



ROCKING IN INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY FUNDAMENTALS

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1. Introduction to Intellectual Property

Intellectual property (IP) is a valuable asset for any company. Often, the only way a small business can compete with the Goliaths of the world is through their intellectual property. Intellectual property takes many forms, such as copyrights, trade secrets, trademarks, and patents.

The strongest form of intellectual property is a patent. A patent protects an invention and provides a patent owner with a monopoly for a limited amount of time. As a patent is the strongest form of intellectual property, it has to be registered and is the most expensive to obtain and keep. The next strongest form of intellectual property is a trademark. A trademark protects a word or words, slogan, logo, etc. used to identify the source or origin of a good or product. The trademark, which may be registered, is not as expensive as a patent but is rather moderately priced. A copyright protects a work of expression fixed in a tangible medium, such as a painting painted on a piece of paper. A copyright may be registered and protects against copying. There are nominal expenses to obtain a copyright. A trade secret protects information that provides a competitive advantage to its owner. A trade secret is not registered and lasts indefinitely (as long as it remains a secret).

This e-book provides an introduction to the different forms of IP. No previous knowledge or experience on any of these topics is needed to understand what is covered in this e-book, so read on!

2. Copyrights

Copyrights protect works of expression recorded in some concrete way (also referred to as being fixed in a tangible medium). Copyright law covers the broad range of literary and artistic expression, including books, poetry, song, dance, dramatic works, computer programs, movies, sculptures, and paintings. Examples include an artist's painting on a canvas, a musician's song lyrics written on paper, a singer recording a song on a compact disc, an author's story being written on paper (e.g., in a book), someone developing and storing in a computer memory a web page or software code, etc.

The focus of copyright protection is originality of a work expressed or fixed in a tangible medium (e.g., paper, a canvas, a CD, a tape, computer memory, etc.). Ideas themselves are not copyrightable, but the author's particular expression of an idea is protectable under copyrights. A copyright protects the expression of a work and not the idea itself. For example, suppose I create a unique form (Form 1 below) with a particular layout and specific blanks for someone's name, occupation, and gender. If someone else creates a different form (Form 2) with a different layout but that has these same blanks, my copyright has not been infringed (which means violated) because the expression of this form (the layout) is different. The idea of having blanks for someone's name, occupation, and gender is not protected under copyright.

Form 1

// // _____
Name _____
Occupation _____
Gender _____

/

Form 2

Name _____
Gender _____
Occupation _____

a. Obtaining a copyright

A copyright is easy to obtain and lasts longer than patent rights, but is narrower in scope than patents. Once a work is fixed in a tangible medium, a copyright attaches to the work. Thus, unlike patents and (federally registered) trademarks, which require examination and granting by the U.S. Patent and Trademark Office, no formal copyright registration is necessary to obtain a copyright. Therefore, once you create a work and fix it in a tangible medium, you can write on the work that it is copyrighted and the year that you created the work. For example, if you develop a web page, you can write on the bottom of the web page “Copyrighted 2015. All rights reserved.” This provides notice to people that you have a copyright in your web page and provides the first date of publication (here, 2015). Although this copyright notice is not required, it may be beneficial to you if you ever got into a disagreement with someone about the copying of your work.

Although not required, you can register a copyright with the Copyright Office (www.copyright.gov). There are several benefits to registering your copyright with the Copyright Office. These include:

- 1) Registration establishes a public record of the copyright claim.
- 2) Before you can sue someone for violating or infringing your copyright, registration is necessary.
- 3) If made before or within five years of publication, registration will establish evidence in court that your copyright is valid.
- 4) You may be awarded more money by a court if you sue someone for infringing your copyright and win.

Registration of a work with the Copyright Office is relatively inexpensive (e.g., between \$35 - \$200). The Copyright Office does not “examine” or review / check applications for copyright and it does not “issue” copyrights. Rather, an author can only register their work with the Copyright Office. A copyright is protectable when it is created.

Additionally, creativity does not need to be present for a copyright to apply to a work. A copyright can apply to any original work expressed or fixed in a tangible medium. No one will judge your work as not being creative enough to warrant obtaining a copyright. Copyrights protect the copying of the work of expression and so if two people create very similar paintings independently, no copyright infringement has occurred. Facts themselves, however, cannot be protected by copyright.

b. Time period awarded by copyright protection

In the United States, most existing works have a copyright for a term ending 70 years after the death of the author. If the work was a work for hire (e.g., a work created by an employee of a corporation within the scope of the employee’s employment, in which case the corporation is awarded the copyright), then the copyright lasts for 120 years after creation or 95 years after publication, whichever is shorter. As stated above, an author obtains a copyright once the work of expression is materialized in a tangible medium.

c. Work Made for Hire

As stated above, if a work was a work made for hire (also referred to as a “work for hire”), the work was created by an employee of a corporation within the scope of the employee’s employment. Unless there is a written agreement to the contrary, the employer is awarded the copyright. Classifying a work as a work made for hire affects the initial ownership of the copyright and the copyright’s duration. A work made for hire is typically a work created by an employee or a specially ordered or commissioned work that is subject to the supervision and control of the hiring party. A work created by an individual may or may not be a work for hire, depending on the type of work, the type of control the employer has over the work, any written agreement between the employer and individual, and employment factors between the individual and the employer (e.g., the duration of the relationship, the location of the work, the method of payment, the provision of employee benefits, the tax treatment of the individual, etc.). Thus, someone who is working for your company may or may not create a work for hire, regardless of whether you label the person as an employee or independent contractor. Courts will typically look at the above noted factors to determine if the person created a work for hire.

As an example of work for hire, many programmers created Microsoft Windows®, but the copyright in the software belongs to Microsoft®. Similarly, a newspaper owns the copyright in news articles written by its authors.

d. Rights Conferred by a Copyright

A copyright actually awards several rights, as described below.

i. Copying

The owner of a copyright has the exclusive right to make copies of his work. Thus, a copyright protects against copying of protected expression. An independent creation of a work that is similar to a copyrighted work is not subject to the copyright.

ii. Derivative Works

The owner of a copyright has the exclusive right to prepare “derivative works”. A derivative work is a work based on the original work but in a different form or otherwise changed or adapted in some manner. For example, a movie based on a book, a translation, a sound recording, etc. are derivative works. These derivative works are also copyrightable.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. An example is an encyclopedia because an encyclopedia contains a number of independent works assembled into a collective whole. A compilation can be copyrighted if there is some minimal degree of creativity to merit copyright protection.

iii. Distribution

The owner of the copyright has the right to control the sale and distribution of the original work and any copies or derivative works. This right only extends to the first sale of the works

and does not apply to additional sales. For example, if I am an artist and I paint a picture, I can sell the picture to person A for a price that I set. I cannot, however, prohibit person A from selling the picture to person B. Similarly, I cannot set the price that person A sells the picture for to person B.

iv. Performance and Display

The owner of a copyright has the right to control the public (but not private) performance and display of the copyrighted work. This does not relate to using a receiving apparatus that is basically a private home-type device, such as a radio or television. Thus, a restaurant or hotel that plays music through speakers for its guests is not infringing the copyright in the music being played.

e. Infringement of a copyrighted work

An infringement of a copyrighted work occurs when someone copies the work. To determine if a work has been copied illegally, courts accept proof that a party had access to the copyrighted work (such as that the copyrighted work was displayed on a web page). The courts usually also look at evidence indicating that the two works are substantially similar.

A copyrighted work would be infringed by copying the entire work or copying a substantial part of the work. Even the copying of a small amount of the original work, if significant in quality, may be enough for infringement of the original work.

If a first artist paints a new painting that is substantially similar to another painting made by a second artist but that has not yet been released to the public, most courts would determine that no copyright infringement has occurred because the first artist independently created the

painting without having access to the second artist's painting. A copying has to be inferred or directly proven for copyright infringement to be found.

f. Defense to Copyright Infringement – Fair Use

If someone copies a copyrighted work, he is typically infringing the copyright. There is, however, a defense to the claim of copyright infringement – fair use. If the copying is fair use, then the person who copied the original work does not infringe the copyright and does not have to obtain permission from or pay the author of the original work. Fair use can include reproduction for criticism, news reporting, education (including making multiple copies for classroom use), scholarship, or research.

The factors to consider when determining whether a use of a work is fair use include:

- 1) The purpose and character of the use;
- 2) The nature of the copyrighted work;
- 3) The amount and substantiality of the portion used in relation to the entire copyrighted work; and
- 4) The effect of the use upon the potential market for or value of the copyrighted work.

With respect to the first factor, the purpose and character of the use, courts may look at whether the use is of a commercial nature or is for nonprofit educational purposes and/or the public benefit of the use. With respect to the second factor, the nature of the copyrighted work, courts typically determine that there is a greater need to distribute factual works than works of fiction or fantasy. With respect to the third factor, the amount and substantiality of the copied portion, courts look at how much of the original was taken and how valuable the copied portion is to the entire work. With respect to the fourth factor, the effect of the use upon the potential market for the copyrighted work, courts typically look at whether there is a substantial harm to the value of

the copyright due to the copying. A court will typically look at these factors and weigh them together to determine whether the copying of an original work constitutes a fair use.

One example of a fair use is a parody. A parody is a work that makes fun of an original work through imitation and distortion. As people need to recognize the connection between the original work and the parody, the parody copies at least some of the original work. A Saturday Night Live skit in which an actor sings a distorted version of a famous (copyrighted) song is an example of a parody because the skit copies some of the famous (copyrighted) song but distorts it to make it humorous. Saturday Night Live is not infringing the copyright in the original song because the SNL song is a parody and therefore constitutes fair use.

g. Strategy for best practices

I recommend fixing your work in a tangible medium, which is easy to do. I also recommend marking your work with a copyright notice and the year of first publication. For example, if you develop a web site and publish the site in 2014, put on the bottom of each page “Copyright 2014. All rights reserved.” As registering your copyright with the Copyright Office is relatively inexpensive, I recommend doing this so that you obtain the benefits of registration.