

# Intellectual Property & The *Law*



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## **G**OVERN YOURSELF ACCORDINGLY: TRADEMARK 101 FOR THE INTERNET ENTREPRENEUR

Michael D Hobbs, Jr.

“Reserved.” Heady words to an Internet entrepreneur viewing the “Whois” database. Having secured that new “.com” domain name, the company is now just a few quick rounds of VC funding and an IPO away from providing the owners with new Porsche Boxsters and condos in Vail, right? Wrong. Absent the proper intellectual property protection, the owners may never get beyond Subaru Justys and duplexes in Newark. Candidly, even these days with Google going public and Yahoo actually earning a profit, the application of traditional intellectual property doctrines to the Internet still matters.

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## **C**ONNECTING THE DOTS: STRATEGIES FOR EFFECTIVE DOMAIN NAME PORTFOLIO MANAGEMENT

JoAnn Holmes & Anne E. Yates

When does the domain name registration for your Web site expire? Do you own <www.yourcompanyname.biz>? Has a disgruntled employee or customer registered <yourcompanybites.com>? If you don’t know the answers to these questions, surely you can reconcile the status with a quick call to your company’s information technology department. Or, your in-house legal team? Outside counsel, perhaps?

Domain names are widely recognized as Internet addresses, but they are equally important and essential as effective advertising and promotional vehicles. Still, many companies are uncertain as to which domain name registrations they own. Moreover, they may not have considered whether

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## GOVERN YOURSELF ACCORDINGLY...

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Let's flesh out the above scenario. A start-up Internet company manages to reserve the domain name <mymousetrap.com> with Network Solutions, Inc. (NSI) for its new company. It then reserves the name MyMousetrap.com LLC with the Delaware Secretary of State's Office and has one of the founder's cousins incorporate the company. Several palettes of JOLT cola and DOMINO'S pizza later, the site goes live to rave reviews. *Wired Magazine* calls and wants to do an interview. Mymousetrap.com is getting more eyeballs on the Internet than Paris Hilton.

Three weeks later, a letter arrives via certified mail. "Our client, Acme Corp. (Acme) has requested that we advise you of its federal trademark rights in and to the mark MY MOUSE-TRAP." The letter concludes with a friendly reminder to "Govern yourself accordingly!" MyMousetrap.com is now faced with the prisoner's dilemma of burning through capital to fight an expensive trademark fight with no guarantee of winning, or starting over with a new brand, new company name, and new domain name. Those oh-so-helpful venture capitalists now treat you like you have a tattoo ... on your face.

MyMousetrap.com made the common mistake of assuming that merely because it reserved a domain name and incorporated, it was finished clearing and protecting itself. Some entities believe this because NSI allows registration of a domain name only if it is available, and a secretary of state's office will only permit incorporation as long as there is no identical company incorporated under the same name. However, under federal and state law, use of a



trademark that is confusingly similar (not only a mark that is identical) to another prior used or registered mark constitutes trademark infringement and unfair competition. Thus, such trademark use can be enjoined by the senior trademark owner, even if the junior trademark is also the subject of a domain name registration or state incorporation. In certain instances, the senior trademark owner can also recover lost profits and attorneys' fees. Courts have consistently recognized that usage of a domain name as a brand on a Web site constitutes trademark use and ordered that the underlying Web site be shut down or modified if it finds trademark infringement.

What could MyMousetrap.com have done differently? Prior to reserving the domain name and incorporating, a search of the U.S. Patent and Trademark Office (PTO) records should have been conducted, at a minimum, to reveal pending trademark applications and existing trademark registrations for marks that are identical or, although not identical, are likely to confuse the public. For example, CADILLAC automobiles and CADILLAC dog food are identical trademarks, but the person that confuses these two marks is likely to have a hard time getting around town and one very angry dog. The test for trademark infringement includes: (1) are the marks similar in sight, sound and/or meaning; (2) do the marks identify similar goods or services; and (3) are the marks' underlying goods or services sold to similar customers such that the public would believe one company makes both products or provides both services?

Having conducted a quick electronic search of the PTO to determine if a confusingly similar mark exists, MyMousetrap.com should then order a comprehensive search from an outside trademark search company. In addition to searching the PTO database, a comprehensive search includes state trademark databases and common law sources that could reveal the existence of relevant trademarks. These additional searches are important because in the United States, trademark rights can be created simply by using a trademark. Take the “Weinermania” hot dog stand outside your building run by old Mr. Weinermania—he has a trademark and protectable rights in that trademark, even if he can not discern the difference between the PTO and the PTA. Try using <weinermania.com> as an online address for Internet hot dog delivery services in your town, and Mr. Weinermania’s attorney could sue you. One of the goals of a comprehensive search is to find the Weinermanias of the world through corporate information records, telephone directories, and other sources before he sues you. This allows you to select a new name before you invest significant resources in a brand name for which someone else already has rights.

Following the comprehensive trademark search review and analysis, if a mark appears to be available, the domain name can now be registered and the company incorporated. Done? Nope. Even though Mr. Weinermania may have some common law trademark rights through his use of the WEINERMANIA trademark, there are numerous significant legal and practical advantages to obtaining a federal trademark registration. For example, with high-tech startups, the time from reserving a domain name and incorporating until a mark actually gets used may be several months. During that

time, every graphic artist, banker, and pizza delivery boy can decide that you have a great name, reserve <mymousetrap.net> and launch a Web site before you. All those hours developing a business plan and Web site are now worthless. If you rely on use alone, you do not have any trademark rights until “use in commerce” begins, which means your Web site must “go live.” Mere preparations to do business generally do not create any trademark rights. However, by filing a federal “intent-to-use” trademark application, your trademark rights date back to the date you filed the application, even if use does not begin for a year or more. If that pizza delivery boy launches his site after you file your federal trademark application, but before your site goes live, once your site goes live, you can make him shut down his site. Govern yourself accordingly, pizza boy.

Federal trademark registrations provide many other significant advantages. A common law trademark’s rights extend only as far geographically as the owner has used the mark. In contrast, federal registrants are entitled to nationwide rights. Furthermore, a common law trademark owner must prove protectable rights in the mark, whereas the law entitles federal registrants to a presumption that they own protectable rights in their mark. A common law trademark owner must protect his trademark rights and hope that prior to another person’s or entity’s adoption of a mark, a trademark search discloses his mark and discourages those others from adopting his mark. A federal registration helps ensure that others have notice of your mark because federal registrations almost always show up in a trademark search, thereby encouraging a “would be” trademark user to adopt another mark to avoid the expense of litigation costs. Finally, federal registration shows the

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world that you are serious about protecting your intellectual property rights. Coke has federal trademark registrations. Nike has federal trademark registrations. Microsoft has federal trademark registrations. Lots and lots of federal registrations. Do you want to follow the strategic business practices of The Coca-Cola Company, Nike and Microsoft, or will you let Weirnermania lead you?

On a final note, this article has attempted to convey some of the fundamental issues related to trademarks and their application to high-tech companies without the mind-numbing legalese that so often accompanies articles of this type. It must be stressed, however, that

trademark issues can be complicated. Absent competent and early counseling, a company can make irreversible mistakes that jeopardize the viability of the entire business venture. The trademark litigation that Go.com and others in the Internet community have faced is very real and very unsettling. Nevertheless, this area can be navigated with the help of proper legal counseling and a fundamental understanding of trademark law by a company. So, as you embark on your entrepreneurial journey, but before you start calling your Porsche dealer, do yourself a favor, govern yourself accordingly and protect your trademarks. ♦

## CONNECTING THE DOTS...

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newly emerging domain name registrations should be added to their current portfolios.

Recently, the domain name extensions “.pro” “.la” and “kids.us” have been introduced, adding to the host of generic, restricted, country code, and internationalized domain names that were previously available. Because the broad array of domain name extensions may appear to be overwhelming, your company may have settled on a “.com” domain name and gladly resigned itself not to keep up with the latest domain name introductions. That strategy (or lack thereof), however, could prove detrimental. Does your company have an effective plan for domain name portfolio management?

At best, without a domain name organiz-

ing system, your company may miss the opportunity to capitalize on audiences who seek your products or services at a particular domain name, or who seek information about your company if you have recently started your business. At worst, left to the devices of cybersquatters or disgruntled employees and customers, domain names can be manipulated to tarnish your company's trademarks and diminish its public goodwill. So, with an ever-growing population of domain name extensions, how do you “connect the dots?”

Consider the following suggestions:

1. Identify all of your company's domain name registrations. Some may be apparent. Others may require sleuthing. Designate a domain name “czar” to

http://

contact your information technology team, attorneys, business managers, advertising staff, and others in your organization who may have registered domain names on behalf of the company. Troutman Sanders can assist in identifying your domain names through software tools, which reconcile trademarks to domain names, search for domain names by owner, and identify domain names that contain key words. As you compile a comprehensive list of your company's domain name registrations, note the domain names' expiration dates. Moving forward, the czar can serve as a gatekeeper for portfolio information, additional registrations, and updates to your company's current portfolio.

2. Decide which registrations to maintain and which to abandon. Consider which domain names solicit the most Internet traffic. Which ones fit with your company's forward-looking marketing strategies? Are there registrations that are only necessary for a finite time span and in a limited geographic area? Keeping in mind that different extensions merit different registration fees, how many domain names will your company's budget allow?
3. Choose new domain names to register. If there are alternate spellings or common misspellings of your company's name or trademark, consider registering those domain names to avoid "typosquatting." Be aware that, when domain names incorporate hyphens, each word will be read separately by Internet search engines. This could result in higher rankings among search engine results. Do disparaging variants of your company's most popular trademarks merit defensive registrations?

Does your company offer products or services outside of the United States? If so, be sensitive that some populations strongly prefer domain name extensions that are country code specific (for example, ".uk," ".de," and ".ar") in lieu of the generic ".com" or ".net" variants. Also, internationalized domain names are an option to attract consumers who prefer a non-English language. Whatever domain names your company decides to add to its portfolio, ensure that each of them directs traffic to your company's Web site or an effective alternative site.

4. Adopt a registrar that offers portfolio management services. For example, ask whether the registrar can set auto-renewals for your company's domain names to prevent inadvertent registration lapses. Request services that allow your company to easily update registration information for all of its domain names at once. Also, be certain that the registrar can accommodate your company's expanding portfolio by evaluating whether it can host diverse domain name extensions, including country code domain names. Seek free educational services such as bulletins or seminars to keep you abreast of new domain name extensions as they become available. In keeping with this, inquire whether the registrar regularly participates in "sunrise" registration periods to assist trademark owners in pre-registering emerging domain names before they become available to the public.
5. Create an email address such as <domainnames@yourcompany.com> for receiving information about your company's domain name registrations. Make certain that the email account can be accessed by

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## CONNECTING THE DOTS...

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more than one person. This failsafe helps to ensure that important information will be received by someone in your organization, even if the "czar" should leave the company.

6. In compiling the list of domain names that your company owns, you may identify some registrations that it would like to acquire, and yet others that were registered without its permission. The Internet Corporation for Assigned Names and Numbers has established the Uniform Dispute Resolution Policy as an efficient means for resolving disagreements about domain name ownership. Moreover, the federal Anticybersquatting Consumer Protection Act is an alternate domain

name dispute resolution vehicle, which was enacted to protect trademark owners. Another measure, should your company opt not to take legal action, is to establish a domain name monitoring account so that it can register desired domain names as soon as they become available.

Take affirmative steps to identify and organize your company's domain names. Use resources such as legal counsel, information technology professionals, and registrars to keep abreast of news and developments that affect your company's domain names and trademarks. Adopting and maintaining an effective management strategy will help your company to keep connecting the ever-extending domain name dots. ♦

## CAN EXPERIMENTAL USE NEGATION BE RELIED UPON TO DEFER PATENT APPLICATION FILING?

R. Stevan Coursey

U.S. patent law requires that a patent application for an invention must be filed within one year of the first date on which the invention is in public use in this country. Realizing that inventors and entrepreneurs may need to use an invention, by way of experiment, to perfect the invention, the U.S. Supreme Court created the "experimental use exception." The experimental use exception, or more precisely stated, the "experimental use negation," enables an inventor or entrepreneur to diligently conduct public tests as long as necessary to perfect a claimed invention without barring itself from patent protection. The inventor or entrepreneur can proceed with public testing exempt from the one year public use filing require-

ment.

Sounds too good to be true, doesn't it? As pharmaceutical giant SmithKline Beecham Corporation (SmithKline) recently discovered, if it sounds too good to be true, it probably is! In March 1985, a SmithKline chemist developed crystalline paroxetine hydrochloride hemihydrate (PHC hemihydrate) which, ultimately, became the active ingredient in an antidepressant drug marketed as Paxil®. In May 1985, SmithKline began double-blind clinical trials in the United States to determine the safety and efficacy of PHC hemihydrate capsules to treat depression symptoms. SmithKline filed a patent application in the British Patent Office on October 25, 1985 in which SmithKline claimed PHC

hemihydrate, PHC anhydrate (a form of PHC without bound water molecules), and mixtures of both. Then, on October 23, 1986, SmithKline filed a patent application in the U.S. Patent Office claiming priority to the British patent application, but limiting the U.S. patent to the PHC hemihydrate compound. The U.S. patent application eventually issued as U.S. Patent No. 4,721,723 (the '723 patent). Subsequently, SmithKline sued Apotex Corporation for infringing the '723 patent on the basis that Apotex had filed an Abbreviated New Drug Application with the U.S. Food and Drug Administration seeking approval to market a rival antidepressant drug having PHC anhydrate as its active ingredient.

At trial, Apotex contended that SmithKline's clinical trials constituted public use, which should render the '723 patent invalid. The District Court for the Northern District of Illinois did not agree. Reasoning that the clinical trials qualified as experimental uses, the court held that the '723 patent was not invalid. On appeal, the U.S. Court of Appeals for the Federal Circuit (CAFC) reversed and held that SmithKline's clinical trials constituted public use of the invention claimed by the first claim of the '723 patent.

The CAFC stated that the determinative inquiry was whether SmithKline tested the invention of the first claim of the '723 patent because testing of non-claimed features of an invention does not show that the claimed

invention was the subject of experimentation. In other words, the experimental use negation only negates the failure to file a patent application within one year of public use when the inventor was testing claimed features of the invention. Thus, because the first claim of the '723 patent only claimed the PHC hemihydrate compound and included no limitation related to the efficacy, commercial use, or pharmaceutical viability of the PHC hemihydrate compound, the CAFC found that SmithKline's clinical trials did not test the claimed features of the invention, that it was public use and the patent was invalid.

Often, an invention is critical to a business and, as a result, the business' future may depend on the issuance and enforceability of a patent protecting the invention. Unfortunately, inventors and entrepreneurs frequently have limited resources and may defer the filing of a patent application for their invention, relying instead on testing or trials of their invention and the experimental use negation. In view of this ruling, the experimental use negation may be narrowly applied by courts, and inventors and entrepreneurs should be hesitant to gamble the future of their businesses on the application of the experimental use negation.

Keep this in mind when devising your own patent application filing strategy, and don't hesitate to contact legal counsel so that your patents and patent claims do not meet the same tragic fate as SmithKline's '723 patent. ♦

## **O**NLINE ADVERTISING: KNOW THE BOUNDARIES OF CYBERSPACE

Jackie Haley

If you are considering launching your products or services into cyberspace, be careful—the U.S. government is watching you.

The U.S. Census estimates that over 54

million American households own at least one computer, and of that number, approximately 80% have Internet access. The seemingly infinite number of consumers reached by

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## ONLINE ADVERTISING...

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computer advertising and electronic mail is quickly becoming an obvious and appealing medium for many businesses.

Before you move into cyberspace, however, you should know the rules of the road. The Federal Trade Commission (FTC) is taking a closer look at online advertisers, and failing to comply with FTC guidelines can cost your business a great deal of money.

In an effort to assist online advertisers, the FTC issued guidelines explaining the FTC's prohibition against "unfair or deceptive acts or practices" and providing suggestions for how online advertisers may comply.

The same rules that apply to advertising via any other medium also apply to the Internet. Broadly speaking, this means that advertising must not be deceptive, advertisers must have evidence to substantiate their claims, and advertisements cannot be unfair.

An advertisement is considered deceptive if it contains a statement that is likely to mislead a consumer in buying the product or if it does not have a reasonable basis to support a claim made in the advertisement.

Substantiation of claims requires an advertiser to have reasonable support for all express and implied claims made in the advertisement.

The FTC allows advertisers to qualify claims or avoid misleading impressions with disclosures. A disclosure must be clearly and conspicuously placed within the advertisement so that the overall impression of the advertisement is that all claims are truthful.

Online advertising presents a particular



challenge to retailers. FTC studies show that most consumers do not read an entire Web site, making the advertiser's ability to make any disclosures "clear and conspicuous." To avoid civil penalties, the advertiser should take affirmative action to ensure that the reader has the opportunity to review the disclosure. (See FTC's Guide... on page 9). Additionally, the Web site should be monitored for click-through rates to the disclosure. The placement of the disclosure may need to be adjusted if it does not appear that consumers are accessing it.

Another speed bump on the information superhighway is the FTC's enforcement of the new federal SPAM law. On January 1, 2004, the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003," or "SPAM law," became effective. The SPAM law places specific limitations on companies that directly advertise to a consumer's e-mail in-box, and the SPAM law assesses monetary damages for each e-mail sent violating the law.

The SPAM law only applies to commercial e-mails — electronic messages whose primary purpose is as an advertisement or promotion of a product or service. The law does not apply to e-mails sent to facilitate a transaction that the recipient previously agreed to enter into with the sender; e-mails which provide warranty, recall, or security information; e-mails that provide account information, such as account balances; and e-mails that deliver goods or services, including product upgrades.

The SPAM law requires a company sending a commercial e-mail to comply with four requirements. (See Complying with

Federal Spam Law page 9) It also provides rules and sanctions for predatory, abusive, false, and misleading e-mails, address harvesting, and other abusive practices.

Violations of the SPAM law and Internet advertising laws can cost your company a great deal of money. Before you drive on the information superhighway, know the rules of the road.

#### **FTC'S GUIDE TO MAKING YOUR DISCLAIMERS AND DISCLOSURES COUNT**

1. Place the disclosure in close proximity to the claim, preferably on the same screen.
  - a. If the disclosure requires that the reader scroll to the bottom of the page, use visual cues to encourage scrolling to read the disclosure.
  - b. If using hyperlinks to direct the reader to the disclosure, consider the following:
    - i. make the link obvious
    - ii. label the hyperlink to convey its importance
    - iii. use consistent hyperlink styles so the consumer knows the link is available
    - iv. place the hyperlink near relevant information and make it noticeable
    - v. take the consumer directly to the disclosure on the click-through page
    - vi. assess the effectiveness of the hyperlink; monitor the click-through rates
2. Reorganize and respond to technological limitations of high tech methods for making disclosures, such as pop-ups or frames.

3. Display disclosures prior to purchase. Realize that placement of disclosures only on the purchase page may not be sufficient.
4. Prominently display disclosures so that consumers notice them. Evaluate the size, color, and graphics of the disclosure in relation to the Web page. Do not allow other text on the page to detract from the disclosure.
5. Repeat disclosures, as necessary.
6. Use audio disclosures, if appropriate.
7. Use clear language so that consumer can understand the disclosure.

#### **COMPLYING WITH THE FEDERAL SPAM LAW**

1. When sending solicitation e-mails, the e-mail must:
  - a. contain a functioning return e-mail address;
  - b. clearly and conspicuously identify that the message is an advertisement or a solicitation;
  - c. include a valid physical postal address; and
  - d. clearly and conspicuously include an opt-out option allowing the recipient to request not to receive future commercial e-mails.
2. It is specifically illegal to generate any e-mails, commercial or otherwise, which have misleading or deceptive header information.
3. It is illegal to buy or sell an e-mail address from any entity that, at the time it was obtained, notified the addressee that it would not give, sell, or otherwise transfer the address for the purpose of initiating e-mails. ◆

## **T**HE UNINTENDED CONSEQUENCES OF COLLABORATION

Joel Nied

Some of the greatest modern entrepreneurial ventures were the result of collaborations. Steve Jobs and Steve Wozniak created the first single-circuit computer together and founded Apple Computers. Larry Page and Sergey Brin came up with a novel method of cataloging the Internet and started Google.

Most of us would love to have Jobs, Wozniak, Page, or Brin as a business partner. However, how would you feel if a former co-worker with whom you once collaborated, before starting your own company, showed up and told you he was your business partner? What about the independent contractor you hired to help write software code for your best-selling application? Or the joint venture partner that you worked with briefly? Having a business partner can often be a trying endeavor. Imagine what it would be like if you did not want that person or company as a business partner in the first place.

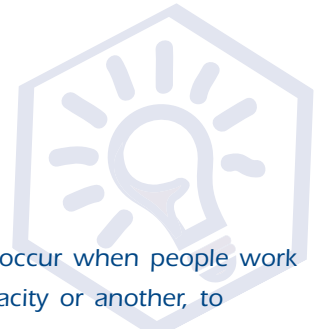
Unfortunately, that is what can happen if a joint work is created. Whenever two or more people produce a work that can be copyrighted, whether it is software code, a movie or video, a song, fabric or wallpaper pattern, or any sort of original text, there is a possibility that the joint authorship will result in a product that is considered a "joint work." The Copyright Act of 1976 defines a joint work as a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."

Like much of the Copyright Act, the definition of "joint work" does not provide significant guidance for the incalculable number

of situations that can occur when people work together, in some capacity or another, to produce a copyrightable work. Fortunately, the courts have come up with a few tests to help determine whether a copyrightable work is a joint work. Naturally, these tests assume that there is no written contract to govern the relationship between the authors. One federal court has determined that joint authorship exists if: (1) the authors control the work and are one of the "master minds" behind the expression of the idea; (2) the parties objectively manifest an intent from the outset for the product to be co-authored; and (3) each author contributes a material element to the product that plays an integral role in its success.<sup>1</sup>

Another court provides a similar test. The work is the result of a joint authorship if: (1) each author makes an independently copyrightable contribution; and (2) the parties objectively intend to be co-authors.<sup>2</sup>

What are the consequences of joint authorship? The effects can create substantial problems for a company attempting to license its intellectual property or attract investors. As the term implies, joint authorship means there is more than one author of a work. The courts that have addressed joint authorship issues universally state that joint authors, or co-authors, are "tenants in common" with regard to the joint work.<sup>3</sup> Although that term is typically applied to real estate, it applies to personal property as well. Copyrightable material, although intangible, is personal property. A tenancy in common means that two or more persons have undivided shares in the property, with each owner having an equal right to possess the whole property.<sup>4</sup> The consequences of two parties being tenants in



common with regard to copyrightable material can be deleterious.

The good news is that if you or your company is a co-author of a work, you or your company can still use the work without the permission of the other co-author(s). The problem is, however, that the other co-author(s) may use the work without your permission. While you are trying to license your work, your co-author(s) may be doing the same thing and undercutting your price or other competitive advantage. Another problem of co-authorship is that it is impossible to sue a co-author for copyright infringement. A co-owner cannot infringe on a work it co-owns.<sup>5</sup>

The problems can get worse. If you believe a third party is infringing on your jointly owned copyright, you may seek a preliminary injunction prior to trial to stop the infringement. However, one court has found that a joint author cannot obtain a preliminary injunction against a third party. The court reasoned that there cannot be any immediate harm by another party using the intellectual property because there is at least one other party, the co-author, that has rights to use the intellectual property.

The problems can get even worse. Even if the co-author is not undercutting you, the joint authorship will still cost you money when you profit from your intellectual property. A co-author has the right to receive a proportionate share of the proceeds from the use of the intellectual property.<sup>6</sup> In other words, the co-

author has the right to part of the proceeds even when the co-author is doing nothing.

All of these potential problems will not be lost on potential investors, joint venturers, and parties seeking to become exclusive licensees. Those parties will be extremely hesitant to become involved with a company that touts its intellectual property when the company does not have exclusive control of that intellectual property.

The way to avoid the joint authorship problem is to determine ownership rights from the beginning. If you do not have a company, create one and assign any intellectual property rights, and have any collaborators assign their intellectual property rights, to the company. Be sure to do this at the beginning of the collaboration. If your company hires a consultant, have the consultant sign an agreement that explicitly assigns all rights in and to the intellectual property to your company. If your company enters into a joint venture, engineering services arrangement, or any other type of collaborative effort, put the terms of the collaboration in writing prior to doing any work.

There are many perils to joint authorship. A joint authorship problem can drain a company's revenues and spoil potential business ventures. However, like many transaction-related problems, the tribulations of joint authorship can be avoided by careful planning and precise documents that describe the relationship between the collaborators. ♦

<sup>1</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

<sup>2</sup> *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

<sup>3</sup> *Morrill v. Smashing Pumpkins*, 157 F.Supp.2d 1120 (C.D. Cal 2001); *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C.Cir.1988); *Andersen Consulting LLP v. American Management Systems, Inc.*, 1995 WL 510042 (S.D.N.Y. Aug 28, 1995); *Childress v. Taylor*, 1990 WL 196013 (S.D.N.Y. Nov 28, 1990); *Picture Music, Inc. v. Bourne, Inc.*, 314 F.Supp. 640, 646-47 (S.D.N.Y.1970); *Silverman v. Sunrise Pictures Corp.*, 273 F. 909 (2d Cir. 1921), cert. denied, 262 U.S. 758, 43 S.Ct. 705, 67 L.Ed. 1219 (1923); see *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir.1998); *Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*, 523 F.Supp. 21, 25 (S.D.N.Y.1981).

<sup>4</sup> Black's Law Dictionary (7th ed. 1999).

<sup>5</sup> *Oddo v. Ries*, 743 F.2d 630, 632-33 (9th Cir. 1984).

<sup>6</sup> See H.R.Rep. No. 1476, 94th Cong., 2d Sess., at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir.1994).

## **T**HE INTELLECTUAL PROPERTY PRACTICE GROUP

### **Douglas Salyers**

Kamla Alexander  
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Robert A. Angle  
Thomas W. Baker  
Gerald R. Boss  
Daniele E. Bourgeois  
John M. Bowler  
John M. Briski  
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James J. Wheaton  
Robert P. Williams  
Alan D. Wingfield  
Hunter Yancey  
Anne E. Yates  
Melissa J. Yost  
Mary C. Zinsner

## **C**ONTRIBUTING WRITERS

R. Stevan Coursey	(404) 885-3632	s.coursey@troutmansanders.com
Jacqueline Haley	(404) 885-3561	jacqueline.haley@troutmansanders.com
Michael D. Hobbs, Jr.	(404) 885-3330	michael.hobbs@troutmansanders.com
Joel R. Nied	(757) 687-7540	joel.nied@troutmansanders.com
Anne E. Yates	(404) 885-3697	anne.yates@troutmansanders.com

## **E**DITIONS

Mary An Merchant, Ph.D.  
Trenton A. Ward  
Hunter Yancey  
Anne E. Yates

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**ATLANTA**  
600 Peachtree Street, NE  
Suite 5200  
Atlanta, GA 30308-2216

**HONG KONG**  
2 Exchange Square  
8 Connaught Place  
Suite 3403  
Central, Hong Kong  
Phone: 011-852-2533-7888

**LONDON**  
Dashwood House -  
Tenth Floor  
69 Old Broad Street  
London EC2M 1QS  
England

**NORFOLK**  
150 West Main Street  
Suite 1600  
Norfolk, VA 23510

**RALEIGH**  
225 Hillsborough Street  
Suite 250  
Raleigh, NC 27603

**RICHMOND**  
1111 East Main Street  
Richmond, VA 23219

**TYSONS CORNER**  
1660 International Drive  
Suite 600  
McLean, VA 22102

**VIRGINIA BEACH**  
222 Central Park Avenue  
Suite 2000  
Virginia Beach, VA 23462

**WASHINGTON, D.C.**  
401 Ninth Street, NW  
Suite 1000  
Washington, D.C.  
20004-2134

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