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49ers Kaepernick Win Boosts Kaepernicking

Colin Kaepernick and the San Francisco 49ers won big in Charlotte and even copied Cam Newton's celebratory Superman move. Of course, the Panthers quarterback hasn't filed to trademark or copyright it. Niner NaVarro Bowman also copied the Superman move after sacking Newton.

In contrast, Kaepernick has filed "Kaepernicking" with the U.S. Patent and Trademark Office, and his bicep-kissing move is now back in the limelight. The U.S. Patent and Trademark Office shows six registration applications filed January 14, 2013, including "use of the mark in commerce" for shirts and other articles of clothing. But is this sort of thing really "intellectual property?"

"Kaepernicking" is just a surname turned into a verb, while appropriate trademark use is usually an adjective. Still, a surname can work when it takes on a secondary meaning over time. Tim Tebow's "Tebowing" triggered a wave of filings until Tebow's own company successfully registered a trademark for "Tebowing" on shirts. And Kaepernicking could be quite valuable.

After all, Colin Kaepernick's No. 7 jersey remains NFL's top seller. License deals could produce a stream of revenue, but for some holders of intellectual

property, the bigger payday is to sell. One reason can be controversy, where holders of competing intellectual property—think Apple and Samsung—duke it out and spend big.

Another reason can be the ordinary income tax rates that apply to licensing revenue—39.6%—versus the capital gain tax that can apply to a sale. In 2012, the top capital gain rate was only 15%, and now it's risen to 23.8%. That's made up of the 20% capital gain rate plus the 3.8% Obamacare tax. It's still better than the 39.6% top rate on ordinary income.

Some intellectual property sales are capital gain even if paid over time. The same is true for settlements of intellectual property legal disputes. Settling litigation can be done in different ways, but a transfer of less than ownership of the intellectual property is usually a license. 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. Most of the tax cases involve patents, but trademarks can also be sold.

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 much bigger issues on his mind than worrying about taxes or even on the status of his legal rights. Those are clearly issues for later. Still, as Coach Harbaugh might say, it's never too early to plan ahead.

You can reach me at Wood@WoodLLP.com. *This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*