



Intellectual Property: Protecting Business Assets with Patents, Trademarks, Copyrights, and Other Tools

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As a small, micro, or home-based business owner, you have probably read or heard the term “intellectual property.” What does that term mean for your business? Does your business have anything to protect? Do you know where and how to get this protection?

The purpose of this publication is to answer intellectual property questions and direct you to resources that can help protect your property. The concept of intellectual property law is introduced. Information about the law and how it might benefit you is provided. Understanding the laws will also help you avoid the improper use of someone else’s intellectual property. Your best local resource regarding intellectual property is:

Patent and Trademark Library
501 Edmon Low Library
Oklahoma State University
Stillwater, OK 74078-1071
405-744-7086
lib-ped@okstate.edu
www.library.okstate.edu/patents/

Intellectual Property Defined

Intellectual property can be a business asset that offers a firm a competitive advantage over others. It refers to “any product of the human mind or intellect, such as an idea, invention, expression, unique name, business method, industrial process, or chemical formula, which has some value in the marketplace, and that ultimately can be reduced to a tangible form” (*Patent It Yourself*, 10th ed., 1/10). These assets are important resources to a business. Because of today’s expanding electronic connections, it has become easy for others to pirate this type of resource. Protecting those assets has now more than ever become more important. However, business owners are often puzzled about the words “patent” or “copyright” or the symbols © (copyright) or ™ (trademark). As a business owner, it is important to understand what these various words and symbols represent, how to obtain them, and what legal protection they offer.

Intellectual property represents the products of creative minds. In its broadest interpretation, intellectual property law covers the legal protection of innovations, ideas, and how these items are transferred between people. This law includes

Oklahoma Cooperative Extension Fact Sheets
are also available on our website at:
<http://osufacts.okstate.edu>

patents, trademarks, copyrights, trade secrets, and trade dress. The survival of the business would be harder without a mechanism to protect this property.

There are five primary areas of intellectual property law.

Patents - A legal right, for a limited term, that prevents others from using, selling, or making an invention or discovery that you own.

Trademark/Service mark - The words, symbols, designs, or logos that identify your product or service. Examples are McDonald’s Golden Arches, the Nike Swoosh, or “Fly the Friendly Skies of United.”

Copyright – Protects original works of creative expression in a fixed and tangible medium and gives the creator the exclusive right to their use, display, and reproduction. Copyright law covers art, books and other written work, video and audio productions, computer software, sculpture, choreography, etc.

Trade Secret - Is information known only within a firm that gives it a competitive advantage such as the Coca-Cola formula or the Kentucky Fried Chicken recipe.

Trade Dress - Protects the overall image and appearance of a product including packaging, color, size, shape, and graphics. The Hershey’s Kiss chocolate candy is an example.

The following information discusses each of these in greater detail. Resources are provided on how to obtain such protection. Some of the processes are easy and relatively inexpensive while others are more difficult and/or expensive to obtain the protection.

Patents

Patents provide protection for innovative working mechanisms. Examples of inventions that can be patented include machines, processes, (how something is done), designs, or the composition of matter. To be granted a patent, the invention must be new, useful, and able to be put into practice. There are three different types of patents.

Utility patent is granted on any new and useful machine, process, or composition of matter. It also may be granted for new and useful improvements on existing items. These patents exclude others from producing the invention, mechanism, or process for a period of 20 years. Simply speaking, a utility patent protects how the invention works. There is an initial

patent application fee, a patent issuance fee, and maintenance fees due at 3 1/2, 7 1/2, and 11 1/2 years. There are provisions for lower fees if you qualify for small entity status (independent inventor, small business, or nonprofit organization). As a general rule, recipes are not patentable.

A **design patent** protects how the item of a manufacture looks or its appearance. Both a utility and a design patent may be filed on the same item. The design must be original and of commercial concern. Design patents provide protection for 14 years. Filing fees and issuance fees are required.

A **plant patent** is granted on any distinct and new variety of an asexually reproduced plant.

An individual can file a provisional application. Although it offers no protection, it allows you to use the words "patent pending." A full application must be filed within a year. Also U.S. patents only provide protection in the United States.

Often people are interested in patenting a recipe. However, recipes are simply blends of common food ingredients. Therefore, **recipes cannot be granted patent protection.** The usefulness of the product is unchanged (it is still a food), and the generic nature of the ingredients does not provide a unique appearance. Besides, patenting a recipe would require public disclosure of the recipe. The intellectual property represented by a recipe is therefore typically kept as a trade secret.

An individual should research existing patents before filing to ensure the invention is unique, new, and is not already protected. You can do some of this work yourself, but when developing and filing your patent application, inventors are encouraged to use the services of one of the attorneys and agents registered with the U.S. Patent and Trademark Office (USPTO). A list of these names is available from the USPTO's Inventors Assistance Center page <<http://www.uspto.gov/web/offices/pac/dapp/pacmain.html>>. *Be aware that by publicly disclosing your idea to a third party, such as some of the fraudulent services offering a 1-800 invention protection service, may cause you to lose valuable rights!*

For more help about the patent process contact the Patent and Trademark Library at OSU, 405-744-7086. Contact the U.S. Patent and Trademark Office at: 800-786-9199 or visit their Web site at: <<http://www.uspto.gov/>>.

Note: Remember that not all ideas are suitable for or need protection. For example, ideas with a short life cycle (i.e., the pet rock craze), a patent would probably not be necessary.

Trademark/Service mark

A trademark is a word, name, symbol, device or any combination that identifies and distinguishes the goods or services of one manufacturer or merchant from another. Services may also be termed servicemark. The symbols TM (trademark), SM (servicemark), and/or ® (meaning the mark has been registered with the U.S. Patent and Trademark Office) are used to distinguish marks.

To be protected, the mark must be unique, not used by anyone else, not an unmodified generic noun or phrase, and must be used or intended to be used in commerce. Marks used to represent a company name are termed trade name. The company name may be a registered mark, and often the company produces several products, each of which may have their own separate mark. For example, General Motors

has registered GM, but it has also registered Oldsmobile, Chevrolet, etc.

Before using any mark, it is important that a search be done of existing marks. This will decrease the possibility of using someone else's mark. This reduces the costs of defending the use of a mark and/or developing a new mark later. A preliminary search of federal trademarks can be done on the U.S. Patent and Trademark Office Web site. Oklahoma trademarks can be searched at the Secretary of State's Office 405-521-3912. The **Tulsa City/County Library, 918-596-7991** can search for trademark use in other states as well as those protected by common law.

The level of protection granted to a trademark depends on its use and registration. Unlike a patent, a trademark is protected from the moment it is first used in trade. This is known as common law protection. Although no registration is required, the amount of protection for the trademark is limited. If two or more companies should use the same trademark, the company that has registered will have a significant legal advantage.

A trademark can also be registered at only the state level. This provides more protection but typically only from other people within the same state using the mark. State registration can be done with the **Oklahoma Secretary of State.**

The greatest amount of protection for the trademark comes from a federal registration. Federal registration is preferred if you expect to do business in more than one state or overseas. It offers the greatest protection for your mark. U.S. registration only provides U.S. protection.

Unlike patents, the federal registration of a mark lasts indefinitely by filing an initial 10-year application and then re-filing an affidavit during the 5th year of every 10-year period. The Patent and Trademark Library at OSU can help with Federal trademark questions, or contact the **U.S. Patent and Trademark Office.** A helpful booklet, "Basic Facts about Trademarks" can be obtained from their Web site. A person can do his or her own filing online, but using an attorney familiar with trademarks may be desirable.

Copyright

A copyright protects the authors of "original works of authorship" whether published or unpublished. Copyright protection is quite broad and covers literary, musical and drama works, visual arts, audiovisual and architectural works, and sound recordings. You cannot copyright works that have not been put into a tangible form. Also titles, names, short phrases or slogans; familiar symbols or designs; variations of typography; lists of ingredients or contents; ideas or concepts; or works containing information that is common property cannot be copyrighted.

A copyright allows you to reproduce a work, distribute copies, prepare derivative works, and perform and/or display the work. The copyright only protects the way you may display the information. In the case of facts or data, it may not protect the data itself.

Copyright protection is automatically granted from the moment a work is fixed in a tangible medium. It need not be registered to be valid but copyright registration is recommended since it makes a public record of the basic facts. The original author holds the copyright typically for their lifetime plus 70 years. To learn more about and file a copyright registration

see the U.S. Copyright Office Web site: <<http://www.copyright.gov/>>.

Note: The “author” of a work made for hire is the employer or hiring party for whom the work was prepared. This default ownership rule is known as the work made for hire rule. Unless the parties have agreed otherwise in a signed written document, an employer owns the copyright of a work made for hire. For commissioned work, if the parties agree and the work fits one of the eight categories specifically designated, then the work for hire is owned by the contracting individual.

Trade Secrets

A trade secret is information such as a product or process that you (or your company) possess and do not want to disclose, i.e. the formula for Coca-Cola or the recipe for Kentucky Fried Chicken.

Trade secrets are not a regulatory process; there are no forms to file. They are obtained by contract. Your rights to keep the trade secret private are upheld by the court of law. In such a proceeding, you are required to show that the secret offers your firm some type of competitive advantage, that management treats the trade secret as confidential information, and that the information is not generally known outside the firm. Preserving such secrecy requires you to ask all employees, contractors, and others who come into contact with your firm to sign an agreement stating they will keep information private and confidential. You are required to take every reasonable step to maintain confidentiality.

For more information about trade secrets and confidentiality agreements, contact your attorney. For examples of such agreements you can also contact:

OSU Food and Agricultural Products Center
Oklahoma State University
Stillwater, OK 74078
405-744-6055
www.okstate.edu/OSU_Ag/fapc

Trade Dress

Trademark law in part covers trade dress which describes a product's unique packaging or appearance. Trade dress may include elements such as shape, design, color, advertising, or graphics. Competitors' products may not look like yours if done simply to confuse the consumer. Such elements of trade dress are upheld through the judicial system under Section 43(a) of the Lanham Act of 1946. The legal system has interpreted trade dress to mean that competitors cannot copy the total image of your product, especially when the elements copied have more to do with image rather than function.

There is not a guarantee that the product look will be protected. In such lawsuits, it is up to the originator of the product to prove that its design is distinctive, the design elements

are not part of its function, and that customers are likely to be confused about where the product came from. Customer confusion is often the key element. If you believe you have a trade dress issue, contact an attorney.

Summary

Intellectual property can be the most significant asset of your firm. It is important that you carefully consider this information if you have such property. This publication provides you with resources that can help you get the needed protection. Being proactive in protecting yourself can save you time and money later, if you should have to defend a violation of your business rights.

References

Lickson, C. P. (1994) A legal guide for small business. Washington, DC: U.S. Chamber of Commerce Small Business Institute.
Basic Facts About Patents, www.uspto.gov/
Basic Facts About Trademarks, www.uspto.gov/
U.S. Dept of Commerce, Patent and Trademark Office. www.uspto.gov/
U.S. Copyright Office. www.copyright.gov/

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The Oklahoma Cooperative Extension Service

Bringing the University to You!

The Cooperative Extension Service is the largest, most successful informal educational organization in the world. It is a nationwide system funded and guided by a partnership of federal, state, and local governments that delivers information to help people help themselves through the land-grant university system.

Extension carries out programs in the broad categories of agriculture, natural resources and environment; family and consumer sciences; 4-H and other youth; and community resource development. Extension staff members live and work among the people they serve to help stimulate and educate Americans to plan ahead and cope with their problems.

Some characteristics of the Cooperative Extension system are:

- The federal, state, and local governments cooperatively share in its financial support and program direction.
- It is administered by the land-grant university as designated by the state legislature through an Extension director.
- Extension programs are nonpolitical, objective, and research-based information.
- It provides practical, problem-oriented education for people of all ages. It is designated to take the knowledge of the university to those persons who do not or cannot participate in the formal classroom instruction of the university.
- It utilizes research from university, government, and other sources to help people make their own decisions.
- More than a million volunteers help multiply the impact of the Extension professional staff.
- It dispenses no funds to the public.
- It is not a regulatory agency, but it does inform people of regulations and of their options in meeting them.
- Local programs are developed and carried out in full recognition of national problems and goals.
- The Extension staff educates people through personal contacts, meetings, demonstrations, and the mass media.
- Extension has the built-in flexibility to adjust its programs and subject matter to meet new needs. Activities shift from year to year as citizen groups and Extension workers close to the problems advise changes.

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