

## **Intellectual Property Protection in the United States**

Intellectual property can be among the most valuable assets of a business. Therefore, it is critical that businesspeople understand the different varieties of intellectual property and protect them accordingly. “Intellectual property” describes intangible assets that are creations of the mind, which may be musical, literary, and artistic works; discoveries and inventions; or words, phrases, symbols, and designs. Below is a brief explanation of the different types of intellectual property that are recognized under U.S. law.

### **Trademarks and Servicemarks**

A trademark is a word, phrase, symbol, or design that identifies and distinguishes the source of the goods of one party from others. A servicemark plays the same role for the services offered by a party. In this article, I will use “trademark” to describe both trademarks and servicemarks. The most common examples of trademarks are a company’s name and logo. For instance “McDonald’s” is a trademark of McDonald’s Corporation. The “golden arches” logo, the large yellow M, is also a trademark of McDonald’s Corporation. These trademarks help potential customers distinguish McDonald’s stores and products from other stores and products. A user of a trademark acquires some rights to such trademark by merely using it in commerce, but in order to take advantage of stronger protections under federal law against use by another party or challenges to ownership, a trademark owner must register its trademark with the United States Patent and Trademark Office (“USPTO”). Notably, while most European jurisdictions use a class-based registration system, in the United States, a trademark owner may only obtain a trademark registration in connection with the specific goods and services the trademark owner provides or has a bona fide intent to provide.

Once a trademark is registered, a trademark owner must maintain its trademarks properly in order to retain its rights. For one thing, if a trademark owner chooses to license its trademarks, such license must include provisions giving the trademark owner control over how the trademark is used and protecting the goodwill of the trademark and the reputation of the trademark owner. Failing to exercise the required amount of control could result in loss of trademark rights. Furthermore, a trademark owner may lose its rights through abandonment, either by failing to continue to use the trademark in commerce or by failing to stop unauthorized parties from using the trademark.

## **Copyrights**

A copyright is the exclusive legal right to print, publish, perform, film, or record literary, artistic, or musical material. The most commonly-known types of works that are subject to copyright are books, movies, songs, and computer programs (including code). The author of a written or recorded work automatically possesses a copyright in a work as soon as the work is written down or recorded as long as such work qualifies as “original” under applicable federal law. However, in order to create proof of copyright and to avail itself of the stronger protections for copyrighted works provided under federal law, including the right to bring a legal action in court, a copyright holder must register its copyright with the United States Copyright Office. Use of a notice of copyright in connection with the work is also an important tool in copyright protection.

## **Patents**

A patent is the exclusive legal right to exclude others from making, using, offering for sale, or selling an invention. Unlike trademark rights, copyrights, trade dress rights, and trade secrets (discussed below), patent rights do not automatically arise from use or creation of an invention but must be granted by a governmental authority. In the United States, an inventor must apply for a patent through the USPTO. Moreover, unlike trademarks and copyrights, which may be registered at any time after use or creation of the underlying work, respectively, applicants may only file for a patent within one year of the private or public disclosure of an invention. The two most common types of patents issued by the USPTO are utility patents and design patents. An invention qualifying for a utility patent must introduce a useful process, machine, manufacture, or composition of matter that is novel and nonobvious. An invention qualifying for a design patent must introduce a new, original, and ornamental design embodied in or applied to an article of manufacture that is nonobvious. The term of a utility patent is 20 years, while the term of a design patent is 14 years. Apple Inc. holds design patents for the iPhone, which include, for instance, the rounded edges and the bezel on the front surface of the phones. It also holds a utility patent for the tap-to-zoom feature used in iPhones.

## **Trade Dress**

Trade dress is the distinctive packaging of a product or design of a building, which, like a trademark, identifies and distinguishes the source of the product. For example, the restaurant

chain TGI Friday's decorates its locations in red stripes and uses the same distinctive red stripes in its advertisements. In order to be protectable, trade dress must be inherently distinctive, and its distinctive aspects must not be purely functional. Although it is more difficult to register trade dress than it is to register trademarks, trade dress may be registered with the USPTO, thereby obtaining stronger protections under federal law.

### **Trade Secrets**

A trade secret is a formula, process, device, or compilation used in business which gives the owner an advantage over competitors who do not know or use such trade secret. For instance, the recipe used in making Coca Cola is a trade secret that has never been revealed. Trade secrets cannot be registered. In fact, the only way to protect trade secrets is to preserve their secrecy by implementing proper security and confidentiality procedures within the business which owns the trade secret and with respect to anyone outside the business to whom the owner discloses the trade secret, such as attorneys and independent contractors. If a properly-maintained trade secret is misappropriated, the owner of the trade secret may sue the misappropriating party for damages.

This article provides only a basic summary of the various types of protection available under U.S. law. Consult an attorney for specific and individualized advice tailored to the needs of your business.

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