

The Eastern Script

Shameless self-promotion since 2011

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PRESIDENTIAL ADDRESS



Welcome to the new school year. August was a sad wash-out for sunworshippers but it's apparently not too late to enjoy a summer vacation still in the "new summer month" of September.

The first part of our most recent newsletter is an invitation to visit two pages of our website that have just been piled topheavy with new information: "Credits" and "Bio". See actual photos of live staff members, taken by our very own Mark Woodland—researcher by day, visual artist by night! Scroll down a too-long list of projects we have worked on in our 20+ years!

We've got a Guest Speaker in this issue, a trademark attorney from Phoenix Arizona whose presence comes thanks to my finding his blog antigenerictrademark.com. In the piece "Is it a brand name?" he and I offer some background on why generic vs. tradename is an issue that keeps us both scratching our heads, for different reasons: for him, as an attorney applying for trademark applications and for me, as a script clearance researcher needing to flag brand name language for clients.

Next: haven't you always wanted to know how to make a clearance report? Read on to "Assembling a clearance report" for a play-by-play description of the process, offering you what I hope are valuable insights into how we work and why those things are so labour-intensive.

As usual, we conclude with perennial favorites "Helpful Bookmarks" and "Recent Projects", the latter to whet your whistle for new television and feature projects that you can look forward to seeing soon. All well cleared, of course.

Anne Marie Murphy
President



WEBSITE OVERHAUL

We have added information to our website! Since you have just gone there to grab this newsletter, how about checking out two more things before you leave?

A new page called “Credits” features much shameless self-promotion in the form of unsolicited compliments, notes on Anne Marie’s various speaking gigs, and a fat section of projects that we have worked on over the years (movies, live action tv, animated tv).

Even more fun than looking at a bunch of program titles, though, is checking out our crackerjack staff at the new “Staff” link. See pictures of everyone! Browse the compelling thumbnail bios in which wine preferences are noted! Learn how this motley crew assembled over the years as they each escaped from varied false career starts—before each found his/her true calling.



FEATURED ARTICLE

Is it a brand name?



When reading scripts for our clearance reports, one type of item we flag/note for clients is references to brand name products. Example: “hand me that sharpie—Reference in dialogue to the tradename writing implement Sharpie (Sanford, L.P. Newell Operating Company).” There are various reasons why especially a television production would want to avoid these tradename references, not the least of which is that some broadcasters (PBS in the U.S., for example) do not allow them. Permanent marker competitor Staedtler’s advertisements might be broadcast during the t.v. show that references the Sharpie® in multiple scenes—also not ideal. Another consideration is what’s known as trademark dilution: use of a registered trademark’s name as if it were generic language (your reference to Kleenex® then becomes “facial tissue,” Xerox® becomes “photocopier,” Band-Aid® becomes “adhesive bandage,” etc.).

We are often not sure that a word used in dialogue is a registered trademark. There are some words that don’t smell like brand names but, lo and behold, there they are at the U.S. Patent & Trademark Office (USPTO) in all their registered glory. We spend a lot of time at USPTO and the Canadian Intellectual Property Office (CIPO) websites determining trademark status of words used in scripts.

Since this is significant component of our work day here, a staff member suggested my writing an article on this topic for the next newsletter. I learned a few things at the USPTO website that I did not know, such as the fact that it is “unique among (U.S.) federal agencies because it operates solely on fees collected by its users, and not on taxpayer dollars.” Its “operating structure is like a business in that it receives requests for services—applications for patents and trademark registrations—and charges fees projected to cover the cost of performing the services it provides.”

I also learned that the USPTO trademark examiners (person reviewing the application & determining its viability) are all registered attorneys. Trademark examiners have a very lengthy manual which you are welcome to read (helps accelerate onset of sleep) and which includes a section on the generic/descriptive topic. In the U.S. manual, you’d go to sections 1209.01(b) “Merely Descriptive Marks” and 1209.01(c) “Generic Terms” to learn more. Both sections send you to further reading to discover their logic behind the decisions on applications for names such as: APPLE PIE (when used as potpourri name), BED & BREAKFAST REGISTRY, Dial-A-Mattress, MALE-P.A.P. TEST, REGISTRY OF MEDICAL PATHOLOGISTS, etc.



It didn’t take much more internet sleuthing to find the website antigenerictrademark.com, host to the blogs of “Mr. Anti-Generic Himself” Justin Clark of the J. Clark Law Firm in Phoenix, Arizona. His website includes many interesting entries on this very topic, among them: Trademark Trolls: Similar to patent trolls, just with less press; The Stars and Stripes Forever! (Just not as a trademark); My Name Is Mud—Donald Trump Protects His Name (and the hair). “The brains behind this online operation and namespace for, *er*, cool name ideas” who “plays a mad drum solo from time to time” graciously agreed to answer my questions on the use of generic and descriptive language in trademarks. How does it happen? What is allowed?

Eastern Script: I’m trying to figure out how the USPTO trademark examiners determine what is “generic/descriptive language” and thus un-register-able. In our office we have come across examples of items that have been registered marks and we can’t figure out how they got past that sniff test. Examples include “chip clip” and “autotune” (for a device that automatically checks to see if an instrument is in tune).

Justin Clark: It helps to distinguish between generic words and phrases (which cannot be protected as a trademark) and descriptive language. Generic words and phrases are common words that merely identify products and services instead of a source of products and services. Generic words are easily spotted where they are used in connection with a product or service such that they fulfill their dictionary definition (for instance “tires” for round, large pieces of rubber placed on automobiles to allow the wheels to touch the ground smoothly). Generic words, because they are so ubiquitous and cannot tell a consumer anything about the underlying producer of the goods or services, can never be registered as a trademark.

Descriptive words are words that describe the underlying goods or a characteristic of the goods. An example of a descriptive trademark would be “Pink Bev” for a soft drink that is pink in color (“Bev” being short for beverage). In many countries (including the U.S.), descriptive words are capable of being protected as trademarks if they come to serve as a source identifier. Attorneys call this characteristic of a descriptive trademark “acquired distinctiveness” because the word has become synonymous with a source and is identifiable by consumers in the marketplace. The mark COCA-COLA is an example of a descriptive trademark that has acquired secondary meaning by virtue of years of use in the form of marketing and billions of dollars in sales.

When the U.S. Patent and Trademark Office (USPTO) receives an application for a word or phrase that appears to describe the underlying goods or services (but which is not so descriptive of the good that it is a generic word), the USPTO places the word along a continuum of distinctiveness which traverses from generic to descriptive to suggestive to arbitrary to fanciful. If the word describes a feature or a use of the

underlying goods or services, the USPTO will ask the applicant to prove that the mark is not descriptive or has otherwise acquired distinctiveness. An applicant can satisfy this standard by providing evidence that the applicant has exclusively and continuously used the mark for at least 5 years or by providing evidence (consumer testimony, consumer surveys, and the amount and length of advertising conducted) that the mark is identified in the marketplace with the applicant. If the USPTO refuses to register the trademark on the principal register, they will allow it to be registered on the supplemental register, giving an applicant the chance to apply for protection on the principal register after 5 years.

Eastern Script: Would you be able to share any experiences you have had with advocating for a particular brand name and hearing from the USPTO that they had deemed the language too descriptive?

Justin Clark: In my experience filing trademark applications for clients, it is preferable to choose a non-descriptive trademark at the outset and build the brand off of that trademark. Assuming that the word or phrase has not been used for a long period of time or that the client hasn't begun offering product under the mark, it is better to start with a stronger trademark (e.g. a coined term) because it will be easier both to get a trademark on this word and also to enforce it later against third-parties that use the same trademark.



If a client comes to me with a trademark that describes one aspect of the goods, I advise them to make their mark as distinctive as possible. For example, combining two words together that might otherwise be descriptive when used apart may be protectable as a trademark because the combined words distinguish the word from an ordinary word. Another way to ensure that a descriptive mark is not initially rejected is to stylize the wording of the trademark or add a design element to the mark (like a graphic symbol or an illustrated element). If you look at the U.S. trademark registrations for HOT DOG ON A STICK, for instance, almost all of the marks include the words "Hot Dog On a Stick" in a stylized font with illustrations of an attendant in a hat and colorful uniform holding a stick, usually incorporated into the word "stick".

A problem that I see a lot in applications that are not filed by attorneys is that the goods description includes some of the same words that are used in the trademark itself (e.g. mark was "Lemon Glass", a the trademark owner uses the words "glass containers for lemons" in a description of the goods offered with the mark). This will almost surely prompt the USPTO to issue a rejection based on descriptiveness, so avoid this practice at all cost!

Eastern Script: Do you have any comments from the lawyer's point of view on this topic? How do you pre-screen for generic/descriptive before filing an application? I'm guessing it's not an exact science.

Justin Clark: Ideally, a client will see an attorney very early on in the development of a brand. Early consultation is important so that the attorney can provide input on the strength of the mark. If a client has not already selected a trademark, I usually sit down and discuss the marketing goals of the client in relation to a particular product or service. I advise clients to come up with about 5-10 different trademarks in the event that each of the trademarks is already in use by somebody else.

If the trademarks that the client has come up with happen to describe a feature of the product, I tell the client to consider putting a twist on the word they have come up with so that it doesn't quite describe the product. For many clients this is hard to do because they want the word to be somewhat descriptive of the product; the product is easier to market that way. If the client is dead-set on a descriptive word for the trademark, I suggest adding design elements or applying for protection on the supplemental register, if in the U.S. (Canada does not have a supplemental register, so a trademark must be shown to be distinctive in Canada before it can be registered). This will provide some protection and allow the client to use the mark and promote it heavily, which will be required if the client wants to move the trademark from being merely descriptive to being distinctive and protectable as a trademark.

Many thanks to Justin Clark for his input, Managing Attorney of the J. Clark Law Firm located at 40 North Central Avenue, Suite 1400, Phoenix, AZ 85004.

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ASSEMBLING A CLEARANCE REPORT



A new-ish producer called for information last week and asked a question I don't often hear: "How do you do the work on a clearance report?"

Well, here's how we *don't* do the work. At a client visit a few years ago with a room full of that company's employees, one of the people in the room—a young intern—asked, "Do you have a computer that reads the scripts for you?" There have been too many days when I have wished that such an invention existed! Where is Rube Goldberg when you need him?

Sorry, there is not yet hardware or software that can read a script to flag for clearance issues. You still need a human brain for that job. So the first thing we do is **read the script**. As we read, we highlight any piece of text that needs to be flagged and we paste that item into the appropriate section of the report.

Our reports are separated into **distinct sections**: cast list, dialogue references, art department concerns, locations noted, music use, and a final "sources consulted" area. This reading/report set-up part takes a whole lot of time and, quite frankly, laser focus that takes us to another place; sometimes you forget there are other people in the room. The categorized sections of our reports are not a feature of most clearance companies' reports but are very helpful to production.

Once we fill in those sections of the report with the relevant items, we make what we call our e-notes document on which we then **begin research**. We start at our “report sources” area. That place tells us whom to contact for a crazy variety of story elements, among them: *airline call signs, comic books, disc jockeys, food critics, gemologists, high school yearbooks, law firms, pilots, stockbrokers, wrestlers*, and others. Those lists tell us where to check and they give us well-researched authoritative sources for knowing we are covering our bases. If we don't have a source list set up for an item in the script (Tibetan monk? Arizona graphologist?), that becomes part of that day's work.

For cast and business names, our first level of concern is an invasion of privacy issue in the place the story takes place. We **check in the setting**. If we are working on a project set in New York City, the first sources we consult are those specific to that city to determine if the name is “clear” to use there. In phone directories and internet searching, do we find only one person listed by that name in New York City? If so, we find some similarly flavored alternative character names that can be checked in all the relevant sources too.

The next level of concern for a cast name is **checking the profession**. If that New York City story has a lawyer in it, we check the licensing office for lawyers in NY state to confirm that the name is “clear” (non-existent or common enough). We'll next check for prominent people in the profession who may not be right in your setting. Maybe we find noone by your character's name who is licensed to practice law in New York State but the name is the that of the current president of the American Bar Association. Again, we'll check alternative names so that you have something you can use instead.

We research art department items as well: business names being featured, products being shown, other named items used as set dressing. If your intention was to have created fake business names to put on signage, we'll confirm that there are no conflicts. If you need contact information for featuring actual items, we'll track that down for you.

We take copious notes from sources consulted and draw conclusions based on our findings so that we can, after research is complete, provide you with “clear” or “not clear” in our report. If “not clear,” we will have cleared some names that you can use instead. We **type up a report** of the flagged items and our findings. Before sending it off to you, the client, a peer review of both the report and the e-notes is performed for quality control. Typically you have every answer you need then to proceed.



And that is how you assemble a clearance report. Thanks to last week's caller for asking the question!

RECENT WORK

BIG SCREEN

BAD HAIR DAY “Laura Marano and Leigh-Allyn Baker star in this Disney production described by Variety as a “comedic buddy adventure” about a “high school tech whiz who’s bound and determined to be crowned prom queen. But, on the big day, everything that can go wrong does go wrong.”

Credit: Variety.com

FIRE SONG “When a teenaged girl commits suicide in a remote Aboriginal community in Northern Ontario, it’s up to her brother Shane to take care of their family...when circumstances take a turn for the worse, and Shane has to choose between his family or his future, what will he do?”

Credit: Indiegogo's plot summary

THE TICKET “A blind man who regains his vision finds himself becoming metaphorically blinded by his obsession for the superficial.” Cast includes Oliver Platt, Dan Stevens, Kerry Bishé.

Credit: IMDB plot summary

ZOOM “A multi-dimensional interface between a comic book artist, a novelist, and a film director. Each lives in a separate reality but authors a story about one of the others.” Cast includes Gael García Bernal and Jason Priestley.

Credit: IMDB plot summary

SMALL SCREEN

FOOL CANADA “FOOL CANADA is a new hidden-camera comedy show featuring Canada's best improv artists traveling across the nation, in disguise and ready to prank an unsuspecting public.”

Credit: cbc.ca

KILLJOYS “It follows a fun-loving, hard living trio of interplanetary bounty hunters sworn to remain impartial as they chase deadly warrants throughout the Quad, a distant system on the brink of a bloody, multiplanetary class war.” For broadcast on Syfy.

Credit: DEADLINE HOLLYWOOD

ODD SQUAD “The show focuses on two young agents, Olive and Otto, who are part of the Odd Squad, an agency whose mission is to save the day whenever something unusual happens in their town. A math concept is embedded in each of their cases, as Olive and Otto work together to problem-solve and correct the oddity du jour in each episode.”

Credit: pbs.org

HELPFUL BOOKMARKS

This is a good starting point if you are looking for permission to feature the artwork of an American artist, either living or deceased. The Artists Rights Society's website: arsny.com

“Explore the World’s Knowledge” indeed—this is almost as good as going to a museum, visiting the website of the British Library: bl.uk

“Rumor Has It” is this website’s appropriate tagline, for here is the place to go to debunk (or confirm) just about any so-called urban legend: snopes.com