

Intellectual Property: What It Is, What It Does

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Intellectual property, or IP, is loosely defined as any property interest that is produced as the result of human thought. We protect IP through patents, trademarks, trade secrets, unfair competition laws, licensing, franchising, and copyright.

Patent

Patent protects inventions by granting the patent holder the right to exclude others from making, using, selling, distributing, or importing the patented invention in the US.

To obtain a patent, the inventor must show that the invention is new, non-obvious, and useful. This is done in the US by filing a complete disclosure of the invention with the US Patent and Trademark Office (USPTO) and claiming the invention. The inventor must demonstrate that the invention fulfills patentability requirements before a patent issues. A patent in the US is generally valid for 20 years from the date the application was filed.

The US recognizes three types of patents:

- Utility patents—most people associate only these with patents—protect a device or method.
- Plant patents protect inventions of new plants that can be asexually reproduced and are not tubers.
- Design patents protect the non-functional design elements of inventions.

In addition, the USPTO recognizes two types of patent applications:

- A *provisional* patent application is filed with the USPTO and is valid for one year from the date of filing. It is never examined and it never matures into a patent. The invention must fulfill the patentability requirements, but no claims need be written. Its purpose is to reserve a filing date for the follow-on *non-provisional* application.
- A *non-provisional* application is examined, and, if it meets patentability requirements, eventually issues as a patent.

Trademarks, Service Marks and Trade Dress

Trademarks and service marks identify the source of a good (trademark) or service (service mark). Trademarks protect the designation of the source of goods in commerce, while service marks do the same for the source of services in commerce.

Trademarks can be registered and protected under state or federal law for as long as the owner of the mark continues to use the mark in commerce (interstate commerce for federally registered marks; intrastate commerce for state-registered marks) and pays the required periodic renewal fees.

Trade dress, governed by state law, protects the general look-and-feel of a business. When you walk into McDonald's, whether that franchise is in Saratoga or Tokyo, you know you're in a McDonald's because the store looks like McDonald's.

Copyright

Copyright protects works of authorship that are affixed in a tangible



medium. In the US, copyright is protected only at the federal level. While copyright attaches when the work is affixed in a tangible medium, to obtain full protection the copyright holder must register the work with the Copyright Office.

Trade Secret

Trade secrets are those methods, processes, and inventions that a company chooses not to disclose through the patenting process or otherwise make available to the public. Protect them by keeping the secret. Once disclosed, the protection afforded by the trade secret is lost.

Unfair Competition

Unfair competition is any activity that unfairly utilizes the intellectual property of another, or unfairly prevents the owner of intellectual property from developing and profiting from that property. Examples include trademark infringement, patent infringement, plagiarism, and industrial espionage.

Licensing and Franchising

Licensing and franchising are two forms of a contractual arrangement whereby one entity provides consideration (usually payment) to another in order to utilize the intellectual property of that other. There are, though, major differences between them, both in how they operate and in the governing law. To distinguish between them, the Federal Trade Commission promulgates a three-pronged test.

- First, the franchisee's goods and/or services are offered and sold under the trademark of the franchisor.
- Second, the franchisor requires the franchisee to make a minimum payment of \$500.
- Third, the franchisor maintains significant control of, or provides significant assistance to, the franchisee's operation methods.

BURGER KING® is a franchise. BURGER KING franchisees pay a significant amount of money into the BURGER KING parent corporation, which owns the mark, for the right to open a BURGER KING restaurant. Thereafter every BURGER KING franchise must follow the formula provided by the business model: serve the same food and drink, use the Burger King marks and advertising, and so on. BURGER KING franchisees benefit from the advertising and business model provided by the franchisor, and BURGER KING benefits by maintaining tight control over the use of its mark.

A simple license may comprise having the licensee pay to use the IP, but the IP can be deeply embedded in the licensee's own IP, such that the presence of the licensed IP may not be even visible to the end customer.

Conclusion

Every business owns intellectual property. Whether your IP is your trade-secret client listing, your written manuscripts, your marketing collateral, your business goodwill, or your multi-million-dollar patent, your business is in business because of the creativity behind your IP, and that creativity deserves protection.

Intellectual property protection comes in several varieties, each of which is designed to protect a particular aspect of the creative products of the human mind.