

Trademarks, Patents and Copyrights

Trademarks, patents, and copyrights are often confused with one another. It is important to understand the difference between them and the function that each one serves so you (and your attorney) can best decide what you need.

Trademarks

In general, trademarks are distinctive symbols, pictures, or words that organizations use to identify and distinguish themselves and their products. The owner of a trademark has exclusive rights to use it on the product and often on related products as well. Trademark rights may be used to prevent others from using a confusingly similar mark, but they do not prevent others from making the same goods or from selling the same goods or services under a clearly different mark.

Servicemarks receive the same legal protection as trademarks but distinguish services rather than products.

You do not need to register a mark. You can establish rights based simply on legitimate use of that mark, but the trademark must be used to maintain that status. At the least, occasional marketing must occur for it to remain valid. However, owning a federal trademark registration provides advantages:

1. public notice of the registrant's claim of ownership of the mark
2. a legal presumption of the registrant's ownership of the mark, and the registrant's exclusive right to use the mark nationwide
3. the ability to bring an action concerning the mark in federal court, if needed
4. the use of the U.S. registration as a basis to obtain foreign registrations

5. the ability to file the U.S. registration with the U.S. Customs Service to prevent importation of infringing foreign goods.

Simply applying for a trademark does not mean that it will be granted. It must not infringe on other trademarks, or be too general. Trademark status is granted to distinctive and unique packaging, color combinations, building designs, product styles, and overall presentations. It is also possible to receive trademark status for identification that is not outwardly unique, but which has developed a secondary meaning over time that identifies it specifically with the product or seller. Made-up words (Ovaltine, Kodak, Nynex) gain the greatest degree of trademark protection.

So, how do you know when to use the trademark symbols TM, SM, and ®? Whenever you claim rights with a mark you can use the trademark (TM) or servicemark (SM) designation, regardless of whether you have filed an application with the United States Patent and Trademark Office (USPTO). You can only use the federal registration symbol (®) after the USPTO actually registers the mark. You cannot use the ® while an application is pending. Also, you may use the ® only in connection with the goods and/or services listed in the federal trademark registration.

Go to www.uspto.gov for downloadable forms and to do a free search to see if your name is already being used. To register a Web site domain name, go to www.register.com.

Review and Registration

When creating a new name or logo, it may not be clear to what degree a firm does due diligence in making sure the name or logo are unique to

their market. You may need to ask. As an example, Bidwell ID does the following research:

- Competition
- The general market
- United States Patent and Trademark Office
- State trademarks

That said, we always recommend a final review by an attorney, especially one specializing in intellectual property. We also recommend registering your name or logo, which the attorney can also help with. If needed, we recommend:

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Copyrights

Copyrights are registered by the Copyright Office of the Library of Congress (<http://www.copyright.gov/>). They are a form of protection provided to the authors of “original works of authorship.” These include works both published and unpublished. The 1976 Copyright Act generally gives the owner of a copyrighted work, to prepare derivative works, to perform the copyrighted work publicly, or to display the copyrighted work publicly. Works of authorship include the following categories:

- 1.literary works
- 2.musical works, including any accompanying words
- 3.dramatic works, including any accompanying music
- 4.pantomimes and choreographic works
- 5.pictorial, graphic, and sculptural works
- 6.motion pictures and other audiovisual works
- 7.sound recordings
- 8.architectural works

Copyrights do not protect ideas, concepts, systems, or methods of implementation. You can express your ideas in writing or drawings

and claim copyrights, but be aware that copyrights will not actually protect the idea itself as revealed in the work.

A copyright protects the form of expression rather than the subject matter of the “original works of authorship.” For example, you can copyright the description of an invention, but this only prevents others from copying the description. It does not prevent others from putting together their own description. It does not prevent others from making a similar invention, or from using the invention.

Copyright infringement may be found where one reproduces in whole or any substantial part of an author’s expression. If only the idea is taken then it’s not copyright infringement. It is, however, permissible to use limited portions of a work including quotes for purposes such as commentary, criticism, news reporting and scholarly reports.

There are several ways to search whether a particular work is under copyright protection. If you are unsure, visit www.copyright.gov in order to search the office’s catalog and records. Your best protection, however, is not to copy any works without first obtaining the author’s permission.

Patents

A patent for an invention is the grant of a property right to the inventor, issued by the United States Patent and Trademark Office (USPTO); go to www.uspto.gov for an application. A patent is good for 20 years from the date on which the application for the patent was filed in the United States (US) or, in special cases, from the date an earlier related application was filed, subject to the payment of maintenance fees. United States patent grants are effective only within the US, US territories, and US possessions.

A Patent states that you are the inventor of a process or the developer of a product. This entitles only you to benefit from the use or sales of that invention. Anyone else wanting to use it must receive your permission. A patent does not grant you the

right to make, sell, or distribute the product, but to keep others from doing so. There are two types of patents: utility and design. A utility patent concerns what something actually does, or how it is constructed. A design patent applies to what something looks like.

An invention must pass four tests to be patentable:

1. The invention must fall into one of the five “statutory classes” of things that are patentable:
 - a. processes
 - b. machines
 - c. manufactures (that is, objects made by humans or machines),
 - d. compositions of matter
 - e. new uses of any of the above

2. The invention must be “useful”. One aspect of the “utility” test is that the invention cannot be a mere theoretical phenomenon.

3. The invention must be “novel”, that is, it must be something that no one did before.

4. The invention must be “nonobvious” to “a person having ordinary skill in the art to which said subject matter pertains”. This requirement is the one on which many patentability disputes rest.

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