

Trademark, Copyright, & Patent Issues

There are three different types of intellectual property protection: trademarks, copyrights, and patents.

Trademark®™

A trademark protects the exclusivity of a good or service and typically consists of a name, symbol, design, color, or combination thereof that is used in interstate commerce to encompass the identity of the good or service. Essentially, a trademark is a brand name, and trademark protection will cover the business' name as well as the goods or services provided by distinguishing a specific product or service from others in the marketplace.

In order to receive exclusive trademark protection, the good or service must be used in interstate commerce. The requirement of interstate commerce is satisfied when a good is sent across state lines displaying the mark on either the good itself or the packaging. For services, the requirement for interstate commerce is satisfied when an actual service is rendered across state lines, or a service that affects interstate commerce. In the instance of internet domain names, a domain name is an address on the internet. Generally, the address cannot be trademarked as it is not an indication of a good or service.

Typically, a business' name establishes its market position, so a business owner should carefully select an identifiable business name that links the business entity with the business' purpose. Before selecting a trademark, you should conduct a search with the U.S. Patent and Trademark office (USPTO) to determine whether a proposed mark is available. To conduct a trademark search online, visit the Trademark Electronic Search System (TESS) located on the USPTO website.

If a business determines that its good or service is subject to federal trademark registration, it may consider filing for federal trademark registration. Although not required, federal registration creates evidence of ownership, constructive notice that the trademark is in use, and potential federal court jurisdiction. Additionally, once the USPTO grants the mark official registration, the applicant is then allowed to use the ® on their mark. While an application is pending the applicant may only display ™ on their mark, as to not confuse the public that the mark has officially been registered.

Copyright©

A copyright protects original authorship—including literary, artistic, musical, pictorial, and other unique works—by providing exclusive ownership rights for works that are fixed in a tangible form or expression. It is important to note that the use of a machine or device to communicate the information satisfies the requirement of being fixed in a tangible form of expression. For example, copyright protects original works of authorship that appear on websites—writings, pictures, and artwork—but copyright law does not protect domain names.

Essentially, the author immediately receives copyright protection upon the creation of the work in a tangible form of expression, and no publication is necessary. Though, there are advantages of registering a copyright; specifically, it provides a public record of your specific copyright. By creating the public record, it puts others on notice of your rights. In fact, a copyright owner is required to register before suing an infringer of his exclusive rights of ownership. Further, if you register before or within five years of publication, your registration is considered prima facie evidence of a valid copyright in a court action. Additionally, by registering within three months of publication or before

an infringement of the work, the copyright holder may pursue statutory damages as well as attorney's fees in court actions. Be aware that if and when you do publish the work, the Copyright Act mandates that two copies of the work must be deposited with the Library of Congress for their use. Failure to do so, however, may result in fines, but will not affect your copyright protection.

Although publication is no longer required to obtain copyright protection, as the latest Copyright Act makes copyright automatic upon fixation in a tangible form or expression, it is still advised to display the copyright notice (©). When you do publish, it is recommended that you display the ©, the date, and the copyright holder's name.

Although some exceptions apply, it is generally understood that works created after January 1, 1978 receive copyright protection that lasts for the life of the author, plus an additional 70 years.

Patent

A patent is the granting of the property right, to an inventor, to exclude others from making, using, or selling an invention. This right is guaranteed via Article 1, Section 8 of the United States Constitution, which gives Congress the right to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The United States Patent & Trademark Office (USPTO) is an agency of the United States Department of Commerce and is responsible for granting patents for protection under the patent right. However, once a patent is issued, the patentee must enforce the patent without the aid of the USPTO. The usual general term of a patent is 20 years from the date the application was filed in the United States.

The subject matter that can be patented includes any new and useful process, machine, composition of matter or manufactured goods, and any new and useful improvements to processes, machines, compositions of matter and manufactured goods that are invented or discovered.

However, to obtain a patent the subject matter must be useful, new, and non-obvious. The term useful means that the subject matter must have a useful intended purpose. This excludes mere ideas and suggestions of, for example, a new machine or process. To be patentable, the invention must be new. Thus, an invention cannot be patented if it is known or used by others in the United States, patented, or described in a printed publication in any country before the date of the invention of the patent applicant, or an invention was in public use or for sale in the United States for more than one year prior to the application for the patent. Further, the invention to be patentable must be non-obvious to a person having ordinary skill in the particular subject area related to the invention.

For more information call the MSU College of Law Small Business and Nonprofit Law Clinic at (517)336-8088 or visit our website at www.law.msu.edu/clinics/sbnp/. This resource was produced with the assistance of Aaron Beresh, Spring 2008 Resident Clinician, and Michelle Sealy, Graduate Assistant.