The ENTREPRENUER'S Guidebook Series™

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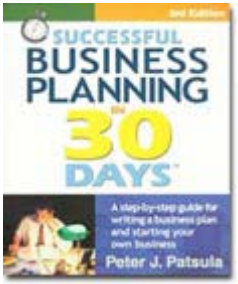

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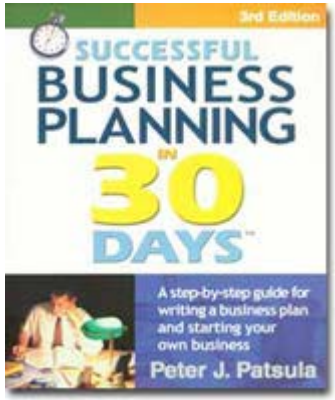

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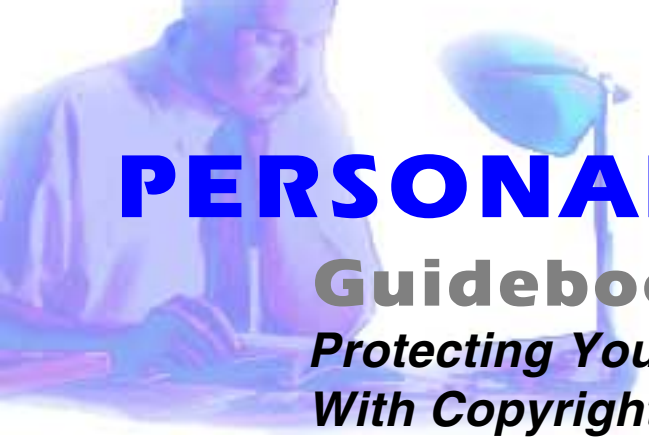
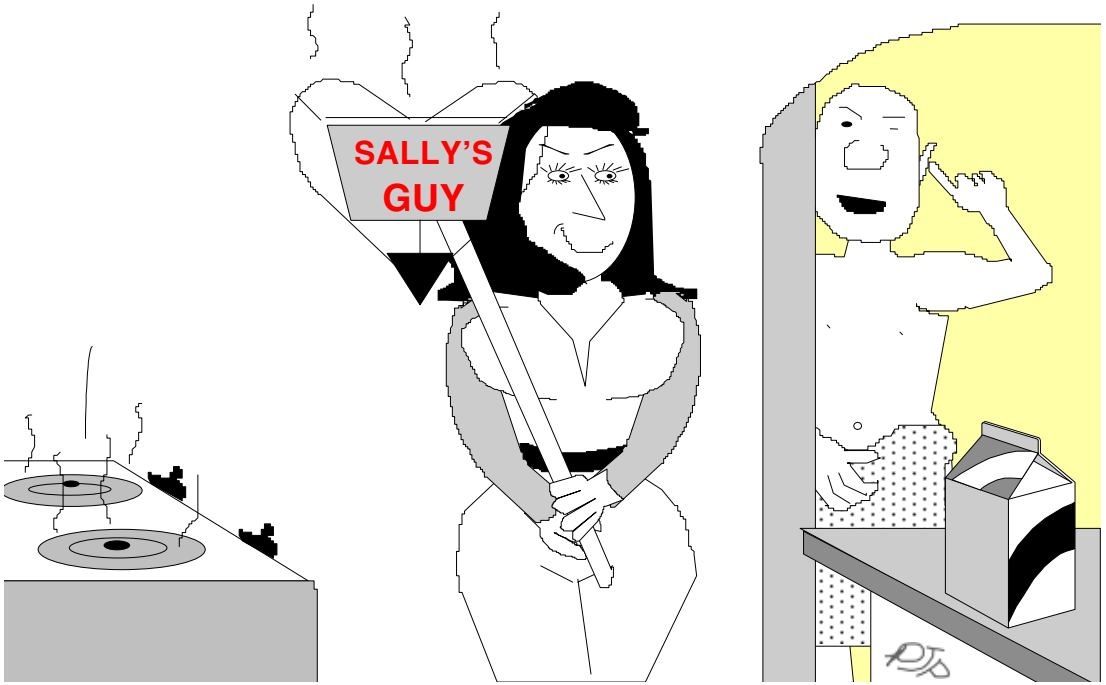


PERSONAL PLANNING

Guidebook #32:

Protecting Your Intellectual Property With Copyrights, Trademarks & Patents..... 4



"Hey . . . what the devil are you burning in there?"

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PROTECTING YOUR INTELLECTUAL PROPERTY WITH COPYRIGHTS, TRADEMARKS & PATENTS

IF you have a great idea with the potential for making a lot of money, you can bet once it becomes public, others will seriously consider ways to take advantage of it or even steal it. After all being innovative, the most important business skill anyone can have, is based upon taking existing ideas and changing them slightly to benefit yourself and others.

Protecting your ideas is therefore almost as important as coming up with them. The three most important ways you can legally protect yourself is through copyrights, trademarks and patents.

COPYRIGHT PROTECTION

COPYRIGHT protection is by far the most comprehensive and incomplete protection there is – copyright laws are broken everyday and often there is little a copyright owner can do about it (unless they have millions of dollars and large legal staff on retainer). However, out of all the ways of protecting your goods and services, it is the easiest, cheapest, and most internationally accepted.

COPYRIGHT PROTECTION

Protects a work created by an author, artist or composer such as a novel, screenplay, computer program, painting, photograph, sculpture, choreographic work, musical composition, or song lyrics. However, copyright law states quite specifically that there is no copyright in facts or ideas, only in the form or expression of an idea. Average copyright protection is the life of the creator plus 50 years.

In general, the primary function of copyright law is to protect the fruits of a persons work, labor, skill or taste i.e., the particular literary or pictorial expression chosen by the author. Copyright protection extends to a description, explanation, or illustration of an idea or system. This protection makes it unlawful for others to reproduce or copy any literary, dramatic, musical or artistic work without the consent of the copyright owner.

However, copyright law gives the copyright owner no exclusive rights in the idea, method, or system involved. If for example ideas can be taken

from a work without copying its order of words, organization of content, or its manner of presentation, than the copyright owner has little recourse.

It must also be kept in mind that a substantial amount of the work must be copied in order to infringe upon the rights of a copyright owner. Substantial refers to the most vital parts of a work. For example, in the music industry, copying eight bars of music from a song is considered substantial, but may not be considered substantial enough if copied from a symphony.

Keeping your profits means protecting the ideas that generated them in the first place.
SUPERTIP

Basic Rights for Copyright Owners

There are five basic rights that belong exclusively to Copyright owners. These are as follows:

- The right to reproduce copies of the original work (no one else can reproduce the work in any material form).
    - The right to distribute copies of the work to the public by sale or loan (no one else can distribute the work without permission).
    - The right to prepare derivative works based on the work (no one else for example, can make adaptation based on the original work).
- The right to perform the work in public, (no one can perform the work in public without consent, or broadcast it – this needs verification).

- The right to display the work to the public.

How to Get Copyright Protection

To secure copyright protection, it is necessary that labor, skill and/or capital be expended sufficiently to impart to a creative work some quality or character which the raw material did not possess. The creative work must also be original and the creator must live in a country, which is a party to the Bern Convention or the Universal Copyright Convention (UCC). Copyright protection occurs the moment a work is created without filing any legal documents or by publishing the work.

The © Copyright Symbol is generally the standard identifier of a Copyright Notice.

However, your legal protection is limited unless you:

Attach a proper Copyright Notice.
There are five basic elements in a Copyright Notice needed to get the fullest protection under present copyright laws. These elements are as follows:

- term “Copyright”
- © copyright symbol
- year of publication
- name of the copyright holder
- phrase “All Rights Reserved”

Copyright Term – The term “Copyright” is technically not required in a copyright notice. However, it should be noted that it may now be used instead of the © Copyright Symbol in the U.S. (this makes notification on ASCII documents much easier to accomplish).

© Copyright Symbol – The © Copyright Symbol is generally the standard identifier of a Copyright Notice. It is required in many foreign countries in order for copyright protection to attach

Year of Publication – Whenever a Copyright Notice is given, the year of publication must be included in the notice.

Name of Copyright Owner – The Copyright Notice must also include the name of the owner of the copyright. However, it is important to note that the legal owner of the copyright is not necessarily the author or creator of the work. Works created by employees in the course of their employment or by independent workers who sign "Work for Hire" agreements are considered to be creating the on behalf of the employer.

Reservation of Rights – In order to gain copyright protection in Bolivia and Honduras you must follow the requirements of the Buenos Aires Convention. This Convention requires that the phrase "Reservation of Rights" be included in the Copyright Notice.

Copyright will not protect ideas, facts, titles, names short phrases and blank forms.

Copyright © 1997 P.J. Perry
All Rights Reserved

NOTE Works can be noticed – or marked – without actual federal registration. The 1976 Copyright Act also provides for the correction of errors and omissions to the copyright notice on works published on or after January 1, 1978. However, works published under the copyright owners' authority before that date, without a proper copyright notice, are

not granted copyright protection under this law.

Register your copyright with the Copyright Office. You cannot launch a lawsuit against a copyright infringer until your work has been registered.

How to Get Copyright Protection in the U.S.

For more information on U.S. copyright, call (703) 557-INFO or write to:

Copyright Office
Library of Congress
Washington, DC 20559.

You cannot launch a lawsuit against a copyright infringer until your work has been registered.

How to Get Copyright Protection in Canada

For more information on Canadian copyright, write to:

Copyright Branch
Canadian Intellectual Property Office
Industry Canada
50 Victoria Street
Place du Portage, Phase I
Hull Quebec, K1A 0C9

Types of Copyright Protection

The Copyright Act of 1976 states that an original expression is eligible for copyright protection as soon as it is fixed in a tangible form. Consequently, almost any original expression can be protected as soon as it is expressed. Items of expression include:

- literary, dramatic, and musical works
- pantomimes and choreography
- pictorial, graphic and sculptural works
- audio-visual works
- sound recordings
- architectural works

However, ***Ideas***, *Methods*, or *Systems* are not subject to copyright protection. Copyright protection, therefore, is not available for:

- business operations or procedures
- mathematical principles
- procedures for doing, making or building things
- scientific or technical methods or discoveries
- any other idea concept, process or method of operation

More specificially, copyright protection is not available for:

- algorithms
- blank forms
- column headings
- facts
- formats
- formulas
- lists and tables takens from public documents

Section 102 of the copyright law, title 17, United States Code, states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

U.S. COPYRIGHT LAW

- names & titles
- short phrases
- simple checlists
- standard calendars

More detailed descriptions of items listed above – as they pertain to small business owners – are given below.

In order to be protected by copyright, a work must contain at least a certain minimum amount of original literary, pictorial, or musical expression.
POWERPOINT

Blank Forms – Blank forms and similar works, designed to record rather than to convey information, cannot be protected by copyright. Since the ideas, plans, methods, or systems described or embodied in a work are not protected by copyright, there is no way to secure copyright protection for the idea or principle behind a blank form or similar work, or for any of the methods or systems involved in it.

NOTE If original photographs or an original compilation of terms or phrases is published in conjunction with a blank form, copyright protection for would extend only to the original photographs or compilation of terms or phrases, and not the blank form.

Books – There are three special rights for people who own book copyrights that deserve detailed clarification. These are *book rights*, *serial rights*, and *derivative rights*:

Book Rights – Book rights can be broken down by the form in which they will appear: the four most common being, hard-cover, paperback, trade paperback, and the right to publish book club editions.

Serial Rights – Serial rights can be broken down by the order in which they will appear, first serial rights (the appearance of the piece for the first time in a serial publication like a magazine), and second serial rights, (either the second appearance in a serial publication or the first serial appearance after publication in book form).

Serial rights can be sold as one time rights (can be published any time, but no guarantee that it won't appear somewhere else first), or simultaneous rights (material can appear in other non-competing publications at approximately the same time). Serial rights can be broken down even further by territory. For example: first North American serial rights, British book rights, South American paperback rights.

Make it a personal rule never to copy any three words in a row.
DAN POYTNER
Self -Publishing Manual

Derivative Rights – Derivative rights include motion picture rights, television rights, sequel rights, merchandising rights, language translation rights, and condensation or adaptation rights.

Brochures & Catalogs – Brochures, catalogs, flyers, newsletters, letters and other written works are protected under literary copyright.

Calendars, Charts & Other Unoriginal Works – Copyright protection does not extend to works consisting entirely of information that is common property containing no original authorship; for example: standard calendars, height and weight charts, tape measures and rulers, schedules of sporting

events, and lists or tables taken from public documents or other common sources.

Compilations – A compilation that requires a large degree of skill and amount of labor is easier to protect than one that does not. In order to be protected, compilations must have merit, must be independently compiled, and it helps if the compilation is published in permanent form like a book.

Ideas – Copyright protects form and expression not content. It protects the product, not the elements or raw materials the product is based on. In other words, there is no copyright in ideas – only in the manner of their expression.

More specifically this means that there is no legal liability for using someone else's idea, unless it was submitted and received in confidence, or in accordance with a contract that spells out the relationship between the parties concerned. This means that a copywriter is free, to use any infor-

Industrial Designs

THE OUTWARD appearance of an article of manufacture, i.e., its particular shape, pattern or ornamentation, may be registered as an industrial design. A registered industrial design cannot be identical or similar to others already registered. In Canada, registration provides exclusive rights to the design for five years, and can be renewable for an additional five years. There is no protection without registration. To register a design, you must file a drawing and description with the "Commissioner of Patents."

mation that can be found in books on a particular subject. Likewise, an inventor is free to use any information that can be found on a certain product's design and even to make and sell their own working copies of anything shown or described.

EXAMPLE If an author writes a book explaining a new system for manufacturing plastic egg cartons, the copyright in the book, which comes into effect at the moment the work is fixed in a tangible form, will prevent others from publishing the text and illustrations describing the author's ideas for machinery, processes, and merchandising methods. However, it will not give the author any rights against others who adopt the new manufacturing process for commercial purposes, or who develop or use the machinery, processes, or methods described in the book.

An inventor is free to use any information that can be found on a certain product's design and even to make and sell their own working copies of anything shown or described.

Industrial Designs & Inventions – Normally, inventions are subject matter for patents, not copyrights. However, under certain circumstances it may be possible to secure patent protection for an invention or an inventive design for an article of manufacture. The drawings or the models in which the design of a product first takes shape, can be copyrighted. Thus, it it possible to protect through copyright the external appearance of many new industrial designs (see sidebar on previous page).

Names & Titles – In general names and titles – whether they be for films, songs, books or plays are not entitled to copyright protection unless they are so long or complicated, that there invention can be said to be the result of the application of labor and skill. Copyright also does not extend to short phrases or clauses such as column headings or simple checklists.

However, this does not mean that anyone is free to use whatever title they wish. Titles of books, plays, motion pictures, songs, and even comic strips have become important commercial properties as they are increasingly being tied in with other commercial ventures. The legal test is whether the public is likely to infer that there is some connection between the title as used in advertising and the work on which the title originally appeared. If so, the title may not be used without permission without risking legal action allowed through "passing off laws." If a title uses non-generic words, it may be possible to have it trademarked.

If a title uses non-generic words, it may be possible to have it trademarked.

Photographs – Photographs can be considered creative works and thus copyrighted because their originality lies in the way the shot is composed and by the angle at which the camera is pointing at the scene.

NOTE Although, you can not take a photo of a photo, you can reproduce what is in the photo, by finding it and taking a picture.

U.S. Photograph Copyright Protection – On January 1, 1978 the Copyright Act of 1976 came into effect, superseding most of the

provisions of the 1909 act. Under the terms of the new law copyright protection subsists from the time a photograph is created. The creator of the photograph automatically and immediately becomes the holder of the copyright. There is no legal requirement to register and deposit copies of a photograph with the copyright office.

According to the act, a photograph created on or after January 1, 1978 is protected for the period of the creator's life, plus 50 years after his or her death. In the case of a photograph that is a "work made for hire," which is defined in Section 101 of the act, the period of copyright is 75 years from publication or 100 years from creation, whichever comes first.

It used to be that in order to be afforded any copyright protection, one needed to attach a copyright notice to the work. While this is no longer the case, it is still customary to attach a copyright notice on copyrighted works in order to be eligible for certain types of damages.

SUPERTIP

A photograph created before the 1976 law came into effect, but neither published nor registered for copyright before January 1, 1978, is automatically given Federal copyright protection under the 50 years plus-life systems or as a "work made for Hire." Transfer of ownership does not convey any right in the copyright to the purchaser, unless there has been an agreement to that effect.

Slogans – Slogans or short phrases are generally not entitled to copyright because insufficient skill and labor is used in their construction. Once

again, it is not the idea itself, but the resolution of the idea into material form which is entitled to copyright. However, some slogans, like titles, can be trademarked.

Duration of Copyright Protection

How long a copyright lasts depends to a large part on whether the work was created before or after January 1, 1978. If the work was published, performed, sold or broadcast, before 1978, the copyright expires 75 years from the date of publication, performance, sale or broadcast (if the copyright was indeed renewed). If the work was created before 1978, but not published, performed, sold or broadcast, the copyright will expire on December 31, 2002.

If the work was created after 1978, the copyright will last for the life of the author, plus an additional 50 years.

If the work was created after 1978, the copyright will last for the life of the author, plus an additional 50 years. If the work was not published, performed, sold, or broadcast in author's lifetime, the copyright protection is 50 years from end of calendar year when first done so. If the work was created after 1978, and the work is owned by someone other than the original author, the copyright expires 75 years from the date of publication, performance, sale or broadcast or 100 years from the date of creation, whichever occurs first.

What Constitutes Copyright Infringement?

What constitutes copyright infringement is often unclear. However, if legal action is

taken on your behalf, your lawyer will concentrate on pointing out the resemblance between your work and anothers, claiming that these resemblances are too many and too close to be coincidence. The defendant then has to produce a reasonable explanation as to how these resemblances came into existence without copying.

In trying a copyright infringement case, the courts will look at the following four key factors:

- *Purpose and Character of Use –* When considering whether any infringement has taken place, the courts will look at the purpose and character of use of the material in question. They will determine whether it is being used for commercial purposes e.g., to make a profit, or nonprofit educational purposes. The will also determine if it can be classified under one the "fair use" categories such as criticism, comment, news reporting, teaching, scholarship, or research. They will also look at the degree of transformation.

When considering whether any infringement has taken place, the courts will look at the purpose and character of use of the material in question.

NOTE This test indicates that preference will be granted to works that were created for non-profit educational purposes.

- *Nature of Copyright Work –* When considering whether any infringement has taken place, the courts will look at the nature of the copyrighted work i.e., whether it is artistic, educational or scientific. This test looks at the original work and

attempts to determine where that work is in the spectrum of worthiness of copyright protection. It acknowledges the fact that some works are simply more deserving of copyright protection than others.

- *Relative Amount* – When considering whether any infringement has taken place, the courts will look at whether the alleged copier has used a substantial enough part of the skill and labor of the original work compared with the whole. In determining this, they will look at both the *quantity* and the *quality* of the copied material. In other words, using a whole work may be fair use in some circumstances, whereas using a tiny fraction of a work may not qualify for fair use in other circumstance.

If it looks like it is copied than it probably is.
POWERPOINT

NOTE Some Justices have looked to see that "no more was taken than was necessary" to achieve the purpose for which the materials were copied.

- *Effect on the Market* – When considering whether any infringement has taken place, the courts will look at the effect upon the potential market for or value of the copyrighted work. This test considers the extent of harm to the market or potential market of the original work caused by the infringement. It takes into account harm to the original, as well as harm to derivative works.

NOTE A good exercise to test copyright infringement is to ask yourself to what extent you would let someone copy your own

work, based upon the above four guidelines (if it looks like it is copied than it probably is).

Understanding the Dangers of Paraphrasing – Some people think that as long as you don't use the original wording in a literary work that you are exempt from copyright violation. However, this is not true. Although ideas cannot be protected, the order of ideas can. Copying the exact order of thought, or closely paraphrasing the way in which the original author expressed an idea can be considered copyright infringement if a substantial amount of the work has been copied.

It is important to note that in certain situations it is permissible to use copyrighted material without consent of the copyright owner. This is called "fair use."

NOTE A good exercise to test copyright infringement is to ask yourself to what extent you would let someone copy your own work, based upon the above four guidelines.

Understanding the Idea of Originality in Copyright Law – In copyright law, the concept of "originality" can create some interesting situations. Unlike inventions, which according to patent law must be novel (never before created or discovered), copyrighted material need only be original. In other words, if you create a work all by yourself that is identical to someone else's, as long as you haven't been exposed either consciously or unconsciously to that persons work, you are entitled to copyright protection.

Understanding What Fair Use Means – It is important to note that in certain situations it is permissible to use copyrighted material without consent of the copyright owner. This is called "fair use." In general, you may use a portion of copyrighted information if:

- It is not taken out of context, credit is given to the source, your usage doesn't affect the market for the material, and the material used doesn't exceed a certain percentage of the total work.
- It is used for criticism or review in a newspaper, magazine or similar periodical.
- It is used for reporting current events.
- It is quoted in public.
- It is used for teaching (including multiple copies for classroom use).
- It is used in a school collection (a short passage).
- It is used for scholastic or research purposes (such as a copy of a single page).
- It is used to comment on scientific developments.
- It is used as a quotation of a passage or paragraph.

Patents, copyright and trademarks, as well as know-how or trade secrets are often collectively referred to as "intellectual property." The first three are also often referred to as "proprietary rights."

FUNFACT

Understanding When Copyrighted Material Enters Public Domain – The Public Domain is that repository of all works that for whatever reason are not protected by copyright. As

such, you are free to use them without permission or fear of copyright infringement.

Works that are in the public include:

- *Works for which the statutory copyright period has expired.* In general, this means you are free to copy any work that was first published in the United States more than 75 years ago. You are also free to copy works first published in other countries whose copyright laws the United States recognizes, if the copyright protection in those countries has also expired.

Federal documents and publications are not generally copyrighted, and therefore are considered to be in the Public Domain.

- *Works that were first published before 1964 in which the copyright owner failed to renew his or her copyright.*
- *Works of the U.S. government.* Federal documents and publications are not generally copyrighted, and therefore are considered to be in the Public Domain. However, being that more and more government work is being contracted out to private sources, make sure to check for a Copyright Notice.

NOTE It should also be noted that many on-line services distribute government documents and claim a copyright in "value added" elements such as comments, formatting, indexing and summaries. By stripping any added comments or other third party additions you can then use this material.

- *Works that were published in the U.S.*

with insufficient or erroneous notices before 1978. While it is all but impossible to lose copyright protection under today's laws, works published before 1978 that did not contain a valid copyright notice may be considered to be in the public domain.

- *Works that were published in the U.S. with insufficient or erroneous notice before March 1, 1989*. These types of work enter the public domain only if it has been more that five years since the last day of the year in which they were published and the proper steps to cure any omissions were not taken.
- *Works granted to the Public Domain.* Otherwise, copyrightable works may enter the public domain if the copyright owner gives the work to the public domain. However, the copyright owner must specifically grant the work to the public domain.

To avoid infringing on someone else's copyright, you must ask permission for anything you plan to use and you must get that permission in writing.

How to Legally Get Permission to Use a Copyrighted Work – To avoid infringing on someone else's copyright, you must ask permission for anything you plan to use and you must get that permission in writing. To locate the owner of the copyright, for a small fee the U.S. copyright office will conduct a search for you to determine whether a work has been registered or its ownership transferred.

Sometimes you can write to the Permis-

sions Department of the publisher of the material in question. If the publisher does not own the copyright, they may be able to tell you who does.

Once you know who the owner is, include the following basic categories in your letter:

- always identify the work you want to quote
- identify the exact quote or material which you intend to use
- the nature of the work you intend to quote it in
- how many copies of that work are likely to be printed

The writer of a manuscript does not necessarily own the copyright.

NOTE The writer of a manuscript does not necessarily own the copyright.

Avoiding Copyright Infringement

Copyright infringement can be avoided by establishing that a work was independently created. Therefore, records showing independent creation are helpful to avoid liability. However, even with such records, establishing independent creation may be difficult if the original work was widely disseminated or otherwise available to the allege infringer. In one such case, the court held that, although copying may have been unconscious, the original was nevertheless infringed.

NOTE All U.S. copyright matters are now the subject of the federal law – state laws regarding copyright no longer apply. A working knowledge of the federal copyright

law (title 17 of the United Sates code) can thus become your best protection against getting ripped off or getting into trouble for infringing someone else's copyrights. For information about getting a copy of this law write to the U.S. copyright office.

All U.S. copyright matters are now the subject of the federal law – state laws regarding copyright no longer apply.

TRADEMARK PROTECTION

A TRADEMARK may be a word, logo, distinguishing mark or other symbol that goods come from a particular company. It might be used by a person or company in a variety of ways – affixed to a product, displayed in an ad for the product, or stamped on a package or container of a product.

A TRADEMARK may be a word, logo, distinguishing mark or other symbol indicating that goods come from a particular company.

Trademarks are one of the most important ways a company creates brand recognition and can easily be your company's most valuable commodity. Over time, trademarks on products become closely identified with the product, impart prestige and value to it, and become of considerable marketing value.

Basic Forms of Trademark Protection

There are basically two forms of trademark protection:

- registered trademark ®
- "common law" trademark ™.

Registered Trademark – A Registered Trademark ® is used to protect a word, name, symbol, or device used by a manufacturer or merchant to identify and distinguish his goods from those of others. This mark indicates that the user has actually registered the item with the federal government, allowing maximum legal protection.

"Common Law" Trademark – A "Common Law" Trademark ™ is used similarly

but only as a “common law” notice. In other words, material marked this way is not necessarily registered with the government and thus has limited and not full protection.

NOTE Trademarks don’t necessarily have to be registered. Trademarks are protected under common law. However, by registering your mark, you do gain certain exclusive ownership under statutory law.

How to Get Trademark Protection

Trademarks can be registered with the Secretary of State and the federal government. State registration is usually processed within several days. Federal registration may take several months. Registering with the state protects your mark during the federal application period.

An application for trademark registration must be filed in the name of the owner of the trademark. Owners can file their own application for registration or may be represented by an attorney.

NOTE In 1988, the United States Trademark Law was amended and the new provision went into

TRADEMARK PROTECTION

Protects words, phrases, numbers, letters, pictures, designs or combinations such as logos and insignias, that distinguish or differentiate one manufacturer’s products and services from another. A product cannot use a common generic term as a trademark. Average trademark protection is 20 years from date registered and is renewable. In Canada, a registered trademark provides protection for 15 years. This protection can be renewed.

effect in November 1989. There is no longer a requirement that a trademark must actually have had commercial use before it can be registered. This requirement led to some companies to set up phony sales of new products in minuscule numbers just so they could attest that the trademark had been used.

There is no longer a requirement that a trademark must actually have had commercial use before it can be registered.

How to Get Trademark Protection in the U.S.

Details and forms for registering a trademark can be obtained by writing to your Secretary of State. For more information on U.S. Trademarks you can also contact the Department of Commerce Trademark Office, or write to:

Patent & Trademark Office
Office of Public Affairs
Crystal Pk., Bldg. 1
2011 Crystal Dr., Rm. 208B
Arlington, VA 22202
(703) 305-8341

Ask for the book: Basic Facts About Trademarks.

How to Get Trademark Protection in Canada

For more information on Canadian trademarks, write to:

Trade-Marks Branch
Canadian Intellectual Property Office
Industry Canada
50 Victoria Street
Place du Portage, Phase I

Hull Quebec, K1A 0C9

Proper Usage of Trademarks

In order not to step on anyone's toes when using a trademark or risk a lawsuit, use the following guidelines whenever using someone else's trademark in your publication, book, magazine and especially advertising:

- Use the generic product name with the trademark. Don't say Gremlin, say Gremlin washing machine.
- Post a trademarks used notice at the front of your book.
- Use special typography for the trademark if necessary in order to successfully represent the trademark.
- Avoid incorrect grammatical forms of the trademark.
- Do not vary the trademark.

The major purpose of the laws concerning patents, trademarks, copyrights and industrial designs is to allow the inventor to exploit the commercial applications of his or her work by protecting his or her invention from duplication by others for a limited time.
POWERPOINT

Popular Usage of Trademarks

Many companies run continuous ads in trade publications reminding readers that their trademarks are the property of their company. However, popular usage sometimes seems to be stronger than Trademark Law. Among the many registered, private trademarks that have become adopted in English parlance (often with no

awareness of their owners) are the following:

Band-Aid	Coke and Coca-Cola
Formica	Jeep
Kleenex	Ping-Pong
Q-tips	Vaseline
Scotch Tape	Styrofoam
Technicolor	Teflon & Orlon
Windbreaker	Xerox

A number of older trademarks have wound up in English-Language dictionaries. Among these are the following:

- aspirin
- cellophane
- celluloid
- escalator
- kerosene
- lanolin
- milk of magnesia
- shredded wheat
- thermos
- yo-yo
- zipper

Avoiding Trademark Infringement

As with patents, a business can infringe on another's trademark without copying it or even being indirect competition with its owner. All that is necessary is to use the same or a similar mark under circumstances in which consumers may be confused as to the source or sponsorship of the goods or services.

NOTE Honest use by a trader of his own

name or the name of his place of business, cannot be an infringement of trade or service maker.

Conducting a Trademark Search – Before applying for your trademark, make sure that your trademark does not infringe upon or duplicate someone else's mark. You can start a preliminary search in your local library, which may have a selection of trademark directories. If you don't find and evidence of your trademark being used, don't commit to it just yet. It is also necessary to determine whether the mark has been registered in the U.S. Patent and Trademark Office, which could give the registrant rights well beyond the market areas currently occupied.

Protection is Canada does not establish your right to use a trademark in the U.S. and vice versa. In the U.S. registration is possible but not required, for trademark rights can be established solely through use.
POWERPOINT

NOTE It costs precious start-up capital to have patent and trademark searches performed. However, proceeding in a new venture without doing so is equivalent to erecting a building or signing a long-term lease without checking the real estate title. Searches will ensure enjoyment of any hard-won market success. A close look before adopting a trademark is cheaper in the long run than the cost of advertising and new promotions designed to advise customers to seek your under a new name.

What a trademark search might reveal? A trademark search is the only way to find out whether a name of something confusingly similar is

being used by others as a mark for a product or company.

Keep in mind however, that even an extensive trademark search might not be sufficient. There are two reasons for this:

FIRST, in the U.S. it unnecessary for a firm to do more than use a trademark to have trademark rights in its market area. Consequently, a search may not locate all such prior uses.

SECOND, people may be able to prevent the use of a potential mark without having used it as a mark themselves, especially, when a trademark can be associated with others in such a way that consumers might presume that some kind of relationship might exists. For example, *Figaro* is the name of the cat in the Disney film *Pinocchio*. Although the Walt Disney Company does not have a monopoly on the use of the name, it might nevertheless, be able to prevent it from being used on a new product. If that seems too farfetched consider the company's concern if *Mickey* had been used.

A few years ago, NBC spent millions of dollars changing its logo. And then was sued because it was identical to that of another company.

FUNFACT

PATENT PROTECTION

ONCE REGISTERED a patent for a product or process grants the applicant the right to exclude others from the making or selling of the invention for a specified time. A patent may be for a new machine, product, process, technological development, or improvement that would not have been obvious beforehand to specialists in the technology being considered.

PATENT PROTECTION

Protects an idea, process, way of making things, or invention that is essentially better in some way than what was made or done before. A patent excludes others from making or selling your ideas, inventions, or products. Average patent protection is 17 years from date of issue and is non-renewable.

Small businesses have the most to gain from protecting their intellectual property. Larger firms can use economies of scale and lack of development costs to copy a new invention, sell it for 20 percent less, and completely wipe out the original creators.

Types of Patent Protection

There are two basic types of patents:

- utility patents
- design patents

Utility patents, provide 17 years of exclusive rights for inventions that deal with the way things work. Design patents afford 14 years of protection for significant improvement in the appearance of useful items such as car bodies or furniture. Both of these patents do more than prevent copying; they forbid

the making, using or selling of an invention similar to or the same as the protected invention, even though the second invention was independently created.

NOTE The 14- or 17-year protection period begins when the patent is issued – not when the application is filed.

The Symbol "Patent Pending" – While the Patent Office is conducting a patent search, to make sure that a product or process has not previously been patented, interim protection of a **PATENT PENDING** applies. This statement is permitted after a patent has been filed, even before the Patent Office makes a final determination of patentability under the law.

The patent system added the fuel of interest to the fire of genius.
ABRAHAM LINCOLN

How to Get Patent Protection

Patenting a new product or process is a complex, expensive and frequently time-consuming procedure that can take several years, with lots of back-and-forth activity between attorneys and patent examiners. It is possible for an individual to secure a patent without the services of an attorney, but this is often impractical.

In the U.S., an inventor has one year to file an application following the first public disclosure or sale of product or process being patented. This allows an individual or small company a chance to test the idea before going to the expenses of obtaining a patent. However, in some other countries the patent must be

filed before any public disclosure or sale of the invention in order to obtain protection. This makes this timing issue more complex.

NOTE Although patent law permits you to file your own patent application, this is very time consuming. The potential for error is also high. For these reasons, filing your own application is not recommended.

How to Get Patent Protection in the U.S.

For more information on U.S. patents, write to:

Patent and Trademark Office
Office of Public Affairs
Crystal Pk., Bldg. 1
2011 Crystal Dr., Rm. 208B
Arlington, VA 22202
(703) 305-8341

Commissioner of Patents
U.S. Patent Office
Washington, DC 20231

A Canadian patent confers rights only in Canada, not in the U.S. and vice versa.
POWERPOINT

How to Get Patent Protection in Canada

For more information on Canadian patents, write to:

Commissioner of Patents
Ottawa, K1A 0E8

How Much Patent Protection Do You Need

How much protection you get from a patent is up to what the patent examiner considers new and innovative in your claim. The

broader your claim, the better your protection, but the more difficult it will be to secure the patent. Getting the maximum possible patent protection in different countries before taking any steps to commercialize an idea can hurt your company more than it helps. Consider your financial resources.

NOTE In some cases, patent protection is not essential to successful commercialization. However, your chances of obtaining a license for an unpatented device are very slim, as most manufacturers will not even preview an unpatented invention.

How much protection you get from a patent is up to what the patent examiner considers to be new and innovative in your claim.

What is Patent Infringement

A patent infringement is an act of trespass upon the rights secured by a patent. The test of infringement is whether the device being contested does substantially the same work in the same way and accomplishes the same results as the device that has already been patented.

Infringing on a current patent exposes one to a suit for damages as well as an injunction (court order) against future use. Even an injunction can result in substantial losses, including the loss of current inventory. Although deliberate infringement is more serious, ignorance of others' patents is no defense.

NOTE One obstacle many individual inventors face is that if a large company takes the risk of infringing a patent; the only remedy an inventor has is to sue for damages. For someone with limited finan-

cial resources, the problems associated with launching and winning a lawsuit against a giant infringer may not be very appealing.

The Future of Patent Law – Although copyright laws are almost worldwide, patent laws are not. In the future however, as the world's economies become more closely interconnected, patent law may become more universal. New patents filed after the date of conception may be given worldwide protection.

As many independent inventors have learned to their misfortune, it is usually easier to patent something than to market it profitably.
SUPERTIP

Avoiding Patent Infringement

If you're hoping to market fairly new technology that doesn't appear to be patented, keep in mind that other inventors have one year from public sale or disclosure of their new idea to file for a patent application. Although there is no liability for infringement prior to issuance of a patent, you would have to cease making, using or selling the technology once the patent was issued to your competitor, thus losing both start-up costs and inventory. Never assume that, because a product is not on the market, it is unpatented.

Conducting a Patent Search – To conduct a patent search, to protect yourself from infringing on the patents of others, you will need to hire an agent or patent attorney. A patent agent is a technically trained person who has passed a special examination given by the U.S. Patent and Trademark Office. A patent lawyer is one permitted to draft contracts and provide other

general legal services. Patent searches can be expensive if one must consult foreign records; it is much less costly to determine whether technology is currently patented in the U.S.

Special Services Provided by the Government – The U.S. patent office provides the following special services useful for inventors:

Data Bank "Dialog" – Most patents granted since 1965 can now be accessed through a computerized data bank called "Dialog." Although many libraries can access this program, they will unlikely to be able to help you interpret the information. The patent office publishes a roster of all registered practitioners who can render an opinion of patentability or prepare and process applications for inventors.

Patent searches are comparatively cheap insurance against the possible need to retool or to absorb inventory losses.
SUPERTIP

Document Disclosure – The Document Disclosure Program offered by the U.S. patent office permits the certified storage of papers for up to two years in order to provide evidence of the date of the conception of an invention. Send a signed, dated and witnessed description of the idea, accompanied by two copies of a cover letter asking acceptance of the document into the program, $10, and a stamped, self-addressed envelope.

NOTE Be aware that some commercial firms charge up to $200 for filing a disclosure document.

Patent Search Help – The staff of the patent office can help you perform a patent search either at the search room or at one

of the 29 depository libraries that receive current issues of U.S. Patents. The patent office also maintains collections of earlier issue patents, offers publications of the U.S. Patent Classification System and other patent documents and forms, and can provide technical assistance in accessing information contained in patents. For more information about patent depository libraries, contact the U.S. Office of Patents and Trademarks.

The Gazette – For a small fee, a patented invention can be advertised in the patent office's *Gazette* as being available for licensing or sale. The *Gazette* is widely circulated among manufacturers, research companies and business owners. A *Gazette* entry includes the patent number, the name of the invention and the inventor's name and address.

The "Gazette" is widely circulated among manufacturers, research companies and business owners.

What a patent search might reveal? A patent search might reveal:

1. No current or expired patents cover the area of proposed research. If your invention or proposed improvements to a product or a process are novel, unique and offer significant advantages over prior designs, you may seek a patent or begin selling your new product without further ado.

NOTE If you begin selling without first filing a patent application, you immediately forfeit possible protection in many other countries and after one year will also forfeit any possibility of patent right in the U.S.

2. Someone one else has a current patent covering all or part of the proposed design. If an unexpired patent is found to cover any part of your proposed product or process, you know that this is not free to use without a license.

3. Someone else had a patent that has since expired; therefore, the information in the patent is now in the public domain. If the invention is now in public domain, you are free to manufacture and market it without concern for the patent laws.

The Benefits of Conducting a Patent Search

WHILE CONDUCTING a patent search, to make sure your claim will not infringe upon anothers, you may come across a host of unpatented ideas that are even better than the ones you are proposing. This in itself could make up for the price of the research. In fact, copying may actually be a way to avoid infringement. You can avoid potential problems by using technology that has been previously described in a printed publication, publicly used or on sale and gives no notice of patent coverage. These products are relatively free from the risk of infringement.

OTHER WAYS OF PROTECTING YOUR PROPERTY

THERE ARE many ways of protecting your company and its property other than using copyright, trademark, and patent laws. Consider the following:

If you think you have an ad with great pulling power, copyright it. To protect yourself from another company blatantly copying your ad, and duplicating your marketing strategy, register a copyright of your ad. That way, if anyone infringes upon your copyright, you waste no time launching a suit against them. This is of special concern to mail-order houses and direct mail businesses.

Before making your product publicly available in a foreign market through sales, advertising, or by publishing descriptive articles, you are strongly advised to seek the counsel of a patent attorney in the foreign country.
SUPERTIP

If you want better protection for your company name, use your company name in a logo. A well-designed logo is one of the most effective ways you can protect the ideas behind your products and services. A logo can not only protect your company name, but it can also be used to protect individual products and product names.

Make it difficult for people to steal your ideas. Don't photograph all your revolutionary designs on brochures. Don't make it easy for your competitors to see how your new invention works. Don't

list your ingredients if you don't have to. Make it difficult for people to get information on the internal workings of your machines, cosmetic formulas etc. Be careful who you give repair manuals to.

NOTE To discourage illegal use, software companies that write games for computers often print game entry codes on shaded paper that doesn't photocopy well.

To discourage illegal use, software companies that write games for computers often print game entry codes on shaded paper that doesn't photocopy well.

"Passing off" is an action in tort and can sometimes be used to protect a work which, through lack or originality, would otherwise not be entitled to copyright protection. The following three guidelines should be followed when considering court action. It is necessary to prove that:

a) The defendant has represented to the public that the goods, business or title are the goods, business or title of the plaintiff.

b) The plaintiff's goods, business or title have acquired a reputation with the public.

c) The defendant acted in such a way that it can be inferred that he intended to deceive the public into believing that his goods, business or title were the plaintiff's goods, business or title.

Protect trade secrets by setting up confidentiality agreements between your company and: employees, customers, licensees, contractors and others to whom this infor-

mation might be disclosed. Consider for a moment the things you believe give your company a competitive advantage. These are your trade secrets.

Trade secrets are usually limited to:

- chemical formulas
- manufacturing processes
- production machines

But they can also include:

- compositions of or lists of ingredients
- customers lists
- future price information
- news about new developments or innovations
- special devices or designs

The composition of Coca-Cola is a good example of a trade secret.
POWERPOINT

- any unique thing that only you or a limited group of people, are aware of and that is commercially valuable

Like any other secret, the best way to protect it is by not disclosing it to anyone. Another way is to require employees to sign a written agreement that assigns their inventions to the company, prevents them from competing for a given period of time after they leave the company, and or requires that they not divulge any confidential information to outsiders, either during or following their employment.

Anyone in a technical business or in a business where internal information may have value or may provide a competitive advantage should consider using such an

agreement.

Confidentiality agreements should also be required from:

- anyone retained by your company as a consultant or independent contractor
- other companies or strategic partners if your alliance involves divulging important information
- potential customers

Protect your ideas with a stamp. Without question the best way to protect a written work is by registering it in a copyright office. However, if your funds are limited, protection can be increased to some degree if you print a copy of your work, use a notarized seal to indicate authenticity, and mail it to yourself. Of course, when you receive it, don't open it. File it away somewhere safe.

Oral contracts are difficult to enforce in court. It is best to have a written agreement.

Protect your ideas, products and services with contracts. For a contract to be legally enforceable, it must involve five essential elements:

- an offer
- acceptance of the offer
- consideration
- both parties must be legally competent (of legal age)
- the subject matter must be legal

Money is the usual form of consideration, but a promise to give your company credit for an idea may be equally important, particularly if you are just launching a career. Oral contracts are difficult to en-

force in court. It is best to have a written agreement.

Protect your products, services, and ideas by penetrating the market and gaining customer loyalty and acceptance. The difficulty and cost of taking a product to market may be as big a deterrent to a potential competitor as the existence of a patent. Many inventors are concerned that someone will steal their idea before it can be patented. But effective protection sometimes means being first, and marketing as quickly as possible with a lot of fanfare. It can be argued that anyone with a good distribution system or promotional flair, has all the protection they'll ever need.

It can be argured that anyone with a good distribution system and promotional flair, has all the protection they'll ever need.

NOTE It is likely that you will come across a few exceptional opportunities in your lifetime. However, your success will depend more upon whether you act, how determined you are, whether you can capitalize your venture, and how good your marketing network functions NOT whether you obtain maximum protection under the law.

Sue for breach of confidence. To sue another for breach of confidence there are three elements essential for the action to succeed:

a) **FIRST**, the information which the action seeks to protect must be confidential.

b) **SECOND**, the information must have been communicated in circumstances

which imported an obligation of confidence on the recipient.

c) **THIRD**, the person against whom the action is to be brought must have made an unauthorized disclosure of the information.

Sue for libel if someone damages your company name. To libel somebody means to injure their reputation by making a false statement that will subject the person to ridicule or contempt in the community, particularly if it would tend to cause damage to the victim's business or profession.

The subject of protecting an idea, invention or other intellectual property is one that certainly should be discussed in a book about entrepreneurship and starting a business. However, get expert advice from an attorney experienced in theses areas. Often, these are complex questions that require expert counsel.

SUPERTIP

Sue for the misappropriation of any kind of information of competitive value. As long as efforts have been made to preserve secrecy, a suit may be brought against another for the misappropriation of almost any kind of information of competitive value. Misappropriation includes industrial espionage and breaches of confidential relationships (e.g., by former employees), but it does not include reverse engineering.

NOTE A trade secret suit will not succeed against those who independently discover

a secret process or compile commercially valuable information. Nor will it succeed if an aspect of a product's design or construction was obtained by examining a product purchased in the marketplace.

Treat important company information as confidential information. Confidential information need not be written nor need it be in any material form such as a record. It must however be secret – or private – information or it must be information, which has come into existence as a result of the expenditure of labor or money.

As long as an idea is not revealed under contract or by confidential disclosure, anyone can make use of that property without infringing any rights.

Examples of confidential information:

- details of an unpatented invention
- information contained in private letters
- matrimonial confidences relating to the private and personal affairs of one spouse learned by the other during the course of marriage
- notes of lectures given to private students
- plots of plays and novels
- trade secrets
- unpatented technology or internal business information that may be helpful to a competitor

Consider the following five key points regarding confidential information:

1. An idea made public, by word of mouth or in writing, immediately becomes

common property. As long as an idea is not revealed under contract or by confidential disclosure, anyone can make use of that property without infringing any rights.

2. The voluntary submission of an idea does not automatically set up a contractual relationship between the originator and the other party.

3. If there is no contract, no action of any kind can be brought by the originator for breach of trust or contract.

If there is no contract, no action of any kind can be brought by the originator for breach of trust or contract.

4. Ideas can be protected, provided the originator follows certain procedures governed by the law of contracts.

5. To protect your property, have the party, sign a contract stipulating if they use it you will receive compensation.

WHAT IF SOMEONE VIOLATES YOUR PROTECTED PROPERTY?

IF ANOTHER business or individual violates your protected property, you can either:

1. sue
2. settle out of court by reaching an agreement

Secrecy is the soul of business.
SPANISH PROVERB

Bear in mind that bringing any party to court takes a large amount of legal fees. Large businesses can get away with stealing ideas simply because they have lawyers on retainer just waiting for litigation. They will then drag a battle on for as long as possible, hoping the party suing will become discouraged or simply will be unable to afford the legal costs.

If your resources are limited, try and retain the services of a lawyer who will take a percentage of the winnings if the suit is successful, rather than charge you a set hourly rate. Then you can find out or be assured that the lawyers feel you you have an excellent chance of winning a case against an infringer.