

# INTELLECTUAL PROPERTY

- **Intellectual Property:** Any property resulting from intellectual, creative processes – the product of one or more individual’s minds.
  
- The framers of the U.S. Constitution recognized the need to protect and promote intellectual property more than two hundred years ago. Article I, Section 8 empowers Congress  

[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the **exclusive Right** to their respective Writings and Discoveries.
  
- Laws protecting patents, trademarks, and copyrights are explicitly designed to protect, nurture, and reward inventive and artistic creativity.
  
- **License:** An agreement by which an intellectual property owner (*licensor*) permits another party (*licensee*) to use the intellectual property for a limited purpose or for a limited time.

# TRADEMARK PROTECTION

- **Trademark:** A distinctive mark, motto, device, or emblem that a manufacturer stamps, prints, or otherwise affixes to the goods it produces so that they may be identified on the market and their origins made known.
  
- Once a trademark is established, its owner is entitled to **exclusive use** of the trademark.
  
- A trademark may be *established* either by:
  - (1) **registering** the mark with one or more states or with the U.S. Patent and Trademark Office pursuant to the **Lanham Act**, or
  
  - (2) prior use sufficient to warrant **common law** protection.

# TRADEMARK VIOLATIONS

- **Trademark Dilution:** Using a mark similar, but not identical, to a protected trademark, without permission. Under the Trademark Dilution Revision Act, a plaintiff must prove the following:
  - (1) The plaintiff owns a famous mark that is distinctive
  - (2) The defendant has begun using a mark in commerce that allegedly is diluting the famous mark
  - (3) The similarity between the defendant's mark and the famous mark gives rise to an association between the marks
  - (4) The association is likely to impair the distinctiveness of the famous mark or harm its reputation
- **Trademark Infringement:** Using a protected trademark, or copying it to a substantial degree, without permission.
- Trademark law only protects marks that are **sufficiently distinctive** from all similar or competing marks so that consumers may

- (1) **identify** the manufacturer of the good easily, and
  - (2) **differentiate** between competing products.
- **Strong Marks:** Fanciful, arbitrary, or suggestive trademarks that are usually unrelated to the nature of the product or service.
  - **Secondary Meaning:** Descriptive terms, geographic terms, and personal names are not inherently distinctive, but will be protected if consumers associate the specific term or phrase with the particular trademarked item.
  - **Generic Terms:** Terms that refer to an entire class of products are not entitled to protection, even if the term was originally the name of a trademarked product.

## SERVICE MARKS

- **Service Mark:** A mark used in the sale or the advertising of *services* to distinguish the services of one person or entity from those of another.
  - Titles, character names, and other distinctive features of radio and television programs may be registered as service marks.
- **Certification Mark:** A mark used by one or more persons or entities *other than the owner* to certify the region, materials, mode of manufacture, quality, or accuracy of the owner's goods or services (*e.g.*, "UL Tested," "Good Housekeeping Seal of Approval," "J.D. Power & Associates").
- **Collective Mark:** A mark used by members of a cooperative, association, or other organization to distinguish products or services approved by the collective from those not so approved (*e.g.*, union labels).

## TRADE DRESS AND TRADE NAMES

- **Trade Dress:** The image and overall appearance of a product (*e.g.*, the distinctive decor, menu, layout, and style of service of a particular restaurant).
  - Trade dress is afforded basically the same protection as a trademark.
- **Counterfeit Goods:** Goods that copy or otherwise imitate trademarked goods may damage the value of the trademark and the trademark holder's reputation and may pose health or safety risks to the consuming public.
  - In 2006, Congress enacted the **Stop Counterfeiting in Manufactured Goods Act (SCMGA)**, criminalizing intentionally trafficking, or attempting to traffic in, counterfeit goods.
- **Trade Name:** A term used to indicate part or all of a business' name and that is directly related to the business' reputation and goodwill.
- **License:** An agreement or contract permitting the use of a trademark, copyright, patent, or trade secret for certain purposes.

# PATENTS

- **Patent:** A grant from the government giving an inventor the **exclusive right** or privilege to **make, use, or sell** his invention for a set period of time.
  - A patent may protect a **product**, a **process**, or a **design**.
  - In order to obtain a patent, the inventor must convince the U.S. Patent and Trademark Office that the product, process, or design is **genuine, novel, useful**, and **not obvious** in light of current technology.
  - Unlike many other countries, the U.S. awards patent protection to the first person to invent a product, process, or design, not the first person to file a patent application for said product, process, or design.
  - The patent owner will frequently grant exclusive or non-exclusive **licenses** to others to enable them to make, use, or sell the patented product, process, or design. In return for which, the patent owner will typically be paid a **royalty** on all sales of goods manufactured or sold pursuant to the license.
- **Patent Infringement:** Making, using, or selling another person's patented product, process, or design without permission.

# COPYRIGHTS

- **Copyright:** The exclusive right of an author to publish, print, or sell a product of her intellect for a certain period of time.
  
- To obtain protection under the Copyright Act, a work must be **original** and constitute a(n):
  - (1) literary, musical, or dramatic work,
  - (2) pantomime or choreographic work,
  - (3) pictorial, graphic, or sculptural work,
  - (4) motion picture or other audiovisual work,
  - (5) sound recording, or
  - (6) architectural work.
  
- It is impossible to copyright an **idea** or a **fact**; however, copyright law may protect a particular **expression** of an idea or **compilation** of facts.
  
- Like patents and trademarks, copyrights can be **registered** – in the case of copyrights, with the U.S. Copyright Office, as opposed to the U.S. Patent and Trademark Office.

# COPYRIGHT INFRINGEMENT

- A copyright grants its holder the same monopolistic control over his or her creation as a patent or trademark; however, a copyright may be obtained **only for works of art, literature, music, and other forms of authorship** (*e.g.*, computer programs).
- **Copyright Infringement:** Using a copyrighted form or expression of an idea, even with slight variations, without permission.
  - **“Fair Use” Doctrine:** Unlike patents and trademarks, federal copyright law provides a statutory defense to a claim of copyright infringement. Section 107 of the Copyright Act permits a person or organization to reproduce copyrighted material without paying royalties as long as the reproduction constitutes “fair use” including, but not limited to, reproduction for purposes of **criticism, commentary, news reporting, teaching, scholarship, or research.**

# TRADE SECRETS

- **Trade Secret:** Information or a process that gives a person or business an advantage over competitors who do not have access to the information or process.
  
- Trade secrets include such things as **customer lists, pricing information, marketing techniques, plans, research and development, production methods**, and, generally, anything else that sets an individual business apart from and would have value to its competitors.
  
- Trade secret protection extends both to **ideas** and to their **expression**.
  
- Although common law generally protects trade secrets, most states have enacted some version of the **Uniform Trade Secrets Act**.
  
- In 1996, Congress enacted the **Economic Espionage Act**, making theft of trade secrets a federal crime.

# INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY

- **The Berne Convention:** The copyright of any work written by a citizen of a signatory country and any work first published in a signatory country, regardless of the author's citizenship, must be recognized by all signatory countries.
  - Works first published after March 1, 1989 are protected even if the signatory country has no prior notice of the copyright.
- **The TRIPS Agreement:** Signed by representatives of more than 100 nations in 1994, this agreement established, for the first time in many countries, standards for the international protection of patents, trademarks, and copyrights for movies, computer programs, books, and music.
  - Each signatory must (1) include in its own intellectual property laws protections for foreign intellectual property rights which are not substantially different from the rights afforded to domestic intellectual property, and (2) provide legal mechanisms for foreign rights holders to enforce their rights against domestic infringement.
- **Madrid Protocol:** A treaty allowing a U.S. company wishing to register its trademark abroad to do so with one application.

- **The Anti-Counterfeiting Trade Agreement (ACTA):** An international treaty designed to combat global counterfeiting and piracy. The idea is to create a new standard of enforcement for intellectual property rights that goes beyond TRIPS.