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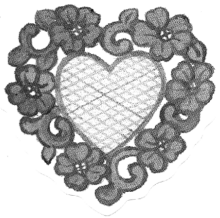
Happy Valentine's Day



"Tip of the Month"

Common Law Trademark

Unlike patent and copyright, which are creatures of the U.S. Constitution, trademark is a form of intellectual property that has been around for centuries. Back in the Middle Ages, the medieval guilds would mark their goods. The stamp on the barrel might say "Bass Ale" with a triangle logo, which is now called "England's oldest trademark."

That mark reflected the source and quality of the goods, so that consumers would know they were getting the genuine article. If someone else were to try stamping the same mark on a competing product, that would be cheating. It was known as "riding on the coattails" of the genuine product's good reputation. Today, that is also known as counterfeiting or trademark infringement, and is characterized as unfair competition under the federal Lanham Act.

The United States Patent & Trademark Office ("PTO") established a registration system for trademarks that is sometimes called federal registration. That system recognizes 45 classes of goods and services. After federal registration with the PTO, the owner of a trademark can and should always include ® with the mark to show that the mark has been registered.

But federal registration does not guarantee that the mark is defensible against everyone else who might use that mark. This is because the strength of a mark depends on first use, not first registration. In other words, a trademark can have priority at common law based on first use in commerce, even over a trademark federally registered with the PTO. The priority depends on who used the mark first.

For example, the NFL (National Football League) federally registered the mark "Who Dat?" which is short for "Who dat say dey gonna beat dem Saints?" as in the New Orleans Saints in the Superbowl February 7, 2010. The NFL threatens to seek injunctions against unlicensed T-shirt sellers moving gobs of "Who Dat?" T-shirts throughout Louisiana.

In response, those defiant T-shirt sellers note that "Who Dat" has been around for maybe 150 years. The Saints have been "marching in" around New Orleans long before there was an NFL Saints starting in 1966. The NFL responds that even an image in the public domain, like an apple, can be a defensible trademark if associated with a particular product, such as a computer.

At the same time, some local merchants claim a common-law right to this phrase in the public domain. It cannot properly be locked up by the NFL say those people, because we were using the mark first. This pits the common law use of the mark against the federal registration.

Depending on first use, the common law mark can sometimes trump the federally registered mark. If you have questions about trademark, give us a call at 668-1971 or contact us by e-mail at *mailbox @ biz-patlaw.com*.

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