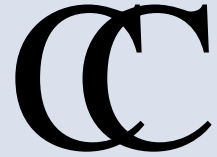


THE CREATOR

Creating Value for Your Clients

The Quarterly
Newsletter from
Corporate Creations



Volume #1:
January 2001

Welcome to *The Creator* from Corporate Creations

This is the first issue of THE CREATOR by CORPORATE CREATIONS. We will be producing issues on a quarterly basis, mailing each issue to 1,000 Chicagoland attorneys. Each issue will touch on corporate/business law and trademark matters, as well as noting recent developments. Our article contributors are Chicagoland attorneys and accountants. It is our goal to provide an informative, worthwhile, and interesting publication.

CORPORATE CREATIONS is an Incorporation and Trademark Services firm staffed by experienced attorneys. We have the ability to do filings in all 50 states, the Virgin Islands, Puerto Rico, and the Bahamas. Furthermore, we are educated in trademark searches and the Federal Application Process at the United States Patent and Trademark Office. With our streamlined business focus, we are able to provide quality and knowledgeable services in an efficient and economical manner.

We hope you enjoy our first issue of THE CREATOR. We are looking for suggestions for future topics and contributing authors for upcoming issues.

We look forward to hearing from you soon!

Happy New Year!
Brian Fons, Attorney and President
Meg Cook, Attorney

Lax on Limited Liability?

The Limited Liability afforded by incorporation can sometimes take a backseat to the beneficial S-Corporation tax treatment in small businesses. Many small business owners find it difficult to imagine being cast in the role of defendant in a lawsuit. The sole shareholder wonders how it could be possible that he would be sued due to his part-time consulting business operated from the basement of his home. Unfortunately, yet predictably, this thought process can be the downfall of many small businesses. In today's global economy with the pervasive influence of the Internet, it is more important than ever to preserve Limited Liability, even in small businesses.

When a company incorporates, the advantageous Limited Liability attaches automatically. Clients should be thoroughly advised on the formalities necessary to maintain Limited Liability in their companies.

A court can "pierce the corporate veil" and reach personal assets of the shareholders if it finds that the corporate structure is a fraud. In making its decision, a judge will consider the following:

Factors Considered

1. Was the corporation undercapitalized at the

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Trademark Protection:

Registration is Not the Only Type of Protection

Registration on the principal register creates a presumption that a mark is valid and worthy of protection. That alone makes registration a valuable method of protecting goodwill and investments in developing or marketing.

After five years of being on the principal register, the mark becomes incontestable if proper Statements of Continued Use and Declarations of Incontestability are filed with the USPTO.

Once declared incontestable, three defenses will no longer be available to potential infringers:

- 1) A defendant cannot assert that the mark is not inherently distinctive or lacks secondary meaning;
- 2) A defendant cannot assert that the mark is confusingly similar to a mark that someone else used prior to the registrant (plaintiff) and continues to use; and
- 3) A defendant cannot assert that a mark is functional.

Those benefits of registration aside, there remain a number of defenses that can be asserted even after a mark is declared incontestable:

1. Geographic limits of a trademark
2. Scandalous marks
3. Genericide
4. Fraud in getting the registration
5. Abandonment
6. Use of the mark to misrepresent source
7. Fair use
8. Pre-registration use by the defendant

Several of the defenses available to a potential infringer can possibly be thwarted by advising your clients to follow a few simple guidelines.

First, all uses of a registered mark should be accompanied by the registered trademark symbol ®. The symbol provides notice that the product comes from a single, autonomous source and should be included whenever the mark is used.

Should a mark be used multiple times in one publication, the symbol should at least follow the first or most noticeable use of the mark.

Second, all uses of a registered mark should be monitored. Marketing campaigns, advertisements, press releases, new packaging concepts, letterhead,

Web sites and even business cards should be reviewed to ensure that the mark is being used properly.

Third, unauthorized uses of a registered mark should be noted and watched closely. Harmless use in an unrelated field may not be bothersome enough to cause your client to worry but enough harmless uses could lead to genericide or a finding of abandonment if your client chooses to do nothing.

At a minimum, some uses should be investigated and opposed (as appropriate) through a carefully worded cease and desist letter.

Finally, all registrations should be maintained. Although the final guideline may seem obvious, clients are often not aware of any maintenance involved in owning a registered mark. Making the procedures and requirements clear from the start and reminding your clients of deadlines is a valuable and greatly appreciated service.

By following these simple guidelines, you can help ensure that the life of your client's registered trademark lasts well into the future.

Valarie M. Fairchild, Associate General Counsel
ThoughtWorks, Inc.

Chicago Bar Association Calendar of Meetings

Corporation & Business Practice Committee
1st Wednesday of every month at 12:15 P.M.
Upcoming Meetings: January 3
February 7

Corporate Practice YLS Committee
2nd Thursday of every month at 12:15 P.M.
Upcoming Meetings: January 11
February 8

Patent, Trademark, & Copyright
Practice Committee
4th Tuesday of every month at 12:00 P.M.
Upcoming Meetings: January 23
February 27

Intellectual Property YLS Committee
1st Wednesday of every month at 12:15 P.M.
Upcoming Meetings: January 3
February 7

Limited Liability

Continued from page 1

- formation stage? Does/Did the type of industry call for larger amounts of capitalization?
2. Were corporate and personal books kept separately?
 3. Were corporate assets commingled with personal assets?
 4. Were corporate assets used for personal reasons?
 5. Did the Board of Directors or shareholders properly authorize corporate actions?

To avoid bursting the client's entrepreneurial bubble, attorneys should supply the client with specific steps needed to comply with corporate formalities.

Preserving Limited Liability

- Obtain and record shareholder and board authorizations for corporate actions.
- Keep an updated Corporate Record Book that is completely separate from personal records.
- Keep corporate and personal assets separated.
- Make it known that the third party is dealing with the Corporation, not the individual officer, when entering into contracts.
- Provide adequate capitalization and provide for insurance for future risks; make this appropriate for the respective industry.
- Maintain distance between Shareholders and Directors; disinterested Directors should vote on all business transactions involving interested members after full disclosure; interested Shareholders or Directors should not vote on such matters.

While the above may seem basic to many of us, it is imperative to explain such measures to clients.

A single shareholder finds it absurd, if not senseless to hold a meeting proceeded by a formal shareholder vote when he is the only person voting. Regardless of the foolishness, these corporate formalities must be followed if Limited Liability is to continue.

Meg Cook, Attorney
Corporate Creations

Something to Think About: The Liability of Technology

Currently, many companies have no official policy regarding employees' use of the computers and network supplied by the company. Companies rightfully believe that allowing unhindered use will increase their employees' effective use of technology, thereby benefiting the company.

However, if it is acceptable for a company's employees to use the corporate e-mail system, company supplied computers, and company supplied Internet access for personal purposes, the company may be exposed to liability as a result of employee action.

Legal liability for a company with no official policy may include:

- Copyright infringement or contributory infringement;
- Theft;
- Aiding and abetting;
- Defamation and libel;
- Sexual harassment;
- Creating or promoting a hostile work environment;
- Sexual, racial, or age discrimination;
- Breach/default issues with respect to unauthorized contract formation;
- Loss of trade secrets.

The best way to reduce potential liability without hindering the effective use of technology, lowering the learning curve, or interfering with the privacy rights of employees is through enhancing employees' understanding of the legal implications of using company supplied Internet, e-mail, or computers.

This objective can be partially accomplished through internal educational efforts. However, educating employees will not completely protect a company from liability. Instead, a company must both educate its employees and implement an Acceptable Use Policy (AUP) with specific usage guidelines. An AUP will have to set usage rules for the Internet (for both work and home use where the home service is provided by the company) and computers/networks, as well as e-mail usage and retention rules.

By adopting a comprehensive electronic communications policy, companies will continue to enjoy the benefits of technology while seriously reducing the risk of litigation.

Valarie M. Fairchild, Associate General Counsel
ThoughtWorks, Inc.

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