

Guardians of the IP Law Galaxy: What Employment Lawyers Need to Know

By

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I. THE IP LAW GALAXY

Intellectual property is what comes from your brain power (until the machines take over). It can be an idea, a conception, discovery, or invention. It can be a work of authorship such as a poem, a cool song, that novel you always wanted to write, or something as boring as a how-to manual. In the employment context, IP is the most valuable asset of a business. Most companies rely on the brain power of their employees. This is most true in the information age we live in – an age in which many assets are intangible.

It is because of its intangible nature that intellectual property can be slippery if nothing is done to protect it. When we share ideas, it benefits society, so there is a relationship between the value of your brain power and society getting to share your great ideas. But, just like the front door of your office, if you don't lock it, bad stuff can happen. And, the cops will probably say it was your fault for not being smart enough to get a lock, or change the key when you fired that bad apple. Our government (mostly federal, but some state) has created the locks and the keys to your IP front door. It is also important to recognize that IP is different from intellectual property rights; the two terms are not the same. Just because your brain can think it does not mean the government will protect those thoughts.

Under intellectual property law, if certain actions and precautions are taken (you lock the front door), IP is entitled to protection, and its owners are granted certain exclusive rights. For an employer, this is a big deal. It protects everything that an employee's brain thinks up (generally) that you paid for on that payroll check: discoveries and inventions; musical, literary, and artistic works; words, phrases, symbols, and designs used in commerce to indicate the source and quality of products or services; and information and ideas. Intellectual property rights protecting these intangible assets include copyright, patents, trademarks, industrial design rights, trade dress, and trade secret rights.

This article will cover the basics for employers, i.e., the different ways that someone will try to break in the front door. In addition to providing a survey of the basics of intellectual property law, this article will consider relevant aspects of the brand spanking new Defense of Trade Secrets Act, the most progressive trade secrets act passed in the last 70 years, the America Invents Act and best practices for dealing with non-producing entity (also known as patent assertion entity) lawsuits. We will also consider what about copyright law is most impactful to employers. Recognizing that branding is an important function of corporate marketing, we will consider the relevant trademark concerns.

II. INTELLECTUAL PROPERTY: Intellectual Property and Intellectual Property Rights –Historical Development

Our founding fathers (some were inventors) wisely created IP rights in the Constitution. In Article I, Section 8:

The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Congress then granted limited exclusive intellectual property rights in the form of patent and copyright rights to discoverers of inventions and authors of creative works, respectively. The end goal was to provide an incentive for inventors and authors to create and disclose their works, thereby building the country's IP and making the knowledge available for the public's benefit, mutually benefitting society and the patentee/copyright owner. Fundamental to this goal is the recognition that invention yields improvement, which results in more invention and spurs the progress of society, but only if that invention, improvement, and progress are available to others to stimulate their imagination, provide the seed for invention, and fuel competition. If laws protecting the developer of IP did not exist, disclosure and sharing by developers would be less likely because they would be fearful they would lose the commercial benefit of their creations if they could not exclude from taking them.

This concern was addressed internationally almost a century after the writing of the US Constitution. In 1873, afraid their ideas would be stolen and exploited commercially in other countries, foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna. *WIPO – A Brief History*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/about-wipo/en/history.html>. This signaled the need for international protection of intellectual property. In 1883, the Paris Convention for the Protection of Industrial Property (the Paris Convention) was born in a year in which important intellectual property came into existence: Johannes Brahms was composing his third Symphony, Robert Louis Stevenson was writing *Treasure Island*, and John and Emily Roebling were completing construction of New York's Brooklyn Bridge. *WIPO Treaties – General Information*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/treaties/en/general/>.

In 1893, the convention merged with the Berne Convention for the Protection of Literary and Artistic Works (1886) (the Berne Convention) to protect works of authorship through copyrights. *Id.* In 1970, this organization became the World Intellectual Property Organization (WIPO), located in Geneva, currently having an impressive 185 member states, a staff of over 930 from 95 countries around the world, and a mission and mandate to administer intellectual property matters recognized by the member States of the United Nations. *Id.*

In the US, pursuant to the Constitutional license of Article I, Section 8, Congress enacted a system of centralized and federalized IP laws with the primary goal of promoting the progress of society. If not protected, IP has little to no value. IP's value develops from the exclusive right to use it, or, its corollary, the right to exclude others from it. Exclusive rights granted under IP laws allow creators of IP to benefit from their discoveries and creations. In 2013, the US Patent and Trademark Office claimed that the value of intellectual property to the US economy is more than \$5 trillion and creates employment for an estimated 18 million Americans. The value of IP internationally is considered similarly high in other developed nations, such as those in the European Union. THOMAS BOLLYKY, *Why Chemotherapy That Costs \$70,000 in the U.S. Costs \$2,500 in India* (Apr. 10, 2013), <http://www.theatlantic.com/health/archive/2013/04/why-chemotherapy-that-costs-70-000-in-the-us-costs-2-500-in-india/274847/>.

There is a positive correlation between strengthening an IP system and economic growth. See generally, MARK A. LEMLEY, *Property, Intellectual Property, and Free Riding*, STANFORD LAW SCHOOL, JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS, WORKING PAPER NO. 291 (Aug. 2004), http://philo.at/wiki/images/Lemly_property_free_riding.pdf (last visited Oct. 19, 2014). Economists have estimated that between one-half and two-thirds of the value of corporate market values in the US can be traced to intangible assets. BARUCH LEV, *Remarks on the Measurement, Valuation, and Reporting of Intangible Assets*, FRBNY ECONOMIC POLICY REVIEW (Sept. 2003) at 1, <http://people.stern.nyu.edu/adamodar/pdfiles/articles/LevonIntangibles.pdf> (last visited Oct. 19, 2014). While some may debate the amount of the value of IP to the US economy, most can agree that in countries with developed or developing IP systems, those systems more often than not result in an increase of intellectual capital, and competition is fostered.

So, protecting your client's front door is kind of a big deal. We employment lawyers and professionals are the first line of defense. In fact, we are the sentry at the gate because of the unique and complex dilemmas our clients face with the brain power created by employees.

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