

Protecting your Trademark, Protecting your Brand

ASPE®, CPD®, and *Plumbing Systems & Design*® all are familiar to ASPE members and supporters as being names directly identified with the American Society of Plumbing Engineers. They also are United States-registered trademarks owned and carefully safeguarded by ASPE. They represent powerful rights and protections in an environment increasingly occupied by scammers, cyber-squatters, rip-off artists, and sound-alike competitors.

As ASPE's general counsel, we protect and monitor ASPE's trademarks, and we recognize that the competitive business landscape is in a state of great flux. As demand shrinks, marketing and branding may become a larger part of your business responsibilities. While basic marketing will get your name out to customers, branding will ensure that your name actually means something.

At ASPE's 2010 Convention, we had the pleasure of meeting a number of ASPE members at seminars, exposition booths, and parties. We noticed that many of ASPE's members are business owners, meaning that many of you are juggling the demands of a business—keeping accounts, making employees happy, and marketing the business—along with the usual demands of plumbing engineering.

A branding strategy goes beyond simply identifying your business with basic marketing strategies; a brand should evoke the strengths of your business in your customers' minds and help them remember your business the next time they have plumbing engineering needs. Think of the Ivory brand, which started as White Soap and was rebranded as Ivory Soap. "White" is merely descriptive, while "Ivory" is memorable, with

connotations of beauty and exotic origins. With some tweaks to your marketing model, you can build a brand name and brand loyalty, meaning that customers will keep coming to you for their plumbing product and service needs, as well as recommending your products and services to their friends.

The legal side of marketing and branding is trademark law—a unique area of the law in that complying with trademark law directly helps your business. Following are some easy tips and tricks you can use to protect your trademark to help build, solidify, and protect your business's name.

WHAT IS A TRADEMARK?

You already may own a trademark or a service mark. American trademark law allows you to acquire legal rights in a trademark simply by using it, whether the mark is a logo, word, phrase, or even distinctive packaging or colors. No registration is required to acquire very basic trademark rights.

For example, if you run a business called "The Jolly Plumbing Engineer Company" and have a website or run a Yellow Pages advertisement for "The Jolly Plumbing Engineer," you've earned some trademark rights in that name. (However, make sure you are properly registered in your home state if you're doing business under a different name than your business name.) Filing for a U.S. trademark for your name confers the full set of rights that are conferred by official trademark status, as discussed later.

TIPS TO CREATE A BRAND

Once you start using a mark—say, "The Jolly Plumbing Engineer"—here are some tips and tricks for using the trademark to both

enhance your legal rights and create a powerful brand.

Pick Your Trademark Carefully

Trademark Strategy: Many considerations go into picking a brand name, so it may seem distracting to have to worry about whether a name can be registered with and protected by the U.S. Trademark Office too. However, by consulting an expert such as a trademark lawyer before picking a brand, you can avoid spending thousands of dollars on a designed logo, promotional materials, and a website address when your brand already is being used by someone else or is not eligible for trademark protection.

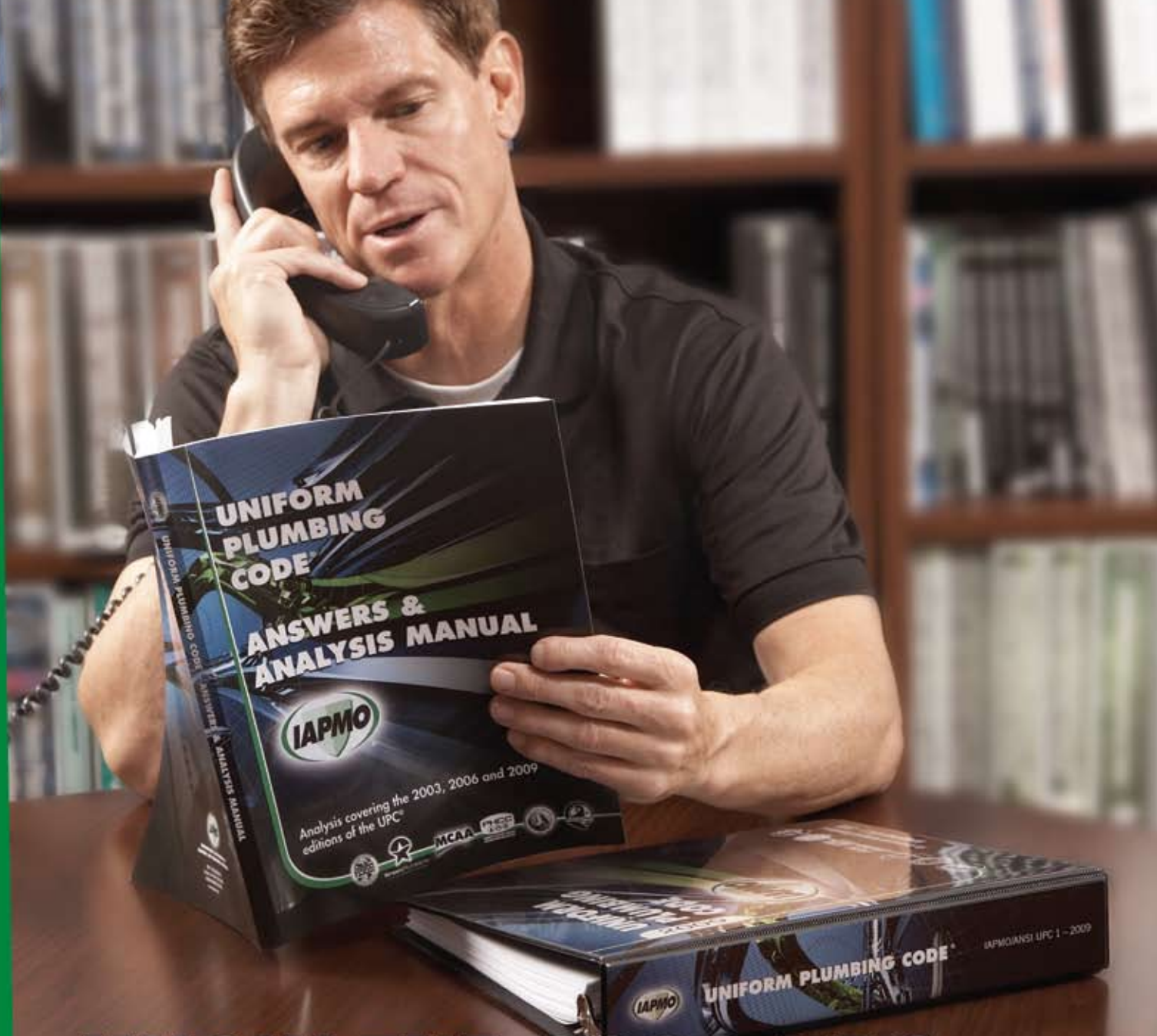
Brand Strategy: Taking the time to consult an expert before picking a trademark makes business sense. A brand is very useful, but it also is a major investment for your company. Having a distinctive and legally protected brand name makes your business more valuable, as intellectual property such as a trademark often forms a large part of the price paid in business acquisitions and mergers because of the good faith value in the brand name that is protected by trademark law.

Use a Brand Name, Not Your Business Name

Trademark Strategy: You cannot simply trademark your business name, but many businesses have trademark rights in their names. If you're trademarking your business name, it's best to drop the "Inc.," "Ltd.," "Co." or "LLC," as you cannot use such designations if you decide to register your trademark.

You must show that you have used your business name as a trademark. This means

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Having a distinctive and legally protected brand name makes your business more valuable.

printing your business name in distinctively bolder, larger, and different lettering than the lettering used for your address, phone number, and other business information on business cards, letterhead, etc. The use of a contrasting color also distinguishes your business name as a trademark. If your business name is simply your surname (e.g., "Smith and Co."), you may have to select a new trademark that is different than your business name, as surnames generally cannot be trademarked.

Brand Strategy: Good branding calls for a brand name that is memorable and evocative of your selling points—for example, quality, value, reputability, and prestige. In many cases, the best brand name to sell your company's products or services may not be the business name that you registered with the secretary of state when you first started your business.

Many business owners do not fully consider their brand (and do not consider its ability to be trademarked) when choosing their business's name; they're thinking about raising capital and sticking to their business plans. To choose a trademark, take some time to consider your brand and the qualities you want it to convey, and then do a quick Internet search to see how many other businesses are using the name already. Most importantly, check to see if a URL using your brand name (e.g., www.jollyplumbingengineer.com) is available. If not, you

probably should keep looking. Ask business associates, friends, and employees about the strengths of your business and for suggested brand names.

Make Your Brand Memorable

Trademark Strategy: Not all trademarks are equally strong. Although you can get a weak trademark registered, you won't have much protection against others who want to use the same trademark. It's best to pick a strong trademark, and the strongest trademarks are those that are unique. The strongest marks are ones that are not words found in any language, such as Pepsi and Xerox. Other strong marks are those that use a known word in an unfamiliar way, such as "Apple" for computers. Marks that are merely descriptive of an aspect of your goods or services, such as "Quality" or "Speedy," are weaker and much more difficult to register. However, if your mark is descriptive in a fanciful, more subtle way, such as "Coppertone" for a tanning lotion, it is a strong mark.

Brand Strategy: Smart trademarking and smart branding may seem to be running contrary when it comes to picking a brand name. At first, you may want to snatch up a brand name that conveys the qualities that make your products or services the best choice for a consumer, such as "Quality Plumbing," "Value Plumbing," or "Best Plumbing." However, a smart brand strategy should lead you to pick memorable and unique brand names for your business, because hundreds of other companies have probably tried using the "Best" or "Quality" brands and have failed. Better branding insists on using a unique brand that will distinguish you from the other providers of plumbing engineering services or plumbing equipment.

Use Your Brand Consistently

Trademark Strategy: Many businesses undermine their own trademark rights by using their trademarks/brand names inconsistently. Make sure you decide on a trademark and use it the same way every time you advertise your business or mark the goods you are selling.

For instance, look at your business's website. Do you use your business name in some places and your trademark in other places? It shouldn't be "The Jolly Plumbing

Engineer, Inc." in some places, "The Jolly Plumbing Engineer" in others, and "Mr. Jolly Plumbing Engineer" elsewhere. Also, using your URL (e.g., www.jollyplumbingengineer.com) does not count as using your trademark unless your trademark actually includes the "www" and ".com."

Brand Strategy: Picking a single brand name and using it consistently doesn't just strengthen your legal rights in the brand; it also strengthens your brand name. This is the most basic step in brand management—picking a brand and sticking to it. Using a single brand name in the same way each time you use it, whether on your website, on your trucks, or on your marketing materials, will solidify your brand in the eyes of consumers. In fact, if you don't use your brand name consistently, you won't really have a brand at all.

Get Everyone on Board

Trademark Strategy: To protect trademarks at companies with many employees and outside contractors, everyone needs to know about your trademark goals, not just your top officers and marketing department. Communicate with your web designers, graphic designers, and anyone who has a hand in designing your promotional materials. Communicate with your sales and customer service teams and make sure they know how to use your brand name, know to always refer to your company by that name, and know what the brand name represents. Everyone needs to know to put your business name in large letters if you're using it as a trademark. Make sure all employees use the same lettering and spelling and leave out extraneous words every time they use the brand name.

Brand Strategy: Streamlining your approach to your brand name by informing your sales team and outside marketing contractors about your plan for trademark protection also will help strengthen your brand. If customer service and sales representatives know your brand message, they will build your brand while protecting your trademark at the same time. Make sure everyone is responsible for building the brand.

Keep Records

Trademark Strategy: Many trademark disputes revolve around one issue: What was the first business to use a certain trade-

mark? In the United States, that is a big question and one that affects who owns a trademark when a conflict arises.

Thus, it is very important to keep records of how you use your trademark, where you use the trademark, and when you started using the trademark. If you want to deny the registration of a competitor's trademark that is too similar to your trademark, you may have to prove that you started using your trademark first. You also may have to prove that you started using the trademark in a certain geographic region, such as the New York City metropolitan area, if that's where your competitor is located. Start a trademark file by gathering the oldest advertising and promotional materials you can find using the trademark and save them indefinitely.

Brand Strategy: Brand names present significant investments, when you consider the money that goes into designing logos, websites, brochures, fliers, and letterhead. All of that investment can turn into profit if you sell your business or use the trademark as collateral for a loan. Also, your brand can constantly bring money into your business as customers come to recognize your brand as a source of high-quality services or goods. Because brand names are worth a lot of money, keeping records of your use of branding will help you see how your brand value rises and falls over time and allows you to track the effectiveness of your marketing and sales efforts.

Register Your Trademark

Trademark Strategy: Registration of your trademark with the U.S. Trademark Office is not an absolute guarantee of the superiority of your rights in the mark, but it will do a lot to protect your trademark.

- Registration makes it easier to assert, prove, and enforce your trademark rights.
- Registration allows you to sue any infringer in federal court.
- Registration makes your trademark easier to register and enforce abroad. For example, U.S. Customs will stop any goods that infringe on your trademark rights at the border. Even better, after five years of federal registration, your trademark rights become virtually incontestable.

Brand Strategy: Protecting your trademark always complements your efforts to establish and protect your brand name, and federal registration offers significant protections

for your brand. Registering your trademark will place it on a nationwide database of registered trademarks, which other business owners will search before applying for their own trademarks. Another benefit of federal registration of your trademark is the right to use the ® signifier, which you can use only after you register your trademark with the U.S. Trademark Office. (Otherwise, you can only use the ™ signifier.)

Following these tips will build your brand and protect your trademark, which will help your business take on the challenges of the increasingly crowded marketplace where online presence, branding, and well-protected trademarks are crucial. **PSD**

David J. Lynam is owner of and **Carolyn E. Sorock** is an associate at Lynam & Associates (www.lynamlaw.com), which has served as ASPE's General Counsel for the last decade. The firm also serves other small and mid-market U.S. and international for-profit and nonprofit companies from its offices in Chicago and Barrington, Illinois. David is a graduate of the Loyola School of Law, attended the Hague Academy of International Law, and is admitted to practice before the Illinois Supreme Court, the U.S. Supreme Court, and the U.S. Tax Court. He gives professional legal education lectures on real estate topics, is an author on contracts and other legal issues, and is a member of the Chicago Bar Association and the Illinois CPA Society. Carolyn is a 2010 graduate of the Chicago-Kent College of Law and served as an executive board member of and has been published in the Chicago-Kent Law Review. She received her undergraduate degree from the University of North Carolina at Chapel Hill. For more information or to comment on this article, e-mail articles@psdmagazine.org.

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