Intellectual Property

We want to protect IP for two reasons:

1. Preventing invention
2. Protecting company's investment in their customers

There are two sets of IP tools in general.

- Preventing Others from **Making or Selling** Protected Products or Services
  - Trade Secret (state/federal)
  - Patent (federal)
  - Copyright (federal)
- Preventing Others from Providing Consumers with False/Misleading Information; Protecting Famous Marks
  - Trademark (state/federal)
  - Unfair Competition (state/federal)

Trade Secrets

> **Important**
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> **Definition 6.1**: Trade Secret
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> A trade secret is business or proprietary information that is formulas, processes, computer programs, customer and supplier lists, strategic business data, financial projections, research results, marketing strategies, customers' needs and profiles, business or product plans, even negative know-how.

Note that this is a **potentially very broad** list. Trade secrets are inherent to the company and doesn't require any filing to be valid.

- Patents and trademarks, on the other hand, are **NOT** valid or valuable until they are file, and they only applies to certain things

Negative know-how are past evidence of **failures** and **trials** of a company. They are valuable because knowing this would save a significant amount of R&D costs by an outside party.

- Especially important in the pharmaceutical industry

To prove a trade secret infringement, we will need to show **two facts**.

1. Company has a trade secret protection program in place
2. There is misappropriation of trade secrets

Trade Secret Program

There are four components.

1. Notification of trade secret
    - Also known as "read-in", conducted when an employee is hired
2. Identification system
    - Company needs to individuate any trade secrets in a clear and premise manner, but can't be **TOO** granular
3. Security
    - Reasonable measures and steps to protect trade secrets
    - These steps have to be **ABOVE** standards
4. Exit interview
    - Same as notification, also known as "read-out"

Misappropriation of Trade Secrets

This can be shown in **either** ways:

1. The trade secret is used or disclosed **WITHOUT** consent
2. Or is learned through improper means such as theft, bribe, corporate espionage, breach of fiduciary duty (inducement of breach), or fraud

However, if a trade secret is learned in **other means** than these, it is **NOT** identified as a misappropriation, thus the company **CANNOT** file a lawsuit against the party who is allegedly using the trade secret.

- This turns out to be a huge weak spot

Tldr

Protection from trade secret laws are pretty narrow. Trade secret is **no longer** a trade secret once it is publicly disclosed (though a company can still file a lawsuit for this). Hence, future misappropriation of such "secret" will **NOT** be protected.

Patent

Important

Definition 6.2: Patent

A patent is a **government-granted** right to **exclude** others from making, using, selling, offering for sale, or importing into the United States an invention.

There are three types of patents:

- Utility patent
- Design patent
- Plant patent

Patents are **time-bound** and **non-renewable** and under the **U.S. constitution** (federal law).

- In short, this grants a **short-term monopoly**
- In contrast, a **trade secret** lasts **indefinitely** until disclosed
  - Patents and trade secrets are mutually exclusive
    - Filing a patent means **disclosure**
  - Patent laws offer **broader** protection than trade secret laws, which only protects misappropriations

A company needs to file a patent at the **Patent Trade Office** (PTO). We will be discussing two out of the three patent types below.

Utility Patent

There are four elements we need to look for to establish a utility patent.

1. Novel: is this an invention or innovation in their respective field?
2. Non-obvious

3. Useful
4. Patentable subject
    - The subject needs to be an application of ideas, but **NOT known** ideas
    - Or it can be new ideas that are **USEFUL**

A utility patent has a lifetime of 20 years.

Design Patent

There are three elements we need to look for to establish a utility patent.

1. Novel
2. Original
3. Ornamental: pertaining to the appearance and shape of the product
    - Opposite of utility patent

Defense

There are two ways to defend against a **direct patent infringement** claim.

1. **Patent invalidity**
    - The subject matter should **NOT** be patentable in the first place (proving that it doesn't comply with at least one of the requirements of patent)
2. **Non-infringement**
    - The act does not really infringe plaintiff's patent

Innocent Infringement

Once direct infringement is established, the defendant can still argue for the case of **innocent infringement**.

Innocent infringement exists if

1. Infringement party claims **NOT knowing** the patent
2. And the patent holder didn't notify the public about the patent

> **Note**
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> Note that an innocent infringement is **STILL** an infringement - except that there is no punishment.

To disqualify innocent infringement, the plaintiff simply needs to tell the world about their patent.

- Through internet, it's fairly easy

If the plaintiff wins the case, the court has two ways of offering remedy to the plaintiff.

1. **Monetary compensation**
    - Most common way: how much the defendant made by exploiting the plaintiff's IP?
    - Preferred way
2. **Injunction**
    - Not preferred (costly and time-consuming)

Copyright

> **Important**
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> **Definition 6.3**: Copyright
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> A copyright is a legal ownership of an **original expression** over a **fixed and tangible medium**.
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> In general, a copyright lasts for **70 years** after the creator's death.

What can be copyrighted?

- Original expression of an idea
- Books
- Songs
    - Extremely complicated copyright laws:
        - Playing
        - Recording
        - Performing

Whereas the following most likely cannot be copyrighted:

- Names, slogans, brands
- Facts and ideas
- Useful articles or codes that have a utilitarian function

A copyright protects the owner from six main types of activities:

1. Reproduction
2. Distribution
3. Creation of derivative works
4. Live performance
5. Digital performance, and
6. Display

> **Tip**
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> Everything on TikTok resembles a copyright infringement by the definition.

Copyright Infringement

To prove a copyright infringement, a plaintiff needs to show the following **two elements**.

1. Two works are **substantially similar**
2. The infringer has **access** to the copyrighted item
    - The more substantially similar the two works are, the easier to prove that the infringer has access to the former.

Filing copyright

Copyrights are *created* as soon as the copyright item is being put in some fixed, tangible medium. However, there is a distinction between having a copyright and **filing a copyright**.

One **CANNOT** file a copyright infringement claim unless they had previously **filed** the copyright at the Copyright Office prior to the infringement.

- Incentivizes people to file copyrights early on
- However, legal protection is still present since copyright was already *created*

> **Note**
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> There is a 90-day grace period for published works such that if you filed your copyright registration within 90 days of the first publication of your work, you have full protection even if the infringement occurred earlier than your filing date.

Defense

The defendant can argue that the infringement is really just a **fair use** of the document. To argue this, they will need to demonstrate the following three elements:

1. Purpose of use
    - Must **NOT for profit** or **commercial use**
2. **Impact** on the author
3. **Amount** and substantiality of the portion used in relation to the copyrighted work

There are two types of remedy a plaintiff can seek after copyright infringement has been established.

1. **Actual damages**
    - Compensation: Profit made through infringing the plaintiff's copyright
2. **Statutory damages**
    - Compensation in the dollar amount of $30,000
    - **ONLY available** to if the plaintiff has **filed** their copy right before the infringement takes place

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Trademark

Important

Definition 6.4: Trademark
A trademark is a legally protected word, symbol, or image that **identifies some source** of goods or services. This can include

- Name, logo
- Trade dress (appearance or shape of a product)

A trademark lasts **indefinitely**.

The U.S. is very generous with what can be a mark (much more so than other countries).

Note that this is somewhat similar to a design patent. In fact, a company can always choose to file a design patent to win 15 years of time to build the **natural connection** between their designs of the product and their company brand.

> **Note**
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> Unlike the other forms of IP protection, trademark **DOESN'T** protect against **duplication** of product or service like copyrights and patents. Instead, they focuses on protection of a **substantially similar mark** that creates the **potential for customer confusion**.

This implies that trademark is only valid in their respective context. For example, Apple's trademark only protects the company in the electronics industry but not the fruit industry.

Trademark Infringement

To file an infringement claim, a plaintiff needs to showcase the following three elements are present:

1. Validity
    - The trademark must have been previously filed
2. Priority
    - The trademark was created earlier than infringer's trademark
3. Potential customer confusion

Defense

There are two ways to defend against a **trademark infringement** claim.

1. Invalidation
    - The trademark should be invalid in the first place because of
        - Generality: the trademark is **TOO general** and is of some **common usage**
        - No longer valid: there is no connection between the company and its copyright
2. Fair use
    - Nominative use only (only using the name) in the context of
        - Discussion
        - Criticism
        - Non-monetizing use
        - But **NOT** slander or defamation in any ways

> **Note**
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> Trademarks such as "Google" or "Uber" have already become very generic such that they have symbolized the action of web searching and ride-sharing, respectively. However,

these companies would **STILL need** to enforce a clear **difference** between their product and their trademarks; otherwise, their trademarks would be invalidated because of generality.

Tldr

Google can't use the word "Google" in place of searching in their official documents.

If the plaintiff wins the case, the court has two ways of offering remedy.

1. Money damages
    - Compensates the dollar amount of profit made by the infringement party
2. Injunction
    - Mandates the infringer to **IMMEDIATELY stop** infringing activities
    - Trademark owners are more willing to choose this route than in patent, oftentimes