

ESTATE PLANNING ISSUES FOR BUSINESS OWNERS, INVENTORS, MUSICIANS, AUTHORS AND OR ARTISTS

If you own a business, or if you are an inventor, author, musician or artist, intellectual property rights may be among the most valuable assets in your estate. Intellectual property may be transferred through intestate succession laws, by your will or trust agreement, or by a written transfer documents during your lifetime. Patents, trademarks, copyrights, trade secrets and other forms of intangible property should be protected with a plan for the transfer of these assets through your estate plan to avoid results that you do not expect or intend. You will want to evaluate whether transfers should be done during your lifetime or via a testamentary transfer after death – each having different tax consequences.

Intangible property requires specific planning techniques and language in estate planning documents. For example, most wills contain bequests of "tangible personal property", but that language may not transfer your intellectual property rights because they are intangible personal property. The intellectual property may end up as part of the "catch-all" residuary estate rather than passed to your desired or most appropriate beneficiary.

Copyright law does not protect underlying ideas, only the expressions of those ideas by means such as literary works, computer programs, musical works, dramatic works, works of fine art, audiovisual works, and architectural works. If copyrights are potentially a substantial part of your estate, you need to plan for the disposition and control of the copyright rights as they may continue to be valuable for as long as 70 years after you have died.

In the case of post-1978 copyright licenses and transfers, there is a one time five-year period that begins 35 years after the license, transfer¹ or first publication of those works where the copyright license may be terminated by the author, or by the author's surviving spouse, children, grandchildren or personal representative (in that order). It is important that this opportunity not be missed if the rights granted are unfair under today's standards so a more equitable license or transfer can be negotiated.

It is important to remember that the transfer of a physical object (for example, a sculpture, book or painting) does not transfer any rights to the copyright unless there is a writing making the transfer of the copyright explicit. While the transferee will get to enjoy the book or painting, he or she will not be able to license or copy it, or create derivative works based on the original.

A lifetime gift or a testamentary bequest of a copyright must be carefully drafted. Upon your death, your executor(s) should consider recording the transfer in the Copyright Office to extend protection for 70 years after the date of death. In the absence of such recording, the work will be presumed to be in the public domain upon the earlier of 95 years from the date of first publication or 120 years from the creation of the work.

With respect to trademarks, you might individually own the trademark of your business (and license it to the business) or the mark might contain a name or a reference to an identifiable

¹ "Transfers" include transfers to non-testamentary trusts

individual whose permission is needed to register and renew trademarks incorporating the name. Particular attention in the drafting of an estate plan must be paid to the disposition of marks licensed by you to the business and any use of a person's name, likeness and right of publicity in connection with the business.

As part of the administration of an estate containing state or federal trademark registrations, your executor or trustee must file documents with the appropriate agency to record the transfer of the registration, monitor for potential infringement and ensure continued use of the mark in order to properly protect it.

Patent law protects "inventions," which are defined as any new and useful process, machine, manufacture or composition of matter, or a non-obvious improvement to one of those. Your will should clearly state who owns the patent, who has the right to license it (and collect the royalty fees) and who has responsibility for making future maintenance payments. In addition, the estate's fiduciary must file appropriate documents with the United States Patent and Trademark Office to record the transfer of the patent in order to allow the new owner to administer the patent registration. If you die before filing a patent application or during the application review process, your executor or personal representative may apply for the patent and/or be issued the patent with the filing of papers showing the transfer of rights upon death.

If you have not taken the proper steps to protect your copyrights, trademarks, patents, or other intellectual property, we recommend that you do so. If you have a will or trust, review the provisions with a lawyer who has experience planning for intellectual property assets. If you own intellectual property but do not have a will, develop a plan for transfer of those assets during your lifetime or upon your death. Evans Fox LLP has a team that includes estate and intellectual property protection attorneys. We can advise clients and help in strategic planning to ensure the owner's rights are properly protected and transferred according to the intended plan.

The forgoing is not intended to be and should not be construed as legal advice. Only after an attorney client relationship is established in writing may legal advice be given.

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Tracy Jong is a Senior attorney at Evans Fox LLP with 30 years of experience focusing her practice in business law, intellectual property and licensing for alcohol and cannabis. Tracy Jong is a member of the New York Bar and is a registered attorney at the United States Patent and Trademark Office. She can be reached at Tjong@EvansFox.com.