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Are You Properly Considering the Disposition of Important Property?

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Death is inevitable, and the disposition of property after death is also inevitable. Thus, every individual will at some time be involved with a decedent’s estate. This is true whether or not you have a will, trust or related document. Many individuals will be involved with their own estate plans, and some individuals assist friends or relatives with theirs.

It is also a fact that every person will have some interaction with some form of intellectual property. In fact, everyone who creates a document that involves some creativity and originality is dealing with a writing that is protected by the United States copyright law. In addition, individuals may own patents, registered or unregistered trademarks, and other intangible property such as trade secrets, domain names, email accounts, websites and blogs.

The Copyright Act provides that works covered by the statute are protected for the lifetime of the copyright owner plus 90 years when the copyright is owned by an individual. If the work is owned by an entity, published anonymously, or published under a pseudonym, then the period of protection is 120 years from creation or 95 years from first publication, whichever period expires first. Given these lengthy periods, the vast majority of copyrights will exist after the creative person’s death. When the copyright is owned by the individual who created the work, the copyright will always survive the individual.

Other types of intellectual and intangible property can also be protected beyond the owner’s death. A United States patent lasts for 20 years from the date the patent application is first filed. A federally registered trademark remains in effect for 10 years and may be renewed for an indefinite number of 10-year periods. Trade secrets survive so long as they remain a secret and retain commercial value; for example, the recipe for Coca-Cola has survived the death of its creator and remains a closely-guarded trade secret after more than 100 years.
The complexity of estate planning can be compounded if intellectual property owned by the decedent has been exploited through licenses. In many instances, and especially in the case of patents, a license will require the creative person to provide expertise or other benefits to the licensee in exchange for royalties. The beneficiary of the creative person is likely not in a position to provide that assistance, and if the license agreement does not have a provision dictating what happens when the creative person dies, this could cause lucrative licenses to terminate or create other problems for the beneficiary.

In the case of trademarks, in order to maintain a trademark that is licensed to another party, the trademark owner must exercise quality control to ensure the integrity of the trademark’s use. See, e.g. Barcamerica International USA Trust v. Tyfield Importers, Inc., 289 F.3d 589 (9th Cir. 2002). If the trademark owner dies and a beneficiary receives the trademark, it appears that the responsibility to perform quality control would fall to the beneficiary. If the beneficiary fails to perform the quality control obligation, it would create what is known as a “naked license,” and the trademark could be considered to be abandoned, making it worthless.

Furthermore, in today’s world, many individuals own other types of intangible property, such as domain names, email accounts, websites and blogs. The rights to domain names, websites, and email accounts are becoming a significant source of litigation. Many email hosts take the position that if the account holder dies, then the account itself disappears, along with all emails in that account, whether or not they have been read. This issue arose in a recent Michigan case, where a probate judge ordered Yahoo to give the parents of a Marine killed in Iraq full access to their deceased son’s email account. These policies may result in having literary gems disappear, or if the account winds up in the hands of an inappropriate heir, embarrassing items may surface.

It is clearly important to consider the fate of intellectual property in any estate planning situation. Lawyers who deal with estates of obviously creative people, such as artists and authors, will likely consider these issues and make appropriate disposition of the creative person’s intellectual property when preparing an estate plan. However, the same attention may not be paid to estates of individuals who did not consider themselves to be involved in the creative arts. Even when attorneys prepare their own estate plans, they rarely consider the fact that a great deal of the work they prepared during their careers, such as articles and briefs, may be part of their estates. This omission may be disastrous, because some of these items can turn out to have significant value.

The first item to consider with regard to the intellectual property of a testator is whether the testator actually owns the intellectual property in question. For example, a lawyer who prepares a brief while an employee of a law firm likely created the brief as a “work made for hire.” As defined in the Copyright Act, a work made for hire is a work prepared in the scope of an employee’s employment, and the copyright in a work made for hire belongs to the employer unless the parties have agreed otherwise in writing. 17 U.S.C. §§ 101, 201(b). Therefore, the copyright in items prepared in the scope of the testator’s employment often does not belong to the testator, and will not pass through the testator’s estate.
On the other hand, absent an agreement to the contrary, a patentable invention developed by an employee, even within the scope of employment, will remain the property of the employee. The employer, however, will obtain a “shop right” in the invention; that is, the right to use the invention in the employer’s business without paying royalties. Many companies require employees to assign all patentable inventions to the employer during the term of employment and employees who are hired expressly for the purpose of developing a patentable invention will likely have worked out specific arrangements with respect to ownership as well. Therefore, an attorney preparing an estate plan should ask the appropriate questions to determine whether the testator has been involved with intellectual property, such as patents.

Once it has been determined what intellectual property is included in a testator’s estate, it is important to consider who will receive that property. If intellectual property is not explicitly dealt with in a well-drafted will, the consequences can be catastrophic. An example of the importance of choosing an appropriate beneficiary for intellectual property is apparent when dealing with the estate of an artist or sculptor. Many states have “multiples laws” requiring disclosure of certain information to purchasers of limited edition prints and sculptures. One of the items that typically must be disclosed is whether the print was created posthumously. The disposition of the plates or molds used to create a limited edition print or sculpture must also be provided for and disclosed. When a complete edition of a limited edition print has been run out, the plate should be cancelled, and when a limited edition sculpture has been completely cast, the mold should be broken. The beneficiary of these types of intellectual property must be made aware of the legal requirements of the multiples laws and be prepared to comply with them.

If the decedent has a will, it will most likely include a catchall provision known as a residual clause, which essentially says that any remaining assets after the rest of the dispositions in the will have been carried out will be given to an identified individual or group of individuals. When the testator and the person assisting the testator in preparing the will do not consider that some of those assets may be valuable or sensitive intellectual property, then the items may wind up in the hands of this residual beneficiary, who may be an unwise and unintended choice. Many wills for creative people appoint an artistic administrator for purposes of dealing with the decedent’s artistic property.

If there is no estate plan at all and a person dies intestate, then the problem is just as complex because the intestacy laws of the state where the person resides at the time of death will determine who is to inherit that person’s property. This will, as noted above, include intellectual property, such as copyrights, trademarks, patents and other forms of intangible property. Whether the individuals who take by intestacy are the appropriate persons to deal with any or all of the decedent’s tangible and intangible property is a question that should certainly be considered before the law makes this irrevocable decision.

It is only by considering all of the possible forms of intangible property that an individual may have in his or her estate that an appropriate disposition of those assets can be evaluated and a meaningful plan implemented. You will do yourself a significant service by considering intellectual
property when you engage in the estate planning process.

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