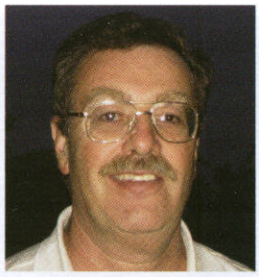
Trademarks *and* Direct Selling

by Jeffrey Babener©

From Nothing to Everything

At first, a trademark may be the least valuable of assets. Famous marks such as Coca-Cola, Microsoft or IBM were nearly valueless at one time. However, for a mature company, the brand name may be its single most valuable asset. Valued names such as GE, Disney or Intel add billions of dollars to the balance sheet.

Similarly, there was a time when the names Avon, Mary Kay or Tupperware had little or no value. And yet decades later, the goodwill associated with those direct selling brands would allow their products, if the companies so chose, to be sold in any retail venue in the world. As they say, "mighty oaks from small acorns…."



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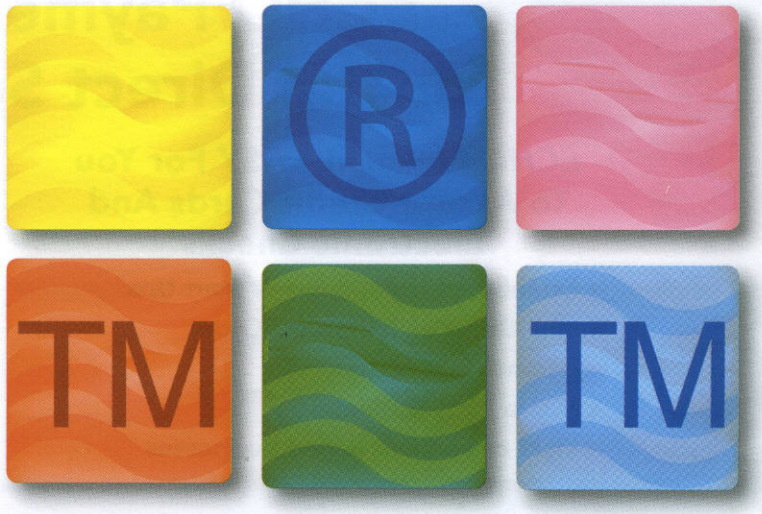
Protection of trademarks is as vital to direct selling companies and distributors as trademark protection in the retail field. Customer or distributor recognition of unique names or logos may well be responsible for generating billions of dollars in additional sales.

For this reason, all leading direct selling companies have devoted substantial budgets to protecting their trademarks in the United States and throughout the world. In addition, distributors will note that direct selling and network marketing companies go to great lengths in distributor agreements and policies to outline permissible and licensed distributor use of company trademarks.

It is a good idea for direct selling companies and distributors to have a basic understanding of how our trademark system works in the United States.

The Origins of Trademarks

The use of trademarks originated in medieval England when craft guilds required their members to place their individual mark on products so that a craftsman could be traced in the event a product proved defective. In time, second-rate craftsmen realized the benefit of associating their products with the mark of a quality craftsman. As a response, the English common law system attempted to develop a body of law that would protect the trademark associated with a craftsman's goods. Today, in the United States, a trademark is protected both by common law as well as federal and state trademark-registration statutes.



A trademark may be a word, phrase, logo, etc., that is strictly associated with a product or service. It may be defined as a word, name, symbol, or device, or combination, used by a manufacturer or merchant to identify his goods and distinguish them from those sold by others.

Protecting the Trademark

To receive trademark protection, the mark must be distinctive and distinguishable from others. The most distinctive of marks are those that are purely arbitrary or fanciful. Such marks would include those that have no meaning or connotation other than that of identifying the source of a particular product. For instance, in the field of cameras, the mark "Kodak" is purely arbitrary and distinctive. As a general matter, the name of a company will not receive protection. Generic and descriptive terms are generally not distinctive and are therefore not considered worthy of protection. For instance, a company could not receive trademark protection for the generic word "Beer."

Some descriptive marks have, however, received protection because they have acquired a secondary meaning that is solely associated with the source of the product, rather than with the dictionary meaning. For instance, "TV Guide" has probably acquired a secondary meaning. Advertising slogans such as Wendy's "Where's the beef?" also likely achieved a secondary meaning.

Trademark protection is not achieved by adopting a trademark, but by its "use" in association with the product. Thus, the first user of the mark will probably receive primary protection. In addition, an "intent to use" application may be filed. With subsequent