

What is Intellectual Property?

Part 1: Patents

By Judith Silver, Esq.¹

Intellectual Property is the group of legal rights in things people create or invent. Intellectual property rights typically include patent, copyright, trademark and trade secret rights.

Most people are surprised to discover that Intellectual Property rights originate with our Founding Fathers in the Constitution (Article 1, Section 8, Clause 8) which states that 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.” The right to exclusive ownership and use of one’s inventions and the monetary rewards from giving others permission to use them complement the other beliefs of our Founders.

In the middle to late nineteenth century, these beliefs grew into capitalism which embodies the benefits and rewards of hard work (as remained from Puritanism); the exchange of business ideas through products and services; and competition in the marketplace and financial reward for the most popular or beneficial ideas. It was not accidental that capitalism had many of the same theoretical bases as Charles Darwin’s notions of survival of the fittest from the same time; author and Harvard biology professor Stephen Jay Gould states that Darwin read Adam Smith prior to writing his “survival of the fittest” theory². Indeed, intellectual property law, with exception of patents which preceded the rest in codification by several centuries, reached major legal codifications in this same period, during the late eighteenth to late nineteenth century. These laws sought to ensure that the best and most popular inventions and creations earned monetary compensation for their creators. This, in turn, inspired others to create through discussion and understanding.

The heart of intellectual property law is the balancing of (a) financially rewarding creation through granting of exclusive rights to the author and (b) promoting the free flow of ideas to facilitate more creation. This balance is two-fold. First, it can be seen as the a tension between rewarding ideas and spurring new ones. Secondly, it can be seen as a balance between the “Promotion of Science and Useful Arts” Constitutional clause above and the First Amendment – this is an equally compelling tension between ownership of arts, words and

¹ Judith Silver is a computer, internet, intellectual property and free speech attorney licensed in CA, FL and TX; she is not licensed to practice before the Patent Office.

² Stephen Jay Gould, *The Panda's Thumb: More Reflections in Natural History* (New York: Norton, 1982), p.64 according to www.crosscurrents.org/darwin

invention and the freedom of Americans to speak and express themselves without restriction. This balance is visible through all the laws and all the cases about intellectual property in the United States. If you keep this tension in mind, everything else becomes much easier to understand.

With this in mind, let's consider briefly what rights are granted under patent law³.

Patent

Origins

The United Kingdom Patent Office states that the first patent was issued in London in the fifteen century. In the United States, the first patent was granted in 1790.

When Do You Get a Patent?

After inventing a work, the inventor must apply for and obtain a patent from the US Patent and Trademark Office in Washington, DC.

What's Required to Get a Patent?

In order to patent something, you should have a patent attorney, licensed to practice before the Patent Office, assist you with the application. Upon receipt of your application, the Patent Office will examine your application to determine if it meets the legal requirements for obtaining a patent. The requirements are extremely complex, but simplified are that your invention is:

- Novel: this mean it must not be known or used by others in this country, or patented or described in a printed publication here or abroad, or in public use or on sale in this country more than one year prior to the application for patent
- Non-obvious: this means it must not be obvious to a person having ordinary skill in the pertinent art as it existed when the invention was made
- Useful: this means it must have current, significant, beneficial use as process, machine, manufacture, composition of matter or improvements to one of these. According to the Patent Office, "the word 'process' is defined by law as a process, act or method, and primarily includes industrial or technical processes. The term 'machine' used in the statute needs no explanation. The term 'manufacture' refers to articles which are made, and

³ This information is based loosely on that available from the Patent and Trademark Office.

includes all manufactured articles. The term “composition of matter” relates to chemical compositions and may include mixtures of ingredients as well as new chemical compounds. These classes of subject matter taken together include practically everything which is made by man and the processes for making the products.” Certain kinds of software and internet-related processes merit granting of patents.

What Do You Have When You Have a Patent and Is There Any Risk?

If granted, you receive a 20 year monopoly on selling, using, making or importing the invention in or into the United States; what is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention.

You should be aware of two risks. First is that obtaining a patent can be expensive. You should consult your patent attorney to get a specific estimate, but the application and granting process can take years and require substantial legal work. Secondly, be aware that in exchange for your patent rights, your patent (ie how the invention works), becomes public information so that others may learn from your ideas and create further. Due to the disclosure result, many often opt not to seek patent rights so that they can keep their invention and ideas secret.