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Intellectual Property Law: A Brief Introduction

Intellectual property (IP) law comprises a set of exclusive rights to exclude others from making, copying, or using certain intangible creations of the human mind. The U.S. Constitution's IP Clause provides Congress with the power to grant "Authors and Inventors the exclusive Right to their respective Writings and Discoveries" in order "[t]o promote the Progress of Science and useful Arts." IP rights are intended to encourage innovation and the spread of knowledge by providing incentives to create new works and generate useful inventions.

The U.S. economy is increasingly knowledge-based, with a growing focus on technology and innovation. A recent study by the United States Patent and Trademark Office (PTO) found that IP-intensive industries—such as computer technology, entertainment, and pharmaceuticals—account for 28 million American jobs and $6.6 trillion in economic value, representing 38% of U.S. gross domestic product. IP law, given its economic and cultural significance, is therefore more important than ever to Congress.

At the federal level, IP comprises three distinct, yet often confused, forms of legal protection: patents, copyrights, and trademarks. Each form of IP protects a different type of intellectual creation, has a different procedure for obtaining rights, and grants the IP owner rights that vary in scope and duration. As a result, each of these different areas of law is best considered separately. This product provides a brief overview of each form of federal IP protection.

Patent Law

Whoever invents or discovers "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" may apply to obtain a patent before the PTO. Patents can be obtained on almost any invention made by humans, save for laws of nature, abstract ideas, and natural phenomena. For example, new pharmaceutical drugs are often patented. The key requirements for a patent are that the claimed invention is novel, useful, and nonobvious, and that the inventor is the first person to file a patent application.

The process for obtaining a patent before the PTO—called "patent prosecution"—is fairly demanding. The patent application must contain a written specification that describes the claimed invention such that a person skilled in the relevant field is able to make and use the invention. During prosecution, a patent examiner at the PTO is to review the claimed invention to determine if the invention is (1) truly novel, useful, and nonobvious; (2) directed at patentable subject matter; and (3) adequately described in the patent application.

If the PTO grants the patent, the patentee has the exclusive right to make and use the invention for a set term, usually 20 years from the date that the application was filed. Any other person wishing to practice the invention needs permission from the patent holder during this period. To enforce the patent, the patent holder may sue alleged infringers in federal court and seek an injunction, damages, and other remedies. Patents are presumed to be valid, but accused infringers may defend against lawsuits by claiming noninfringement (i.e., what they did was not covered by the patent) or invalidity (i.e., the patent should never have been issued because, for example, the invention was not new).

Copyright Law

Copyright grants creators of "original works of authorship" a set of exclusive rights in their creative works. Forms of expression that are copyrightable include literary works (such as books and computer code); musical works and sound recordings; pictorial, graphic, and sculptural works; audiovisual works (such as movies and television); and architectural works. The key requirements for a copyright are that the work is independently created, at least minimally creative, and fixed in some tangible form. Copyright does not extend to ideas, processes, systems, discoveries, or methods of operation.

Copyright attaches once a work is created and fixed in a tangible medium of expression (e.g., recorded in a computer file or on a piece of paper). Unlike patent and trademark, the copyright holder does not need to apply with the government to obtain a copyright. However, in order to sue in federal court, American copyright holders must first register their copyright with the U.S. Copyright Office.

Holders of copyrights generally have the exclusive right to reproduce the work, publicly perform and display it, distribute it, and prepare derivative works from it. For most works created today, the copyright does not expire until 70 years after the death of the author. Once the copyright is registered, copyright holders may sue infringers in court to seek injunctions and damages.

"Fair use" is an important limitation on copyright that permits certain socially valuable uses that would otherwise be infringements (e.g., using portions of a copyrighted work in a parody or book review). Fair use is governed by a four-factor test: courts will consider the purpose and character of the use, the nature of the original work, the substantiality of what was copied, and any market harm from the use. Courts also consider whether the use is "transformative," that is, whether it adds new expression, has a different purpose, and/or alters the original work with new expression or meaning.

Trademarks

Trademarks are the third main area of federal IP law. Although a form of IP, trademarks are not a product of the Constitution's IP Clause. Rather, Congress's power to regulate interstate commerce is the source of authority for federal trademark law. Trademark law seeks to protect consumers from unfair competition by preventing businesses from misrepresenting the source of goods or services.

In general, any "word, name, symbol, or device" may be used as a trademark to identify a particular business's goods or services. Familiar examples include brand names and logos such as NIKE and its familiar swoosh. However, generic terms (i.e., the name for a particular type of good) or deceptive terms may not be registered or protected as trademarks. In addition, descriptive terms (e.g., New York Pizza, Fast Dry Cleaners) cannot be trademarked unless the term acquires an association with a particular source of a product (so-called "secondary meaning").

To obtain a federal trademark, a business is required to register the mark with the PTO. (Limited common law rights are available without registration.) Each registration for a mark is limited to a particular type of good or service.

Owners of trademarks have the right to prevent other businesses or persons from using similar marks to identify their goods or services, if such use is likely to cause consumer confusion. Like other forms of IP, trademark owners may sue to obtain injunctions and damages in court. If properly renewed, trademark rights may last indefinitely.

Table 1. Comparison of Each Form of Federal Intellectual Property Protection

	Patent	Copyright	Trademark
Constitutional Basis	IP Clause (U.S. CONST. art. I, § 8, cl. 8)	IP Clause (U.S. CONST. art. I, § 8, cl. 8)	Commerce Clause (U.S. CONST. art. I, § 8, cl. 3)
Statutory Basis	1952 Patent Act, as amended, *see* 35 U.S.C. §§ 1–390	1976 Copyright Act, as amended, *see* 17 U.S.C. §§ 101–1332	1946 Lanham Act, as amended, *see* 15 U.S.C. §§ 1051–1141n
Initial Rightsholder	Inventor	Author	Business or person using mark to identify goods or services
Subject Matter	Any "new and useful process, machine, manufacture, or composition of matter"	"[O]riginal works of authorship"	Any "word, name, symbol, or device" used to identify goods or services
Subject-Matter Examples	Pharmaceuticals, industrial machinery, biotechnology, manufacturing processes	Books, musical works, movies, fine art, architecture, software	Brand names, logos, distinctive trade dress
Requirements for Protection	Novelty; nonobviousness; utility; first to file	Originality (independent creation and minimal creativity); fixation	Nongeneric; (intent to) use in commerce; first to register
Excluded From Protection	Laws of nature, natural phenomena, and abstract ideas	Any "idea, procedure, process, system, method of operation, concept, principle, or discovery"	Generic terms; descriptive terms that lack "secondary meaning"
Process to Secure Rights	PTO patent application process ("patent prosecution")	Create and fix the work (registration is required to sue)	PTO trademark registration process
Exclusive Rights Granted	To make, use, offer to sell, sell, and import the patented invention	To reproduce, distribute, or publicly perform/display the work, and/or make derivative works	Prevent uses of confusingly similar marks with respect to a particular good or service
Duration	20 years	Life of author plus 70 years	Potentially indefinite
Infringement Test	Practice the claimed invention	Substantially similar to original	Likely to confuse consumers
Main Defenses to Infringement	Invalidity; noninfrginement; inequitable conduct	Fair use	Fair use; nominative use
Selected Legislative Amendments	Leahy-Smith America Invents Act (2011); Hatch-Waxman Act (1984); Bayh-Dole Act (1980)	Digital Millennium Copyright Act (1998); Copyright Term Extension Act (1998); Berne Convention Implementation Act (1988)	Trademark Dilution Revision Act (2006); Anti-Cybersquatting Consumer Protection Act (1999)

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Kevin J. Hickey, khickey@crs.loc.gov, 7-2070