

6.0 INTELLECTUAL PROPERTY. . . SOME BASICS

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6.1 Introduction and Summary

Intellectual Property (often abbreviated IP) is any product of the intellect that has commercial value. Such property comprises, for example, literary or artistic works, patents, copyrights, trademarks, tradenames, appellations of origin, business methods, recipes, customer lists, industrial processes and other trade secrets. Such property can be considered a business asset, can be placed on the balance sheet (at cost) and be depreciated over the expected lifetime of the asset, pursuant to IRS guidelines.

6.2 Patent Defined. . .

A **patent** for an invention is the grant of a property right to the inventor, issued by the U. S. Patent and Trademark Office. The grant of patent protection extends for 20 years from the date of filing in the United States and is effective only within a US territory.

The right conferred by the patent grant is, in the language of the statute and of the grant itself, “the right to exclude others from making, using, offering for sale, or selling” the invention in the United States or “importing” the invention into the United States. What is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention.

There are two main kinds of patents, a *design patent*, which addresses how something looks, like a telephone or a shoe, and a *utility patent*, which protects what something does or how it is made.

Patents are great legal devices, but not everything is patentable. To meet the requirements for a patent, a creation must be different from anything known to the public, i.e. nothing disclosing the creation can be in the “public domain.” For obvious economic considerations, a patent should apply to something *useful*.

The most difficult, and potentially the most costly, element in securing a patent is the search of existing “prior art” in the public domain, by which one determines the uniqueness of the concept. Such searches are not always conclusive, since there are so many patents that have issued over the course of time and many of them are not included in a readily accessible database. Unfortunately, the failure to find prior art can lead to a legal challenge of the validity of a patent, and litigation.

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6.3 Trademark

A **trademark** is a word, name, symbol or device that is used in the trade of goods to indicate the source of the goods and to distinguish them from the goods of others. A service mark is the same as a trademark except that it identifies and distinguishes the source of a service rather than a product. The terms “trademark” and “mark” are commonly used to refer to both trademarks and service marks.

Trademark rights may be used to prevent others from using a confusingly similar mark, but not to prevent others from making the same goods or from selling the same goods or services under a clearly different mark. Trademarks for use in interstate or foreign commerce may be registered with the U. S. Patent and Trademark Office.

6.4 Copyright

A **copyright** is a form of protection provided to the authors of original works of authorship including literary, dramatic, musical, artistic and certain other intellectual works, both published and unpublished. The 1976 Copyright Act generally gives the owner of a copyright the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies of the work or to perform or display publicly the copyrighted work.

The copyright protects the form of expression rather than the subject matter of the writing. For example, a description of a machine could be copyrighted, but this would prevent others only from copying the description; it would not prevent others from writing a description of their own or from making and using the machine. Copyrights are registered by the Copyright Office of the Library of Congress. *Source: USPTO*

6.5 Steps Needed to Gain and Maintain Protection

A patent, trademark (or service mark,) and copyright are relatively low-cost legal devices that business owners can implement to protect their intellectual property rights.

A patent is a right granted by the U. S. Patent and Trademark Office, which among other things defines the inventor or developer (and thereby the owner) of a process, device or machine. The owner thus defined is the only party legally entitled to benefit from the use or sale of the invention described.

Patents can protect a machine or process, or a method of manufacture, or a new and useful improvement to an existing item or process. They do not protect the name of a business . . . a trademark is for that purpose. A patent deals with **what** a business makes or **how** it is made; a trademark protects the **name** under which a product is made or the name of a business. The law presumes that the party with the trademark on a name owns the rights to the name.

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A trademark has to be used in order to assure its continued ownership. If too much time passes without any commercial endeavor attached to, or using, a trademarked name, it can be considered abandoned and the legal exclusive right of use is lost.

Trademarks not only protect names, they also protect logos or symbols used to advertise or promote a product or service. While one does not have to officially register a trademark (applying the small TM serves as a reminder to potential copycats), full legal power is gained only by legally registering the mark with the PTO. Registration also allows one to use the widely recognized ®, symbolizing "Registered Trademark."

Typically the law grants the greatest degree of trademark protection to owners of names that are distinctive or made-up words (such as *Exxon*) rather than mere descriptive words (like "small business.**")

Before seeking a patent or trademark, the potential applicant should conduct a thorough search to make sure that no prior art exists. A basic search can be done on the PTO website, www.uspto.gov, using the U. S. trademark electronic search system.

Non-distinctive marks, like those using common or ordinary words or geographic terms, receive less protection or none at all. Marks used to describe a type of product, rather than a brand of product are considered generic and can't be protected by trademark laws.

Copyrights are the least formal device for protecting business assets that fall under the rubric of "artistic expression." A copyright protects things like the written word, photographs, artwork and music such as jingles. Registration of a copyright costs about \$20 and a little time, but the government does not inspect them, so the onus is on the applicant to make sure that he is not copyrighting something to which someone else already holds the rights.