The Trademark Company, LegalZoom & Other Online Services

Online forms are no substitute for legal advice

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Over the years I have routinely received inquiries from prospective clients who have, as they have phrased it, "wasted their money" with LegalZoom or The Trademark Company, thinking they were "saving money" by doing the work themselves, but who now realize they need help to fix what has gone wrong. With each year that passes consumers are increasingly more comfortable conducting business transactions of all types online, including filing trademark and patent applications without the help of a trademark attorney. This has resulted in an increase of clients asking attorneys to jump into a pending trademark or patent application process previously initiated using one of these online forms companies to get things back on track and help them avoid loss of their valuable intellectual property rights. With some news recently published about one of those online providers, it seems now is a good time to again highlight the risks to help avoid costly issues, and to convey that for those who are already in the midst of the myriad problems created by relying on these online forms providers there may be ways to recover. All may not yet be lost.

When clients reach out to us to fix whatever has gone wrong with applications they filed on their own using, e.g., LegalZoom, or The Trademark Company, or the like, we tend to see the same issues each time that need attention. Sometimes we have to be the bearer of bad news that some level of permanent loss of intellectual property rights has occurred. But most often we are able to repair or at least partially salvage whatever has gone wrong to maintain the desired protection for the invention or brand, albeit likely at a higher total cost to the client (including what they paid to LegalZoom or The Trademark Company at the time of initial application filing) versus had the client just worked with us from the beginning.

What Exactly Are The Trademark Company, LegalZoom & Others?

These companies are not law firms; they are online providers of forms. As it relates to The Trademark Company, the recent news is that they are back in a second attempt at providing online services. After being investigated by the United States Patent & Trademark Office (USPTO) Office of Enrollment and Discipline (OED), attorney Matthew Swyers, the founder of The Trademark Company law firm (the prior iteration) had to agree to no longer practice law for some period of time. This was a negotiated settlement compromise in exchange for OED dropping the investigation into Swyers and his law firm. The Trademark Company law firm was shut down in 2015.

Shockingly, in 2019, Swyers is back and he is exploiting a loophole. He has restarted The Trademark Company brand, but this time as a limited liability company (LLC), not as a law firm.

The Trademark Company now uses artificial intelligence and a library of forms and automated functionality to do what every individual in the U.S. has the ability to do themselves for free, but The Trademark Company charges for it and simultaneously touts lower costs than law firms. In my opinion, customers are at risk of being lead into the misperception that these services being provided online are equivalent and therefore an alternative to the legal advice clients receive

from law firms when trying to navigate the brand protection trademark registration process or invention protection patent application process.

> To back up briefly, every individual in the U.S. currently has, and has always had, the ability to prepare and file their own patent applications to protect their inventions, and their own trademark applications to protect their brands. Other than the government filing fees charged by the USPTO, there is no cost for the access or the forms to carry out these processes, which are available online at www.uspto.gov. Representing yourself in front of the USPTO is called acting "*pro se*", and anyone can do it. What you cannot do is represent someone else in these processes unless you have been licensed at least as a patent agent (for patent applications) or as an attorney (for trademark applications). A patent attorney is both a registered patent agent and a licensed attorney.

The prior instance of The Trademark Company that was shut down operated as a law firm by providing not only the forms but also some of the substantive legal advice related to aspects of the patenting and trademarking processes. Where they strayed and what got them into trouble was that the substantive legal advice was provided by non-lawyer administrative staff without oversight by a licensed attorney. This was a textbook example of practicing law without a license, and it is why The Trademark Company was shut down and why Mr. Swyers was disciplined and had to agree to stop practicing law back in 2015.

Now, The Trademark Company is back, but not as a law firm. Rather, it is just a regular company. This is a similar model to LegalZoom and other online providers. These companies provide their customers with copies of forms and some narrative to explain the process, but they cannot provide legal advice or legal guidance as their customers/clients prepare and file their own applications.

What does this mean? What's the difference?

It means that neither LegalZoom, nor The Trademark Company LLC, nor other similar online "filing services" can provide legal advice related to these patent or trademark filings, or else they risk running afoul of the laws against practicing law without a license.

Here is the disclaimer that as of the posting of this article is at the bottom of the LegalZoom website:

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And here is the disclaimer that as of the posting of this article is at the bottom of The Trademark Company website:

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See any similarities? These disclaimers are the same!

If you pay your hard earned money to The Trademark Company (or LegalZoom) what you get in return is a set of automatically generated forms for preparing and filing a patent application or a trademark application with the USPTO, some equivalents of which are already available online at www.uspto.gov for free. They specifically clarify that they are not a law firm, are not a substitute for an attorney or law firm, and cannot provide any kind of advice, explanation, opinion, or recommendations. So, at the end of the day, the risk and liability falls entirely on the consumer and not on The Trademark Company (or Mr. Swyers), LegalZoom, or other similar online forms providers, to ensure you are adequately protecting your valuable intellectual property in your *pro se* prepared application.

If you, the Applicant, are experienced as it relates to properly pursuing protection of valuable brands or inventions, then these online forms services could be a useful resource of forms for a low cost. But it can all be done for free using the government-provided resources, so really all you are paying for and getting in return appears to be convenience in having all the necessary forms in one place.

If you, the Applicant, are inexperienced as it relates to properly pursuing protection of valuable brands or inventions, then the road ahead when using the automated forms from these online forms providers is fraught with traps for the unwary (or just the inexperienced) and there is real potential and risk to permanently lose intellectual property rights to brands or inventions. Common issues for trademarks include the improper selection of the entity applying for the registration, or an inadequate identification of goods and/or services. Common issues for patents include failing to include a sufficient and appropriately targeted level of detail regarding the core invention for which patent protection is ultimately sought.

> When comparing the pricing for The Trademark Company or LegalZoom with pricing from an attorney or a law firm, be aware that such a comparison is one of proverbial apples with oranges in terms of the services being paid for and received. The online companies provide forms, not legal advice. Attorneys and law firms provide advice based on their expertise as applied to the facts related specifically to you and your desired outcome. This is a meaningful difference.

And for those who may have already started down the path of using one of these online services and are either second guessing whether their invention or brand is adequately protected, or perhaps have run into a roadblock after having received an Office Action from an examiner at the USPTO rejecting your application for any number of different reasons, now is the time to find an attorney who can try to help repair any issues created at filing.

If you find yourself in such a situation, don't walk away from your application too quickly. Call an attorney and see what can be salvaged. And if you haven't yet begun an application using an online provider, call an attorney first. You may find out that it can save you some time, money, and frustration in the long run!

For more information on the trademark application process and how to properly protect your IP, please contact Sean Detweiler.