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Got Intellectual Property?

Chances are you have intellectual property that needs protection even if you think you are not in the "intellectual property business". Times have changed. In the past twenty years there has been a dramatic shift in the percentage of a corporation's assets that are tangible (buildings/real estate, equipment, etc.) and the percentage of assets that are intangible, such as intellectual property. Some business analyst authorities report a complete reversal from approximately 75% of a corporation's assets being tangible assets in the late 1970s to approximately 75% of a corporation's assets being intangible assets in the early 2000s. Even characteristically "low tech" companies have intellectual property that needs protection. Intellectual property adds value to a company even if the company is not in the "intellectual property business" such as a software or entertainment company.

Trademarks

All companies that use a brand name in connection with the sale of goods or services should apply for state or federal trademark registration. You may apply for trademark registration of a brand name and/or logo. Some people mistakenly believe that incorporation or the registration of an assumed name (fictitious name) provides effective trademark protection. It does not. The practical reality is that trademark registration is the only effective way to achieve trademark protection in the United States.

A trademark is a word, phrase or logo that identifies a product or a service. Often, the trademark is one of the most valuable assets of a business. "Trademark" means a brand name and/or logo for the product or service sold by your company. The trademark may be the same as or similar to your company name, or the trademark may be entirely different than your company name. It is customary to omit the corporate suffix such as "Inc." from the trademark.

A name by any other name...

There is generally a hierarchy of protection for trademarks and service marks. The strongest protection lies with coined or arbitrary marks that in no way suggest or describe the product or service such as "Exxon". Next, and also protectable are marks that merely suggest the product or service or suggest some characteristic or quality of the product or service. At the bottom of the list and generally not readily protectable are descriptive marks. Generic terms can never become valid trademarks.

Rights in a trademark or service mark are acquired in the United States by being the first to use the mark in commerce on or in connection with the goods or services. Rights may also be established by filing an application for trademark registration with the U.S. Patent and Trademark Office based on a bona fide intent to use a mark at a later date. A mark cannot be registered

(Continued on page 2)

Inside This Issue

GOT INTELLECTUAL PROPERTY?	1
ATTORNEY SPOTLIGHT	3
RM ANNOUNCEMENTS	3
EMPLOYMENT LAW: TIME LIMITS SERVE AS BOTH A SWORD AND A SHIELD IN TITLE VII DISCRIMINATION SUITS	4

(Continued from page 1)

until it has actually been used on a product or service.

While a trade or service mark can be protected under state and federal laws without registration, it is beneficial to register the mark with the Secretary of State and the U.S. Patent and Trademark office if interstate commerce is involved.

When a mark is registered at the federal level the registration provides others notice of the registrant's claim of ownership and it gives the federal courts jurisdiction to hear infringement claims. Once a trademark is registered with the U.S. Patent and Trademark Office it may be accompanied by the notice symbol ®.

For protection of your brand name used in connection with the sale of goods or services in the United States, we recommend federal trademark registration. In general, federal trademark registration provides a right of priority nationwide to the first company that submits a federal trademark application. This right of priority nationwide is subject only to the limited common law rights that others may have acquired in the geographic areas where they have advertised and sold products or provided services under a confusingly similar trademark prior to the filing date of your federal application.

Copyrights

Copyrights seek to promote literary and artistic creativity by protecting what our founding fathers' in the U.S. Constitution broadly called "writings and authors". Copyrightable works include, but are not limited to, literary works, original landscape plans, musical and dramatic works, sculptures, motion pictures and other audiovisual works, sound recordings and computer programs.

A copyright protects only the particular expression of ideas and not the ideas themselves. To be protectable, a work must be original and it must evidence some creativity. Depending on the nature of the work, the owner of copyright has the exclusive right to reproduce the work, to prepare derivative works, to distribute copies of the work, to perform the work, to display the work and authorize others to do these things.

Once a copyrightable work has been created and fixed in tangible form, such as being written down, recorded it is protectable, whether it has been published or not. If it is to be published, all the copies of the work that rare published should preferably bear a copyright notice. The statutory copyright notice consists of the symbol © or the word "copyright" the year of first publication and the name of the owner of the copyright. In the case of sound recordings a "P" in a circle must be

used in place of the "C" in a circle. Audio-visual works should bear both the circle "P" and circle "C" indicators.

Copyrights may be registered with the Copyright Office in the Library of Congress. As of 1989 it is no longer necessary to place the copyright notice on a work, nor is it a requirement to apply for registration with the Library of Congress, but such notices and filings are strongly recommended to obtain advantages in the event that a copyright is enforced in a court of law. For example, registration is still required to bring a lawsuit and the existence of registration prior to an infringing act may entitle the copyright owner to additional monetary awards by a court.

An individual's copyright lasts for the author's lifetime plus 70 years. A copyright registered anonymously under a pseudonym or as an entity lasts 120 years from creation or 95 years from the date it is first published whichever expires first.

Trade Secrets

Trade secrets are information that companies keep secret to give them a competitive advantage. Examples of trade secrets include customer identities and preferences, vendors, product pricing, marketing strategies, company finances, manufacturing processes and other competitively valuable information. For example, the formula for Coca-Cola is a trade secret.

Under the Uniform Trade Secret Act, information must meet three criteria to qualify as a trade secret. First the information must be "generally known or readily ascertainable" through proper means. Second, the information must have "independent economic value due to its secrecy". And third, the trade secret holder must use "reasonable measures under the circumstances to protect" the secrecy of the information. Nearly all states have adopted the Uniform Trade Secret Act (UTSA).

While patents and copyrights require you to disclose your information in the application process, trade secrets require you to actively keep the information secret. Information is protectable as long as the information fits the definition of trade secrets. This can be moments or decades.

WE APPRECIATE YOUR COMMENTS REGARDING OUR NEWSLETTER. PLEASE ADDRESS THEM TO OUR EDITOR, KATHLEEN GOODRICH, 2600 N. MILITARY TRAIL, 4th FLOOR, BOCA RATON, FLORIDA, 33431-6348, OR E-MAIL: kgoodrich@rmlawyer.com.

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ATTORNEY SPOTLIGHT



JHAN THOMAS LENNON

Jhan Thomas Lennon, Esq. practices in the areas of Civil Litigation, Real Estate, Intellectual Property and Business Transactions. He represents individuals and institutions in Florida and Massachusetts. Jhan is passionate about helping businesses and individuals understand and value their intellectual property.

Mr. Lennon provides a full range of intellectual property services for clients including:

- * IP Portfolio Management and Development
- * Due Diligence Investigations
- * IP-Related Corporate Transactions
- * Licensing
- * Copyright
- * Trademark Clearance and Prosecution
- * Trademark Litigation/Litigation Prevention
- * Trade Secret Misappropriation
- * Unfair Competition and False Advertising

His representation of clients has included the following accomplishments:

- * Assisted company in development of significant IP portfolio, resulting in increased intangible assets and share value.
- * Successfully negotiated settlement of contentious international trademark litigation, resulting in preservation of client's corporate name and related trademarks.
- * Represented creative concept development company in successfully securing copyright to multiple original works.
- * Worked with software company in crafting strategic licensing arrangement with national distributor of software products.
- * Represented Franchisors and Franchisees with various trademark issues related to the franchise distribution business model.
- * Worked with musicians and graphic artist with respect to securing various copyrights and licensing opportunities.

Jhan is a 1997 graduate of New England School of Law in Boston, and he received his Bachelor's Degree from St. Lawrence University in Canton, New York. He grew up in Boca Raton, Florida and graduated from Saint Andrews School in 1989. He is member of the Massachusetts and Florida Bars. He is also a member of the American Bar Association and Palm Beach County Bar Association.

Jhan lives in Boca Raton with his wife, Amy, and their three children, Grace, Kathryn and Christopher. He enjoys writing and performing music as well as saltwater fly-fishing and tennis. Jhan is active in various local charities.

RUTHERFORD MULHALL, P.A.

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Employment Law: Time Limits Serve as Both a Sword and a Shield in Title VII Discrimination Suits

The U.S. Supreme Court recently ruled in a decision that the late filing of a discriminatory wage claim is a bar to any recovery. The Court, in the case of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* held that an employee's untimely filing of a complaint with the EEOC alleging a discriminatory act based on gender is "merely an unfortunate event in history which has no present legal consequences."

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" to discriminate "against any individual with respect to compensation . . . because of such individual's . . . sex." What differentiates Title VII claims from other wage claims such as the overtime provisions of the Fair Labor Standards Act ("FLSA") is the requirement that a Title VII plaintiff must show the employer acted with discriminatory intent. Any individual wishing to bring a claim alleging violation of Title VII must first file a "charge claim" with the EEOC, which evaluates the claim, and either attempts to mediate a resolution, dismiss the claim or issue a right to sue letter. In Florida, a charge claim must be made by an employee within 180 days of the discriminatory act, and an employee may not proceed with a lawsuit without first filing a claim with the EEOC.

The plaintiff in *Ledbetter* alleged she was the victim of discriminatory conduct when she was denied two promotions based upon her gender. These promotions would have increased her weekly pay, and Ms. Ledbetter argued the decrease in each paycheck was a result of a past discriminatory act. Ms. Ledbetter, however, failed to file a charge claim with the EEOC within 180 days of the alleged discriminatory act of denying her promotion. To avoid the 180 charge claim period, Ms. Ledbetter argued that a new violation under Title VII was committed by the employer with the issuance of each paycheck. This "paycheck accrual rule" was rejected, and the Court held that absent discriminatory intent, the act of issuing a paycheck does not constitute an act in violation of Title VII, and because the plaintiff failed to timely file a charge claim with the

EEOC, she is precluded from proceeding in a Title VII claim in Federal Court.

It is just as important to note what the *Ledbetter* decision does not do. First, *Ledbetter* does not apply to claims brought by employees under the Equal Pay Act prohibiting disparity in pay based upon gender, just as it does not effect an employee's right for compensation under the provisions of the FLSA. Second, an employee who is the subject of a gender based discriminatory act in the past (over 181 days in Florida and up to 300 days in other states) is not precluded from bringing a subsequent action based upon the same, or renewed, act of discrimination. Similarly, an employer is not shielded from past discriminatory acts simply because an employee failed to file a timely charge claim with the EEOC in the past. An employer is subject to liability under Title VII for discriminatory employment practices based upon gender so long as the employee files a charge claim with the EEOC within 180 days of the discriminatory act. Any renewed act, when made with the required discriminatory intent, may form the basis for an employer's liability.

The future of the Supreme Court's decision in *Ledbetter* is also important to watch. Currently the Ledbetter Fair Pay Act is moving through the Senate and has already passed the House. If it passes in both houses and is signed into law, the Ledbetter Fair Pay Act legislation would overturn the Supreme Court's decision and eliminate the statute of limitations in filing a charge claim with the EEOC on not only discrimination claims brought under Title VII, but potentially as to all pay discrimination claims. Although President Bush has threatened to veto the legislation, the ramifications for both employers and employees if the legislation passes would be significant..

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