

20. A WORD ABOUT TRADEMARKS

Before we leave the subject of names—have you noticed all the little TMs in the products, services and slogans of certain companies? You’ll see the Big Boys using them all the time—and ®s and SMs as well.

“TM” stands for “trademark” and it’s essentially a line in the sand that says “this is mine; keep your mitts off.” An ® indicates the trademark has been registered with the U.S. Patent and Trademark office. An “SM” is a “service mark,” essentially the same as a TM.

But don’t think those TMs are just a gimmick, and don’t underestimate the power of a trademark. Once again, it’s not for naught that the biggest of the Big Boys assiduously register and defend their trademarks. You should too.

Trademark what you do—it puts the world on notice that you are unique. That TM is a tiny flag saying, “We are unique, we are individual, we are proprietary, and you can’t get what we offer from anyone else in the world.” Which, by the way, is why you’re branding to begin with.

I’m not an intellectual property attorney, and I don’t pretend to be an expert on trademark law. However, I have helped my clients develop and register dozens of trademarks, and I’ve been educated quite a bit by the intellectual property attorneys we’ve engaged. You should hire your own attorney when it’s time for a federal registration with the U.S. Patent and Trademark Office. But here are some things to know in the meantime.

The Difference between ® and TM.

The TM symbol is staking your claim to this mark. To place the TM symbol on your product, you don’t have to have permission, you don’t have to file legal documents, you don’t have to get an attorney

in the room. You just do it. (Notice I did not say “Just Do It®,” which is a registered trademark of Nike.) Now, it’s smart to check out the environment and make sure someone else has not already claimed this mark; if they have you are likely to get a cease-and-desist letter as soon as they get wind of your use.

Simply using your mark establishes your trademark rights. That’s the law. Isn’t it beautiful? You don’t have to file a federal trademark registration to establish rights to a trademark. You simply have to use the mark in interstate commerce. You also should establish bulletproof documentation as to when you first used the mark. For instance, a certified letter to yourself with the item included will establish proof-positive of its existence at that time. As with the Oklahoma Land Rush, he who arrives first claims superior rights.

Many businesses reflexively register with their state’s Secretary of State. It’s a good idea, but it essentially affords no protection outside of the state. If you’re going to use your mark in marketing and branding (and I suggest you do), the strongest protection is to file a trademark registration with the United States Patent and Trademark Office. Once your registration is approved by the USPTO, you get to use the ® with your trademark.

Shepherding your mark through registration requires professional help. Hire an attorney. They’ll charge you several thousand dollars, and it will be worth every penny. Be prepared too—the full investigation into your mark may well yield prior uses and conflicting registrations. Get a first peek yourself at USPTO.gov, where you can conduct your own trademark search on the name or names you’re considering. This screen is not the final word on the registerability of your mark—but it gives you a good snapshot of who’s already out there competing with you. There’s a lot of gray area in registering trademarks, and my experience is that attorneys typically err on the side of conservatism. If they don’t feel like it’s

open and shut, they're going to tell you to come up with something new. They don't realize how hard it is to invent original names. If you believe in it, be willing to fight for it.

Apple's iPhone Adventure

Trademarks are a high-stakes, brass-knuckles adventure for the Big Boys. When Apple announced its iTunes-enabled, Web-browsing cell phone in January 2007, it called it the "iPhone." Naturally, this name leveraged its hugely successful iPod, iTunes, iMac and iBook products. In fact, by this time in its life, Apple seemed unlikely to roll out any new product that wasn't an iProduct.

The biggest problem for the iPhone was that Cisco already owned the federally registered trademark on "iPhone," applying it to a voice-over-Internet-protocol product line.

Apple had tried and failed to license or purchase the mark from Cisco. When Apple announced the product as the iPhone anyway, Cisco immediately filed suit for trademark infringement. Unfortunately for Cisco, the momentum in the market was so great that Apple was able to prevail—securing a settlement that allowed both companies to proceed with marketing their products under the iPhone trademark.

That's good enough for Apple, because it knows full well which product the market will ultimately recognize as *the* iPhone.

