

Chapter 40—Protection of Intellectual Property

Intellectual property is an economically significant type of intangible personal property that includes trade secrets, trade symbols, trade names, copyrights, and patents.

A. Trade Secrets

Trade secret—is commercially valuable, secret information that is guarded from disclosure and is not general knowledge. It may include a formula, pattern, compilation, program, device, method, technique, or process.

Misappropriation—if a person wrongfully uses a trade secret, the owner may obtain damages and, where appropriate, injunctive relief.

Trade secrets are misappropriated when an employee wrongfully uses or discloses it; or a competitor wrongfully obtains it.

B. Trade Symbols

“Palming Off,” the fraudulent marketing of one person’s goods as those of another, was one of the earliest forms of unfair competition and is still common today. Section 43 of the Federal Trademark Act (known as the Lanham Act) prohibits businesses from using a false designation of origin in connection with any goods or services in interstate commerce. The Lanham Act also established federal registration of trade symbols and protection against misuse or infringement by injunctive relief and a right of action for damages against the infringer.

Types of Trade Symbols

The Lanham Act recognizes four types of trade symbols:

Trademark—is a distinctive symbol, word, name, device, letter, number, design, picture, or combination in any arrangement that a person uses to identify the tangible products he manufactures or sells.

Service mark—similar in function to the trademark, is used to identify and distinguish the services of one person from those of another.

Certification mark—is used with goods or services to certify the region of origin, composition, mode of manufacture, quality, accuracy, or other characteristics of goods or services.

Collective mark—is a distinctive mark or symbol used to indicate either that the producer or provider belongs to a trade union, trade association, fraternal society, or other organization or that the goods or services are produced by members of a collective group.

Registration—to be protected by the Lanham Act, a mark must be distinctive. Marks may meet this requirement in one of two ways: it may be inherently distinctive, such as marks that are fanciful or arbitrary or it may be distinctive through secondary meaning, by taking on an association with the product which is beyond its surface meaning. The mark must be registered with the Patent and

Trademark Office to be federally protected, for a ten-year period with unlimited ten-year renewals.

Remedies

The Lanham Act provides several remedies for infringement: damages, injunctive relief, an accounting for profits, destruction of infringing articles, attorneys fees, and costs.

C. Trade Names

A trade name is any name used to identify a business, vocation, or occupation. Trade names may not be federally registered under the Lanham Act.

D. Copyrights

Copyright is a form of protection provided by the Federal Copyright Act to authors of original works, which includes literary works, musical works, dramatic works, pantomimes, choreographic works, pictorial, graphic and sculptural works, motion pictures, architectural works, and sound recordings.

Rights

In most instances, copyright protection lasts for the period of an author's life plus fifty years. Compulsory licenses permit certain limited uses of copyrighted material upon the payment of specified royalties and compliance with statutory conditions. Fair use of a copyrighted work for purposes such as criticism, comment, news

reporting, teaching, scholarship, or research is not an infringement of copyright.

E. Patents

A patent is the exclusive right to make, use, or sell an invention to the absolute exclusion of others. The patent owner may also profit by selling the patent or by licensing others to use the patent on a royalty basis. The patent may not be renewed. Upon expiration, the invention enters the public domain and anyone may use it.

Patentability

Any new and useful process, machine, manufacture, or composition of matter or any new and useful improvement thereof may be patented as a utility patent. Naturally occurring substances and fundamental truths or ideas are not patentable. To be patentable as a utility patent, the process, machine, manufacture, or composition must be novel, useful, and nonobvious.

There are also plant patents (the exclusive right to reproduce a new and distinctive variety of asexually reproducing plant) and design patents.

Procedure

The US Patent Office issues patents upon the basis of an application containing a specification and claims. The applicant must be the inventor. The office determines whether the application meets the required criteria. Applications are confidential, but the confidentiality ends upon the granting of the patent.

Infringement

A direct infringer makes, uses, offers to sell, or sells a patented invention without permission. An indirect infringer actively encourages another to make, use, offers to sell, or sell a patented invention without permission. A contributory infringer knowingly sells or supplies a part or component of a patented invention. Good faith and ignorance are defenses to contributory infringement.