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Law and Policy News From
Harmon, Curran, Spielberg & Eisenberg, LLP

nonprofit Navigator

Is Your Corporate Name Being Misused?

Protecting Your Investment in a Name

As the number of nonprofits grows, so grows the problem of sound-alike and look-alike organizations. Because name confusion has the potential to damage an organization's reputation, nonprofits should consider steps to protect their corporate identities—their name, logos, and names that identify their products or services. Such steps include securing trademark registrations, monitoring the Internet for similar corporate or domain names, and consulting an attorney as to whether formal legal action is warranted to stop intentionally confusing uses of similar names.

A trademark is a distinctive word, phrase, logo, or other identifier that distinguishes certain goods and services from the goods and services of others. While a few organization names may be suitable for registration as a trademark because they are truly distinctive or unique, others may be too generic or descriptive to qualify for formal registration at the federal or state levels. Nonprofits more commonly register their logos and/or the brands they use to identify their programs, products, or services.

The legal rights of a trademark owner spring from the use of the mark to identify services or products. Trademark registration provides some additional benefits, such as the right to sue in federal court. Five years after registration, the federal trademark statute (the Lanham Act) provides that the owner's exclusive right to use the name or logo becomes legally incontestable.

> *Distinguishing among nonprofits is becoming more and more difficult due to the increase in sound-alike, look-alike nonprofit organizations.*

Only holders of federal registrations can use the ® symbol. Trademark registration also puts others on notice that a name or logo design is already being used.

Even if formal trademark registration is not possible or not anticipated, a name for a product or a logo can be used with a "TM" (or "SM" for services) symbol to signify that the user considers it a trademark or brand name. An organization that fails to register its trademark still has legal remedies against those who adopt similar names to confuse the public. Use of the ® or TM symbols may not prevent intentional infringers, but it does alert people or organization's of good will that the mark is not available for them to use. Many states have similar laws governing unfair or deceptive

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Your Corporate Name, cont.

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A nonprofit should take the following steps to protect its name:

- Consistently use a unique or distinctive name so as to promote public recognition of the name;
- Obtain formal trademark registrations;
- Consult a trademark or business attorney to examine the legal implications of adopting a particular name;
- Regularly monitor various publication and the Internet for similar uses; and
- Order searches of existing and pending trademark registrations to reveal marks that are identical or similar to the nonprofit's name.

business or trade practices. Finally, state attorneys general have the power to go after organizations or individuals that are intentionally trying to deceive or defraud the public, either under the state's unfair business practices law or its charitable solicitation provisions.

Federal registration of a trademark is one way for a nonprofit to control the use of its name

Last year the Arthritis Foundation, the American Heart Association, and the American Cancer Society sued a California group that was collecting money for various groups with names that were confusingly similar to their own, such as the "National Cancer Association" or "National Heart Foundation." The case was eventually settled and the California group agreed to limit the ways in which it promoted its causes.

Nonprofits can protect their names by obtaining formal trademark registrations or at least by regularly monitoring various publications and the Internet for similar uses. They can also consider ordering searches of existing and pending trademark registrations to reveal marks that are identical or similar to the name

A nonprofit can protect its name by registering its trademark and regularly monitoring publications and the Internet for similar uses.

used by the nonprofit. When selecting names for a new program or service, the nonprofit should consult a trademark or business attorney to examine the legal implications of adopting a particular name. Last but not least, a nonprofit should always try to use a unique or distinctive name in a consistent way so as to promote public recognition of the name and strengthen in the public's mind the connection between the organization and a particular program or service.

Benefits of Federal Registration:

- The right to sue infringers in federal court;
- The ability to recover damages and expenses from infringers;
- The ability to recover attorney's fees in infringement cases;
- The right to use the ® symbol with the mark, which serves as a notice of registration and can deter potential infringers; and
- Increased likelihood that others doing trademark searches will realize that the trademark is already in use.

All Things Considered, We Wanted the Cash

Minnesota Public Radio sued on allegations of improper member list exchanges

Minnesota's Attorney General Mike Hatch filed suit in early January against Minnesota Public Radio, the state's largest public radio affiliate, for deceptive fundraising practices under the state's Charities Act. At issue was whether the station properly disclosed to contributors its practice of exchanging their names and other information with other organizations.

Nonprofits should revisit their member/donor list exchange policies and disclosures to ensure that potential and current contributors know what will happen to the information they provide to the organization.

So-called "list exchanges" are agreements by which two (or more) charities agree to swap ailing lists, thereby expanding the pool of potential donors for both organizations. These exchanges are frequently exempt from the threat of unrelated business income tax and can be used in appeals to generate new individual donors.

Chief among the Attorney General's concerns is that the 1999 MPR brochure included the statement: "Occasionally [MPR] makes the names of its members available to other organizations in which [MPR] think[s] MPR members may be interested." In fact, Hatch alleged, MPR exchanged not just member names, but also their telephone numbers and addresses. Additionally, the Attorney General asserted, the exchanges were not occasional; indeed, over the past five years, MPR allowed 100 organizations to use the names and addresses of MPR members for fundraising solicitation in some 400 individual list exchange transactions.

In response, MPR asserts that it exchanged the name of an individual donor approximately six times over the course of a year, which comported with its definition of occasional. The organization also allowed members to opt out of list exchanges and claims it complies with the professional and ethical standards of the nonprofit community. Unsurprisingly, the organization left the charge of exchanging addresses, in addition to names, unanswered.

List exchanges were at the heart of last year's controversy involving the national public broadcasting organizations that disclosed that they had exchanged member lists with various political (largely left-of-center) entities. It is important to note that these agreements were not per se illegal, unless, as alleged in the MPR case, the organizations misled members, contrary to state laws, about their list exchange policy.

Regardless of the merits of the Attorney General's suit, nonprofits should revisit their member/donor list exchange disclosure policies to insure that potential and current contributors know what will happen to the information they provide to the organization. It is good practice to provide contributors with the opportunity to opt-out of any exchanges.

Election Connection

Coordination Confusion

FEC issues proposed rules on coordinated expenditures

Nonprofits with an advocacy bent breathed a sigh of relief last September when D.C. District Court Judge Joyce Hens Green rejected the Federal Election Commission's allegation of coordination in its suit against the Christian Coalition's (quasi) independent activities supporting Republican candidates in the early '90s [NN 9/99, p. 2]. In mid-December, the Commission released proposed regulations which were to have incorporated the court's reasoning into law. Those hoping for tighter guidance or looser regulations from the Commission on permissible contacts between advocacy groups and campaigns will be disappointed.

> ***The proposed regulations cover all communications mentioning a candidate, even if there is no electoral reference.***

The Commission makes "general public political communications" its regulatory target. The term means messages including a "clearly identified candidate" transmitted by any means (including the Internet) with an intended audience of more than 100 people. This target differs considerably from the "expressive expenditures" outlined by Judge Green last September in that expressive expenditures, whether coordinated with political campaigns or not, were communications "made for the purpose of influencing a federal election." The Commission explicitly rejected Judge Green's terminology in favor of the proposed "political communication" standard, which will cover all communications mentioning a candidate, even if the message contains no reference to the person's status as a candidate or to the election.

For instance, an educational advertisement about heart disease featuring a legislator with heart disease who also happened to be up for reelection could be covered under the proposed regulations.

Communications which mention a candidate are not automatically deemed in-kind contributions. The proposed coordination regulations closely track the letter of the *Christian Coalition* decision establishing coordination when an organization produces and distributes a communication at the behest of, under the control of, or pursuant to negotiations with a candidate, his or her agent, committee or party with respect to the communications content, message, distribution, etc.

Some nonprofits have already objected to this standard, arguing that the proposed regulations would open the door for sweeping FEC inquiries into an organization's operations in search of facts to support a finding of alleged coordination. The proposed regulations acknowledge that even one meeting with a candidate's agent could be sufficient for a finding of coordination.

> ***Organizations would still have to weigh the benefit of legitimate speech against the cost of arguing with the FEC.***

The Commission provided two potential alternatives to the proposed rules. The first would exempt advertisements soliciting funds for out-of-state candidates so long as donors were instructed to send money directly to the targeted candidate. Additionally, the alterna-

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Private Foundations Not So Private Anymore

IRS Issues New Disclosure Laws for Private Foundations

The IRS issued final regulations in January extending to private foundations the same disclosure requirements placed on most other tax-exempt organizations. Under the new rules, private foundations will be required to make their annual returns and exemption applications available to the public. The disclosure regulations require private foundations, unlike exempt organizations that are not private foundations, to disclose the donor information included on their annual returns.

Regulations were issued last spring [NN, 5/99, p.2] requiring most tax-exempt organizations, except private foundations, to make their applications for tax-exempt status and their annual information reports (Forms 990) widely available to the public. The new regulations simply subject private foundations to most of the same requirements.

The following private foundations forms are subject to public inspection and copying:

- Exemption Application (and supporting materials
- Form 990PF for the past 3 years returns filed after March 13, 2000
- Form 4720 for the past 3 years filed after March 13, 2000
- Form 1065

The new regulations will take effect March 13, 2000. Returns due before that date will not be subject to the new rules, meaning that for some private foundations the new disclosure rules may not apply to returns filed before 2001.

Coordination Confusion, cont.

Continued from previous page

tive would limit the finding of coordination to those communications broadcast primarily in the geographic area in which the named politician was a candidate. This alternative would exempt an issue ad trumpeting, for instance, the McCain-Feingold bill from the coordination regulations.

The FEC acknowledged that it would be difficult to apply this alternative in split-media-market states, like New Hampshire and New Jersey. Problems also would arise with the example of the heart-disease-afflicted local politician. To be effective, such an ad generally would have to run in the lawmaker's home district.

A second alternative would add a much more fact-specific determination to the definition of coordination. Instead of coordination occurring the moment a candidate make a request or meets with a group or individual about an ad, the alternative would require that the parties also discuss the location, timing, content or distribution of the proposed communication.

Even if the alternatives were adopted, the proposed regulations fail to provide much guidance about the types of communications with candidates that would be acceptable. Adoption of these regulations as drafted, as several members of the regulated community have complained, would continue to leave organizations in the untenable position of having to weigh their desire to engage in legitimate speech against their unwillingness to argue with the FEC.

While past performance is not always an accurate predictor, past Commissions have taken periods of years to adopt major new regulations. The Commission, which recently turned over its membership and has a new chair, seems committed to speedy action. Nevertheless, it is unlikely that the Commission will approve the controversial coordination regulations before this electoral cycle is over.

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IRS Update

IRS Issues Inflation-Adjusted Rates

Minor Increases in Expense and Giveaway Allowances

The IRS has released a number of inflation-adjusted figures for the 2000 tax year, which will be of interest to both individuals and nonprofit organizations.

"Low Cost Article"

The unrelated business taxable income of certain exempt organizations does not include proceeds from the distribution of "low cost articles" in connection with charitable solicitations. For tax year beginning in 2000, a "low cost article" is any article which costs $7.40 or less.

1999: $7.20;   2000: $7.40

Other insubstantial benefits

The IRS established guidelines in Rev. Proc. 90-13 to provide charitable organizations with help in advising their patrons of the deductible amount of contributions when the contributors are receiving something in return for their contributions. The value of benefits received by a donor in return for a fully deductible charitable contribution may be disregarded if either: 1) for a contributions of $25 or more, the contributor did not receive something in return that costs more than $5 (the rate for a "low cost article" listed above); or 2) the fair market value of all of the benefits received in connection with the payment is not more than 2 percent of the payment or $50, whichever is less. The $5/$25/$50 schedule is annually adjusted for inflation and this year has been increased to $7.40, $37, and $74, respectively.

1999: $7.20 / $36 / $72;
2000: $7.40 / $37 / $74

Mileage

The standard mileage deduction rate for business use of an automobile has increased to 32.5 cents/mile. The figure for volunteer or charity work remains at the 14 cents/mile rate in effect last year.

1999: 31¢/mile;   2000: 32.5¢/mile

Reporting Exception for Lobbying Expenditures

Rev. Proc. 98-19 set at $75 or less—annually adjusted for inflation—the amount of annual dues that social welfare organizations may receive without becoming subject to I.R.C. § 6033(e), which requires a tax-exempt organization that incurs nondeductible lobbying expenditures to notify its members, at the time the dues are assessed or paid, of its reasonable estimate of the portion of the dues that is allocable to those expenditures. In 2000, the annual dues limitation to qualify for the reporting exception regarding certain exempt organizations with nondeductible lobbying expenses is $78 or less.

1999: $77;   2000: $78

Non-Member Dues

In 2000, dues paid by an individual to 501(c)(5) agricultural and horticultural organizations and 501(c)(6) organizations will not be subject to UBIT provided the dues do not exceed $112.

1999: $110;   2000: $112

Annual Exclusion for Gifts

The first $10,000 of gifts to any person (other than gifts of future interests in property) is not included in the total amount of taxable gifts made during that year. The 1997 Taxpayer Relief Act allows this figure to be annually indexed for inflation (rounding down to the next lowest multiple of $1,000), but no

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Cold Cash Chills Speech

10th Circuit strikes down parts of Utah fundraising consultant law

Utah's Charitable Solicitations Act, along with similar laws in other states, has long raised the hackles of professional fundraising consultants. The Act required them to register with the state and obtain a permit. In order to get a permit, these consultant firms had to complete a written application, and most onerous, post a $25,000 bond or letter of credit.

> *The bond requirement created an unacceptable risk of suppressing ideas.*

In 1998 a federal district court upheld the law in its entirety [NN 9/98 p. 7]. In mid-January, however, the 10th Circuit Court of Appeals struck down the bond requirement and some provisions giving the Utah's Division of Consumer Protection overly broad authority to deny permits.

American Target Advertising, a Virginia-based fundraising consulting firm, challenged the law. Because the company needed to put up 100 percent collateral for its bond and did not have sufficient unpledged collateral to do so, it would have had to borrow funds to meet the bond requirement. The 10th Circuit ruled that this was "a sizeable price tag"and that, since the same situation might apply to other consultants, any effort to enforce the bond requirement created an unacceptable risk of suppressing ideas. If the goal of the statute was protecting consumers from fraud, the court held, that goal could be met by the registration and monitoring provisions of the statute.

The court also rejected provisions requiring applicants to supply "any additional information [Division of Consumer Protection] may require" and giving the Division the authority to deny an application upon finding that the "applicant failed to reasonably supervise its agents, employees [and] solicitors." The court struck down both provisions because they granted the director of the Division of Consumer Protection overly broad discretion to deny an application (and hence, to restrict speech).

The remainder of the Act stands, leaving in place the application process and fees.

Inflation-Adjusted Rates, cont.

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increase is effective for 2000. This amount is expected rise in future years.

2000: $10K (unchanged from 1999)

Itemized Deductions

The income threshold for the overall limitation on itemized deductions, which rises slightly each year, has risen to $128,950, or $64,475 for married individuals filing separately. The allowable amount of deductions is reduced for taxpayers with adjusted gross income above that amount.

1999: $126.6K; 2000: $128.95K

For more information about the significance of these figures, consult previous issues of *Nonprofit Navigator*.

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Getting to Know Harmon, Curran, Spielberg & Eisenberg, LLP

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