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What is Intellectual Property

How many times have you heard about Ronaldo's "trademark" moves? Or what about Michael Jordan's "patented" fade away jumper? So you're probably already familiar with some of the common terms of intellectual property law.

While the terms may be used casually in everyday conversation, they have technical meanings under the law. When we talk about intellectual property, we're basically talking about things like brand names, books, inventions and secret formulas. Protecting these things as assets is what intellectual property law is all about. Here's a brief overview of the different kinds of intellectual property. We'll talk about each of them in more detail later in the guide.

Trademarks

When George Eastman came up with the name KODAK® for his camera in 1883, what he came up with was a trademark. Trademarks include brand names, logos, slogans and even product shapes. Here are some other famous trademarks that you might recognize.

intel®

CK
Calvin Klein

Disney®

Kodak®

Coca-Cola®

It takes a licking and keeps on ticking®
Copyrights
When Ernest Hemingway wrote The Old Man and the Sea in 1952, what he wrote was protected by copyright. Copyright protects creative works like writings, paintings, movies, music recordings and even computer programs. It’s because of copyright law that people can’t copy these materials without permission.

Patents
When Thomas Edison ran electricity through an incandescent filament in 1879, he invented the modern light bulb, and what he got for it was a patent. Patents protect inventions.

Trade Secrets
When Dr. John S. Pemberton mixed together sugar syrup and other ingredients in 1886 to make a refreshing new beverage, he came up with the secret formula for COCA-COLA®. He kept it secret and protected it as a trade secret. A trade secret is information valuable to your business that other people don’t know about.

Dr. John S. Pemberton, inventor of Coca-Cola®
What is a Trademark?

Trademarks are what are commonly referred to as brand names, but there are other types of trademarks. Essentially, trademarks let consumers know that what they’re buying comes from a particular source. It sets one company’s goods and services apart from those of others.

Types of Trademarks

Some basic types of trademarks include:

Brand Names

These are by far the most common type of trademarks. They’re words that are used to identify products. In choosing a brand name, keep in mind that fanciful, made-up words are entitled to the strongest protection under trademark law. In contrast, words that mean the same thing as what they identify are never protectable as trademarks. This means that no one has trademark rights in generic terms such as car, vitamin and pipe.

Logos

In addition to traditional word marks, symbols, logos and designs are also commonly used to identify products.

Slogans

Slogans are commonly used to promote products in advertising and promotional materials, and they can also serve as trademarks.

Just Do It®

Your Way, Right Away™

Where do you want to go today®
Colors
A color can sometimes function as a trademark if consumers see the color used on a product as a sign that the product comes from a particular manufacturer. The color pink for OWENS CORNING® insulation is a good example.

Product Shapes
As with colors, the shape of a product can sometimes function as a trademark if consumers see the product shape as a sign that the product comes from a particular manufacturer.

House Marks
A house mark is generally a shortened form of a corporate name that is used as all or part of a brand name on a product.

Service Marks
Service marks are trademarks that are used to identify services rather than products.

Corporate Names
The corporate name of a company is the company’s full legal name. Company names do not function as trademarks for a specific product, but instead designate the company itself.

Tiffany®
(short for Tiffany & Co.)

MasterCard®
(for credit card services)

McDonald’s®
(for restaurant services)
Trade Names
The trade name of a company is often a shortened form of the company's corporate name. As with corporate names, trade names do not function as trademarks for a specific product, but instead designate the company itself.

Caterpillar
Stanley
IBM

Obtaining Trademark Rights
In the United States, trademark rights are generally created when use of the trademark begins in commerce. A caveat to this is the ability to file an application for your intent to use the trademark and thus eventually create rights based on that application date.

In many countries outside the U.S., you can get title to a trademark and exclusive right to use the trademark only if you register it with the trademark office. The first person to file for and register a trademark has priority in that trademark. You may not have to begin use of the trademark before filing, but to maintain the rights you typically must use it in commerce generally within 3 to 5 years after registration.

Trademark Application Procedure
Search and Clearance
Before a new trademark is used or applied for, a trademark search should be performed, and the results should be reviewed by a trademark attorney to determine whether the proposed mark is available for use and registration.

The Application
The trademark application is filed with the trademark office of the particular country in which the mark will be used. The application usually contains a depiction of the mark, the name and address of the applicant and a description of the goods or services that are or will be used in connection with the mark. The trademark office reviews the application to determine whether it meets regulatory requirements, and in some instances, whether it's confusingly similar to any previously filed or registered trademarks. If the application passes the review process, the trademark office will publish it so that others will have a chance to oppose the application if they believe that registration of the trademark will harm their rights.

Trademark Infringement
Trademark infringement happens when someone uses a mark that is the same or confusingly similar to a registered mark in connection with similar goods or services. If your registered trademark is infringed, you can sue for money damages and an injunction to prevent future infringement. In cases of counterfeiting, criminal sanctions may also be available. The court can further order seizure, forfeiture and destruction of infringing goods.
Length of Trademark Protection

A trademark registration is usually valid for 10 years and is generally renewable for successive, 10-year terms so long as the regulatory requirements are met.

International Trademark Protection

Trademark protection is generally available only on a country-by-country basis. Registration of a trademark in one country does not necessarily give you any trademark rights in another country. However, international conventions have made it easier to register trademarks in multiple countries. For example, applications may, when appropriate, be made under the Madrid Protocol International Register. Also, if you file a trademark application in a country that is a signatory to the Paris Convention for the Protection of Industrial Property, you can claim the same priority date for applications later filed in other signatory countries for a period of 6 months after the first application was filed. A trademark registered in a country that is a signatory to the Andean Pact will be afforded protection in another country that is also a signatory to the Andean Pact even if the trademark isn't registered in the other country. Additionally, it is possible to seek a Community Trademark Registration covering all member countries of the European Union.

Proper Use of Trademarks

Trademarks are important assets of a company, and they need to be used properly to protect their value. Improper use of a trademark can lead to the weakening or even loss of rights in the trademark, so you should follow the guidelines below when using trademarks.

Distinguish Trademarks from Ordinary Text

A trademark should be distinguished from its surrounding text as well as from any generic term that it modifies. You can do this by writing the trademark in all capital letters. Examples of proper use:

- POST® brand cereal
- TIFFANY® jewelry

Use the Trademark together with the Generic Term for the Product

Technically speaking, a trademark is an adjective that should modify the generic word for the product. A trademark should never be used as a noun. Examples of improper use:

In these examples, the trademarks are used as nouns, which endangers the validity of the trademark.

- People that value taste choose LIPTON.
- TYLENOL is made according to the highest standards.
Designate Trademarks with Proper Identifying Symbols
If the trademark is registered, the “®” should be used directly following the trademark. The “®” symbol should never be used in connection with a trademark that is not registered. Rather a TM notice can be used for unregistered trademarks.

Follow the Company’s Design Guidelines for Trademarks
The graphical elements of a trademark should be consistent in each use to reflect a unified identity for the mark, which means use of the same color scheme and font specifications. When using trademarks, the guidelines set forth in a company's manuals for graphical representations of those marks should be followed.

Maintain Control over Use of the Trademark by Others
If other people are allowed to use your trademark, make sure that they use it properly (i.e., by following the company's guidelines). If you license your trademark for use by someone else, you must maintain control over the quality of the products or services that are used in connection with your trademark. This is important to ensure that people only associate your trademark with high quality goods and services. In some cases, if you don't maintain quality control over a licensee's use of your trademark, you may lose your rights in the trademark.
What is a Copyright?

A copyright generally protects literary, artistic and musical works, as well as other creative works such as architectural designs and computer software. (Note, however, that computer software can sometimes also be protected under patent law, and, in some countries, computer software is only protectable under patent law.) A copyright basically gives you the right to prevent others from copying your creative work. To be protected by copyright, the creative work must be written down, recorded, performed, or otherwise put in a form that can be observed. Copyright law does not protect ideas, but only the ways in which ideas are expressed.

Typical Business-Related Copyrightable Works

A work does not need to be a work of art or a literary classic to enjoy copyright protection. Most written materials prepared in the ordinary course of business are copyrightable, including construction drawings, brochures, advertisements, product packaging text and designs and employee manuals.

Obtaining Copyright Protection

As soon as you create a work of sufficient originality, such as by writing it down on paper or recording it on a disk, that work automatically enjoys copyright protection. Registration does provide some benefits, but it’s typically not necessary to register a work unless it has significant value. For most works created during the normal course of business, there’s no need for registration, unless you have concerns about infringement by others.

Copyright Infringement

Copyright infringement generally occurs when someone else copies your creative work without your permission. If someone infringes your copyrighted work, you can sue for money damages as well as an injunction against future infringement. In cases of counterfeiting, criminal sanctions may also be available. The court may further order seizure, forfeiture and destruction of infringing goods.

Keep in mind that certain activities are not considered copyright infringement, including:

- Use of the basic idea expressed in a copyrighted work
- Independent creation of an identical work (i.e., without copying the copyrighted work)
- “Fair use” of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research

Length of Copyright Protection

The length of copyright protection given to a work varies from country to country. For the sort of copyrightable works typically generated by companies in the course of everyday business, copyright protection could last over 100 years.
International Copyright Protection

Protection against copyright infringement in a particular country depends on the laws of that country. However, most countries do offer protection to foreign works under certain conditions, and these conditions have been greatly simplified by international copyright treaties and conventions. For example, the Berne Convention for the Protection of Literary and Artistic Works provides that each contracting state would recognize copyrighted works authored by nationals of other contracting states. There are almost 100 member countries in the Berne Convention.

Copyright Notice

It’s advisable to designate every copyrightable work with a notice of claim to copyright, particularly if it will be distributed to the public. The copyright notice should include:

• The “©” symbol or the word “Copyright”
• The year of first publication
• The name of the copyright owner
  Example: © 2008 ABC Company

If new material is later added to an existing work, the date of the copyright notice should be updated accordingly. For example, if a web page, advertisement or promotional brochure is first published in 2007, but it is revised in 2008, the copyright notice should read:

  © 2007-2008 ABC Company
What is a Patent?

A patent is a property right given by the government to an inventor that gives the inventor the right for a limited time (typically about 20 years from the date a patent application is filed) to exclude others from making, using, offering for sale, selling or importing the invention. In return for that exclusive right, the inventor must disclose the invention to the public so that others can learn from it.

Types of Patents

Patents are granted on new inventions of or useful improvements on things in the following categories:

Method

A method is a way of treating material to produce a tangible result. Examples: software processes and steps for making products.

Machine

A machine is a mechanically, electrically or electronically operated device for performing a task. In patent law, the term means the same thing as mechanism, device, engine or apparatus. Examples: plasma monitors and network routers.
Composition of Matter
“Composition of matter” refers to chemical and metallurgical compositions and may include certain combinations of ingredients, as well as new compounds. Examples: chemicals, alloys and pharmaceuticals.

Manufacture
An article of manufacture refers to an article that is manmade. It's essentially a catch-all category covering products other than machines and compositions of matter.

Other categories of patents include ornamental designs and asexually reproduced plants.

Requirements for Patentability
To be eligible for patent protection, an invention must meet the following basic requirements:

Novelty
An invention must be “new” (i.e., not already known by the general public or those skilled in the field of the invention).

Utility
An invention must have a useful purpose, and it must actually work. It must not be frivolous or immoral.

Non-obviousness
An invention must not be obvious to a person with ordinary skill in the field of the invention at the time the invention was made.

Patent Application Procedure

Documenting the Invention
It’s important to document all steps taken to come up with an invention so that there will be a record to support the creation of the invention if the invention is later challenged. Proper documentation begins from when the invention is initially conceived and continues throughout development of the invention. Each person working on an invention should keep a detailed, bound log book that is witnessed, dated and signed by at least two others not involved in creating the invention to document the work that he or she performs.

Dangers of Publication or Use Prior to Filing an Application
If you let other people know about your invention or use it before you file a patent application, you may lose the right to patent the invention. The United States allows them to disclose and/or use their invention up to one year before a patent application is filed, but most countries have no grace period at all. Thus, it’s a good idea not to disclose or use the invention until a patent application has been filed.

Patentability Search
Before applying for a patent, you may want to consider performing a patentability search to determine, among other things, whether the invention is novel and non-obvious. The search should be conducted and reviewed by a patent attorney.
The Application
The patent application is prepared by a patent attorney with the help of the inventor. The application typically includes a specification and drawings accompanied by one or more claims. The claims make up the legal definition of the invention. The application must make a full disclosure of the invention to teach others how to make and use the invention and to define the boundaries of the patent protection. Once filed, the application is examined by a governmental patent office to determine whether the invention meets the requirements for patent protection.

Patent Infringement
Infringement of a patent generally occurs when someone makes, uses, offers for sale, sells, or imports an invention that is covered by the patent's claims without the permission of the patent owner. If your patent is infringed, you can sue for money damages and an injunction against future infringement.

Length of Patent Protection
Typically, a patent has a term of about 20 years from the date the patent application is first filed, but the actual term varies depending upon the country issuing the patent.

International Patent Protection
A patent granted in one country is only valid in that particular country. Separate applications must be filed in each country where the invention is to be protected under patent law. After a patent application is first filed in any country, patent applications in other countries must generally be filed within one year of this first filing date. Further, if you file a Patent Cooperation Treaty (‘PCT’) Application within one year of your initial application filing date, you can generally wait until up to 30 months after the initial filing date to file patent applications in countries that are signatories to the PCT. If you wait more than a year after you initially file a patent application to file either a PCT application or patent applications for the same invention in other countries, that invention may not be eligible for patent protection in those other countries.

Notice of Patent Rights
After filing a patent application for an invention, you can use the informal legend “Patent Applied For” or “Patent Pending” on products or processes based upon the invention and in advertisements for them. Once the government grants the patent, you should use the following legend on the patented product: the word “Patent” or “Pat.” followed by the number of the patent.
Deciding Whether an Invention Should be Patented

Getting a patent on an invention is a process that may take several years and cost thousands of dollars. However, patents provide some of the strongest intellectual property protection available. Given this, you should consider whether to protect the invention as a patent or trade secret (which is discussed in the next section). You should give the decision some careful thought. Some questions you should ask:

- How susceptible is the invention to "reverse engineering" or independent discovery (which will be discussed in the section on Trade Secrets)? An invention that can be easily taken apart and figured out generally cannot be protected as a trade secret. Trade secret law also typically doesn't prevent someone from capitalizing on the same invention if that person comes up with it on his or her own. In such cases, a patent for the invention may be a good idea because "reverse engineering" and independent discovery are not defenses to patent infringement.

- Are your competitors working to come up with the same invention, or is it an invention that's important to the industry? If so, it's a good idea to pursue a patent aggressively, because if you get a patent, you'll have the right to prevent your competitors from using it for about 20 years, and they'll have to license the invention from you if they want to use it.

- Can you afford a patent? The process for getting a patent can be expensive, as can enforcement of a patent.

- Is the invention patentable (i.e., is it novel, useful and non-obvious)? Although the ultimate decision should be made by a patent attorney, you should consider this on your own first.

- Is there a market for the invention, and what is the commercially viable life of the invention? If the invention will just be a hot fad that will die out in a matter of a couple of years, it might not be worth patenting. But if it's something people will need and want for years and years, then a patent may be worthwhile.

- Would disclosing the invention give your competitors valuable information that you'd prefer to keep secret? Remember that patent law requires you to disclose to the public how to make the invention. If doing that will give your competitors information that's too valuable, protecting the invention as a trade secret may be a better idea.
What is a Trade Secret?

A trade secret is information that is important to your business that isn't known by others. Some common types of trade secrets include customer lists, marketing plans and formulas.

Requirements for Trade Secret Protection

To be eligible for trade secret protection, the information must, of course, be a secret, and it can't be something that is readily ascertainable. For example, you can't claim a secret on a customer list consisting of all roofing contractors in a city because anyone else could easily come up with the same list by looking in a phone book. There has to be more to the list, such as the buying habits of particular contractors. And you've got to use reasonable efforts to protect the secrecy of the information.

Practical Steps to Protecting a Trade Secret

You should keep the information under lock and key, and it should only be given out on a need-to-know basis. If the information is in electronic form, encrypt it. People who are given access to the information should be required to sign confidentiality agreements before they see the information.

Key Differences between Trade Secrets and Patents

No Public Disclosure

Whereas a patent must be disclosed to the public upon registration, a trade secret must never be disclosed to the public. Once a trade secret becomes known to the public, it stops being a trade secret.

Limited Protection

Trade secret law gives you no recourse against people who come up with the information on their own or figure out the information through “reverse engineering.” “Reverse engineering” refers to a situation where a person takes something apart to figure out how it's made. In contrast, independent discovery and “reverse engineering” are not defenses to an action for patent infringement. Trade secret infringement requires you to prove the trade secret was unjustly obtained from you; patent infringement has no such requirement.

Length of Protection

Patent protection usually lasts for about 20 years, but trade secret protection is available for as long as the information stays a secret. This is why The Coca-Cola Company is still the only company that gets to make and sell COKE® soda pop, because, after all these years, it's still the only company that has the secret formula for making COKE® soda pop.

No Registration Required

Unlike a patent, a trade secret need not and cannot be registered, so it's generally less costly to maintain a trade secret as compared to a patent.
Who Owns Intellectual Property?

Much intellectual property created in the ordinary course of business by employees typically belongs to the employer as a matter of law. However, to ensure that there is no ambiguity, companies should include a provision in agreements with employees expressly stating that all intellectual property created by the employee in the scope of his or her employment shall belong to the company and that the employee shall assign any and all rights that he or she may have in the intellectual property to the company.

Where intellectual property is created by an independent contractor (e.g. a vendor) a written agreement regarding ownership of rights and transfer of rights to the company must exist.