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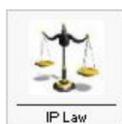
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## The Name's the Game: Branding and Trademark Protection

on Friday, October 29, 2010 - 12:52 PM - 1601 Reads

By David R. Ellis, Attorney  
Largo, Florida

In September 2010, near the end of the baseball season, I spoke to a large professional group at Tropicana Field before a game between the New York Yankees and the Tampa Bay Rays about branding and trademark and related legal issues.

The Yankees, of course, own one of the most famous brands in America, having won 27 world championships over the past 80 years, while the Rays have only been in existence for a dozen years, most of them dismal, although the past three years have been much more successful. The Rays have re-branded since 2008, changing from the Devil Rays to the Rays and adopting new colors and logos emphasizing the sun's rays, while also keeping the design of an ocean ray on their uniform sleeve and some other items.

It would be speculative to say that the Rays' new look and name has anything to do with their improved performance, but the fact is that they had a bad losing record as the Devil Rays and have a good winning record as the Rays.\* At the game where I spoke, the teams began the day with the two best records in baseball, with the Rays slightly ahead of the Yankees in the standings at the beginning of the evening and slightly behind when the Yankees won the game 8-7 on a home run in the 10th inning.

In my presentation, I spoke about branding and trademark protection. Branding is a matter of choosing the names, logos, symbols and designs that identify a company's goods and services and distinguish them from those provided by others, and trademarks are the legal vehicle to protect these devices. When a trademark is used in connection with services, it is called a service mark. Adoption and use of a trademark gives the owner the right to prevent others from using the same or similar mark in a manner that would be deceptive, misleading or confusing to the public.

If a firm provides goods or services in more than one state, the trademark may be registered with the U.S. Patent and Trademark Office (USPTO) in Washington. The federal law is the Trademark Act of 1946 (Lanham Act), 15 U.S.C. §§1051 et seq. A federal trademark is good for ten years and may be renewed for as long as it continues to be used. A federal trademark gives the owner the exclusive right to prevent others from using the trademark in a manner that would create a likelihood of confusion to the public throughout the United States, and to enforce its right by suing in either federal or state court.

Before a company attempts to register a trademark, we generally advise them to have a clearance and availability search conducted to determine whether there have been any previous filings or registrations of the mark or any similar ones. Such a search typically includes the records of the USPTO, state trademark offices, trade directories, and the Internet in order to reduce the likelihood that the trademark has been previously used or registered by another company or individual.

If a company is selling its product or services only in Florida, it may register the trademark with the Department of State in Tallahassee. In Florida, a registration is good for five years and may be renewed for subsequent terms of five years as long as it is still being used in the state.

Once a trademark is registered, either at the federal or state level, the registrant can bring suit against anyone who has infringed it. Infringement is the unauthorized use of the trademark in connection with any product, service or advertising where the use is likely to cause confusion or mistake or to deceive the user as to the true source of the goods or services.

In such a case, the court may order the violator to cease its unauthorized use of the mark, order all infringing products destroyed, and award money damages to the trademark owner, which may be trebled in certain instances. In determining the amount of damages, the court may require the infringer to pay the trademark owner all profits derived from its wrongful use, plus court costs.

In cases of infringement under the federal statute, the court may also award attorney's fees in "exceptional cases." Under the Florida statute, however, an award of attorney's fees may be ordered without a showing that the case is exceptional, so trademark owners may want to register their marks under state law in addition to registering under the federal act.

\*A similar thing happened when the Tampa Bay Buccaneers changed from their orange Creamsicle uniforms and Bucco Bruce logo to pewter and red colors and a Jolly Roger flag in 1997, and started to win games, culminating in a Super Bowl championship just a few years later.

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