

What is Intellectual Property?

In the simplest of terms, intellectual property is that set of rights accorded to specific creative, inventive or intellectual efforts, and to a bundle of marketing rights. Specific areas of intellectual property include patents, trademarks, copyrights, moral rights, performer's rights, industrial designs, plant breeders rights, integrated circuit topography rights, as well as trade secrets and confidential information. Privacy and domain name rights are closely related matters. What follows is a non-exhaustive outline of certain basic concepts relating to intellectual property.

You can learn more in general at www.kerrnadeau.com but for specific issues you need the individual attention of an intellectual property professional. Fatal errors may arise because of mistakes or ignorance about timeliness or disclosures and early advice is recommended to avoid such problems.

Patents

A patent is the time-limited right given to patent owners to exclude others from making, using or selling the invention claimed in the patent. Except for patents granted as a result of filing in Canada prior to October 1, 1989, the term of a Canadian patent is from the date the patent actually issues, until twenty years from the Canadian application date.

To be patentable in Canada, an invention must be new and useful, and must not have been obvious to others who are skilled in the art to which the invention pertains. "Mere workshop improvements", "mere scientific principles", "abstract theorems", "mathematical formulae", and "higher life forms" are not patentable in Canada. The advice of a patent professional is essential in determining whether or not an invention is patentable.

There is no such thing as an international patent. A patent application must be filed and processed in each individual country in which patent rights are sought. However, a single PCT application can be filed which has the effect of filing in multiple countries which are selected.

Delay and disclosure are deadly. While Canada (and the US) may grant a "grace period" of up to twelve months from first public disclosure in which to file an application, because Canada uses a modified "first to file" priority system, an independent inventor may nevertheless beat you to the patent office. Moreover, most other countries do not have any grace period at all. Thus, wisdom dictates contacting a patent professional early, and certainly before any disclosure.

It is also important to understand that a patent is a right to exclude, not a right to practice. For example, where a first inventor has obtained a patent for a device, and a second inventor has obtained a patent for an inventive improvement in respect of the first device, the second inventor is still excluded from producing the first device, just as the first inventor will be excluded from producing the second device. In situations such as this, one may try to obtain a license from the other, or the two may agree to 'cross-license'.

Copyrights

Copyrights are best understood as a bundle of rights given to the creators (or their assignees) of works such as *literary works* (including books, stories, text, poems and software), *artistic works* (including art, cartography, photography, drawings, sculpture and architecture), *musical works* (whether the music alone or the music in combination with lyrics) and *dramatic works*. Related rights, such as *performer's rights* are also given under the Copyright Act.

One of the central rights of the owner of copyright is the exclusive right to reproduce the copyrighted work, or any substantial part thereof, in any material form. As well, for each of the different types of protected works, the Copyright Act provides an exhaustive list of specific additional rights.

Copyright arises automatically at the moment of creation of the work, but the ability of a creator to enforce rights may be enhanced by registration or by affixing certain language or symbols warning of the existence of copyright, an example of which is our copyright note at the bottom of this article.

Copyright may be assigned from the author to another individual or entity, but such assignment must be in writing.

Moral rights are closely related to copyright, and are also protected under Canadian law. These provide the author of a work with the right to the integrity of the work, and the right, where reasonable in the circumstances, to be associated with the work as its author by name or pseudonym, as well as the right to remain anonymous. Moral rights may be waived by the author, but such waiver must be express. It is important to remember that an assignment of copyright does not, in and of itself, waive moral rights.

Trademarks

Trademarks may be defined as one or more letters or words, or designs or guises, which are adapted to distinguish the wares (or services) of one trader from those of another. The word "COKE", the McDonald's "golden arches" and the stylized Ford oval are all well known trademarks.

In Canada, although trademarks may exist without registration, it is wise to register as registration gives the owner of the trademark a Canada-wide right to exclude all others from using that exact trademark in respect of the registered wares and services, and additionally provides the Canada-wide right to exclude others from using a confusingly similar trademark. Trademark registrations last for a period of 15 years, and may be renewed.

Industrial Designs

Industrial designs are those features of shape, configuration, pattern or ornamentation which may be applied to a useful article and which appeal to and are judged solely by the eye. The shape of a beverage bottle, for example, allows it to function as a useful container, but also makes it appealing to the eye. Industrial designs must be registered and have a term of five years, renewable once for an additional term of five years.

Plant Breeders' Rights

Not surprisingly, plant breeders' rights are those rights granted to breeders of new varieties of plants and include the exclusive right to sell and produce in Canada the new plant variety.

Trade Secrets and Confidential Information

Information which is secret or confidential can enjoy protection in Canada even in the absence of a written contract. Obviously, a contract setting out the precise nature and scope of the confidential obligation is to be preferred, but in general terms, information which is confidential (that is, which has the necessary quality of confidence about it) and which is conveyed to another in circumstances of confidence, will establish a confidential obligation with respect to that information. This obligation will be enforced by the courts.

The wise owner of confidential information will require the recipient, before disclosure, to agree in writing to maintain the confidence, but the wise recipient will in any event avoid unauthorized passing along of such information.

Infringement, Assignments and Licenses

In simple terms, it is an infringement to use another's intellectual property without his or her permission. Infringement is actionable, that is, you can be sued for infringing. To avoid infringement, you can obtain an assignment or a license.

An assignment is an agreement which *transfers* a legal right from one person or entity (the assignor) to another person or entity (the assignee), while a license is *permission* from the licensor to the licensee to do that which would otherwise be prohibited.

Generally speaking, there are three types of licenses— "exclusive", "sole" and "non-exclusive". In the first case, the licensee has the right to use the subject matter to the exclusion of everyone else, including the licensor. In the second, the licensee may use to the exclusion of everyone else except the licensor, and in the last case, the licensee may use, but may not exclude anyone else from using.

It is important to note that in some circumstances it may be necessary to obtain licenses from several licensors in order to acquire complete freedom to make, use, or sell a product or process. This is because it is often the case that even a single product may utilize more than one patented invention and may involve trademarks and copyright! Licensing is a complex area of law and an expert should be consulted.

The value of owning intellectual property

It can be readily understood that the ability to exclude others from copying your work or exploiting your ideas can enable you to profit from your creativity, as well as to control the manner in which your ideas and creations are utilized. It therefore flows naturally that locking down your ownership is of utmost importance, and in this regard the assistance of the intellectual property professional becomes essential.

The foregoing is a very condensed summary of some of the key features of intellectual property law and as such should be relied upon only for general information purposes. It is not legal advice.

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