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### Colin Kaepernick Trademarks 'Kaepernicking' But What's It Worth?

Is this “intellectual property?” Technically, yes. The [San Francisco 49ers](#) quarterback filed to trademark “Kaepernicking,” his bicep-kissing move that’s become ubiquitous. The U.S. Patent and Trademark Office website shows a registration filed January 14, 2013. Mr. Kaepernick intends to use it on T-shirts, and some proceeds from the Sportiqe “Kaepernicking” shirt go to Camp Taylor, which organizes camps for children with congenital heart defects.

His Kaepernicking trademark may turn out to be quite valuable. After all, Kaepernick’s jersey has been the best-selling NFL jersey on Fanatics.com of late. He was exemplary in the Green Bay playoff game, rushing a record 181 yards with two touchdowns, and passing for 263 yards with two more. Kaepernick’s marketing agent, Shawn Smith of X-A-M Sports, said her team intends to file other trademarks on his behalf. See [Colin Kaepernick Files To Trademark “Kaepernicking.”](#)



Detail of the tattoos on the left arm of quarterback Colin Kaepernick #7 of the San Francisco 49ers as he addresses the media during Super Bowl XLVII Media Availability at the New Orleans Marriott on January 30, 2013 in New Orleans, Louisiana. (Image credit: Getty Images via @daylife)

Myopically, I wonder whether the star will pay ordinary income or capital gain on all that revenue? See [Baldwin v. Costner Suit May Come Down To Taxes](#). The new higher 20% capital gain rate plus the 3.8% Obamacare tax makes a top long term capital gain rate of 23.8%. Yet that's far better than the 39.6% Kaepernick will pay on ordinary income. See [Securities Lawsuit Recoveries: Capital Gain or Ordinary Income?](#)

How could he get capital gain? It's not likely on licensing revenue, but a sale of the trademark after a year could be a different story. Some IP sales are capital gain even if paid over time. See [Five Tips About Capital Gain For Everyone \(Not Just Mitt Romney\)](#). The same is true for settlements of IP legal disputes.

A transfer of anything less than ownership is a license though, and that means ordinary income. Where rights are retained, a key question is whether they have substantial value. It also helps if the payor calls the payment a purchase. A payment for "royalties paid" without mentioning a transfer of rights is likely to sound ordinary to the IRS.

Only individuals and pass-through entities (S corporations, partnerships and limited liability companies) benefit from capital gain, there must be a transfer of all rights. Most of the tax cases involve patents, but trademarks can be sold as well. The professional or amateur status of an inventor is relevant, since professional inventors earn ordinary income.

That leads to line-drawing. Thus, in [Lockhart v. Commissioner](#), an inventor with 37 patents over 19 years was ruled a professional. In contrast, in [Kucera v. Commissioner](#), an inventor with 21 inventions and several patents was not a professional so was entitled to capital gain.

Kaepernick probably has many bigger goals than worrying about taxes, especially from his fledgling trademark. Still, as Coach Harbaugh might say, it's never too early to plan ahead.

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