

USING INTELLECTUAL PROPERTY TO GAIN A COMPETITIVE ADVANTAGE IN THE MARKETPLACE

There are many ways to gain a competitive advantage in the marketplace. For example, a company might be the “first mover,” have superior channels of distribution or the ability to manufacture at a lower cost. Intellectual property (IP) protection, which includes patents, trademarks, copyright and trade secrets, can likewise provide a competitive advantage in the marketplace.

One form of IP protection is the U.S. patent, which applies to an invention that is new, useful and non-obvious. In order to be considered new for patent purposes the invention cannot have been used commercially, offered for sale or disclosed publicly more than one year before the patent application was submitted. The United States Patent and Trademark Office (USPTO) accepts and reviews patent applications. Once a patent is issued, it gives the owner the right to prevent others from making, using, selling, offering for sale or importing the invention to the U.S. for 20 years from the date of filing. If the owner discovers that someone may be infringing upon the patent, the owner may take steps to prove infringement and enforce the patent. For a patent to be infringed upon, every element listed in a patent claim must be found, literally or equivalently, in the infringer’s device or method.

Another form of IP protection is the trademark, which functions to protect any distinct word, symbol or device used to identify the source of goods or services. This category includes company names, brand names, logos and even some colors and sounds. The USPTO receives and processes applications for federal registration of a trademark. In addition, a trademark can be registered with the Secretary of State’s Office for state protection. Unlike a patent, a trademark does not need to be registered to be enforced, though it is recommended. Registration with the USPTO provides nationwide protection, whereas a non-registered trademark would enjoy protection only a limited geographic area and only in certain cases. Trademarks also differ from patents in that there is no time limit to how long they can be enforced. As long as the trademarked name, phrase, logo, etc. is used continually it remains protected. In addition to continual use, registered trademarks require renewal with the USPTO or Secretary of States Office from time to time to maintain the registration. Similar to patents, trademark protection gives the owner the right to prevent others from infringing on the mark. Since the trademark serves as an identifier of the source of goods or services, trademark infringement occurs when another mark is similar enough to an existing mark that the public is likely to confuse the two. If the rightful owner of the trademark is able to prove the infringing mark is likely to be confusing, then the infringing mark may no longer be used.

Copyrights are another formal means of protecting intellectual property. A copyright can be applied to any original work of authorship fixed in a tangible medium of expression. A work is fixed if it is written down, recorded, saved, etc. Property protected by copyright includes books, songs, software and articles like this one. As with trademarks, registration of a copyright is not required, but it is recommended. The United States Copyright Office within the Library of Congress handles the registration of copyrights. A copyright gives the holder the exclusive right to reproduce, distribute, perform publicly and display publicly the copyrighted work. Typically, this right lasts

for the life of the author plus seventy years, unless the work was done for hire. Copyrights on works for hire typically last the earlier of ninety-five years from the date of publication or one hundred twenty years from the date of creation. A copyright is infringed if the author's work is copied without the author's permission or is substantially similar to the copyrighted material.

Trade secrets are a type of intellectual property held by virtually all companies in some form or another. A trade secret can be any valuable information not generally known or easily obtained. However, in order for the information to qualify as a trade secret, the company must use reasonable efforts to keep the information secret. For example, if a trade secret is disclosed to employees then the company must give notice to those employees that the information is confidential and is not to be disclosed. The more valuable the secret is, the more effort is required to keep it secret. Trade secrets can be as common as a company's client lists or as famous as the secret recipe for Coke and the Colonel's Original Recipe for KFC. There is no formal system for registering company secrets; they are simply held and protected by companies. As long as the information is kept secret there is no time limit on how long it can be enforced. Companies have the right to sue others who improperly acquire the trade secret or those who breach confidence regarding the trade secret. However, trade secret protection does not prevent the practice of reverse engineering.

As businesses strive to identify and create competitive advantages, they should be sure to carefully examine their intellectual property. Intellectual property that is adequately protected and effectively utilized can provide a powerful competitive advantage in the marketplace.

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