

**IRWIN IP**

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**INTELLECTUAL PROPERTY LITIGATION**

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# **Workshop: What You Should Know About the Legal Side of Branding & Marketing**

American Marketing Association

May 6, 2025

Jason Keener and Suet Lee

# **\*Disclaimer\***

This presentation and its materials aim to provide general public information and entertainment pertaining to American intellectual property law. They reflect the authors' personal views and do not serve as specific legal advice, as legal solutions can vary by case. The content has been simplified for clarity, so it may not be applicable to all situations. Neither authors nor Irwin IP LLP assumes responsibility for the opinions expressed or for any inaccuracies. Additionally, the materials do not establish an attorney-client relationship.

# Agenda

**01**

Who We Are

**02**

Intro to IP

**03**

Trademarks

**04**

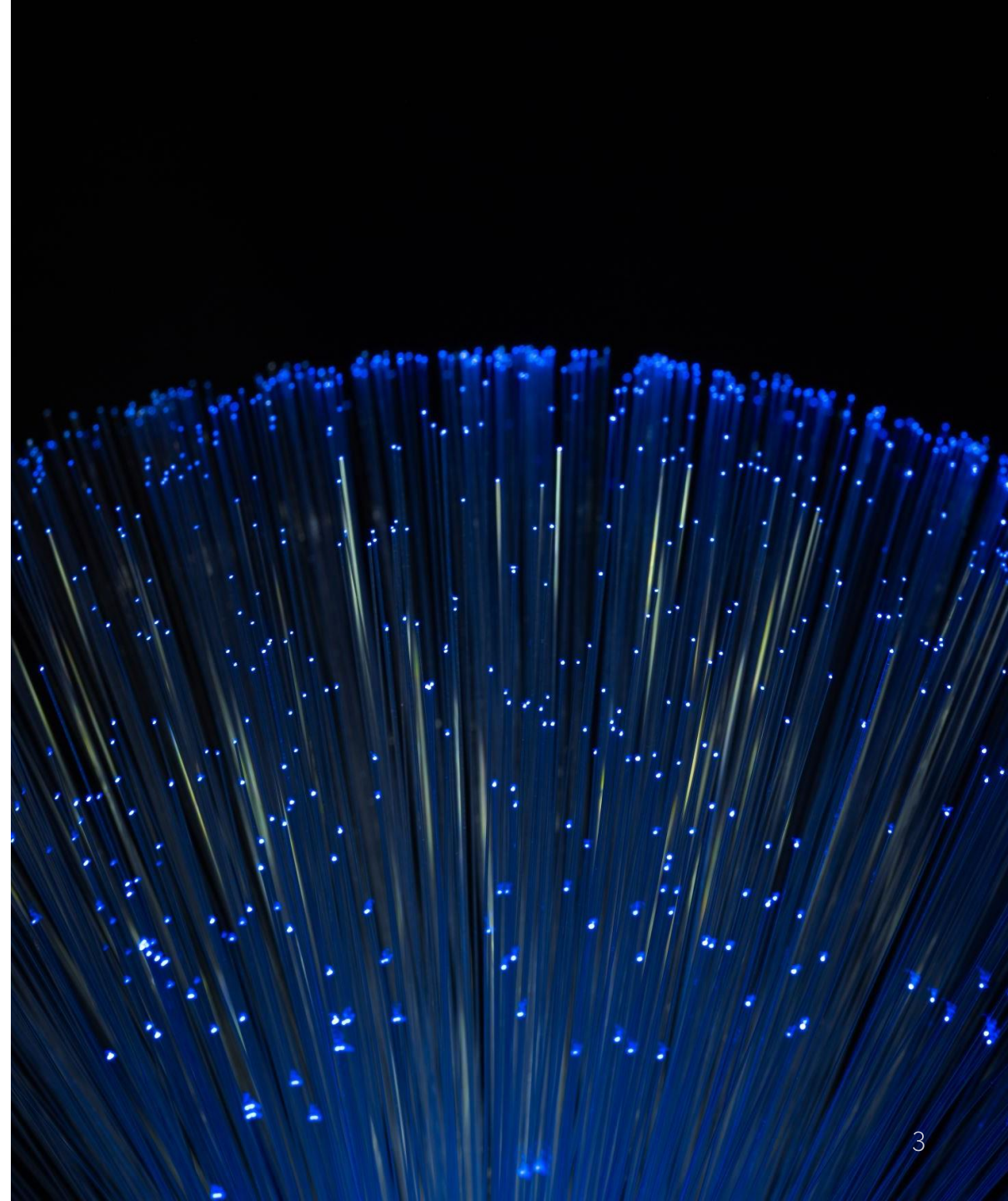
Copyrights

**05**

Artificial  
Intelligence

**06**

Takeaways and IIP  
Resources







# 01

## Who We Are

INNOVATION.  
INTEGRITY.  
IMPACT.

# IRWIN IP

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## INTELLECTUAL PROPERTY LITIGATION

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For more info:  
<https://irwinip.com>

**Check us out on LinkedIn,  
Facebook, and Instagram**

A boutique law firm specializing in intellectual property (patent, trademark, copyright, and trade secret) and technology litigation





# Meet IIP Attorneys

- Handling IP issues for 20+ years
- Litigated IP disputes across country, including numerous trials
- Represented software companies, movie production companies, photographers, musicians, authors, toy and game inventors, and other creatives



Jason Keener



Suet Lee

- IP associate
- Assists in patent litigation, trademark UDRP, and copyright cases
- Represents automobile companies, theaters, small business entrepreneurs, and other creatives



# 02

## Intro to IP



# IP Overview and Examples

Type of IP	Definitions	Examples	Term	Cost
Trademark	Source identifiers such as words, slogan, design, sound, scent, color, or a combination thereof that is source-identifying	Company names and logos such as Apple and Starbucks	As long as the business continuously maintains and uses the trademark in connection with goods or services	\$\$
Copyright	Original expressions in a tangible form like computer programs, films, architecture, videos, graphic images, fine art, music, photos, books, etc.	Hamilton lyrics and music, A Few Good Men, Andy Warhol's Campbell Soup	Author's life plus 70 years (or, for anonymous or works made for hire, the shorter of creation plus 120 years or publication plus 95 years)	\$





# 03

## Understanding Trademarks and Brand Identity

# Definition of Trademarks

“Trademarks protect brands – including logos, taglines, and even company names – from imitation.” – US Chamber of Commerce

- Act as source identifiers
- Distinguishes your branding from competitors
- Prevent imitation
- Need to use the trademark
- Registration is not required but strongly encouraged

Trademarks identify you as the source of the goods and/or services that you offer and can include:

- Logo on your products
- Word mark on your website
- Use of your marks on receipts and email signatures
- Use of your marks on social media content
- Website/domain name



**STARBUCKS®**



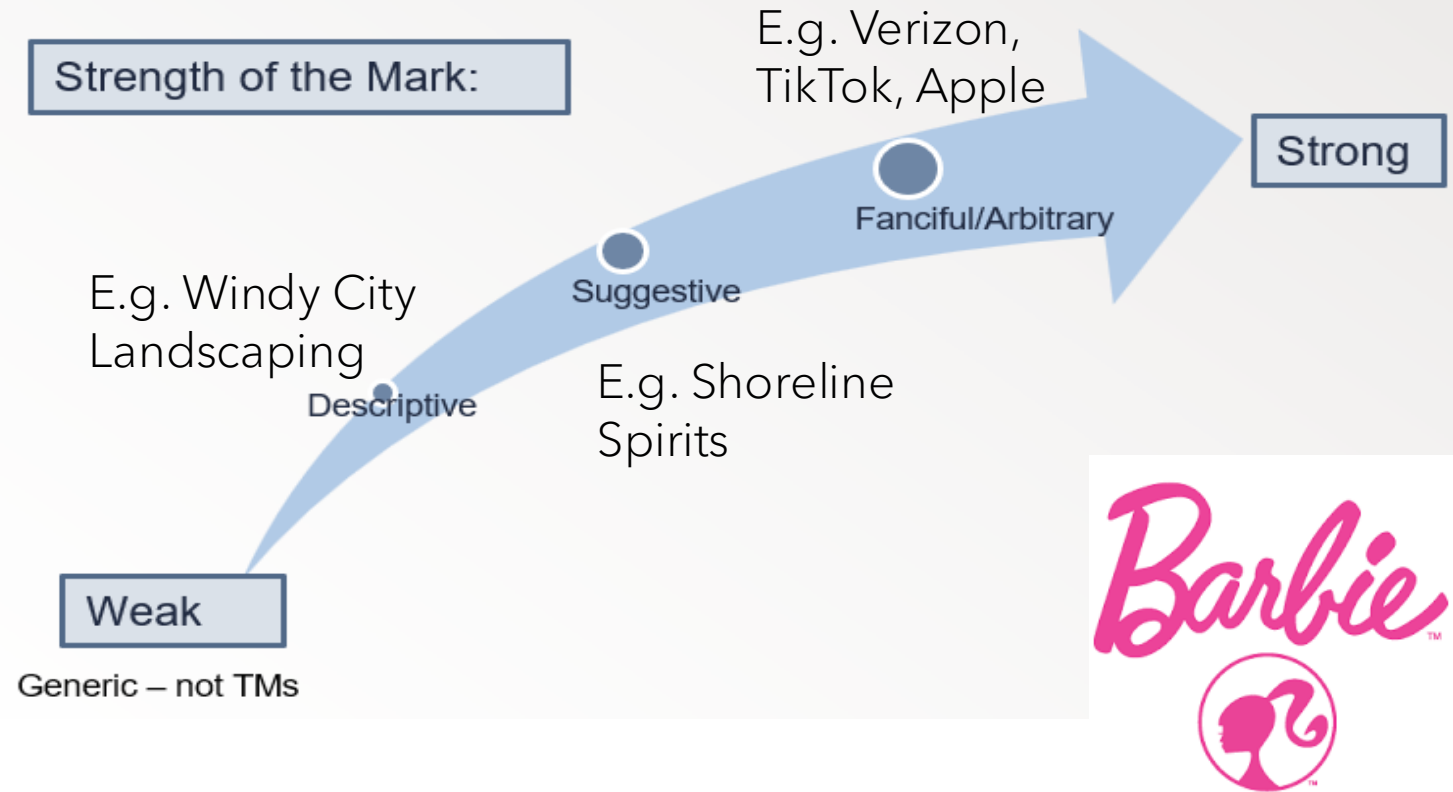


# Trademarks

## Notice of Trademarks

<b>TM</b>	➔	Unregistered trademarks
<b>SM</b>	➔	Unregistered service marks
<b>®</b>	➔	Registered marks

E.g. Just Do It<sup>®</sup>



# Trade Dress

Definition: Visual appearance of a product or its packaging that signifies the source, e.g. shape, color, texture, layout

## Types of trade dress:

- Product packaging
  - Store or service layout (e.g., atmosphere, décor, lighting)
  - Can be inherently unique and instantly recognizable as a trademark
- Product design
  - Tangible, actual product or a physical element of the product
  - Not inherently distinctive and requires secondary meaning





# Types of Trademark Applications

## Used-Based TM

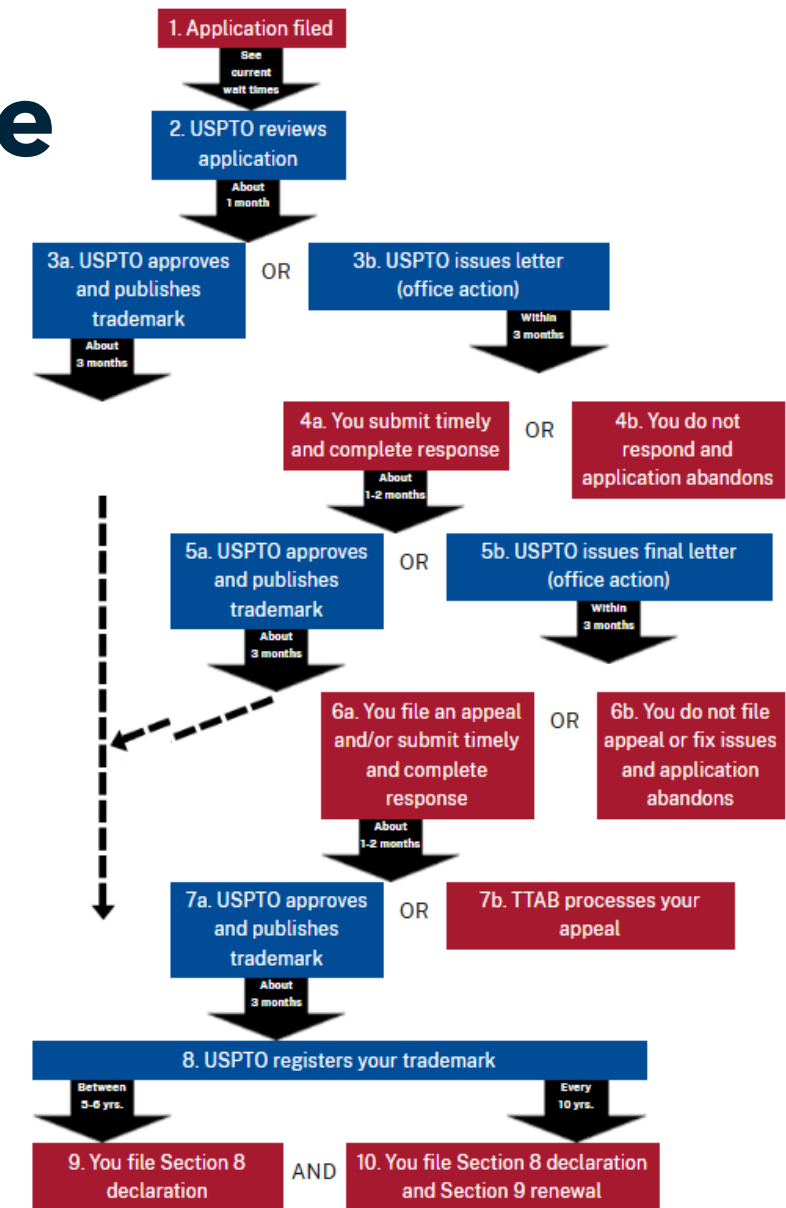
- Requires evidence of use in interstate commerce at time of filing
- Pros: Cheaper and faster to register than ITU

## Intent to Use TM

- Have not used mark in interstate commerce yet, but individual has a "bona fide intent to use" the TM in interstate commerce
- Pros: Have TM rights before using the TM, gives nationwide protection for the rights holder
- Cons: Longer to obtain because additional step compared to used-based TM application
  - Notice of allowance
  - Within 6 months from the mailing date of the notice of allowance, must submit statement of use which includes evidence of use of the mark in interstate commerce
  - Can file for 5-6 month extensions for a total time of 3 years from the notice of allowance
  - Past the 3-year period and there is no evidence of use submitted, then the application must be refiled

# Trademark Application Timeline

1. Application filed - ~\$350 per class of goods/services +Attorney Fees
2. USPTO reviews application
3. USPTO approval or refusal:
  1. Approves trademark and publishes it for opposition
  2. Refuses to register your trademark, so USPTO issues letter (office action)
4. Response to office action:
  1. Submit a timely and complete response to the office action
  2. You don't respond and your application is abandoned
5. Repeat steps 3-4, as required
6. Appeal
  1. File an appeal and/or submit a timely and complete response to final letter
  2. You don't file an appeal or fix remaining issues and your application is abandoned
7. USPTO approves trademark or TTAB processes your appeal
8. USPTO registers trademark
9. File Section 8 declaration or Section 8 declaration and Section 9 renewal





# Common Trademark Mistakes

- Using the mark inconsistently or having multiple marks across products
- Not using the mark in commerce (or not documenting the uses)
- Not evaluating the strength of the trademark; choosing a generic or descriptive mark (e.g. "smooth" for skincare products or "green market" for a vegetable store)
- Not doing a "clearance search" before committing time and money to developing the name/brand
- Incorrectly using or leaving off <sup>TM</sup>, <sup>SM</sup> or <sup>®</sup> markers
- When registering the mark, choosing the wrong trademark class(es) for the product or service
- Ignoring the deadline for mark renewal and renewal fees
- Failing to police your marks
- Not filing a new trademark application when goods/services change

## When to call an attorney:

- Before you start using a mark
- During the mark application process
- After use has begun to strengthen and monitor the mark
- As soon as you find out someone might be infringing your mark
- Upon receiving notice that you might be infringing another's mark



# 04

## **Understanding Copyrights in the Marketing Content**



# Copyrights

Copyright do not protect:

- Facts, ideas, systems, or methods of operation

Copyrights do protect:

- Original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture
- Contents of a website – writing, artwork, photographs

Registration not required, but strongly encouraged for the benefits of statutory damages and attorney fees

## Exclusive Rights From a Copyright

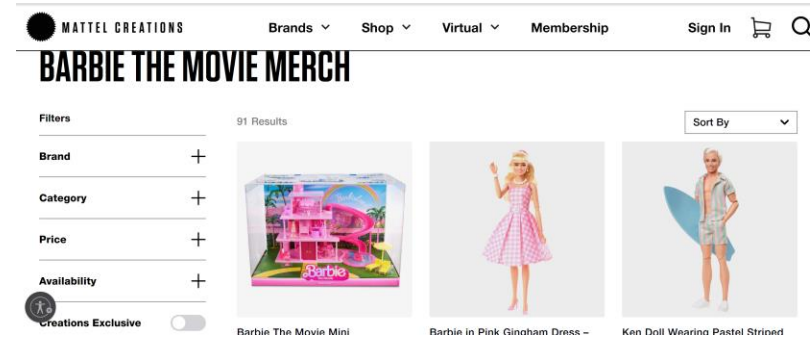
- To reproduce their work
- To prepare derivative works
- To distribute their works
- To perform/display their work publicly
- Copying an original expression from a copyrighted work without the owner's permission is copyright infringement
- Allows for almost worldwide protection

# Copyrights

Use your IP for: influencer marketing and digital marketing platforms

Copyrights protect:

- Website content
- Social media posts
- Advertising campaigns
- Promotional videos and images





# How to Register a Copyright

## Draft Stage

- Timeframe
  - Register before infringement
  - During infringement, within 3 months of publication
  - You can still file an infringement action even if you have not registered your copyright before the infringement or before 3 months of publication
- Benefits
  - Bringing an infringement action
  - Evidence of copyright validity
  - Presumption of ownership
  - Statutory damages
    - \$750-\$30,000 per work infringed
    - Or if willful infringement, up to \$150,000
  - Attorney fees

## Action Stage

- Step 1: Application: Depends on type of work
  - ✓ Is this a work made for hire?
  - ✓ Is this work unpublished or published?
  - ✓ What kind of application is needed?
  - ✓ How much does it cost?
- Step 2: Non-refundable filing fee
- Step 3: Submit copy of your work

The screenshot displays the Copyright.gov website interface. At the top, the 'Copyright' logo is visible, along with navigation links for 'Home', 'Help', and 'Contact Us'. The main heading is 'Electronic Copyright Office (eCO)', with subtext 'United States Copyright Office' and 'Library of Congress'. On the left, there is a 'User Login' section with a prompt to log in if the user is registered, followed by input fields for 'User ID' and 'Password', and a 'Login' button. Below the login fields are links for 'Forgot Your Password or User ID ? / Reset Your Password ?' and 'If you are a new user, click here to register.' On the right, a 'Welcome!' message is displayed, followed by a welcome to the eCO and instructions on how to use the website. It lists two main actions: 'Register your work' and 'Preregister your work if you fulfill the requirements'. A note mentions submitting electronic works to comply with a Notice for Mandatory Deposit. A detailed note specifies that the eCO system is confirmed for use with the Firefox browser on Microsoft Windows 7, and that other browsers like Internet Explorer, Chrome, Safari, and Netscape may not work optimally. A final note states that Adobe Acrobat Reader is required for viewing and printing documents, with a link to download it.

**Copyright**  
United States Copyright Office

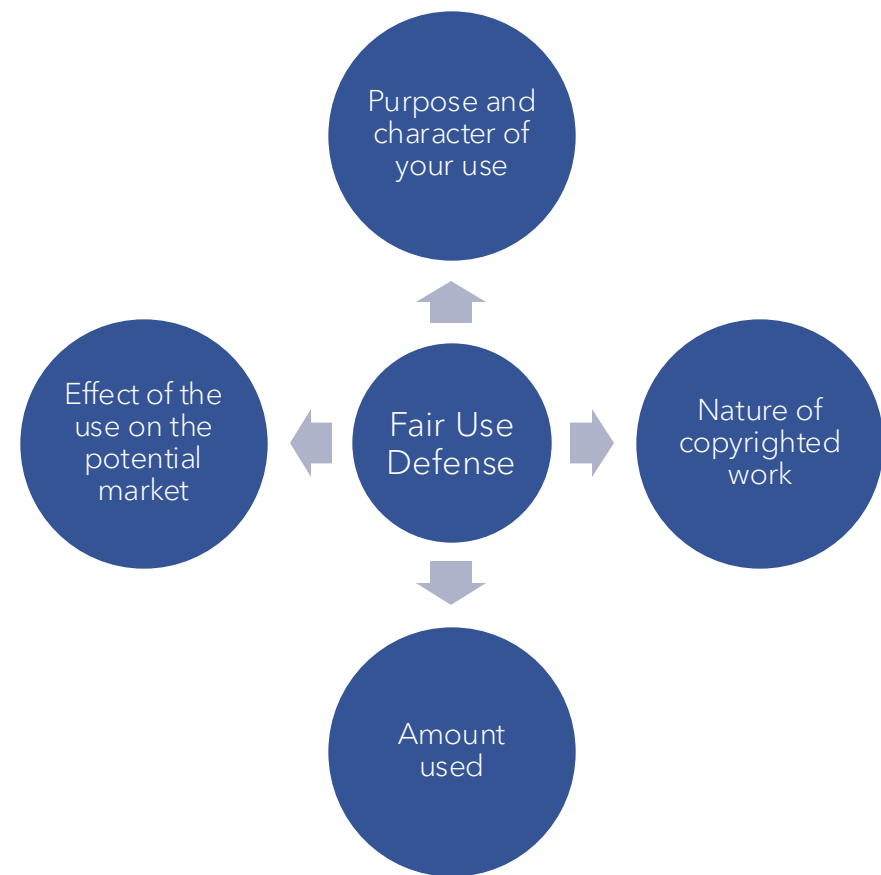
**Electronic Copyright Office (eCO)**  
United States Copyright Office  
Library of Congress

**User Login**  
If you are a registered user, please login here.  
User ID  
Password  
Login  
[Forgot Your Password or User ID ? / Reset Your Password ?](#)  
[If you are a new user, click here to register.](#)

**Welcome!**  
Welcome to the Electronic Copyright Office (eCO)  
You may now use this website to:  
\* Register your work  
\* Preregister your work if you [fulfill the requirements](#)  
\* Submit electronic works to comply with a Notice for Mandatory Deposit  
NOTE: The eCO System has been confirmed for use with the Firefox browser on the Microsoft Windows 7 Operating system. Other browsers such as Internet Explorer, Chrome, Safari and Netscape (as well as out-of-date browsers) may work but perform less than optimal behavior when used with the eCO System.  
To view and print documents you will need the Adobe Acrobat Reader installed on your system. ([click here to download](#))

[www.copyright.gov/registration/](http://www.copyright.gov/registration/)

# Fair Use - An Expensive Defense



Factor	Description	Leans Towards Fair Use	Leans Against Fair Use
Purpose and character of your use of the work	<p>Transformative Use - adds something new with a further purpose or different character and does not substitute for the original use of the work</p> <p>Non-profit or commercial?</p>	Noncommercial, educational, scholarly, newsworthy, or transformative	Commercial and/or entertainment
Nature of the copyrighted work used	The work that was used, factual or creative?	Factual, based on public documents	Creative
Amount and substantiality of the portion used in relation to the copyrighted work as a whole	<p>How much was used?</p> <p>"Heart of the work" - looking for the most extraordinary or creative elements of the work</p>	Small portion/% of your work	"Heart of the work" and/or entire work
Economic effect of use upon the potential market for or value of the copyrighted work	<p>Will the use harm the copyright owner's ability to profit from the work?</p> <p>What's the purpose and how does it link to the market?</p>	None or little devaluation/money lost	Substantial actual or probable money lost because of use



# Common Copyrights Mistakes

- What's considered copyrightable – e.g. short phrases
- Not registering the copyright early or at all
- Not considering what you can and cannot use from other sources
- Falling for common fair use myths – E.g., copying is okay if...
  - Use of less than 30%
  - Use of fewer than 200 words
  - I change at least 25%
  - I say where I got it from
  - I found it online
  - Everyone else doing it

## When to call an attorney

- When the work has been created
- Upon infringement, takedown, or official notice that you may be infringing
- NOTE: Registration is CHEAP:  
<https://www.copyright.gov/about/fees.html>

## Registration

### Registration of a claim in an original work of authorship

Electronic filing:

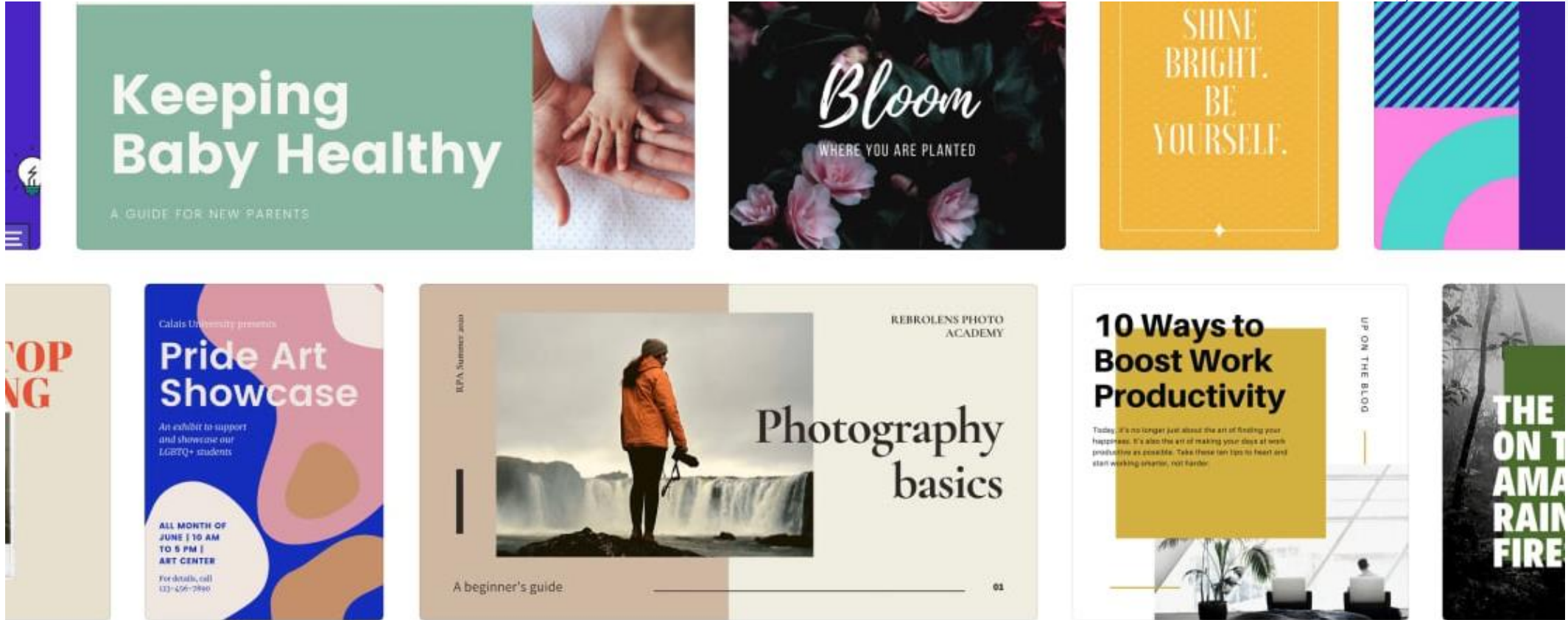
Single author, same claimant, one work, not for hire \$45

Standard Application \$65

Paper Filing (Forms PA, SR, TX, VA, SE) \$125

# Case Example: Canva

- Has a library of “photos, icons, illustrations, video, audio, fonts and templates (Content)”
- Can be used to create a range of designs, such as social media posts, logos, and presentations





# Case Example: Canva

## Free Content or Pro Content

- Free
  - Check over the thumbnail of the content (nothing – free, a crown – Pro)
  - Watermark on Pro content (can be removed by buying a license to use the content in that design for a one-off fee or Canva Pro subscription)
- Pro
  - Can resize a design, remove background tool, and Pro Content
  - Limitations:
    - Selling templates including Pro Content – must keep template within Canva, sold via shareable link that returns user to Canva, and cannot be an off-platform downloadable file
    - Pixel limit for unedited media in your design (e.g. a large photo being included on a webpage design) – particularly for websites and e-books

Scenario: What if I'm using the Free version of Canva and want to include one pro element in my design?

The image shows a side-by-side comparison of the Canva Free and Canva Pro subscription plans. The Canva Free plan is on the left, with a light gray background, and the Canva Pro plan is on the right, with a light purple background. Both plans are for one person. The Canva Free plan is priced at US\$0/year, while the Canva Pro plan is priced at US\$120/year. The Canva Pro plan includes a crown icon and a 'Start a free trial' button. The Canva Free plan has a 'Get started' button. Below the pricing, the Canva Free plan lists features like an easy drag-and-drop editor, 2M+ professionally-designed templates, 1000+ design types, 4.5M+ stock photos, AI creative partner, build interactive designs, bring multiple formats into one design, design printing and delivery, and 5GB of cloud storage. The Canva Pro plan lists features like unlimited access to premium templates, 140M+ photos, videos, graphics, audio, 1000 Brand Kits, quickly resize and translate designs, remove backgrounds in a click, create, resize, translate and remove backgrounds at scale, boost creativity and productivity with 20+ AI tools, plan and schedule social content, 1TB of cloud storage, and online customer support.

Canva Free	Canva Pro
For one person	For one person
<b>Canva Free</b>	<b>Canva Pro</b>
Design anything and bring your ideas to life. No cost, just creativity.	Unlock premium content, more powerful design tools, and AI features.
<b>US\$0</b> /year for one person	<b>US\$120</b> /year for one person
<a href="#">Get started</a>	<a href="#">Start a free trial</a>
<b>Features you'll love:</b>	<b>Everything in Free, plus:</b>
<ul style="list-style-type: none"><li>✓ Easy drag-and-drop editor</li><li>✓ 2M+ professionally-designed templates</li><li>✓ 1000+ design types (social posts, docs, presentations, sheets*, and more)</li><li>✓ 4.5M+ stock photos and graphics</li><li>⌚ AI creative partner for design, image and text generation**</li><li>⌚ Build interactive designs and experiences with AI**</li><li>⌚ Bring multiple formats into one design*</li><li>✓ Design printing and delivery</li><li>✓ 5GB of cloud storage</li></ul>	<ul style="list-style-type: none"><li>✓ Unlimited access to premium templates</li><li>✓ 140M+ photos, videos, graphics, audio</li><li>✓ 1000 Brand Kits to manage your brand</li><li>✓ Quickly resize and translate designs</li><li>✓ Remove backgrounds in a click</li><li>⌚ Create, resize, translate and remove backgrounds at scale*</li><li>✓ Boost creativity and productivity with 20+ AI tools*</li><li>✓ Plan and schedule social content</li><li>✓ 1TB of cloud storage</li><li>✓ Online customer support</li></ul>

# Case Example: Canva

Rule: Don't resell, redistribute or take credit for standalone content (e.g. a photo by itself without any other design elements) provided through Canva

Permitted Uses	Nonpermitted Uses
<ul style="list-style-type: none"><li>• Invitations, advertising and promotional projects</li><li>• School projects</li><li>• Social media post or profile image</li><li>• Social media posts</li><li>• Entertainment applications like book covers, magazines, newsletters, prints, and posters</li><li>• Online or electronic publications</li></ul>	<ul style="list-style-type: none"><li>• Use any of the Content as part of a trademark (except for fonts, basic shapes, and lines)</li><li>• Existing templates on Canva being resold as is</li><li>• Use or display of the standalone Content on products like postcards, mugs, t-shirts, or posters</li><li>• Incorporate the standalone Content in any product that results in a re-distribution or re-use of the content (e.g. taking a photo from a flyer and selling it to someone else)</li><li>• "Editorial Use Only" content for commercial, promotional, endorsement, advertising or merchandising purposes<ul style="list-style-type: none"><li>• "'Editorial Use Only' content for e.g., blogs, educational resources, news articles, not selling products or services</li><li>• Need to attribute the creator of the stock media</li></ul></li><li>• Offensive use of the Content (e.g. porn, selling tobacco, escort services, medical products, or in connection with political endorsements)</li><li>• AI machine learning</li></ul>

Tip: If using the Canva Content, add elements like icons, graphics, stickers, etc. to your design to make it a unique composition!





# Business Hypos: Copyrights

Borrowing an example from Canva's website:

Frank wants to design and sell stickers. He makes a sticker sheet with 20 individual swimming and other sport-related elements from the Canva library. The stickers were downloaded as a flattened PDF or as individual PNG files. Is this allowed? No, because this is standalone use of each of the individual elements AND providing the individual file downloads is similar to selling clipart files.

Contrast that with: He makes a sticker sheet with 20 original inspirational quotes and has typed them out using Canva fonts. The stickers can be downloaded as a flattened PDF or as individual PNG files. This is allowed.

## Canva's music for commercial videos

- Can Canva's music be used for commercial videos? Can I download and remix music?
- Yes, Canva's music can be used to create commercial videos. Limitation on Pro Music, however! Can only be used on online advertisements for YouTube, Instagram, and Tiktok.
- No to remixing, creating samples or derivative works.

## Social media and images

- Avoid using other's copyrighted images on website and promotional materials unless you have written permission to do so.



# 05

## Artificial Intelligence



# Intersection of AI and IP

- AI as an IP creator - Only humans can be IP creators for copyrights
- If you use AI-generated images or text, this may prevent you from stopping others from copying your work
- Using AI generated images or text may put you at risk for infringement claims
- If you outsource work to a designer, photographer, videographer, etc., should include a clause in your contracts that forbids, or warrants that no AI-generated content is used
- When creating, consider paying for a subscription that has cleared its database of AI input to minimize risks of infringement



A Recent Entrance to  
Paradise

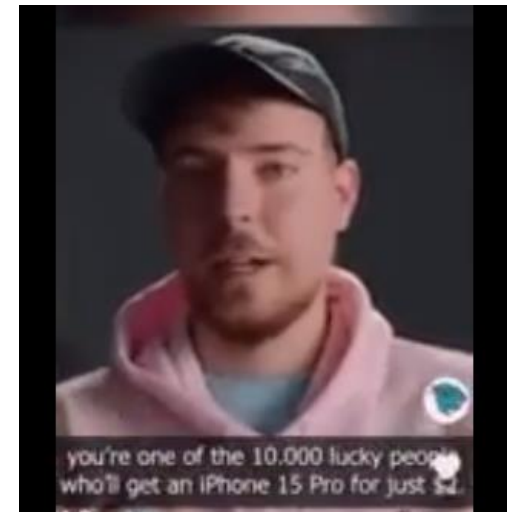
# Right of Publicity Issues

## Right of Publicity

- Legal right of individuals to control the commercial use of their name, image, likeness, or other identifiable aspects of their persona

## Deepfakes

- Lawsuits and disputes from celebrities
- Robocalls



TAKE IT DOWN Act	CLEAR Voice Act	The QUIET Act
<ul style="list-style-type: none"><li>• Creating clear legal pathways for victims to request removal of AI-generated explicit images</li><li>• Establishing mechanisms to report such content to platforms</li><li>• Requiring platforms to promptly remove reported AI-generated explicit content</li></ul> <p>Status: Senate passed Feb 2025. House approved on April 28<sup>th</sup>. On the way to President Trump for signing</p>	<ul style="list-style-type: none"><li>• Requiring disclosure when AI is used to generate or manipulate voice content</li><li>• Establishing rights for individuals to prevent unauthorized use of their voice</li><li>• Creating penalties for using AI voice synthesis to defraud or deceive</li></ul> <p>Status: Introduced; pending</p>	<ul style="list-style-type: none"><li>• Regulations on AI-powered robocalls and telemarketing</li><li>• Requirements for AI systems to identify themselves when making calls</li></ul> <p>Status: Introduced; pending</p>





# 06

## Takeaways and IIP Resources



# Dos and Don'ts of Trademarks

Dos	Don'ts
<ul style="list-style-type: none"><li>• Consider the strength of your mark</li><li>• Research your mark online for competitors</li><li>• Start using the mark for an application or think about the intent to use if pursuing federal registration</li><li>• Use your mark consistently across goods and services for all marketing and branding materials</li><li>• Keep record of the mark's use in commerce for federal registration (e.g. marketing materials, invoices, picture of the mark on products, website screenshots)</li><li>• Federally register your mark</li><li>• Renew your federal registration of the mark</li></ul>	<ul style="list-style-type: none"><li>• Make your mark generic or a commonly used phrase (e.g. "Drive Safely")</li><li>• Use your mark inconsistently (e.g., "Coca-Cola" vs "COCACOLA")</li><li>• Fail to research the market</li><li>• Use the incorrect trademark symbol (know the difference between "TM" and the circled "R")</li><li>• Identify the wrong kinds of goods or services associated with your mark on the trademark application</li><li>• Fail to renew the mark</li><li>• Forget to monitor the mark</li></ul>

# Dos and Don'ts of Copyrights

Dos	Don'ts
<ul style="list-style-type: none"><li>• Check if material is copyright protected</li><li>• Use materials under public domain</li><li>• Use facts and ideas</li><li>• Understand the agreements for clip art and free images from photo sites like Canva (e.g. Creative Commons, Flickr) to make sure you are aware of any restrictions or licenses</li><li>• Place a copyright notice on original work</li><li>• Get explicit permission from the author</li><li>• Put appropriate citation and attribution to the source of the work used</li><li>• Register your work</li><li>• Use short quotes</li><li>• Think about fair use defense</li></ul>	<ul style="list-style-type: none"><li>• Assume online work is public domain</li><li>• Assume that there is no copyright infringement even if you credit the author</li><li>• Assume that if a copyright symbol or notice is not used, that it is not copyrighted</li><li>• Copy substantial portions or the "heart" of someone else's work</li><li>• Assume any fair use if you are not commercializing the use of the work</li><li>• Overlook any takedown notices</li></ul>

# Best Practices for Enforcing IP Rights

- Create original content and/or get permission
- Properly attribute third party content
- Double check that your IP is registered
- Remember to maintain and renew registrations
- Regularly monitor the market for infringers
  - Partner with third-parties who monitor for infringing marks, technologies, or works of art
- Do not wait once you have knowledge that someone is violating your IP rights
- Use cease and desist letters to put infringers on notice of their infringement
- Consult with an IP attorney regarding licensing and litigation options





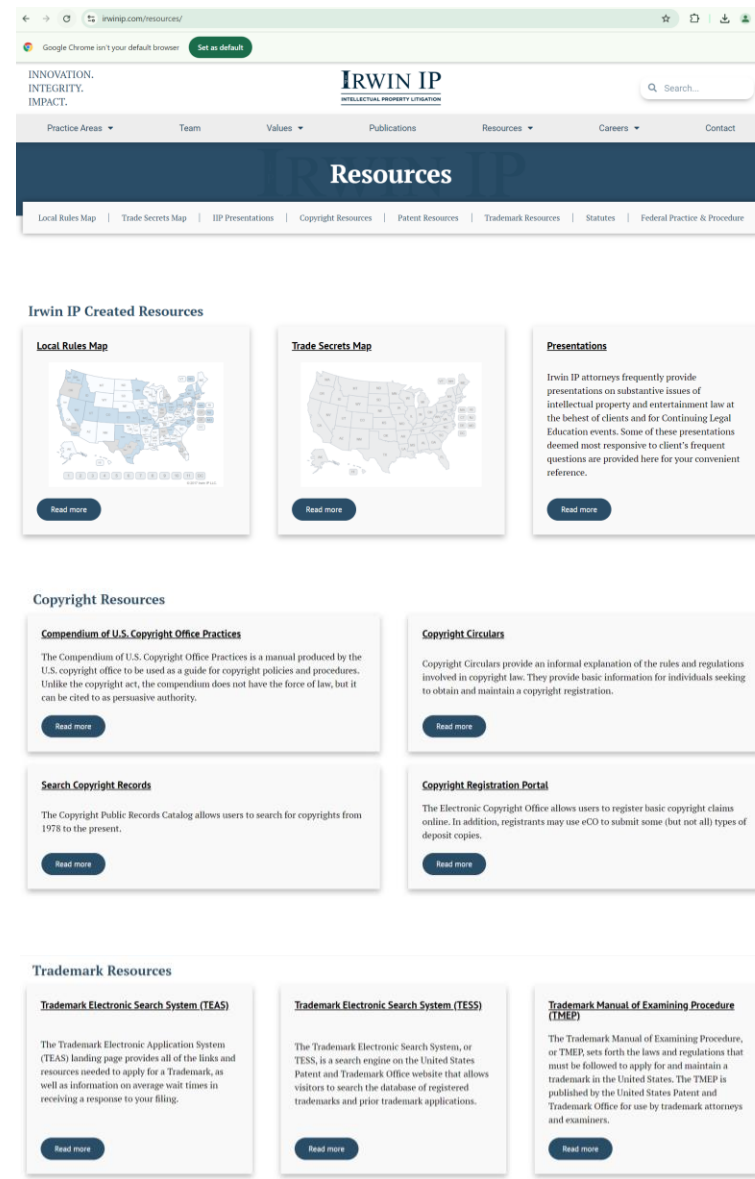
# IIP Resources

We have a myriad of presentations and resources for patents, copyrights, trademarks, and trade secrets and associated statutes, federal practices and procedures.

Check out:

<https://irwinip.com/resources/>

- Trade Secrets Map
- Local Rules Map
- Presentations



IN-PERSON EVENT

# SPRING ENTREPRENEURS WORKSHOP

WITH IRWIN IP LLP

Join us for our first annual Spring Entrepreneurs Workshop and learn how intellectual property can protect and enhance your business.

Discover the key differences between patents, trademarks, and copyrights, and how each can provide value to your startup or innovation.

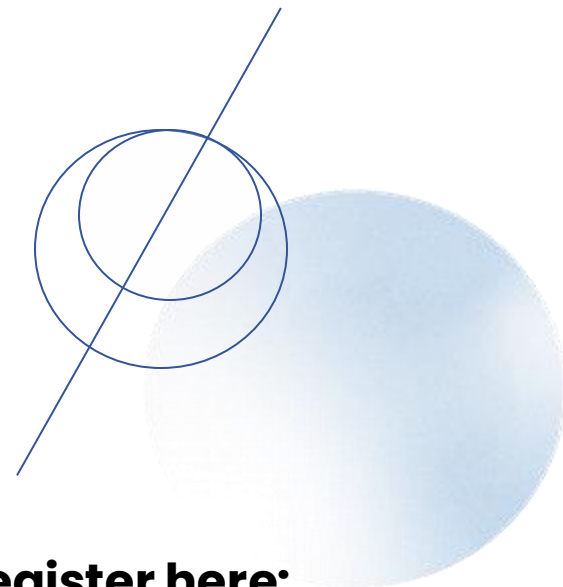
After the presentations, enjoy a complimentary lunch while connecting with fellow entrepreneurs. Attendees will also have the opportunity for one-on-one discussions with our attorneys to ask questions related to the topics covered.

FRIDAY, MAY 9TH

10:00-12:00 PM

**Irwin IP LLP**

150 N. Wacker Dr., Suite 700, Chicago IL



**Register here:**





# Contact Us

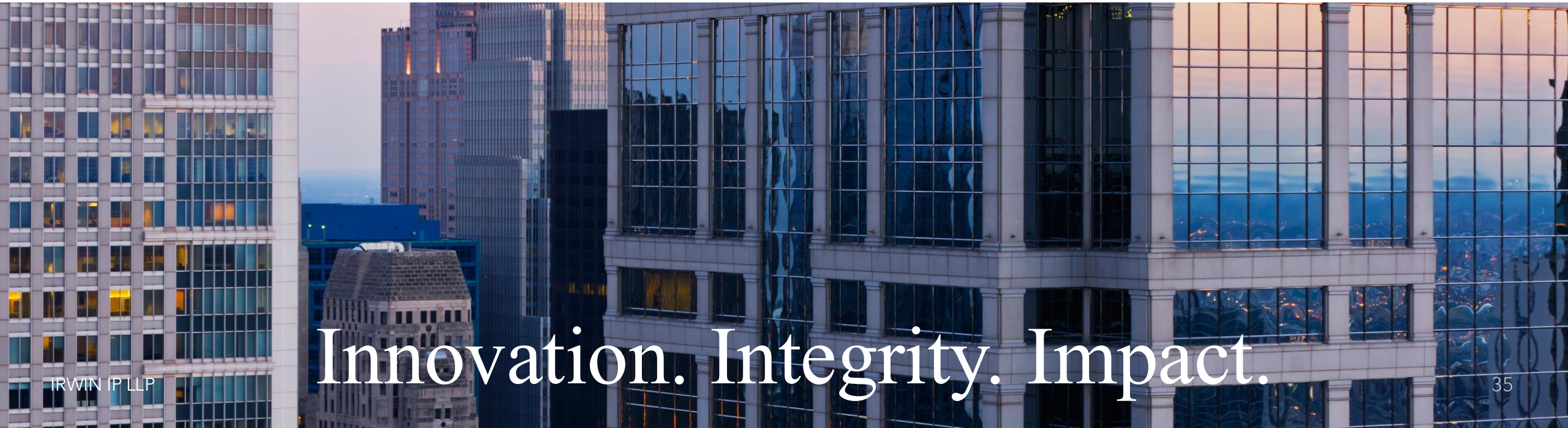
150 N Wacker Drive Suite 700  
Chicago, IL 60606  
(312) 667-6080

Jason Keener  
[jkeener@irwinip.com](mailto:jkeener@irwinip.com)  
(312) 667-6286

Suet Lee  
[slee@irwinip.com](mailto:slee@irwinip.com)  
(312) 248-2651



[irwinip.com](http://irwinip.com)



Innovation. Integrity. Impact.