

As seen in *The Atlanta Journal Constitution's* Biz Voices column
June 12, 2011



David M. Lilenfeld is an intellectual property lawyer with Lilenfeld PC in Atlanta. He specializes in representing clients in business disputes and issues relating to trademarks, copyrights, patents and trade secrets.

www.lilenfeldpc.com

Trademarks amid tragedy

One of life's saddest moments is hearing about the death of a child.

In 2008, a beautiful, brown-eyed Caylee Anthony, 2, was found dead. Sadly, her mother, Casey Anthony is now on trial in Orlando accused of her daughter's slaying. It is obvious that Casey Anthony's parents, George and Cindy Anthony, are devastated. Their daughter is on trial and, of course, they lost their beloved granddaughter. In addition to trying to cope with these tragedies, the Anthonys have taken steps to protect the memory of Caylee.

One of the steps is to file two trademark applications with the United States Patent and Trademark Office. The marks the Anthonys want to protect are "Justice for Caylee" and "Caylee Anthony." According to a news release from the Anthonys' attorney, the intent in registering these trademarks is to stop "opportunists." These are people who are selling buttons, T-shirts, aprons, Christmas stockings, and even underwear, emblazoned with the phrase "Justice for Caylee," for their own personal gain.

I have little doubt that the Anthonys want to use the phrase "Justice for Caylee" for positive reasons, including stopping others from trading off their granddaughter's name. Whether the Anthonys have acquired any trademark rights in these phrases depends on whether or not they have started using those phrases in commerce. Despite what they or their attorneys may believe, the Anthonys have not acquired trademark rights in those phrases merely because they are Caylee's grandparents. Again, trademark rights need to be acquired by use of the trademark.

It is also important to note that under United States trademark law, the names of deceased individuals are entitled to trademark protection to the extent they are used in connection with a good or service. For example, the fast-food restaurant mark McDonald's was named after its founding brothers, Richard and Maurice McDonald. The luxury fashion accessory brand

Versace was named after its founder, Gianni Versace, who was murdered outside his home in Miami in 1997. Despite their namesakes' deaths, these trademarks remain quite strong.

U.S. trademark law also provides protection for marks used for charitable purposes. UNICEF, Red Cross and the American Cancer Society are examples of well-known trademarks owned by nonprofit organizations. Georgia even has a set of laws that provides increased protection to trademarks owned by nonprofit organizations. Those laws increase penalties for infringers of a nonprofit's trademark and make getting injunctions to stop infringement easier than for trademarks owned by for-profit enterprises.

Often balanced against trademark rights is the right to free speech under the First Amendment to the U.S. Constitution. The First Amendment is implicated in the Anthony case because of the heightened publicity this alleged crime has garnered. People want to comment on this story and, undoubtedly, some might argue that their comments can lawfully include putting the phrase "Justice for Caylee" on a T-shirt and the right for someone else to wear it. Free speech advocates would argue that the phrase "Justice for Caylee" is political speech directed at the criminal justice system and that it cannot be silenced by trademark law. Indeed, in many cases, a strong First Amendment defense will prevail against a trademark infringement claim.

Again, it certainly appears the Anthonys have the best intentions with respect to their effort to trademark these phrases. Whether trademark law provides an effective way to protect their deceased granddaughter's name will depend on when and how they first used those phrases in commerce. Any claim they might bring will also need to prevail over what would appear to be a strong First Amendment defense.

Whether successful or not, my heart goes out to the Anthonys for the terrible losses they have suffered. I also hope that anyone profiting from this tragedy does the right thing and donates all profits to a reputable charity that works to keep our children safe.