

The Value of Trademarks to the Literary Entrepreneur

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Like other business people, Literary Entrepreneurs use trademarks or brands on their products and services to identify them and distinguish them from those of their competitors. The terms trademark, brand, and brand name are often used interchangeably. A trademark identifies the source of a product or service (which company or individual produces or distributes it), and a brand or brand name is the name given to a certain product or service. Many brands, however, may not be suitable for federal trademark registration yet may clearly identify a certain person, product, or service. For example, Yellow Pages, if used for the business pages of a telephone book, is not suitable for federal trademark because it is generic; yet, it is a very strong brand. But The Real Yellow Pages®, The Friendly Yellow Pages®, The Original Yellow Pages®, and 1-800-Yellow Pages® are among the many registered trademarks using the term (brand) Yellow Pages.

Contrary to popular belief, trademarks come into existence the moment you use them to mark your goods or services for your customers. That is worth repeating: trademarks come into existence the moment you use them to mark your goods or services for your customers. You do not have to register your trademark with any governmental agency to bring your trademark into existence. In fact you cannot register your trademark until you have used it with your goods or services. The longer you use your mark, the stronger it becomes - because it builds goodwill and recognition with your customers. This unregistered use of a trademark is protected under common law.

Trademarks registered under federal and state laws as well as certain unregistered trademarks under common law enjoy exclusive rights. A federally registered trademark will generally give you the right to use the mark in all fifty states and all U.S. territories. A federal trademark also protects consumers by preventing different businesses in the United States from using the same or similar trademarks, which helps to avoid confusion among products and their sources. Protection of trademarks registered under state law is limited to the state of registration; the rules and regulations that affect trademarks vary from state to state. Trademark protections of common law are limited to the geographic area in which the mark has actually been used. The fact that many trademarked products are now marketed and sold via the World Wide Web to a large interstate audience means that a broad common law protection may cover them.

Trademark and Service Mark Defined

A trademark or service mark is one way to identify certain goods or services as those produced or provided by a specific person or company. A service mark is the same as a trademark except that it applies to the source of a service rather than a product. The terms trademark, mark, and brand are often used interchangeably to refer to both trademarks and service marks, whether they consist of word marks or other types of marks, which will be described below. They may be names, slogans, logos, designs, or other identifying marks. Trademarks date back to about 4000 B.C., when different markings were used to identify property belonging to specific owners. Craftsmen reproduced their marks or brands on their products. Farmers branded their livestock, and royal families identified their ancestry with a specific coat of arms.

Over the years this identification method evolved into today's system of trademark registration and protection. This system helps consumers identify and purchase a product or service that meets their needs because its unique trademark indicates its nature and quality. United States law defines trademark as a word, phrase, symbol, or design, or a combination of words, phrases, symbols, or designs that identifies and distinguishes the source of the goods or services of one party from those of others.

Trademark Issues Specific to Authors

A Single Creative Work versus a Series: Usually, the title of just one creative work - one book, one record or compact disc, one video, one play - may not be trademarked because the title describes the contents of that one creative work itself and does not lead you to its source or identify its source. For example, Black Coffee, Grand Daddy's Dirt, and Married But Still Looking are all titles of a single book. Also, the name of a character in a single book is not usually thought to function as a trademark even if it forms part of the title, as Little Lulu does in Little Lulu Goes to Market.

When a book title acts as a single identifying source for a series, however, it then serves as a trademark for the series. Examples include Chicken Soup for the Soul® and Harry Potter®.

Pen Names: A pen name, or pseudonym, is a name a writer uses that is different from his or her legal name. Pen names, even if used in a series, do not function as trademarks.

Characters: A character from a series of books, even when used repeatedly in that series, is usually not given trademark registration. But trademark protection may be given depending on how the character is used in connection with goods. Only when the character is an identifying source for the author or the series can that character serve as a trademark. Examples include Mickey Mouse®, Nancy Drew®, and Little Bill®. Each immediately identifies its source of goods.

Articles, Columns, and Features in Publications: Portions or sections of publications, such as chapters or subsections of books or columns and features of newspapers or magazines, are not usually considered separate goods but are part of the publication. People usually buy the publication - the magazine, newspaper, or book - based on the mark that identifies it and not the feature or section title as the source of the information.

For example if you read an article entitled "Self-Published Authors" in *Black Issues Book Review (BIBR)*, you are more likely to remember that you read the article in *BIBR* than to remember the name of the author.

Name of Recording Artist or Group on One Recording: Similarly, the name of a recording artist or group on one recording is not registrable as a trademark for that recording. If the artist or group's name has appeared on a series of recordings, however, the artist's name or designation identifies the source and is registrable as a trademark.

Online Publications: Internet publications such as e-newsletters, e-bulletins, and e-zines are a popular phenomenon. These online publications are considered a service rather than a product and are registrable under existing trademark laws.

**Excerpt from *Literary Law Guide for Authors: Copyright, Trademark, and Contracts in Plain Language*
by attorney **Tonya M. Evans****