

Intellectual Property

A primer for creative entrepreneurs

By Lawrence R. LaSusa



Intellectual property is the last field of law that most lawyers and business owners ever master. In today's Internet and digitally driven global economy it should be the first and foremost. Our nation's focus has moved away from relying on natural resources and manufacturing. We have entered a time of economic revolution in which success rests upon our ability to harness and leverage intellectual potential, human resources and great ideas. Your rights in intellectual property are designed to protect you and your business from unfair competition. Here are the basic steps you can take to jumpstart your understanding of the vast and complex area of intellectual property (IP):

1 Educate yourself

IP takes many forms: trademarks, trade secrets, copyrights and patents. As a business owner who invests time and money in researching and developing your business, you need to know what kind of property you are seeking to protect. Each one of these IP forms has boundless permutations and nuances. However, here are some basic descriptions: A trademark is a name, slogan, symbol or design used to identify your business and products in the marketplace. Generally speaking, it needs to be unique and not merely descriptive.

"Trade secrets" cover a wide range of commercial and technical information, and have no precise definition. A trade secret is really any valuable formula, pattern, device, process or other information you use in your business that gives you an advantage over competitors who

do not know or use that information. The key to being a "trade secret" is that the information must be secret.

Trade secrets do not include information that can be readily ascertained or acquired by the general public or competitors without significant difficulty. Some things that are typically considered trade secrets are pricing formulas, customer lists, and specialized software programs, devices, manufacturing methods, techniques, or testing processes.

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Finally, patents, like copyrights, grant the inventor the exclusive right to manufacture sell and distribute the product, design or process. And yes, patents can apply to processes. For example, American Express holds many business process patents and makes a fortune by licensing them.

2 Inventory your business for IP assets

Start by reviewing your marketing materials and website. The goal is to uncover any IP assets used or owned by your business, and then identify how important they are to your continued and future business. Create a catalogue of all registered trademarks, copyrights, patents and licenses. Then look at and catalogue any of the same types of IP that are being used but are not registered, as well as any trade secrets or business processes and inventions that are not yet patented. This type of audit can help

create an IP licensing revenue stream, as well as identify any IP that your competitors may be infringing upon.

3 Protect your IP

Here is what most lawyers won't tell you: Registration of your intellectual property is not always necessary, and it limits the useful life of your IP. Trademark registration does not override common law rights that attach at first use. Once registered, your great idea becomes public knowledge, and the protection of it has a limited shelf life. Trade secrets are no longer secret. Coke never patented its formula for that reason. Copyrights only last the creator's lifetime plus 70 years. Patents are only good for 14 or 20 years.

The best way to protect your trade secrets is to disseminate that information only on a "need-to-know" basis. Have employees (and independent contractors or vendors) sign non-disclosure agreements or non-compete covenants before they are hired, or even after they are hired as a condition of their continued employment. Be vigilant about protecting your rights. Courts frown on infringers but take no pity on those who are tardy in standing up against infringement. Send a "cease and desist" demand letter at the first sight of infringement. Then stay on top of the infringer to ensure compliance. Lastly, don't forget you really have a business and legal cost/benefit analysis to make: Do you license or litigate?

The bottom line is simple: If you do your homework in advance, you may be able to avoid the expense of an infringement lawsuit. But, if you have to use the courts, your preparation and better understanding of IP will help you work with your attorney to decide whether a lawsuit is likely to produce cost effective results, and ultimately will help you to negotiate the best possible arrangement to pursue your matter to successful conclusion.

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