



AN ENTREPRENEUR ACADEMY WORKBOOK

INTELLECTUAL PROPERTY

Lesson 8: Intellectual Property

“Intellectual property has the shelf life of a banana.”
- Bill Gates

Ideas are currency in the world of business. From original works to cutting edge inventions, you want to protect your work from theft, reverse engineering and dilution. Learn the ins and outs of copyrights, trademarks, patents and trade secrets and how to protect your intellectual property.

Great ideas are a rare commodity. They deserve to be protected, whether it's a product you created, a new word you coined, a movie script you wrote or a new seasoning recipe that is so original it needs to be kept a secret from the competition.

In most cases, intellectual property (IP) issues should be handled by an attorney. Yes, there are some things you can do on your own, but knowing the finer points of intellectual property law, especially when it has national and international implications, requires an intellectual property attorney. They can help you navigate the often complicated and time-consuming process so that you can protect your work with the full force of law, which varies widely by country.

The following are the primary types of intellectual property protection you may need in your business. In reading through these sections, realize that no attempt has been made to provide any legal advice. These are simply guidelines, and there are always exceptions to the rules. When in doubt, seek the advice of an intellectual property attorney.

Copyrights

A copyright is used primarily for creative works, including literary works, computer programs, databases, films, music, choreography, art, photographs, architecture, advertisements, maps and technical drawings. You cannot copyright an idea, procedure, method of operation or a mathematical concept. Also, copyrights may not extend to titles, slogans or logos, depending on the circumstances.

There are two general protections offered in a copyright. There are economic rights, which allow the owner to derive a financial reward for

the use of their original work, and moral rights, which protect the non-economic interests of the creator.

The economic rights not only provide for financial compensation but allow the creator to control its use. Permission is required to use a copyrighted work in print, public performance, a recording, broadcast, translation into other languages or adaptation into a derivative form such as a novel into a screenplay by another party.

Unlike other forms of intellectual property, copyright protection is extended automatically upon the creation of the work. There is no need to register the work to gain protection. You can, of course, voluntarily register the work at the state or federal level as these additional steps can help in legal proceedings or the assignment or transfer of rights down the road.

Titles, short phrases, slogans, or the listing of product ingredients are not copyrightable because they don't contain enough elements of authorship to demonstrate any form of original expression. That said, brand names, slogans and phrases used in connection with a product or service that has been protected under trademark law may be protected within the trademark portion of intellectual property law.

Copyright law doesn't extend to what is known as "useful articles," either. These would be things like lamps, clothing, sinks or computer monitors as they are considered utilitarian. For example, you can copyright the print or fabric a piece of clothing is made from, but not the item of clothing itself. The design can't be copyrighted because it is only a unique cut of the copyrightable fabric.

Any work created after Jan. 1, 1978 is protected under copyright law for the creator's life plus an additional 70 years after their death. If it is a joint work with two or more people, the protection is extended to 70 years after the death of the last surviving creator. For works made for hire, anonymous and pseudonym works, the duration is 95 years from publication or 120 years from its creation, whichever period is shorter.

Patents

A patent protects an invention and grants its inventor exclusive rights as to its use. The idea of protecting intellectual property is so important to the economy that its protections were outlined in the U.S. Constitution: Congress shall have power... to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discovery.

Patents are handled by the United States Patent and Trademark Office (USPTO). The most common patent, the utility patent, offers protection for 20 years from the date of filing but is not enforceable until the date the patent is actually issued. Design patents protect ornamental designs and plant patents offer protections to new varieties of reproducing plants.

A patent application is submitted to the patent office, which is reviewed by an examiner to determine whether or not it can be patented. If a patent is granted, the USPTO will give you the exclusive right to make, use and sell your invention in the United States. Some countries offer the same protection of a U.S. patent within their own borders; others do not.

A patent can be worth a fortune, but they are also expensive to pursue. A typical patent application can cost between \$8,000 and \$20,000 per patent. The actual application and review process is excruciatingly slow, taking two to three years to be granted. The market can change tremendously in that amount

of time, and thousands of inventions have become irrelevant while the patent application is still under review. For small companies, this can be a significant barrier, but it is the only way you can legally protect a product or service you invent.

Trademarks

Before we dive into trademarks, let's clear up some confusion. The terms "trade name" and "trademark" sound similar but they are very different. A trade name is the company's official name, the one you registered with the state. It is commonly known as a DBA, "Doing Business As." A trade name in and of itself does not provide you with any legal protection or exclusive rights of usage.

A trademark, on the other hand, does offer legal protection. Think Coca Cola. It is the name of the company and the name of one of its soft drinks. If you were to name a product or service Coca Cola or Coke, you would receive a very curt cease and desist letter from Coke's legal department, since it is a registered trademark. A registered trademark has a ® symbol behind it. If the trademark is not officially registered and approved by the USPTO, it has a ™ instead. Unregistered service marks have an ™ after it.

To make things a bit more confusing, companies, products and services may have the same name from time to time. For instance, there's Pandora, the jewelry company, and Pandora, the music streaming service. This may seem to contradict the Coke example, but these two entities are in vastly different industries, so there's no cause to believe a consumer would confuse one with the other when making a purchasing decision.

Having a registered trademark from the federal government offers you protections that a state-level registration cannot. It allows you to bring legal action against another company that is using your registered mark. For instance, if you discover a business is using your federal registered mark in another state, you can send

them a cease and desist letter or file legal action against them.

A trademark can be registered by you or an intellectual property attorney. Some companies offer this service as well. You can do an initial search in TESS, the Trademark Electronic Search System.

So, what can be trademarked?

Letters and words, logos, pictures, combinations of words and logos, slogans, colors, product shapes and sounds can be all be trademarked. For example, the distinctive pink of Owens-Corning's insulation is trademarked as is the three-tone chime of NBC.

There are trademark rights that are also common law, existing beyond those protected in statute. This provides you some protection of your mark within your own state's borders, even if someone else had it registered in another state. Unless they had a federal registration, of course.

Because a federally registered trademark is national in scope, it has certain benefits, including the ability to recover damages for infringement as well as attorney fees. You are granted the right to use the ® symbol, clearly demonstrating ownership and ease of discovery in searches, preventing others from using similar marks.

Trade Secrets

The fourth type of intellectual property concerns trade secrets, which protect information, such as a formula, pattern, compilation, program, device, method, technique or service. A trade secret has two main characteristics: It is information that has reasonable measures in place to protect or restrict access, and it derives its economic value from not being disclosed to competitors or the public.

Coca Cola's soda formula, McDonald's' special sauce and Google's search algorithm are all examples of proprietary information that is central to a company's competitive advantage and its very survival.

Nearly every business has trade secrets in one form or another. Things like customer lists, manufacturing processes, software code and strategic plans are examples. Most of these aren't truly trade secrets since extraneous measures have never been put in place to protect the information. Plus, a lot of this information can be reverse-engineered, and once it is, it ceases to be a trade secret.

Reasonable measures put in place to protect a trade secret can include technological or physical safeguards or legal mechanisms such as non-disclosure agreements and work-for-hire and non-compete clauses. Another method is to restrict access to certain parts of a facility where proprietary information is stored or the use of keycards and passcodes. Digital safeguards may include firewalls, two-factor authentication and encryption.

These measures help demonstrate that the information is indeed a trade secret, should litigation occur. Unlike patents, trade secrets protections can continue indefinitely, until the secret is revealed or reverse engineered.

Assignments

1. Take TESS for a test drive. Login to the federal trademark search database and perform some searches for names you'd like to use. Try a simple search and a Boolean search as they will generate different results. Search results note whether they are "Live" or "Dead."
2. Learn the FAQs. The Secretary of State has an informative set of frequently asked questions to help familiarize yourself with trademark use and registration at the state level.
3. Find an intellectual property attorney. Do a Google search to find an intellectual property attorney in your area. If you have a product or service you want to patent or a trademark to register, many will provide you with an initial consultation.





