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THE PRIVATE BRIEF · AI & IP

Trademark or Copyright: Which One Protects a Brand Name

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IN BRIEF

- ◆ A brand name is protected by trademark law, not copyright. The U.S. Copyright Office says names, titles, short phrases and slogans cannot be copyrighted because they contain too little authorship.
 - ◆ A trademark identifies who goods or services come from; a copyright protects original creative work, such as writing, music, photographs or code, once it exists in a tangible form.
 - ◆ One logo can involve both: the artwork may be copyrightable while the name in it is a trademark question. A state LLC or DBA filing is neither.
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You have the name for the bakery, and a friend who means well tells you to “copyright it before someone steals it.” It is kind advice, and it sends you to the wrong government office.

If the thing you want to protect is a name (a company name, a product name, a band name, an app name), you are in trademark territory, and copyright will not help. The U.S. Copyright Office says so in its circular on works copyright does not protect: words and short phrases, such as names, titles and slogans, cannot be copyrighted, because there is too little authorship in them. Its list of examples includes the name of a business, the name of a product or service, the name of a band, a domain name, and slogans. The same circular points you elsewhere: in some circumstances, names and short phrases can be protected under trademark law.

This is an easy wrong turn, and it is costly in a particular way. You file the wrong thing, believe the matter is handled, and find out otherwise when someone else starts using the name.

What each one actually protects

The U.S. Patent and Trademark Office (the USPTO) draws the line cleanly. A **trademark** is a word, phrase, design or combination that identifies your goods or services, distinguishes them from other people’s, and tells buyers where they come from. A **copyright** covers creative works, such as writing, music, films, software code, photographs and paintings, that are original and exist in a tangible form: paper, canvas, film or a digital file.

So:

- ♦ **Trademark** answers “who is this from?” It is about the marketplace, and about buyers not being misled.
- ♦ **Copyright** answers “who made this?” It is about the work itself, and about copying.

A name does the first job. It cannot do the second, because there is not enough of it to copy.

An illustration: one bakery, six things to protect

This is a composite, not a client. A bakery's logo shows its name, hand-lettered, inside a hand-drawn illustration of a wheat sheaf. Here is how each piece of the brand sorts out:

- ◆ **The name, used on baked goods:** trademark. A federal application in the right class is the tool.
- ◆ **The wheat sheaf drawing:** original artwork, and copyrightable. Registering it with the Copyright Office is what you would need before suing someone who copies the drawing.
- ◆ **The lettering of the name:** usually neither. The Copyright Office will not register typeface or mere variations of lettering, apart from very limited cases. The lettering is protected, if at all, as part of the logo's trademark.
- ◆ **The logo as a whole, as it appears on the box:** registrable as a trademark in its own right. A registration of the name in plain letters protects the wording however it is displayed; a separate registration of the logo protects the design.
- ◆ **The tagline on the box:** not copyrightable, because it is a short phrase, but possibly protectable as a trademark if it works as a brand signal rather than as ordinary advertising.
- ◆ **The photographs on the website and the copy in the newsletter:** copyright, and nothing to do with the name at all.

Six pieces, one brand, two bodies of law. Where a single asset does two jobs, expect to file twice.

What registration adds, on each side

Neither right depends on registration to exist. Both are worth registering, for reasons that have nothing to do with each other.

Trademark. Rights come from use: the USPTO itself says common-law rights (rights from use alone, with no registration) are based solely on using a mark in commerce in the United States with specific goods or services. Federal registration adds what use alone cannot. Once the

mark registers, your filing date counts as nationwide use of the mark, which gives you priority from that date across the country against anyone who had not already used or filed for it. You get a legal presumption that you own the mark, the ability to sue in federal court, the option to record the registration with U.S. Customs and Border Protection to stop infringing imports, and the ® symbol, which is for registered marks.

Copyright. Protection begins when an original work is fixed in a tangible form: you own the photograph when the shutter closes, the song when it is recorded. Registration is what lets you enforce it. For a work first published in the United States, or an unpublished work by U.S. authors, you generally cannot sue for infringement until the Copyright Office has registered the work or refused to. And timing matters. Statutory damages (an award the statute sets, without your having to prove the money you lost) and attorney's fees are generally available only if the registration took effect before the infringement began, or, for a published work, if you registered within three months after it was first published. Register late, and for infringement that started in the gap, those remedies are gone. That is often the difference between a claim worth bringing and one that is not.

*Copyright is a thing you have. A
trademark is a thing you maintain.*

The clocks run differently

Copyright starts when the work is created and, for a work made by an individual author since 1978, lasts for the author's life plus seventy years. A trademark starts with use in commerce and lasts as long as you keep using it. A federal registration also needs periodic filings, and can be renewed every ten years for as long as the mark stays in use.

That difference has a practical consequence people miss. Copyright is a thing you have. A trademark is a thing you maintain.

The certificate from the state is neither

Neither right is what you got when you formed the company. Registering an LLC or corporate name with a state, or filing a DBA (a “doing business as” name), reserves that name in that state’s business registry. It does not give you nationwide trademark rights, and it does not stop a competitor elsewhere from building a similar brand. The certificate looks official, and it is. It is just not a trademark.

If you are working out which filings your brand needs, the firm’s trademark page sets out its clearance and application work, and its pricing page lists copyright registration. The fees for both are published there.

Why the wrong filing hurts more than no filing

A copyright registration for the logo drawing is a real asset. What it is not is a defense against another company adopting your name. If you file it and stop, three things follow: you have no federal trademark filing date, so someone who files first gets the benefit of theirs; you have no trademark registration to point to when you ask someone to stop; and you have spent the window in which the name was still cheap to change.

The reverse error is quieter. A company registers its trademark, launches, and later learns that the campaign photography it paid for belongs to the photographer. Under the copyright statute, the author owns the copyright to begin with. A commissioned work belongs to the business that paid for it as a “work made for hire” only in narrow cases: the creator is your employee working within the job, or the work falls into one of nine categories the statute lists and both sides signed an agreement saying so. Otherwise, ownership passes only if the photographer signs a written transfer. Nobody wrote it down, so the photographer still owns it.

The short version

Name, logo, slogan, product name, the sign over the door: trademark. The writing, the music, the images, the code, the video: copyright. The certificate from the state: neither.

None of this is a promise of an outcome. A trademark application can be refused, and the USPTO decides that, not your lawyer.

Where to start

This week, list every piece of your brand on one page: the name, the logo, any tagline, the photographs, the website copy. Next to each, write trademark, copyright or both. Then, for anything a designer, photographer or writer outside the company made for you, find the signed agreement that says who owns it. If you cannot find one, that is the first thing to fix.

This is general information about how trademark and copyright differ, not legal advice about your brand.

WRITTEN BY

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Anthony is the Managing Partner of Clemenza Law Group and serves as general counsel to a wide range of companies and philanthropic organizations. Nearly every essay here began as a real question from a real client: the contract that landed at 4 p.m., the board that meets on Thursday. He writes them the way he would answer you across the table, plainly and with care.

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The current version of this essay is kept at clemenzalaw.com/insights/trademark-or-copyright-brand-name