Development at Harvard University's Graduate School of Education. His latest book is, *Immunity to Change: How to Overcome It and Unlock the Potential in Yourself and Your Organization* (Harvard Business School Press, 2009).

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