

Trademark Basics

By Frederic M. Douglas

© 2012, Frederic M. Douglas, All Rights Reserved.

What is a trademark? Should you instead “get a copyright” or “get a patent”? Understanding the basic facts about trademarks can avoid misunderstanding and give you the knowledge to protect your hard work and grow your business or other activities.

A trademark is something that identifies the source of products and services. It may be one or more words, artwork, symbols, a sound, a color, or practically anything that differentiates a product or service from other companies. For example, the well-known Nike swoosh trademark, or the McDonald’s golden arches.

You may have heard of a “service mark.” For most purposes, just consider it to be the same as a “trademark” for a service instead of for a product.

Usually, a trademark for products appears on the product or on the product packaging. A service mark usually appears in advertising for the services. A copyright protects an original artistic or literary work (like a painting, a book, software code, a play, a movie, music, and such works). A patent protects an invention (like a gizmo or a method for doing something).

Essentially, if you want to have a trademark, you just start using it. When people say that they want to “get a trademark,” they usually mean that they want to register the trademark with the U.S. Patent and Trademark Office.

To register a trademark, you must file a proper application to register the trademark with the Patent and Trademark Office. Your application will state that you have a bona fide intent to use the trademark in U.S. commerce. You may already have started using the trademark in U.S. commerce before filing your application.

One common misperception is that one must wait until registering the trademark before using the trademark or before asserting your rights in the

trademark against others. While you may have strategic reasons for not asserting your trademark until a later date, you should at least understand that registration is not required to begin using your trademark in your business activities. In fact, delaying using the trademark may erode your rights such that there is the concept of “use it or lose it.”

The ability to sue an infringer is a major advantage to registration. If one company wants to sue another company over a trademark, getting an award of money damages is more likely if the trademark is registered with the Trademark Office. Filing a fictitious business name notice provides no trademark rights.

If you detect a conflict between your use of a trademark and someone else using the same or similar trademark, you need to note that generally the party that either uses the trademark first (and keeps using it) and files a registration application first usually will win a battle at the trademark office. Thus, file your trademark registration application as soon as you are ready.

Frederic M. Douglas (fdouglas@cox.net) is a solo practitioner specializing in litigation involving intellectual property (patents, trademarks, trade secrets, copyright, and more).

freddouglas.wordpress.com