

THE BUSINESS OF SHOW

Put a [Trade]Mark Where Your Dance Is

by Kimberly Maynard, Esq.

In dance, as anywhere, one's reputation can be an invaluable asset. Gaining recognition as an individual person or organization that provides goods or services of a consistent quality can be synonymous with success, whether those goods or services are the creation or performance of choreography, the provision of dance instruction, the presentations of dances by dance companies, or any other of the myriad services provided to and in connection with dance. In intellectual property terms, that reputation or recognition is known as goodwill and the brand that is associated with that goodwill is a trademark. Said differently, trademarks are essentially brands under which goods or services are provided. They tell consumers that the goods or services provided under that brand will be of a consistent quality (be that quality bad or good, in the eye of the beholder).

Trademarks can be fairly easy to acquire and protect, but can slip away almost unnoticed if not properly used and protected.

How are trademark rights acquired?

A trademark* can be any word, phrase, design, symbol or other device used to designate the source of the goods or services provided under that mark. It can be the name of a dance company, name or alias of an individual choreographer or dancer, a stylized logo used by a dance presenter, a design used on the label of dancewear, or even the certain look and feel of a dance venue.

Trademark rights are acquired by using a trademark to provide goods or services in interstate commerce. For example, a dance company—let's call it Beauty—that tours in different states likely owns rights in the trademark BEAUTY for the provision of dance performance services. A New York City dance presenter called Untrod, which has an audience from outside New York State, likely owns rights in the trademark UNTROD for dance presentation services. Both organizations acquire their rights by using their marks consistently to provide their respective services. In doing so, the general public learns that when it purchases tickets for different performances by BEAUTY, it can expect those performances to be given by—or sponsored or approved by—the same company and to be of a like quality. Similarly, the general public can expect that all dance companies presented by UNTROD or in the UNTROD venue will be of a similar quality. In short, the BEAUTY or UNTROD trademarks become a signal to the public that the respective dance services provided under those marks are going to be of the same quality.

What does it mean to have a trademark?

The owner of a trademark has the exclusive right to use that mark for the particular goods or services. In other words, following the examples above, the Beauty Dance Company would have the sole right to use the trademark BEAUTY for a dance company and likely could stop other organizations from using BEAUTY or any trademark that is confusingly similar to BEAUTY for a dance company or for goods or services typically associated with a dance company. It might, for example, be able to prohibit a dancewear company from using BEAUTY WEAR to market and sell clothing or an agent who represents dancers and other artists from using BEAUTY as the name of the agency. Trademark rights, though, are specific to the goods and services offered under the mark, and the Beauty Dance Company likely would not be able to prevent another company from using the trademark BEAUTY in connection with automotive parts.**

* The term "trademark" is often reserved to identify words and symbols that indicate the source of goods, while the term "service mark" is often reserved to identify words and symbols that indicate the source of services. Throughout this article, the word "trademark" encompasses both trademarks and service marks.

What are the best practices for trademark use?

Trademark rights last only so long as the mark is used with the particular goods and services. Failure to use a mark at all or failure to use it consistently or properly can result in loss of rights in that mark—and a loss of the ability to stop others from using a confusingly similar mark for related goods or services.

Best practices for trademark use include:

- Always spell the mark the same, e.g. UNTROD and not UNTRED or UN-TROD;
- Place the mark prominently on any publicity, marketing or advertising materials, including programs and tickets, where appropriate;
- When using the mark in text, use it as an adjective, and not a verb or noun, e.g. the BEAUTY dance company;
- When using the mark in text, offset it from the surrounding text by using bold or italic font, capital letters, or larger font; and
- If you do not have a federal registration (more on that below), consider using the symbol "TM" after the mark, e.g., BEAUTY™ or UNTROD™.

In addition to using a trademark properly, trademark owners should consider registering their marks with the United States Patent and Trademark Office, which provides certain advantages, including:

- National rights in the mark as of the date the mark was first used or the date the application for registration was first filed;
- Evidence that the trademark is valid and is owned by the owner of the registration;
- The right to use the "®" symbol with the mark;
- The possibility of achieving incontestable status five years after registration, which makes it more difficult for another to challenge the trademark; and
- Discourages others from using and/or registering a confusingly similar mark.

In sum

Trademark rights can be owned by almost all individuals and organizations, including those in the dance field, that provide goods or services under a brand name. They are the representation of an organization's or individual's reputation and, treated properly, they can become one of a company's most valuable assets and an important partner in executing an artistic mission. When next updating a website or preparing marketing materials, dance professionals may wish to take a moment to ensure that all trademarks are being used in a way that best maximizes their value. Further, if there are particularly important trademarks, dance professionals may also benefit from considering federal registration.

Kimberly Maynard is an intellectual property attorney at Frankfurt, Kurnit, Klein + Selz. Kim focuses her practice on trademark and copyright law, and regularly counsels clients in the arts and entertainment industries. Prior to becoming a lawyer, Kim worked as an arts administrator for Trisha Brown Dance Company.

** Importantly, there are a number of factors that play into the analysis of when and to what extent one trademark owner can stop another from using a confusingly similar mark. This analysis is fairly complex and outside the scope of this article.