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“hey, they’re ripping us off.” That’s what we heard from an exhibiting manufacturer soon after my law firm, Fish & Richardson, set up its small booth at The Super Show earlier this year—the first legal firm to do so on a bit of a whim to scope out the sports world.

The marketing manager of the company was standing in front of our booth on the first day, fretting, stewing and wringing his hands over what he viewed as a knock-off of his product—and it even had a similar name. He wanted to know what we could do. At the show. The sooner, the better.

So how do you protect your company’s valuable designs, trademarks, products and competitive secrets? And hopefully before you see the knock-off at another booth across the trade show floor.

Time to get familiar with the world of IP. No, not “innings pitched,” but rather “intellectual property.” London’s Financial Times recently reported 70 percent of the stock market valuation of the Fortune 500 companies is based on intellectual or intangible assets, rather than property and office equipment. If you translate that to the fitness world oh-so-loosely, that could mean that seven of 10 products may have an intellectual property component that makes it truly valuable. That’s the hard-to-grasp, slip-through-the-fingers stuff that includes patents, trademarks, copyrights and trade secrets.

Why should you care? Picture a basic white tennis shoe manufactured overseas with some brand name you never heard of—let’s call it “White Shoe.” How much would you pay for it? \$20 bucks? Maybe. Tops. Put a blue swoosh on it. Now how much is it worth? Yup. You got it. That’s why companies, large and small, international and domestic, spend a heck of a lot of money promoting and protecting their IP each year—all for that competitive and business edge.

So let’s take a gander through the different types of IP—patents, trademarks, copyrights and trade secrets—what they mean, how to protect them, if you should bother, and why you should take a good, thoughtful look.

PATENTLY PATENT

Patents are a government-sponsored incentive to promote invention. Patentable inventions can be as simple as that seemingly simplistic cardboard insulation sleeve on your latte or as complex as a chemical assay

utilizing fluorescence polarization to detect microscopic chemical bonds (Huh?). You can even patent certain unique designs. A patent gives inventors (or someone to whom they assign to sell the invention) what amounts to a 20-year monopoly, during which they can prevent others from making or selling the invention. In exchange for that government-sponsored monopoly, inventors describe their inventions in detail in the patent and agree that at the end of the patent term the invention enters the public domain.

There are a number of benefits to patenting an invention. You can sue to prevent anyone else from making, selling or using a product that literally copies your invention. But you also can sue someone who tries to sell a product that is similar enough that it could be considered an “equivalent” of your invention. That’s what the upset exhibitor wanted us to stop earlier this year at The Super Show.

Most people are dismayed to learn that in order to enforce patent rights, they generally have to go to court (read: mucho moolah). But a judge can order manufacturers, distributors, retailers and customers to stop selling and using a product that infringes on a patent. Or, instead of going to court, you can ask those people to pay you for the right to use your invention through a licensing fee—another arrangement quietly common in the fitness industry (think of grip holes in weight plates or folding treadmills).

Of course, there *are* costs in obtaining a patent, and even more costs if you get involved in litigation. How much can all this fun cost? Just getting a patent can *start* close to \$10,000, depending on the invention’s complexity—and could go much higher. And litigation is much costlier: Taking a patent-infringement suit all the way through a trial can run in the millions of dollars in fees, expenses and time. To decide whether to invest time and money in a lawsuit, you need to make a business judgment about the importance of the patent to your company and, conversely, the cost of the infringement on your company’s business.

BY DAVID MICLEAN

PROTECTING YOUR PRODUCTS, INVENTIONS, LOGOS AND SECRETS TAKES A LITTLE INSIGHT, PLUS A LOT OF WISDOM. OUR LEGAL EXPERT EXPLAINS THE INS-AND-OUTS.

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TREADING ON TRADEMARKS

Trademarks are extensively used in the sports and fitness industry because they reinforce brand recognition, identify goods and services, and encourage consumer loyalty. Approximately 31,000 trademark applications are filed annually for sports and fitness products and services (not including clothing) of the approximately 200,000 total applications filed each year. A good trademark is strong and instantly associated with the source of goods or services.

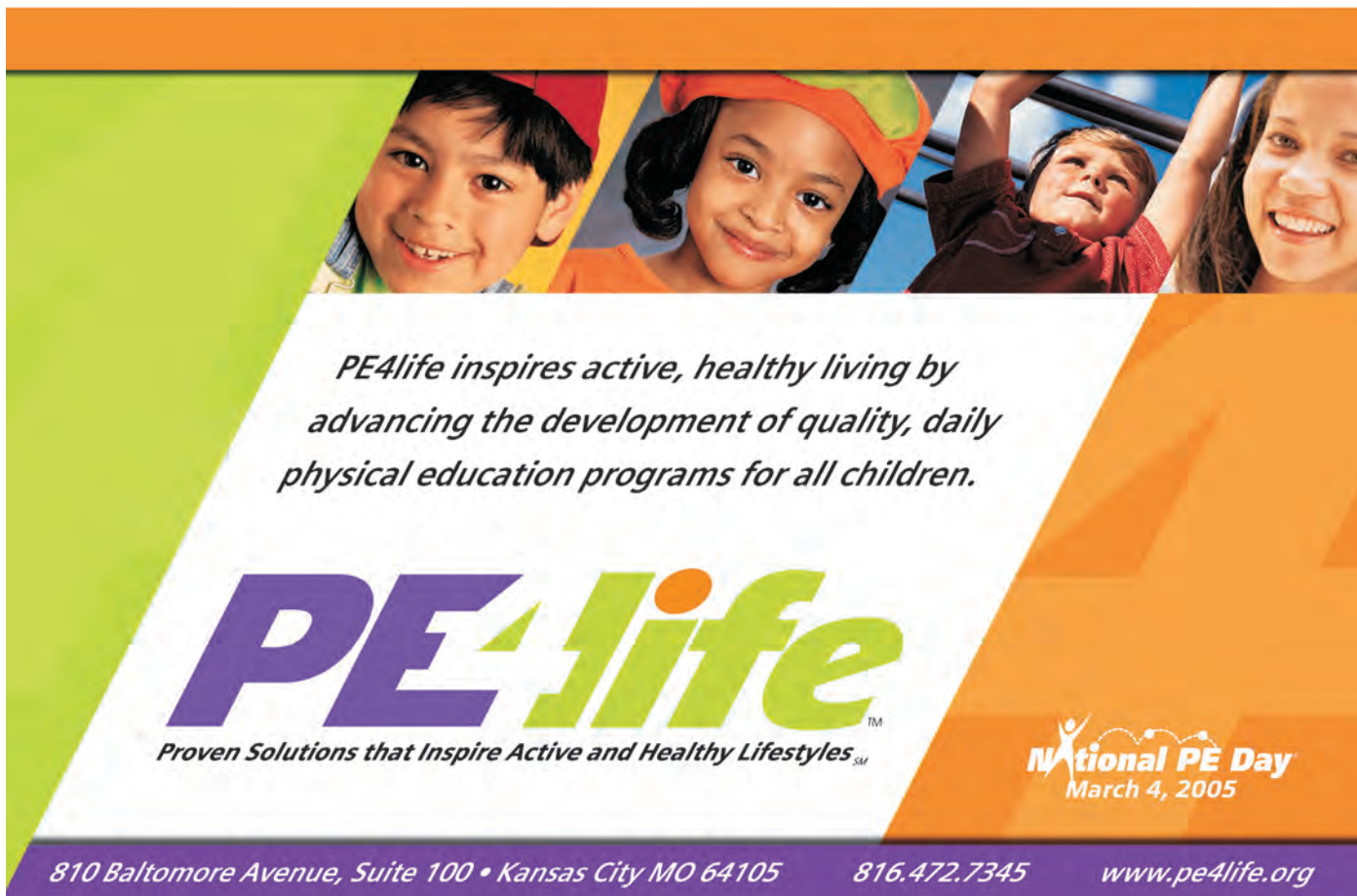
I recently showed a group of 8- to 13-year-old kids some pictures of trademarks without identifying the company or service. These kids instantly recognized the

Nike swoosh, McDonald's "golden arches," Sony's colorful PlayStation logo, and Starbucks' green circle mermaid. The power is stunning, really, so the trademark must be pretty valuable, and is worth protecting. Strictly speaking, you don't have to register your trademarks with the U.S. Patent and Trademark Office (USPTO) to prevent others from using them or to charge infringement if someone starts using it after you did. But it's not an expensive process and is almost always a good idea. You probably know that you can trademark a phrase (like Bose's slogan "Better sound through research") or a design (like the Nike swoosh). But did you also know that Yahoo's yodel, Owens-Corning pink-colored fiberglass, and the Coca-Cola's old-style Coke bottle are also trademarked? Even certain smells have been trademarked.

Trademark law applies a classification system that recognizes them as either strong or weak. Strong trademarks are those that are considered, in a bit of legalese here, "inherently distinctive" be-

cause they clearly identify the particular source of a product or service. Strong trademarks include made-up words, like Velcro for hook-and-loop fasteners or even StairMaster for stepper, or an arbitrary use of a word with no apparent connection to the good or service, like Juniper for computer networks. A strong trademark (Bowflex, for example) can also serve as the factual/legal anchor for the court's imposition of a preliminary injunction against an infringing mark (in this case, allegedly by Icon's CrossBow). This is especially true if the products and marketing channels are very similar (U.S. Court of Appeals for The Federal Circuit's recent decision, *The Nautilus Group Inc. v. Icon Health & Fitness*, from June 21, 2004).

The ideal trademark is simple, short, easily pronounced, distinctive, recognizable and readily remembered—like Google or Yahoo. If you choose a mark that simply describes your product (like Raisin Bran for cereal), the trademark office will not let you claim it as your trademark unless you show evidence that consumers



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associate the mark with your particular product. Generic terms, like camera or computer, cannot alone be registered as trademarks, not to say that some don't try. Unlike patents, trademarks can last indefinitely and are tied to the continuous use of the mark.

THE RIGHT IN COPYRIGHT

Copyright is the legal protection granted to authors of "original works of authorship." Copyright protects many things "fixed in a tangible medium of expression." That includes literary works, as well as music, plays, choreography, paintings, sculpture, movies, audio-visual recordings, sound recordings, clothing designs and building drawings. A copyright protects the expression, not the concept.

Normally, the person who creates the work owns the copyright. When a work is contracted as "work-for-hire" or created by an employee of a company in the ordinary course of employment, the employer is considered the author and the copyright owner. Independent contrac-

tors, on the other hand, own the copyright to their work—unless they sign it away. A copyright lasts for the life of the author, plus 70 years or, in the case of works-for-hire, 95 years from first publication or 120 years from creation (whichever comes first).

You don't need to register a copyright with the Library of Congress, or even put the © mark or word "copyright" on a work to claim you own it, although there are advantages of registering if you decide to seek damages for infringement. Our firm recommends copyright owners mark their works in order to put others on notice that they will enforce their rights against those who copy their work. The proper way to indicate copyright is either with the ©

symbol, the word "copyright," or the abbreviation "Copr;" then follow that with the year of first publication of the work, and then the name of the owner. For example, one might read, "© 2004 Fish & Richardson P.C."

SSSH...TRADE SECRETS INSIDE

Most states have adopted a variation of the Uniform Trade Secret Act (in California—Civil Code § 3426). These statutes enable companies to sue those who misappropriate trade secrets. There are also penal statutes that can make it a crime to steal trade secrets and other technology from another company, competitor or prior employer.

Companies may wish to maintain a se-



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LONDON'S FINANCIAL TIMES RECENTLY REPORTED 70 PERCENT OF THE STOCK MARKET VALUATION OF THE FORTUNE 500 COMPANIES IS BASED ON INTELLECTUAL OR INTANGIBLE ASSETS, RATHER THAN PROPERTY AND OFFICE EQUIPMENT.



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