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ATTORNEYS AT LAW

Newsletter

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Inside this issue:

What is a trademark? And how is it different from a copyright?

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If you have a creative side, or have recently opened a business, you might want to know how you can safeguard your hard work from others who may try to ride on your coattails or improperly copy your efforts. When you want to profit from your creative endeavors, protecting your intellectual property can be as important as protecting your personal property. "Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce." Below is a brief introduction to two kinds of IP: trademarks and copyrights, their differences, and how they might help protect you.

Trademarks

Trademarks can be found almost any place – on business signs (Sears®), restaurant menus (Big Mac®), drink labels (Coke®), home appliances (GE®), children's toys (Fisher-Price®), and fashion accessories (Cole Haan®), to name a few. Basically, a trademark is a recognizable design used to identify goods or services. The legal definition of a trademark is "a word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others." In the marketplace, they are the bottle shape, lettering style, and colors that help consumers distinguish Coke® from Pepsi® before they have even tasted the two drinks. Recently, trademarks have also come to be sounds (the Intel Tune, MGM Lion, and Harlem Globetrotter's theme) and smells. Have you stepped into a Verizon Wireless store recently? Was there a "flowery musk scent" when you walked in? That scent was registered with the United States Patent and Trademark Office (USPTO) on October 7, 2014, to help distinguish Verizon® from other communications retailers. A combination of the things that comprise a trademark may also be used to identify the goods or services *you* offer as belonging to *you* or *your company*, rather than your competitors.

Obtaining a trademark registration puts your home state – or "the world" if you acquire a federal registration – on notice that you are using your trademark and intend to defend and protect it from unauthorized use. Trademarks are critical to separating your goods and services from those of your competitors. If a customer tries your pizza and thinks it's good, you want them to remember that they liked it and purchase it again. A trademark can help your customers quickly identify your pizza out of an entire aisle of frozen foods in the supermarket. In addition, your trademark helps your customers distinguish your tasty pizza from the inferior ones, just by looking at the package. Finally, a federal registration can pave the way for recovering damages against someone who may infringe on your rights in the future.

Before you start using your trademark, you should take steps to make sure that no one is using a mark like it – to make sure *you* are not infringing on someone else's rights. An attorney who is familiar with trademark clearance searches can help you determine whether someone else is already using a trademark similar to the one you want to use. Why does it matter? Because anyone who is currently using a mark that is the same as or substantially similar to yours may oppose registration of your mark, may sue you for infringement, and may obtain an injunction requiring you to stop using your mark (potentially meaning a lot of time and money lost).

On the flip side, once you decide on the trademark you want to use, it is important to think about how to protect it. The easiest ways to protect your trademark are by registering and policing it. Trademarks may be registered within your state, nationally, and even in some other countries. Where you want your goods or services to be recognized is important when deciding where you should seek registration. If you are a small business owner and never plan to expand outside your state, you may want to consider only a state trademark registration. If you

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Otis, Bedingfield & Peters, LLC was awarded "The Best Place to Work in Weld County."

What is a trademark? And how is it different from a copyright? (Cont.)

plan to "go big," however, a federal registration may be right for you. Policing your mark means making sure that no one else is using your mark or one that is confusingly similar. It can also mean making sure that people aren't unknowingly drinking Pepsi® when they asked for Coke® . Policing your mark is important for maintaining your registration and defending any future lawsuits. You can do this yourself, or an attorney can help you.

Copyrights

While trademarks are used to identify the source of a particular good or service, copyrights protect original artwork, books, songs, architecture, movies, choreography, computer software, and more. Copyrights protect how a creative idea is expressed, but not the idea itself. By definition, copyrights protect "original works of authorship fixed in a tangible medium of expression." In other words, you cannot copyright your idea unless you put it in some form that can be touched and redistributed.

As an "author" (the creator of a work that can be copyrighted), you obtain a basic common-law copyright from the moment your work is "fixed." However, only the parts of your work that are *original* will be covered. Multiple people can obtain basic copyrights in their own portrayals of the same subject. The predictable plot of a romantic comedy movie is not copyrightable, but (assuming no infringement has occurred) each writer's individual movie script is.

In addition to owning the original work you have created, a copyright owner also has the exclusive right to control how the work is used: to reproduce it; create derivative works; distribute it; publicly perform or display a literary, musical, dramatic, choreographic, pantomime, motion picture, or other audiovisual work; and publicly perform a sound recording by means of digital audio transmission. This means, for example, you can write and play a song in public, but no one else can play your song without your permission. However, another musician may like your song, add their own style to it, and make it their "own." You can create a bronze sculpture of a family, but another artist can legally create his or her own bronze sculpture of the family, too. This is why copyright registration is so important.

If you want to sue someone for infringing on your rights in the future, your work must be registered with the U.S. Copyright Office. Whether your work is registered with the U.S. Copyright Office also determines what damages you can recover if your lawsuit is successful. Additionally, not every country recognizes U.S. copyrights, so if you want to send your work abroad, you should check the Copyright Office circulars or consult an attorney to determine what your rights will be in other countries and how best to protect them.

Trademarks and copyrights can be instrumental in protecting both your business and your work product. If you are interested in securing a trademark or copyright, or have one that you need help with, contact the lawyers at Otis, Bedingfield & Peters, LLC today.

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-Shannan de Jesús, Esq.

High court's wetlands opinion could be game changer

By: John A. Kolanz, Esq.
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Chalk one up for property rights. The U.S. Supreme Court just changed the playing field for wetland permitting, notably tipping the balance toward landowners and developers seeking clarification of whether their planned activities require Army Corps of Engineers authorization. Moreover, in somewhat of a rarity in environmental cases, the court did so unanimously.

The Clean Water Act requires a landowner to obtain a Corps permit before working in "waters of the United States," a phrase that defines the reach of the Act. Contrary to what one might expect, it often is not clear whether a property contains such waters. Therefore, the Corps has long provided property owners Approved Jurisdictional Determinations that state the agency's definitive position on whether a project area contains protected waters.

If the Corps determines that a planned project area does not contain protected waters (a negative JD), the project can proceed without a permit. A negative JD generally gives the property owner a five-year "safe harbor" for work in the evaluated area. However, if the Corps determines that the area contains protected waters (a positive JD), the landowner typically seeks Corps authorization before proceeding.

In this case, a company in Minnesota sought to expand its existing peat-mining operation to nearby lands. Before doing so, it requested an Approved JD from the Corps for certain wetlands in the expansion area. The Corps issued a positive JD based on the wetlands' "significant nexus" to a river some 120 miles away. Moreover, the Corps indicated to the company that the required permitting process would take years and be very expensive.

Corps regulations specifically allow a party to appeal an Approved JD to a higher level within the Corps. The company pursued such an appeal, but the Corps affirmed its original determination. The company then sought review of the Approved JD by a court.

For years, courts have supported the Corps' position that Approved JDs are not judicially reviewable. This recently began to change, causing inconsistencies among the lower courts. The Supreme Court accepted this case to definitively resolve the issue.

The authority of a court to hear such an appeal turns in part on whether the agency action at issue — here, the Approved JD — has legal consequences. The Corps has long argued that Approved JDs effectively have no legal consequences because landowners still have the options of applying for a permit and appealing any unsatisfactory results, or proceeding without a permit on the theory that the Corps' Approved JD is faulty.

All eight Supreme Court justices (the late Antonin Scalia would have made it nine) rejected the Corps' position, finding the agency's articulated options inadequate. The court observed that getting a permit can be time-consuming and expensive, citing a study from 1999 showing that permits, such as the one required here, take an average of 788 days and $271,596 to obtain. (These figures have likely risen significantly since then.) Moreover, a positive JD deprives landowners of the five-year safe harbor, exposing them to potential civil penalties of up to $37,500 per day, and even higher criminal fines and imprisonment. The court found these to be tangible legal consequences that make Approved JDs appropriate for judicial review.

The Corps' response to this decision is difficult to predict. Since the Clean Water Act does not require the Corps to issue Approved JDs, the agency could simply stop the practice. However, one justice warned the Corps about such a move.

In a concurring opinion, Justice Anthony Kennedy stated that the Clean Water Act, especially without the JD procedure, raises "troubling questions regarding the government's power to cast doubt on the full use and enjoyment of private property throughout the nation." In other words, dropping the practice of providing Approved JDs may prompt heightened scrutiny of the Corps' authority under the Act. The court will likely soon have an opportunity to scrutinize the Corps' Clean Water Act authority when, as most expect, it reviews a controversial rule defining which "waters" the Act protects.

Assuming the Corps continues its practice of issuing Approved JDs, this decision will change the dynamics between the Corps and landowners. Landowners will gain leverage in the JD process. The prospect of a resource-consuming judicial appeal will make the Corps less likely to push the envelope on JDs and more likely to seek common ground. Landowners should carefully consider the legal implications of this case, and how it ties into other recent Clean Water Act developments, before discussing planned projects with the Corps.

- John A. Kolanz, Esq.

Attorney Spotlight

Lia has worked for the firm for the past two years as a law clerk and has recently passed the bar and joined the firm as an associate attorney.

A graduate of Washington State University, Lia obtained her J.D. from the University of Colorado School of Law, where she received the best overall combined brief and oral argument award in the Colorado Appellate Advocacy Competition, and represented CU in the American Bar Association's Client Counseling Competition. Lia's background includes real estate and estate planning, and she has a passion for agricultural matters, including farming and ranching operations.

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Considering options for your home if you are worried about long-term care

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Many of our older clients are worried about two things – 1. Having the resources to afford long-term care, or qualifying for government assistance if they don't, typically Medicaid; and 2. They want to leave their house to their heirs if it is one of their primary assets. These concerns are true even for reasonably healthy individuals.

These concerns lead to questions of strategies for those who own their homes and wish to live there as long as possible, but are concerned that one, or both (if they are a couple) will need expensive, long-term care in either an assisted living facility or a nursing home. Is there a way to continue to own your home as long as possible, qualify for Medicaid AND make sure the family home is passed on to the children? The short answer is that it is difficult to accomplish this goal without giving up ownership and taking actions which require long-term planning. This brief article will not explore all the avenues to both preserve assets to pass on to heirs and minimize your "countable" assets in qualifying to Medicaid assistance, but will provide a brief discussion regarding the family home.

The most common strategy many people will employ is to transfer ownership of the home to a child, but continue to live in the home. While this strategy can sometimes "work" – there are several potential problems with this course of action. First, Medicaid utilizes a look-back period for assets that were transferred within 5 years of a person applying for Medicaid. This means that if you transfer ownership of your home to a child (or children) and need to apply for Medicaid within 5 years of the transfer, Medicaid will impose a penalty period during which you will not be eligible to receive benefits. The period is calculated by dividing the value of the assets transferred by the average monthly cost of long term care in the state to arrive at the number of months you will be ineligible. Worse, the penalty period will begin running on the first day you start receiving services and would be eligible for Medicaid, but for the transfer.

The second potential problem, even if the 5 year look-back period isn't an issue, is that you give up ownership of your home and it is now owned by someone else. While this can often work out just fine, sometimes we can't always control events in our children's lives. Events such as lawsuits, accidents, divorce and the loss of a job may put their ownership of "your" house in jeopardy.

You should be very careful in considering options for your home if you are worried about needing long-term care and talk with an attorney specializing in such matters before taking steps on your own.

- Timothy P. Brynteson, Esq.

The OBP team hard at work helping local Habitat families!

Otis, Bedingfield & Peters, LLC

The attorneys at OBP are recognized leaders in real estate law and business law. We advocate for individuals, businesses, and families in the Northern Colorado region. Our clients are landowners, business owners, business professionals, businesses of all sizes, and individual families in need of guidance or representation in court proceedings involving commercial real estate or business issues

For more information about our lawyers or practice areas, please visit our website at www.nocoattorneys.com or contact us at 970-330-6700, 970-663-7300. ◄

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