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The Revision of the Colorado Trademark Registration Statute

by Arthur H. Travers

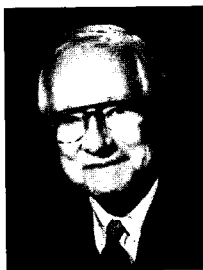
This column is prepared by the CBA Intellectual Property and Technology Law and Policy Sections. The column provides information of interest to intellectual property and technology attorneys who advise clients on protecting and exploiting various forms of intellectual property in the marketplace.

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Arthur H. Travers is Professor Emeritus of Law at the University of Colorado School of Law and was a member of the committee that drafted the revised Colorado trademark registration statute—(303) 492-8436, arthur.travers@colorado.edu. The article was prepared independent of the committee and the Office of the Colorado Secretary of State.



Legislation enacted in the 2006 session will result in major changes in the Colorado trademark registration statute. This article surveys the new law, highlighting some of the ways in which it differs from the statute it replaces.

House Bill 06-1140 (H.B. 1140), which becomes effective on May 29, 2007, essays a major revision of the Colorado trademark registration statute. It is premised on the conviction that the main function of a state trademark registration system is to provide a mechanism for giving public notice of trademark claims. The new law is intended to provide the statutory framework for such a mechanism, which will continue to be administered by the Office of the Colorado Secretary of State (Secretary).

The new statute also is intended to provide for the convenient online submission of statements of trademark registration and the prompt filing of such statements by the Secretary. The new law is designed to make the contents of such statements available to searchers of the public record as soon after submission as possible, and the new law's requirements for such statements are designed to facilitate searches. Under the new law, any statement that includes all of the information required by the statute will be filed by the Secretary.

This article serves as an introduction to the revised Colorado trademark registration statute.¹ It provides an overview of H.B. 1140, as well as some commentary on the current registration system. The article also highlights some of the ways in which the bill differs from the current law and provides detailed information about changes to registration and post-registration filing processes. Finally, the article provides general infor-

mation regarding service of process and transition provisions under the new law.

Colorado Trademark Rights and Registration

In Colorado, trademark rights arise under common law as a result of usage,² and the rights are limited to the market or markets in which the trademark is used.³ Failure to register a trademark would not bar a claim of infringement based on common-law rights.⁴ By the same token, the refusal of the Secretary to register a trademark under the current law would not constitute a legal bar to the use of that trademark by the applicant, although it would deprive the user of whatever advantages registration bestows. Trademark rights under Colorado law must be defined in litigation, regardless of registration. In such litigation, state registration typically has played a negligible role, and the assertions made in any statement of registration always have been subject to disproof.⁵ It is not clear what, if any, procedural advantages registration may confer.⁶

The Current Registration System

The law to be superseded, originally enacted in 1951 and similar to a model act promulgated by the U.S. Trademark Association,⁷ seemed to promise more than just a public record. Based on the federal trademark registration system administered by the U.S. Patent and

Trademark Office (PTO),⁸ the law contemplated that the Secretary would examine every statement of trademark registration filed with it to determine whether the trademark set forth in the statement of registration so resembled a previously registered trademark or name of a domestic or foreign entity as to be likely to cause confusion or deception.⁹

If the Secretary determined that such was the case, registration was to be refused. A refusal to register a trademark could be appealed to the appropriate district court.¹⁰ A registrant whose trademark was accepted might conclude that no one could subsequently register a trademark similar to its trademark, or even that no one in Colorado could use a trademark similar to its trademark.

Limitations of the System

Were this system to have been implemented, it would have significantly increased the amount of time between the initial submission of a statement to the Secretary and the final disposition of the application by the Secretary, even for those statements ultimately accepted. It often can be difficult to determine whether two marks so resemble one another that confusion or deception is likely.¹¹ The whole notion of confusion in this context is anything but straightforward, and the PTO and the federal courts employ multiple factors in deciding this issue.¹²

Under such a system, the Secretary would need to employ a number of em-

ployees (possibly legally trained) whose sole function would be to screen statements of trademark registration, and a significant number of statements would be rejected as potentially confusing. Moreover, registration fees would have to be increased to cover the costs of this system. All of this would impair the value of state registration as a mechanism for giving public notice of claims. In the end, such a system could not guarantee what the statute seemed to promise, because courts typically make their own determinations about confusion or deception, according little deference to the decisions of state administrators.¹³

In practice, the Secretary had never engaged in this process and rarely refused registration to any statement. This created a discrepancy between what the statute called for and seemed to promise, and what the Secretary actually did. Ultimately, the Secretary decided this discrepancy was not acceptable. In 2005, with the cooperation of the Colorado Bar Association, the office assembled a committee to review the Colorado system of trademark registration.

The New Registration System

One of the first questions the committee had to address was whether Colorado should have a trademark registration system at all. Ultimately, it seemed to the committee that the registration system

could serve a useful function; even if state registration seemed unimportant in infringement actions, it could have great value in preventing conflicts from arising in the first place by giving public notice of trademark claims. The committee, the Secretary, and the sponsors of H.B. 1140 agreed that the statute should be amended to make plain that in Colorado, trademark registration provided a public notice of a trademark claim, and no more.

Under the new system, the careful individual or entity contemplating investing in a trademark will first conduct a search of the state and federal records, and the report will disclose the prior state registration. At that point, the potential junior user¹⁴ has available a number of options that can forestall trouble. For example, it may decide to use a different mark, or it may enter negotiations with the registrant and reach an agreement that is satisfactory to both parties. Such a system of public notice can be provided efficiently, at low fees to registrants, and can prevent litigation.

A key provision of the new law, therefore, makes explicit that registration merely gives public notice of the claims in the statement of trademark registration and leaves common-law trademark rights unaffected.¹⁵ Registration under the Colorado statute constitutes public notice of the registrant's trademark claims as set out in the statement of trademark registration in any case in which the issue of notice is material from and after the date on which it is filed.¹⁶ Thus, an infringer who commenced use of its trademark after the senior user filed its statement could not claim to be without notice.¹⁷

Registering a Trademark

The new law does not dramatically change the existing process. A person who has adopted and used a trademark in commerce in Colorado still delivers to the Secretary a statement of trademark registration for filing.¹⁸ However, the new law has made some changes, including changes in nomenclature. For the most part, these changes are designed to integrate trademark registration more fully into Title 7 of the Colorado Revised Statutes, to take full advantage of the database that has been compiled by the Secretary and technological advancements, such as online filing.

Terminology: The new law contains a number of definitions, some of which are new. However, the law also employs terminology defined elsewhere in Title 7. For

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example, if the registrant is an entity that is not a reporting entity, its statement of trademark registration must include information about its address that is not required of a "reporting entity," because the Secretary will already have that information in its database. Reporting entity is a term defined elsewhere in Title 7.¹⁹

General Requirements: Under the current law, the statement must contain the true name of the registrant and the date on which the trademark first was used in this state.²⁰ The new law dispenses with the requirement that the statement provide the date on which the trademark was first used anywhere.²¹ The new law makes clear that the trademark must have been used as a trademark and not merely to reserve a trademark right.²² The new law also continues the requirement that the statement specify the goods or services in connection with which the trademark is used and the class of the International Classification of Goods for the Purposes of Registration of Marks into which the goods or services fall.²³ The new law specifies that the description shall be detailed so as to avoid vague descriptions such as "telecommunication services" or "electronic goods."²⁴

Trademark Requirements: The requirements with respect to the trademark itself have been changed. First, a distinction is drawn between a "standard character trademark" and a "special form trademark." Every trademark must be one or the other, but not both. A standard character trademark is one in which the trademark is expressed in ordinary English letters, Roman or Arabic numbers, or such punctuation as may be acceptable to the Secretary, without any stylization.²⁵ Every other trademark is a "special form trademark," examples of which would include logos, as well as letters or numbers whenever their color or appearance is an ingredient of the trademark.²⁶

For example, suppose a registrant wishes to claim trademark rights in a word or phrase, regardless of the font in which the words appear or any other feature of the word's or phrase's appearance, but also wishes to claim trademark rights in that word or phrase only when it has a particular appearance. In such a case, it will be necessary for the registrant to file two statements, because the requirements for each will be different.²⁷

Regardless of trademark type, a specimen of the trademark, defined as a sample of the use of the trademark, must be included.²⁸ For goods, a specimen might



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be a label or tag; for services, a specimen must show its use in connection with the sale or advertising of the services. If the trademark is a special form trademark, a drawing of the trademark must accompany the statement, as well as a written description of the attached drawing.²⁹ All of these requirements are intended to aid subsequent searchers in finding the statement and deciding what to do in light of that finding.

Statement of Good Faith: The current law's requirement that the registrant state its belief that it has the right to use the trademark in connection with the specified goods or services without infringing another's trademark rights has been continued. However, the wording of that recitation has been simplified.³⁰ Under the old law, the registrant had to state that it believed it was the owner of the trademark and that no other person had

the right to use "such trademark in this state either in the identical form thereof or in any near resemblance thereto that might be calculated to deceive or be mistaken therefore."

The new statement is merely that the registrant believes, in good faith, that it has the right to use the trademark in connection with the goods or services listed, and that the use does not infringe the rights of any other person in that trademark. Both are statements of belief, but the new law makes explicit that the belief only need be in good faith. The change in wording is intended to increase clarity, rather than institute any major change in the substance of the statement.

Registrant Information: The information about the registrant that the statement must contain varies with the nature of the registrant and takes advantage of the Secretary's database, compiled as part of the requirements for reporting entities under Title 7.³¹ In all cases, the true name of the registrant is required. If the registrant is an entity, the form of the entity and the jurisdiction under which it is formed must be supplied, as it is under current law.³²

Other information the registrant must supply about itself is affected greatly by the provisions relating to service of process, discussed below. An individual must give the street address of his or her primary residence or usual place of business in Colorado, if he or she has one (or outside Colorado, if not), and his or her mailing address.³³ An entity other than a reporting entity must give the street address of its usual place of business.³⁴

Nonresident individuals and entities not otherwise required to maintain a registered agent in Colorado are given the choice of either (1) appointing a registered agent for the limited purpose of receiving service of process for any action relating to its statement of trademark registration, or (2) accepting service by mail at the mailing address contained in the statement of trademark registration.³⁵ This choice was not available under the old law.

Post-Registration Filings

Under the new law, a statement of trademark registration is effective for a term of five years, unless it is earlier withdrawn.³⁶ The current law provides for a term of ten years.³⁷ The shorter term means registrants must take action to preserve an effective statement more frequently (and thus pay more nominal fees); however, a shorter term can produce more accurate and up-to-date records. Every year, many trademarks are abandoned in Colorado, and the users have little or no incentive to cancel them on the public record, because little or no cost is attached to the failure to do so. A shorter term means that the record will reveal those marks for which the registrations have not been renewed and thus are no longer effective.

This does not necessarily mean that a particular mark has been abandoned. The registrant merely may have overlooked the renewal requirements, for example. Still, it provides some indication that the registrant no longer is making the claims shown and that it may be adopted by another. However, the careful potential user will wish to ascertain whether the failure to renew actually indicates an abandonment of the trademark with respect to the listed goods or services.³⁸

Statement of Renewal: To renew a statement of trademark registration, the registrant must file a statement of renewal of trademark registration during the 180-day period before the original (or prior renewal) statement expires.³⁹ The new

law specifies much of the contents of the statement of renewal.⁴⁰ The statement of renewal must give the true name of the registrant and identify the statement being renewed in a manner satisfactory to the Secretary.⁴¹ It also must contain the recitations relating to current use and the registrant's right to use the trademark without infringing the rights of others required in the original statement of trademark registration.⁴²

If the mark no longer is being used with respect to certain goods or services, that fact must be stated. If any changes have occurred since the filing of a previously filed statement that make any statement contained therein incorrect, the statement of renewal must state all changes necessary to make the earlier statements correct as of the date the statement of renewal is delivered for filing.⁴³ A current specimen must be attached to the statement so that any changes in usage will be made apparent.⁴⁴

The registrant will be notified by the Secretary no fewer than sixty days and no more than 180 days before the expiration of the statement of its impending arrival.⁴⁵ This is a change from the current law's requirement that the notification be sent during the year preceding expiration, but no fewer than 180 days prior to expiration, a requirement more consistent with the current law's longer term.⁴⁶ This notification is to be sent to the last mailing address supplied by the registrant; however, the failure of the registrant to receive that notification does not affect the obligation to renew or give rise to any legal action.⁴⁷

Statement of Withdrawal: A statement of trademark registration may be withdrawn by the registrant at any time. The registrant must deliver to the Secretary a statement of withdrawal of trademark registration that states the true name of the registrant and identifies the statement to be withdrawn.⁴⁸

Statement of Transfer of Registration: Following a transfer of the registered trademark, the registrant may deliver to the Secretary a statement of transfer of trademark registration, the filing of which will constitute the transferee to be the "registrant," as that term is defined in the statute.⁴⁹ The statement must contain the following information: (1) the true name of the registrant prior to transfer; (2) the true name of the transferee; and (3) the jurisdiction under the law of which it is formed, if the transferee is an entity.⁵⁰ It also must identify the state-



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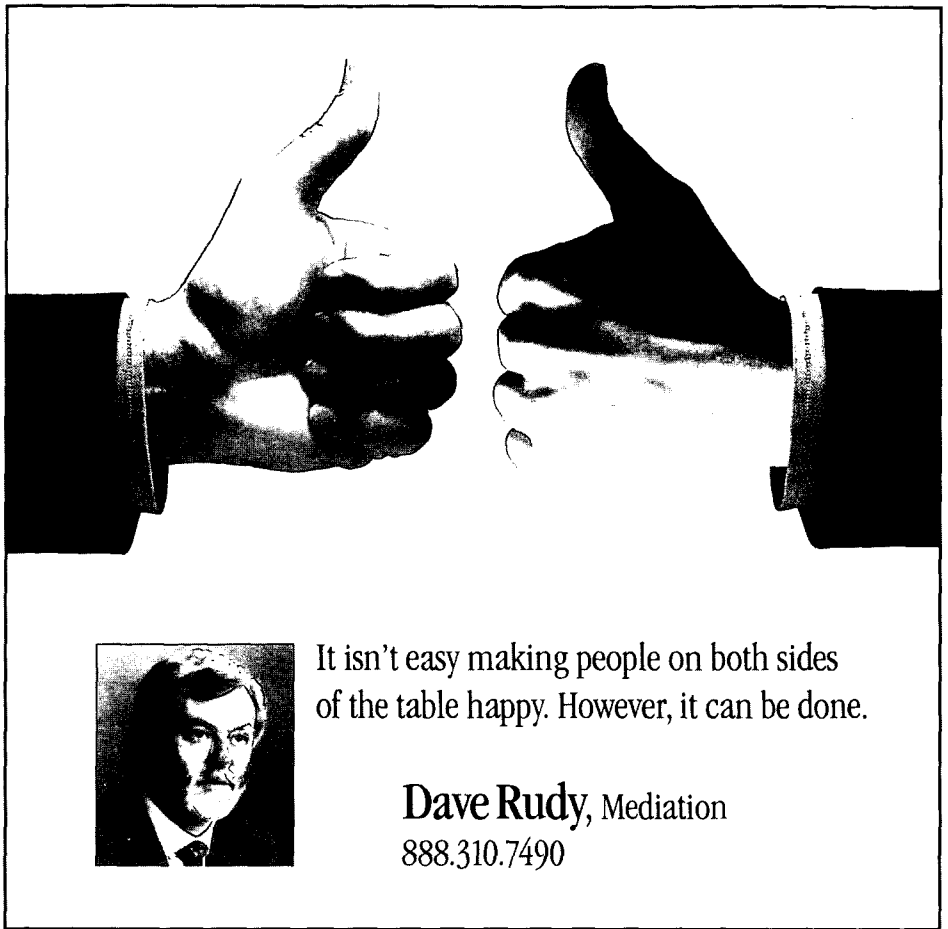
ment of trademark registration to which it pertains.⁵¹

The statement of transfer also must supply for the transferee the other personal information that was supplied in the initial statement of trademark registration for the initial registrant.⁵² The transferee may appoint a registered agent to receive process for actions arising out of the registration, or accept service by mail.⁵³ The statement of transfer also must state that the trademarks have been transferred to the transferee.⁵⁴ The failure to transfer the registration does not affect the validity of the underlying transfer of the trademark rights, but it would deny the transferee the benefit of the notice provisions.⁵⁵

Judicial Cancellation of Trademark Registration: A statement of trademark registration or any other document affecting such a statement filed with the Secretary may be cancelled in a judicial proceeding if the person in whose name the statement or document was filed establishes that the statement or document was filed without his or her authorization, knowledge, or consent.⁵⁶ Cancellation also may be ordered when a person has been injured by the filing of the statement or document by another. It also may be ordered if the statement or document contains a material misstatement, was delivered for filing in bad faith, or is fraudulent.⁵⁷

The procedure for cancellation is for the person requesting cancellation to deliver to the Secretary a certified copy of the court's order for filing.⁵⁸ Cancellation does not automatically expunge the statement or document from the public record, but the court also may order that the filed statement or document be removed from the publicly accessible records of the Secretary.⁵⁹ In such a case, the Secretary can retain the original removed statement or document, or its copy.⁶⁰ However, that document shall not be open for inspection, nor shall copies be made available except upon application to the Secretary and for good cause shown.⁶¹

Oftentimes, a court in an infringement or similar action will order the cancellation of a registration as a part of the relief awarded the winning party. The new law does not affect the power of courts to so order.⁶² However, the provision authorizing the award of reasonable attorney fees to the prevailing party, in exceptional cases, is limited to cases involving cancellation for the grounds specified in the new law and does not extend to any other action in which cancellation may be ordered.⁶³



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Service of Process

Service of process in actions relating to the registration of trademarks may be made in any of the usual ways under Colorado law.⁶⁴ For example, individuals who are Colorado residents may be served at their residences. Reporting entities, including foreign entities authorized to do business in Colorado, will have appointed a registered agent to receive service of process. However, trademarks may be registered by non-resident individuals, as well as by foreign entities whose activities in Colorado are not so extensive as to amount to doing business in this state but who nevertheless have used the trademark in Colorado. The new law attempts to deal with this problem by authorizing such registrants to maintain a registered agent to accept service on its behalf for any action with respect to the statement of trademark registration, in default of which the registrant is deemed to have authorized service by mailing.⁶⁵

Transition Provisions

Statements of trademark registration filed prior to the effective date of the new

law and still on file on the effective date of the new law are deemed to have been filed in accordance with the new law and will have the same effect as if filed under it. However, any previously filed statement is effective for the ten-year term that was part of the law when it was filed. Thereafter, if renewed, it will be effective for a five-year term.⁶⁶

Conclusion

H.B. 1140 was created with the intention of establishing a streamlined system of trademark registration for Colorado that will clearly set forth what a registrant may expect to receive when delivering a statement of trademark registration to the Secretary. It treats state trademark registration as a means of providing public notice of the registrant's trademark claims and eliminates from the statute provisions that could interfere with that function being carried out. Furthermore, the bill aims to take advantage of the benefits that digital technology can provide, and its filing requirements are dictated by the goal of providing an accessible, comprehensive, and accurate public record.

Through a search of the record, potential users will be able to ascertain what claims are being made and take whatever course they deem best.

NOTES

1. In this article, references to the new law will be in the form "CRS § 7-70-101." References to the existing law, in effect until May 29, 2007, will be followed by the year, as in "CRS § 7-70-101 (2006)." In the 2006 edition of the Colorado Revised Statutes, both laws appear. The law to be superseded appears first.

2. Actual use of the trademark as such is a precondition to registration under both the current and the new law. See CRS § 7-70-102(1) and CRS § 7-70-102(1) (2006).

3. Restatement (Third) Unfair Competition § 19, Comments b & e.

4. CRS § 7-70-103(2); CRS § 7-70-113 (2006).

5. McCarthy, *McCarthy on Trademarks and Unfair Competition*, 4th Ed., § 22.1 at 22-7 (Eagan, MN: Thomson West, 2006).

6. *Id.* at 22-2 to 22-5.

7. The current version of the Model State Trademark Bill may be found at <http://www.inta.org>. Roll over "Policy Development & Advocacy"; select "Model Guidelines"; and then select the "Model State Trademark Bill" link.

8. 15 U.S.C. § 1051 *et seq.*

9. CRS § 7-70-102(4) (2006).

10. CRS § 7-70-102(4)(c) (2006), referring to CRS § 7-90-307.

11. See generally McCarthy, *supra* note 5 at Ch. 23, for a comprehensive discussion of all the issues involved.

12. These factors often are referred to as "Polaroid" factors, after the first case to enunciate them: *Polaroid Corp. v. Polaroid Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961). However, each circuit has its own name for its particular set of factors. For example, in the Tenth Circuit, they are referred to as the "Beer Nuts" factors. See *Coherent, Inc. v. Coherent Technologies, Inc.*, 935 F.2d 1122, 1125 (10th Cir. 1991).

13. See Ginsburg, Litman & Kevlin, *Trademark and Unfair Competition Law: Cases and Materials*, 219 3d Ed. (New York, NY: Foundation Press, 2001), quoting Borchard, *Trademark and the Arts*, 2nd Ed. (New York, NY: Columbia University Law School, 2000).

14. A "senior user" is one who adopted and used the trademark first; a "junior user" is one who adopted and used the mark thereafter.

15. CRS § 7-70-103(2) and (3).

16. CRS § 7-70-103(1).

17. *Id.*

18. CRS § 7-70-102(1).

19. CRS § 7-90-102(58).

20. CRS § 7-70-102(2)(a), (b), and (j).

21. Compare with CRS § 7-70-102(1)(d) (1996).

22. This is accomplished through the definition of "use in commerce." CRS § 7-70-101(9).

23. CRS § 7-70-102(2)(h).

24. The required degree of specificity ultimately will be determined by administrative practice and judicial decision; however, it is likely that "cellular telephones" or "portable CD players" would pass muster. The intent is not to generate disputes over the degree of specificity, but to require applicants to make a serious effort to describe the goods or services as precisely as possible.

25. CRS § 7-70-101(6).

26. CRS § 7-70-101(4).

27. It also is true that two statements are necessary because the registrant is claiming two separate trademarks. One easily can imagine cases in which a court would uphold trademark claims only in the limited circumstances in which the appearance of the word or phrase is an ingredient of the trademark. For the same reason, two separate statements must be filed in the case in which the registrant claims rights in the same word or phrase when the word or phrase is stylized two ways, as well.

28. CRS §§ 7-70-102(1) and -101(5).

29. CRS § 7-70-102(1).

30. Compare CRS § 7-70-102(2)(k) with CRS § 7-70-102(1)(e) (2006).

31. In Colorado (as in other states) many types of entities are required to file organizational documents and other reports with the Office of the Colorado Secretary of State (Secretary). As a consequence, the Secretary already has on record a great deal of information about these entities; this can simplify the trademark registration process by obviating any need to re-supply it.

32. CRS § 7-70-102(2)(a) and (b); CRS § 7-70-102(1)(a) and (a.5) (2006).

33. CRS § 7-70-102(2)(c).

34. CRS § 7-70-102(2)(d).

35. CRS § 7-70-102(2)(e).

36. CRS § 7-70-104(1).

37. CRS § 7-70-104(1) (2006).

38. Non-renewal merely means that the registration lapses, not that the registrant no longer is using the trademark. "Abandonment" relates to the trademark itself. A trademark is abandoned, *inter alia*, when it no longer is used and there is no intent to resume use.

39. CRS § 7-70-104(2).

40. Compare CRS § 7-70-104(3) with CRS § 7-70-104(2) (2006).

41. CRS § 7-70-104(3)(b).

42. CRS § 7-70-104(3)(f).

43. CRS § 7-70-104(3)(c).

44. CRS § 7-70-104(3).

45. CRS § 7-70-104(4). If the Secretary already has received the registrant's statement of renewal, this notification need not be sent.

46. CRS § 7-70-104(2) (2006).

47. CRS § 7-70-104(4).

48. CRS § 7-70-105.

49. CRS §§ 7-70-106(1) and -101(3)(b) "Registrant" means . . . [f]ollowing the filing of a statement of transfer of trademark registration, a person who is identified as the transferee in the statement of transfer of trademark registration."

50. CRS § 7-70-106(2)(c).

51. CRS § 7-70-106(2)(g).

52. CRS § 7-70-106(2).

53. CRS § 7-70-106(2)(f).

54. CRS § 7-70-106(2)(h).

55. CRS § 7-70-106(3).

56. CRS § 7-70-107(1)(a).

57. CRS § 7-70-107(1)(b).

58. CRS § 7-70-107(2)(a).

59. CRS § 7-70-107(2)(b).

60. *Id.*

61. *Id.*

62. CRS § 7-70-107(3).

63. CRS § 7-70-107(4). The existing law authorized the award of attorney fees in infringement actions under CRS § 7-70-111 (2006), but the scope of that statutory action is not clear.

64. CRS § 7-70-108(6).

65. CRS § 7-70-108(1).

66. CRS § 7-70-109. ■

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