Protecting Business Names, Trade Marks and Domain Names

This information sheet provides an overview on professional names, including the steps you can take to protect your Business names, Trade Marks and Domain Names.

Choosing a name

Why is a name important?

The name you use to identify your band, work or performance is vital and valuable: it is the lifeblood of your reputation. If your artwork or performance is successful, the name will become a very important asset, for it is the name that sells tickets to an exhibition or a performance.

If you fail to protect your name you may be forced to change it, and the reputation that you have earned will be lost. You will have to begin working with a new name and creating a new identity. A worst case scenario could include being required to change your name on the eve of that all-important gallery opening or on the opening night of your performance.

How do you select a name?

When choosing another name than your own one to identify your work or performance, you need to select one that is original, such as an invented word or a word that would not normally be associated with your particular art form. An example of the latter would be the name BLUR used by the English pop music group. Choosing an original name has the following advantages:

- it will reduce the likelihood that you will infringe someone else's rights;
- it will make it easier for you to establish a reputation in the name; and
- it will make it easier to register the name as a trade mark.

Before using a name it is important to conduct searches to see if there are other artists or businesses that have rights that may prevent you from using the name you have chosen. You can do this yourself or through a professional search agency. It is a good idea to select several quite different names in case you find that someone else has the right to use the one you first wanted and you need an alternative. It can be cheaper, and is quicker, to check all potential names at the same time. Your investigations should include:

- **your own enquiries** to determine whether any of the names you have chosen are already being used. Search the internet, street press, magazines, and other publications for other businesses relating to the particular art form you work in;
- a business name search through the Australian Securities and Investments Commission's (ASIC) website, ASIC Connect, which lists all Australian registered company and business names. You can contact an ASIC Service Centre for assistance;
- a trade mark search through IP Australia's offices and website for both registered trade marks and marks that have been applied for;
- an Australian Business Number search through the Business Entry Point. This will display all entities, including trusts, which may have a similar name and are registered for GST purposes;
- a **domain name search**, for example in relation to the .au domain, through the AusRegistry WHOIS Service (www.ausregistry.com.au)for .com.au, .net.au, .org.au, .asn.au, .id.au and .gov.au, and the AUNIC Status service (www.aunic.net/aunicstatus.html) for .edu.au. For global top level domains, see the WHOIS service (www.whois.net); and

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- a **social networking** search on websites such as Facebook, MySpace and Twitter.

If you plan to work overseas, you may need to extend your investigations to the countries that interest you.

If you are established as a not for profit entity (other than a company limited by guarantee) you should consider obtaining an Australian Business Number (ABN) registration if you intend to trade outside your state or territory of incorporation.

If these investigations fail to find any use of your chosen name or similar names, you may start using the name with some degree of confidence. Be aware, however, that your searches may not have been thorough enough to guarantee that someone does not already have rights in the name.

If you discover that someone else already has the same or a similar name, you are faced with the option of choosing another name or names (and repeating the investigations), or of conducting further investigations to determine who is using the name, and in relation to what goods or services. The second option will involve more time and effort and may require obtaining an opinion from a lawyer as to whether the proposed name use is likely to infringe the rights that the other person has in their name.

You might be able to use a name or similar name to one that is already being used by someone else, particularly if the existing use of the name is in an area unrelated to the arts industry in which you are involved. For example, if you want to use the name BLUR in relation to your cupcake baking business in Adelaide, the existence of an English pop group with that name probably won't worry you. If you're an indie band based in Melbourne that's hoping to release an album on iTunes, you should choose another name! It is, however, always best to proceed with caution and it is certainly more advisable to use a unique name.

Intellectual property and rights of action to protect the reputation in a name

A person may use their birth name (set out in their birth certificate), a nickname given by friends, or choose a pseudonym such as a stage name or pen name (nom de plume). A person can choose a name under which they want to carry out their professional or business activities (a business name) whether operating alone as a sole trader or with others in partnership (such as a band). Incorporated companies select the name they want to use upon registration and can apply to change that name later. A company can also trade under a business name while retaining a different name in the ASIC company register (although the company letterhead and other documents will described the company as "XXX Pty Ltd trading as ZZZ").

While any name can be described as an asset, it is not strictly accurate to say that a name can be owned. The registration of a company name, business name or domain name does not give you a property interest in the name. However you own a registered trade mark because the *Trade Mark Act 1995* (Cth) states that a registered trade mark is personal property. A 'brand name' is another way of describing a name given to trading entity or a product that is badged with a specific name. A 'brand name' can be either a registered trade mark or simply a name that is used to identify a product (a business name or trade name).

While a name is not strictly an interest in property, however there are legal remedies to protect the reputation that exists in a name and to prevent the fraudulent use of a name or misleading and deceptive conduct over the use of a name or that to prevent confusion or a false impression being created by the use of a name.

Copyright law does not protect business or trading names, slogans, short phrases, expressions or titles (such as titles of films, songs, books, etc) as they are not considered to be substantial enough so as to considered to be an original work. However a business logo with any artistic or design elements may be protected under copyright law as an artistic work. A logo may also be capable of being accepted for registration as a trade mark.

Arguments can develop over appropriation of pop culture and the use of popular characters and names. For example the performer known as *deadmou5* became involved in an argument with the Disney Corporation over his application to register his *mau5head* logo as a trade mark and the possible confusion with the Mickey Mouse™ character. Without addressing the

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merits of either side to this dispute, it serves as an example of the commercial imperatives to protect the value created in business/brand names and characters.

For more information see Arts Law's information sheets Trade marks and Copyright.

Arts related partnerships and names

The membership of arts related partnerships is seldom static. Break ups often raise contentious issues such as who has the right to use the name in the future, and how much compensation, if any, should be paid to leaving partners.

As with most things, preventative measures are best. If the group of artists enter into a formal partnership agreement, all rights and obligations will usually be defined in writing. Many arts related partnerships, though, do not have formal partnership agreements. Should this be the case, each State's respective partnership legislation specifies that **all parties are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses sustained by the partnership**. Therefore, the name will generally be a partnership asset that is owned by all of the partners equally and partners will generally be able to use the name in partnership with the other members but not individually unless permission is given by the other partners or the rights are sold. This will not always be the case (for example if the band's name includes the name of one of its members, it may not be possible to prevent that person using their own name professionally in other businesses) and advice should be sought early on if this is likely to be an issue.

The music industry is one sector in which there is the potential for arguments over who is entitled to use a business name. There have been a number of legal disputes over the use of the band's name after the band has broken up or when band members leave the band.

Arts Law publishes a sample Band Partnership Deed and a sample Band Partnership Letter Agreement, which is alternative to the longer more detailed band partnership agreement. Both of these documents deal with the right to use the band name.

Australian name registration and protection

Business names

A business name is the name under which a person or entity conducts a business. On 28 May 2012, a single national register of business names commenced, replacing the former State and Territory registers, and administered by ASIC. The business names register makes publicly available the identity of the person entity carrying on business under a business name and contact details for the person or entity.

Business names that had previously been registered on any of the State or Territory registers were transferred across to the national register on 28 May 2012.

If you operate a business under a name other than your own name, or if you are a company operating under a name other than the company name, you must register the name used as a "business name" with ASIC. In addition, most banks will not open an account for a group of people unless they have a registered business name.

You may also need to register a business name if you cannot use your real name to identify your work or performance because someone else has already established a reputation in the same name, and use by you of your real name would be likely to mislead or deceive the public or incorrectly suggest a connection between you and the other person.

You are exempt from registering for a business name in the following circumstances:

- For an individual, your business name is your full individual name (first name and surname);
- For a registered company, your business name is the company's registered name; and

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- For a partnership, the business name consists of the names of all of the partners.

It is important to realise that:

- Registration of a business name does not grant ownership of the name or give you the exclusive right to use the name. It does not confer any other rights in the name. To protect a name in this way, you should register the name as a trade mark;
- Registration of a business name may be useful, though, to establish the reputation or connection between a name used and a particular business; and
- The rationale behind the business name system is a public policy one: to let consumers know who is actually running a business by making this information publicly available.

Any name may be registered provided that it is not capable of being confused with the name of a company, business or association already registered, and is not misleading or undesirable. For example, these kinds of words can be misleading: “corporation”, “club”, “society” or “institute”. If an application is rejected on these grounds you will be notified. Further information in support of your application may also be requested. In many cases ASIC may first reject the application, but may be more favourably inclined to consider a further application if you can provide persuasive written information to support it.

Applications for business name registration can be completed online through the ASIC Connect website after creating an ASIC Connect account. To complete an application to register a business name:

- You must hold an Australian Business Number (ABN), or have lodged an application for an ABN and have an ABN application reference number. An application for an ABN can be made online on the Australian Business Register website;
- You will need to provide the proposed business name you would like to register – you can check the availability of a business name on the ASIC Connect website prior to, or during, the registration process;
- You will need to provide details of the business name holder. The information required will vary slightly depending on whether the business name holder is an individual such as a sole trader, an incorporated entity, an unincorporated entity, or a partnership or joint venture partnership. Individuals are required to provide their name, date of birth, and residential address. The date of birth and residential address are not published on the website.
- You will also need to provide address information for the business, which should be the primary place where the business is carried on and the address for service of documents. For individuals, where the address is the same as their residential address, ASIC should not display this information on the public register, but will display the suburb and postcode in which the business is located.
- You will need to declare that you are eligible to hold a business name (you would be disqualified from holding a business name if you or a person involved in managing your entity are disqualified from managing a corporation or were convicted of an offence involving dishonesty and punishable by imprisonment of at least three months).

Registration is available for a one year or three year period. The fee for registration for one year is $30, and for three years is $70.

The business names register is publicly searchable free of charge. Typically, a free search will retrieve information such as the organisation name, unique identification number such as ABN, type of company, registration date and next review date. Additional information can be retrieved by paying a fee, such as current and historical extracts, and a copy of the certificate showing details of a corporation’s registration. To determine whether a business name has already been registered and is unavailable, a free search will provide the information required.

Once your business name has been registered, you are required to notify ASIC if there are any changes of details during the registration period that are relevant to the registration, such as changes in business name holders or addresses.

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Your registration should be renewed before the existing registration for the business name expires. Renewal fees and periods are the same as those for initial registration – $30 for one year, and $70 for three years. Change of details and renewal of registration can both be done through the ASIC Connect website. If you are no longer using a business name, and wish to cancel the registration, this can be done by notification to ASIC at any point with no charge.

A joint registration system for ABNs and business names is to be introduced from November 2012, and would operate from the Australian Business Register website, www.abr.gov.au.

Registered trade marks

The best way to protect a name is to register it as a trade mark. If you can afford to register your name as a trade mark, then do.

A common misconception is that trade mark registration only applies to logos or the style in which a name is written. You can register the words in a name without being limited to a particular font of presentation. Once registered as a trade mark (other than in a logo), the registered owner may enjoy a monopoly over the use of that name (that is, the right to prevent others from using the name or a similar name) however it is presented in terms of style and font for – and only for – the particular class or classes of goods or services (or both) for which it is registered. See Arts Law's information sheet on Trade Marks for more information about this regime.

Reputation and misrepresentation

For most artists, especially when starting out, the cost of registering a trade mark seems too high. There are, however, potentially a number of other avenues of protection.

Under an action at general law called "passing off", protection is given to those who use a name and develop a reputation in that name. This may not protect the person who first thought of the name. More important is who has established a reputation in the name. If there is a dispute in relation to the use of a name, and in the absence of any of the parties to the dispute having the name registered as a trade mark, it may come down to the question of who established a "sufficient" reputation in the name first. What constitutes a "sufficient" reputation is difficult to define and depends on the facts of each case.

In addition, the Australian Consumer Law (ACL), which is set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth), prevents corporations and individuals from engaging in misleading or deceptive conduct. These laws have been used to stop people or companies from using particular names, or to place restrictions on their use.

It is a good idea to keep copies or records of articles, interviews, posters, performances and releases to help establish that you have a reputation using a particular name.

Online presence and registration

Many artists choose to promote their professional identity, including their name, online. This could involve registering your own domain name and/or registering an account on a social networking or media sharing site.

Domain names

The most visible way to establish yourself online is by having your own domain name. Having your own domain name allows you to design a website to function as the face of your arts practice.

Be aware that domain names are granted on a ''first come, first served" basis. As a result, you are not automatically entitled to use your business name or trade mark as a domain name just because you have registered it.

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Domain names are not owned by registrants but rather licensed from a domain name registrar. Once a licence is granted, the registrant has the exclusive right to use the name in that domain for a limited period (which can be renewed) under the terms of the licence. There is no property right in a domain name.

The registration system to licence a domain name is different from the company, business, and trade mark registration systems. To register a domain name you must go through a domain name registrar. If you want to register a domain name ending in .au, you can access an accredited registrar through the Australia Domain Name Administrator. A list of accredited registrars may be found at www.auda.org.au/registrars/accreditted-registrars/. Costs for registering a domain name vary depending on the type of domain chosen and the registration term.

It is possible for the same domain name to exist on another domain at a different level, for example www.mydomain.com (global) and www.mydomain.com.au (Australian). The same domain name may also exist at the same level but on a different domain (i.e. www.mydomain.com.au and www.mydomain.net.au). There may also be similar sounding or similar looking domain names on the same domain.

The Internet Corporation for Assigned Names and Numbers (**ICANN**) is in the process of expanding significantly the range of available domain names. This could lead to domain names such as .sydney or .music, and give people the opportunity to self-select a domain name extension that is most appropriate or marketable for them. Domain names will not automatically be reserved for trade mark owners but trade mark owners will have means to make objections to a given domain name. You should consider these developments if you already have a domain name or are thinking about getting one in the future. It seems, however, that the cost of registering a personalised global top level domain (**gTLD**) name will be high.

Social networking and media sharing sites

The use of social networking and media sharing sites as promotional tools is increasingly popular. Such sites facilitate publicly accessible information about your artistic events and activities.

The most popular networking and sharing sites are Facebook, MySpace, Twitter and YouTube. There are, however, many others including blogging services such as Blogger and WordPress. An artist may use a combination of these at the same time, and many sites enable interoperability so that, for example, a video uploaded to your YouTube channel can be immediately shared on Twitter, Facebook, MySpace and other sites.

Accounts on these social networking sites are free to register and allow personalised addresses, registered on a first come, first served basis. There is a benefit in registering on the main social networking accounts so that you can secure your ‘official account’, even if you do not intend to be active on that social networking site. However that may not prevent others impersonating you on the social networking site or prevent people engaging in ‘parody impersonations’ of you. Disputes over the use of social networking and media sharing sites are discussed below.

Disputes

Trade marks and business names

If you discover that someone else is using your name, the first thing to do is to undertake the searches mentioned above, determine the goods or services (or both) in relation to which they are using the name and, if possible, whether they have stronger rights to the name than you do. That is, have they registered the name as a trade mark, did they establish a sufficient reputation in the name before you? If you believe your rights are stronger than theirs, the next step is to write a letter asking them to stop using the name, explaining that you have a reputation in the name or a registered trade mark, or both. If the addressee of your letter does not co-operate, see a lawyer or contact Arts Law.

Domain names

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If a third party has already registered your desired domain name, showing that you have used that name as a business name or trade mark may give you grounds to claim that you have a legitimate interest in that domain name and that it should be transferred to you. These claims are resolved through administrative proceedings conducted through a dispute resolution provider.

There are several dispute resolution providers depending on the level of domain name at issue. Disputes over the Australian level domain .au are heard by the Australian Domain Name Administrator (www.auda.org.au), while disputes over top level domains such as .com and .net are heard by either the World Intellectual Property Organisation – WIPO Arbitration and Mediation Center or the National Arbitration Forum. The administrative dispute resolution proceedings these dispute resolution providers offer are relatively fast and cheaper than court action, but they are not legal proceedings and can be overturned by a court decision.

If you are involved in or need to initiate a domain name dispute, you should see a lawyer who has experience in domain names, or contact Arts Law.

Social networking and media sharing sites

Because social networking and media sharing sites are websites run by private companies, any complaint over registered account names has to be made to the website and resolved according to the website's own policies and procedures. These vary from website to website. For example, Twitter officially prohibits name squatting and has rules covering impersonation and trade marks but does allow 'parody impersonations', while Facebook prohibits any impersonations and allows content owners to reserve or protect certain names.

If you have a dispute over an account name registered on a social networking or media sharing site, you should check the site's policies and complaint procedures.

More information

Business names

ASIC is the Federal government agency responsible for business name registration. Further information on business name registration as well as online registration can be found on ASIC Connect, through the link on ASIC's website, www.asic.gov.au. ASIC can also be contacted on 1300 300 630 or through an ASIC Service Centre.

To search for registered business and company names, use **ASIC's Organisations and Business Names search (www.asic.gov.au)** or contact ASIC by phone or visit your nearest ASIC Service Centre for assistance.

ASIC – National business names register

The Australian Business Register is responsible for ABN registration. Further information on ABN registration as well as online registration can be found on their website, www.abr.gov.au. The Australian Business Register can also be contacted by phone on 13 28 66.

Domain names

For global top level domains: www.icann.org

For the .au domain: www.auda.org.au

For searching the .au domain: www.ausregistry.com.au www.aunic.net/aunicstatus.html

For pricing: www.whatsinaname.com.au

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Trade marks

IP Australia is the Federal government agency responsible for the registration of Australian trade marks, patents and designs. Their website www.ipaustralia.gov.au and State and Territory offices provide information on the registration process and searches of their databases. Telephone 1300 651 010 for contact details.

Australian Business Number

The *Business Entry Point* is a Federal Government website designed to assist businesses including registration for Australian Business Numbers (ABNs). Their website www.business.gov.au provides information and searches of their databases.

The Australian Business Register is responsible for ABN registration. Further information on ABN registration as well as online registration can be found on their website, www.abr.gov.au. The Australian Business Register can also be contacted by phone on 13 28 66.

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Information sheet Trade Marks

Need more help?

If you have questions about any of the topics discussed above please contact Arts Law.

Disclaimer

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