

Intellectual Property Overview

As an attorney working in the area of intellectual property law, I am often asked about the various types of intellectual property and the differences between them. This article attempts to answer these questions briefly and clearly, based on current U.S. law.

Copyright

Copyright law protects original works of authorship—such as books, films, and music—but it protects many other things as well. In the United States, federal copyright law protects a wide range of works, including—but not limited to—literary works; musical works and lyrics; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; architectural works; and computer programs. Federal copyright law is set forth in Title 17 of the U.S. Code. Copyright law protects only the original expression set forth in those works, however, and not the underlying ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries themselves. In other words, copyright protects *how* something is expressed, not *what* is expressed.

Under current U.S. copyright law, generally, a copyright begins on the date that the work is created and lasts until 70 years after its author's death. If the work is an anonymous or pseudonymous work or a work made for hire, the copyright term is 95 years from the date of publication or 120 years from the date of creation, whichever comes first.

The copyright in a work is separate from the work itself and, in the absence of an agreement to the contrary, the copyright is not transferred when the work itself is sold or given away. Thus, an artist who creates a painting and sells it to a collector has not given up the copyright in the work and may prevent the collector from making and selling posters or postcards of the painting. Although the collector does not own the copyright in the work, under U.S. copyright law, he or she does have the right to display and sell the work itself.

Copyright law grants the owner of the copyright certain exclusive rights. Specifically, the copyright owner has the exclusive right to reproduce or make copies of the work; to prepare derivative works based on the work; to distribute copies of the work to the public by sale or other transfer of ownership, lease, or rental; to perform the work publicly (in the case

of literary, musical, dramatic, and other such types of works); to display the work publicly (in the case of literary, pictorial, graphic, sculptural, and other such types of works); and to perform the work publicly by means of digital audio transmission (in the case of sound recordings). Of course, the copyright owner can grant permission to others (by a license, for example) to exercise some or all of these rights.

Copyright exists as of the date the work is fixed in a tangible medium, regardless of whether or not the work is registered with the U.S. Copyright Office. However, there are a number of important benefits that are gained by registering a copyright with the Copyright Office.

Patents

A patent is a right, granted by the government, to exclude others from, among other things, making, using, or selling an invention that is claimed in the patent. Patents protect certain kinds of innovations—namely, original, novel, and useful inventions.

A patent is basically an exchange between an inventor of a product or a process and the government: the inventor provides information about his or her invention to the U.S. Patent and Trademark Office in exchange for a grant by the government of the exclusive right to use the invention for a term of years, which, under current U.S. law, is generally 20 years from the date the patent application was filed. 35 U.S.C. § 154.

Patent rights exist solely pursuant to statute. An inventor's patent rights are entirely contingent upon successfully obtaining a patent from the Patent and Trademark Office, which rigorously reviews patent applications before granting a patent. Patents are governed by Title 35 of the U.S. Code.

The U.S. Supreme Court, in *Baker v. Selden*, 101 U.S. 99 (1879), explained the difference between patents and copyrights in this way:

The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to



an invention or discovery of art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; it can only be secured from a patent from the government.

Baker v. Selden, 101 U.S. at 102.

The patent system is based on the same clause of the Constitution on which the Copyright Act is based, and the goal of the system is to encourage inventors to share their discoveries with the public in order to “promote the progress of science.” By making an invention public, others may then be inspired to make improvements on the invention or to develop alternative methods. Thus, as with copyrights, the law gives rights to the patent owner in order to encourage inventors to make their work available to the public.

Trademarks and Trade Dress

A trademark is a word, a symbol, or a combination of words and symbols (or even a smell or sound) placed on or associated with goods and services and used to identify those goods or services. The term “service mark” is also used more specifically to describe marks that identify and distinguish one company’s services from the services of another, although the term “trademark” is commonly used for marks for both goods and services. When a symbol, picture, or other design is used as a trademark, it is often referred to as a “logo.” Trademarks are also sometimes referred to colloquially as “brands,” although the term “brand” is generally understood to be a marketing concept, whereas a trademark is the more accurate term used to refer to the intellectual property right.

A trademark informs the consumer that the product comes from a particular source and guarantees that the quality of the product will be the same as that of other products sold under that trademark. For example, a trademark on a manufactured item will inform consumers that other such items sold under that mark come from the same source and will be of a similar quality.

Trademarks are also sometimes used to certify compliance with regulations set by a particular organization. In this context, they are referred to as “certification marks.” When a consumer sees a certification mark on a product, the consumer should be able to assume that the product meets whatever standards have been set by the owner of the certification mark. A certification mark may be used to identify a particular region or other source of origin of the product, particular types of labor or materials, a certain manufacturing process, level of quality, or other characteristics.

Unlike copyrights and patent rights, there is no fixed termination period for trademarks. Trademark rights may be maintained as long as the trademark remains in use in commerce. If the trademark owner abandons the trademark, however, then the trademark rights will cease to exist.

In the United States, unlike in some other countries, trademark rights arise from use of the trademark in commerce and registration with the U.S. Patent and Trademark Office is not required. Significant benefits arise from registering a trademark with the Patent and Trademark Office, however. Trademarks are governed both by common law and Title 15 of the U.S. Code.

When the shape of a product or its packaging or container serves to identify the source and quality of the item, it may be protected in a manner similar to a trademark. This feature is known as “trade dress.”

Trade Secrets

Generally, a trade secret is information that is not known to the public, confers some economic benefit to its holder, and is maintained in secrecy. In general, protection of trade secrets is governed by state law. Accordingly, trade secret law varies from state to state. Nevertheless, there are some general principles about trade secrets that are universal. In particular, trade secret law protects confidential information from improper appropriation by another. In order for information to be protected as a trade secret, the information must be maintained as confidential. A number of states have adopted the Uniform Trade Secrets Act as the basis for their laws governing trade secrets.

Unlike copyright law, trade secret law can be used to protect ideas and processes. Although a trade secret may be set forth in a document that is protected by copyright, the trade secret itself (namely, the idea rather than the particular expression of the idea) is not protected by copyright.

Conclusion

So now you know: If you want to protect the name of a product, you need to get trademark rights. If you want to protect the new invention embodied in a product, you need a patent and trade secret rights. If you want to protect the expression of an idea or concept, then you need a copyright.

These legal concepts are not entirely symmetrical and there are some places where the pieces do not entirely fit together, thus leaving some gaps in the system. But the system goes a long way toward protecting the rights of authors and inventors and their creative new ideas. At the same time, the law seeks to balance these rights with the public’s interest in the free expression and the open exchange of ideas. **TFL**

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