What is Intellectual Property?

Introduction

Copyright, trademark, and patent are terms that appear frequently in media coverage of lawsuits and proposed legislation. Collectively, they are known as intellectual property. For the anime industry and other media-related companies, intellectual property is the mechanism for securing a right to buy, sell, and maintain a voice in their products. At its core, intellectual property is a way of ensuring that creators can maintain quality control over their creations, market their creations, and have the right to be compensated for their work. However, misunderstandings about the extent and function of different kinds of intellectual property have caused some confusion on how it applies to everyone, including budding artists, multinational companies, and consumers who watch and buy the distributed products. This paper will provide an introduction to the concept of intellectual property under the law of the United States and its use as a mechanism for recognizing the value in goodwill, inventions, and artistic expression.

Intellectual Property

Understanding the function of intellectual property requires some familiarity with the concept of property in a more general sense. Property is a concept of ownership. Property is the right of one or more people to possess, use or dispose of a thing to the exclusion of others. It is most easily understood as a set, or bundle of exclusive rights assigned to a definable thing. This set of rights can be split up and given to different people, partially retained or kept it its entirety by the holder of those rights. It is a concept that can be applied to physical things such as a book or intangible objects such as a currency. The extent of the rights given to different type of property is primarily defined by the laws of country where the property can be found. The same concept applies to intellectual property. The values attributed to customer goodwill, innovation, secret techniques, and artistic expression are recognized

respectively in trademarks, patents, trade secrets, and copyrights. Like any type of law, Intellectual property definitions and rights and rights differ on both the international, federal and state level and may differ slightly based on country of origin since laws apply on a territorial basis.

Trademarks: A Legal Mechanism for Identification and Customer Goodwill

What Is a Trademark?

Trademarks are a category of intellectual property that are used to identify the source of goods or services. They are governed by the Landham Act. Trademarks can be "any word, name, symbol, or device, or any combination thereof" which are used in business to identify the source of goods or services.[1] This means that a word, name, picture or design can be used to determine the studio that produces a show, volumes in a manga series or any other merchandise from a particular show or series. Trademarks used to identify the source of services are also known as service marks. A trademark can be registered as both at trademark and service mark. Crunchyroll is an example of both a trademark and a service mark since it is used in association with computer software products and the video broadcasting services.[2] Source identification through trademarks allows consumers to make informed decisions about the product they are buying and the company they are buying from.

In addition to identification, trademarks serve as means for safeguarding goodwill. Goodwill is a term used for the reputation that a person or company can build in association with its goods or services. It is closely tied with branding: the concept of tying your trademark with certain market expectations. For example, the Studio Ghibli brand became associated with high quality family films with the release of films such as *Princess Mononoke*, *My Neighbor Totoro*, and *Spirited Away* which gained critical acclaim domestically and abroad.[3] The positive feelings associated with this product

1 Trademark Act, 15 U.S.C. § 1127.
2 Crunchyroll Trademark Registration. http://tess2.uspto.gov/bin/showfield?f=doc&state=4802:y349m3.2.1. (Last Accessed 26 June 2013).
3 Hadley, Peter. "Ghibli Museum features nostalgic Japanese animation".

gains the company a strong goodwill. It is essential in attracting potential customers that may be interested in purchasing goods or services.[4] A sufficiently strong brand may allow a company to sell future products on just the strength of that positive association. Goodwill and branding are also essential in creating certain expectations for the buyer. The value of a trademark is primarily based on the strength of their goodwill and branding. Because maintaining strong goodwill requires continually meeting or exceeding the customer's expectations of quality, innovation and price, protecting a trademark can be essential for a company's growth or ability to thrive through a shifting market place.

The source identification and business goodwill are so important for conducting business that a trademark holder is given right to sole use of the trademark and can pursue legal action against uses of images or designs used that could cause confusion with their trademark.[5] The holder of trademark rights is established by federal registration.

Obtaining a trademark

Trademarks can be obtained by use in business, registration under a state's trademark program, in or federal registration with the US Patent and Trade Office. Federal registration provides the strongest protection in the United States regarding priority and area of protection. A Federal protection establishes priority over any trademark that is filed after or is used in business after the registration in each of the 50 states.[6] A trademark that is merely obtained through use in business will be responsible for providing proof that it was used in business before a similar federally registered trademark and the state trademark is only limited to protection in the state where it was filed.

In order to register a trademark in a certain field, the mark must be 1) used in commerce and 2) distinctive.[7] Merely thinking up a name or designing a logo is not sufficient to obtain trademark rights.

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http://www.comoxvalleyrecord.com/lifestyles/213178171.html

4 "Why brand leaders in Japan are winning".http://www.prophet.com/blog/aakeronbrands/133-why-brand-leaders-in-japan-are-winning. (Last accessed 25 June 2013)

5 See, 15 U.S.C. §117(1)(a & b). http://www.law.cornell.edu/uscode/text/15/1114. (Last Accessed 30 May 2013)

6 See, §115.

7 See, §1051 (3)(C&D)

To use a mark in commerce, the proposed mark must be used in connection with a product or service offered by the proposed trademark holder. Use in commerce does not necessarily mean for-profit use, but rather that they are used in the course of business. This business may be for profit or non-profit purposes. The mark must also be distinctive under trademark law. The purpose of this requirement is to prevent confusion with other goods or services in that field. The trademark cannot be effective if it is unable to be used to identify a particular source. A trademark holder risks loss of their trademark if it becomes indistinguishable from images or terms generally used to describe that type of good or service.[8] If the trademark examiner determines that a proposed mark meets the requirement, they may issue trademark certification to the owner.

Trademark Rights

Once a trademark is issued, the holder has the sole right to determine how the mark will be used. The duration of this right is perpetual as long as it is used in commerce or is not otherwise canceled.[9] Trademark holders are entitled to bring a lawsuit against another person in order to stop them from infringing on their trademark. Infringement may occur if someone else uses the holder's trademark without permission or if they use a trademark that is so similar to the holder's mark that there is a strong likelihood of confusion.[10] If the a court determines that the mark is infringing and it may order the person sued to stop using the mark and may order that person to pay the holder up to $2,000,000 for each count, depending on the circumstances of the infringements. A person may defend themselves by arguing that the trademark has become abandoned or generic, but unlike copyright, fair use is not a defense against trademark infringement.[11]

Avoiding Trademark Infringement

Litigation is often time-consuming and expensive. While a person may think they have a

8 See, §1064(3)
9 See, *Id.*
10 See, §117
11 See, §1064(3)

defense against infringement, it must still be proven in court before they are able to use the trademark freely. It is generally a good idea to refrain from displaying well-known marks on your merchandise and do an online search to check for or searching for the mark at www.uspto.gov prior to use. Ultimately, engaging an attorney with expertise in trademarks may be prudent before registering your own trademark or using a logo, name, or design that you think may be infringing.

Patents: A Mechanism for Protecting Inventions and Manufacture

Types of Patents

The Constitution allows the Federal government to secure an inventor's rights in their inventions through the patents. Patents are a form of intellectual property that allows creators exclusive rights to use their inventions. There are three types of patents: utility patents, plant patents and design patents.

I. Utility Patents and Plant Patents

Utility patents provide protection for inventions that are useful, new and serve a function.[12] Utility patents are the primary type of patent that are thought of when patents are being discussed regarding rights to utilize new technology. The inventor of any new process, machine, manufacture, or composition of manufacture may patent their invention as a utility patent.[13] A utility patent grants the inventor the right to use, make, sell, offer to sell, or even import their claimed invention.[14]

The utility patent can be obtained through application with the US Patent and Trademarks Office. The application must describe the invention and how it works.[15] It is likely the case that the inventions and technology described are beyond the ability of an ordinary person to easily understand. Therefore, the claims of the patent only need to be described in a way that can be understood by a person with typical experience and knowledge of the technological field relevant to the invention.[16] For example, if an inventor to patent their idea for creating mechanical combat suits, their application

12 See,US Patent Act. 35 U.S.C. § 101. (2013)
13 See, *Id.*
14 See, 35 U.S.C § 134(a)
15 See, 35 U.S.C. § 111-112.
16 See, 35 U.S.C. § 103

should describe the suit in a way that the average mechanical engineer would be able to understand the idea of how it functions. These descriptions, or claims, found in the application become the basis of protection if the inventor is granted a patent.

The claims described in the application can be limited or entirely denied if the invention described is not new or is considered obvious.[17] Patent protection will be denied if the Patent Office finds that the proposed invention already existed or would be obvious to a typical person in that technological field. A plant patent is virtually the same as a utility patent, but a plant patent is only required to reasonably comply with the descriptive requirements of the claims and includes the right to prevent others from asexually reproducing the plant.[18] If granted, the patent will expire 20 years from the date when the application was filed.[19] Patent protection covers a variety of different technological fields including, electrical engineering, medicine and software.

II. Design Patents

In contrast, design patents provide ownership over ornamental designs for manufactured items that are new and original.[20] Design protection will expire 14 years from the date it was granted.[21] Unlike utility patents, design protection can only make one claim for protection. It may also overlap copyright and trademark protections and include notices of such protection. However, design patent protection is more limited than copyright and trademark in its duration and will overwrite copyright protections in an original design.[22]

Copyright: A Mechanism for Protecting Artistic Expression.

What Is Copyright?

The Copyright Act covers the majority of media and products associated with the anime

17 See, *Id.* (2013)
18 See, 35 U.S.C. §161-163.
19 See, 35 U.S.C. §154(a)(2).
20 See, 35 U.S.C. §171
21 See, 35 U.S.C. §173.
22 See. 17 U.S.C §1329.

industry. Copyright applies to any "original work of authorship" fixed in any tangible means of expression.[23] The categories of copyrighted works are:

- Literary works, novels, and poetry;
- Musical works and accompanying words;
- Dramatic works, and any accompanying music;
- Pictorial, graphic and sculptural works;
- Pantomimes and choreography;
- Sound recordings;
- Architectural works, and;
- Motion pictures, television and other audiovisual works

Since copyright is intended to provide protection for the exact expression of ideas, novels, manga, anime series, movies, figures and associated music can all fall under the protection of copyright.

Copyrights are distinguishable from patents and trademarks by the character of the protection given. Names, short phrases and symbols do not fall under copyright law; nor do the ideas expressed or the functional aspects of the expression.[24] Copyright does not prevent another artist from using the same or similar name for their anime series while trademark will. Additionally, copyright on a sculpture or software will not prevent another person from writing another piece of software or creating a sculpture that works or moves the same way as the copyrighted work. Software falls into a gray area and may fall under patent or copyright protection based on the details of the program.

Obtaining Copyright.

To obtain become a copyright holder, the author must some record of their work in a tangible medium.[25] Unlike trademark and patents, copyright protection automatically applies as soon as the idea is expressed in a fixed form. Both physical and digital mediums fall under the definition of tangible medium for this purpose. This means that when a song is recorded, a sketch is drawn on tablet or paper, or an animation sequence is saved, copyright protection automatically applies to the resulting work.

While it is not necessary to obtain a copyright, registering a work is required to bring a lawsuit

23 Copyright Act of 1976. 17 U.S.C. §102(a). (2013).
24 See, §102(b).
25 See. *Id.*

on the basis of copyright.[26] Registration provides additional options in asserting copyright which make the process simpler and provides for the cost of filing a lawsuit. There is a presumption of the validity in a copyright if it has been registered for at least a month.[27] Despite the fact that is not necessary to register with the copyright office, registration has several practical uses in asserting and defending against potential infringing parties and other persons who may take advantage of the author. Compared to patent and trademark, copyright registration is simple and requires only the filing of basic forms, fees, and a complete copy of the work with the Copyright Office. This makes copyright protection the most easily accessible type of intellectual property.

Rights in a Copyrighted Work

A copyright is a collection of exclusive rights granted to the author or copyright holder. The author can be a person or corporation and can chose to give the rights away to another person. The person with the exclusive rights is considered whether they were the original author or a person granted rights. The rights that can be granted under copyrights include the right to reproduce the work, to distribute the work and to create a derivative work.[28] Additional rights may apply due to the unique nature of works. There is an exclusive right to publicly perform songs, plays, choreography, movies, and other audiovisual works. An exclusive right also exists to publicly display literary, graphic, dramatic, and sculptural works. Sound recordings have the unique right for digital transmission. A copyright holder of an anime series would have the right to reproduce, broadcast the show, and create sequels and merchandise based on the show. They also have the right to show or prevent others from publicly showing their series. The copyright holder of the rights in the theme song for an anime series have the right to make copies of the song, sell copies of their song, remix their song or allow other people to do covers of their song or make their songs available for streaming or other digital distribution.

26 See. §411
27 See, §412. (2013)
28 See. 17 U.S.C. §106.

The holder has the sole authority to determine how these rights are used. They may chose to manage all aspects of their copyrights, allow others to use some or all or their rights temporarily or permanently as they see fit.

The duration of copyright protection will depend on the character of the author before and when the copyright was created. Different means of determining duration apply to person, persons creating the work for a business entity, or a business entity, respectfully. For works created after 1978, the copyright will expire 70 years after the death of the author or last surviving author if the work was a joint effort; corporations would be limited to 120 years from creation or 95 years from publication depending on the soonest expiration.[29] When a copyright expires it is considered "public domain" and will then be reproduced, distributed or used to make derivative works by anyone.

In the anime industry, copyright is extremely useful for providing reliable expectations for the purpose of making a deal. Determining the person with rights in an anime series, the right to make sequels and the right to authorize merchandise for the series, are all essential for making a reliable and lasting agreement to form the basis for hiring voice actors, animators, and writers for a new show.

Defenses and Avoiding Copyright Infringement

The defenses to copyright infringement and the avoidance of copyright infringement are not necessarily the same thing. Avoiding copyright infringement is generally a matter of refraining from copying any work that is not your original expression of an idea. As previously stated, ideas are not copyrightable but the exact expression is. This means that the song, song recording, or animated picture are copyrighted and cannot be taken without the risk of infringement. While numerous defenses exist for copyright infringement, they are not an automatic bar to litigation. Fair use is generally a broad defense for the purpose of commentary, criticism, and satire of the work itself, but it must be proven in court by the defendant before it can be used. A creator may be better off seeking the advice of a lawyer

29 See, §302.

before investing heavily in a new project especially when it is inspired by a pre-existing work in order to avoid obvious dangers of loss or litigation regarding their work.

Conclusion

Ultimately, intellectual property is a multifaceted means of safeguarding the value found in certain creations of the mind. The rights, rules and defenses available to each category of intellectual property vary based on the nature of the value that is protected. While the focus on tailoring the rules the protected value may make field seem more complex on the outset, it has become a useful mechanism that allows creators to protect and have the chance to profit off the effort invested in their work whether it has been used to develop goodwill, a new invention, or entertain and stimulate audiences with artistic expression.

– Melissa Lum, Public Relations Committee of the Texas State Bar's Intellectual Property Section

Bibliography

1. Landham Act. 15 U.S.C. §§1051-1141n. http://www.law.cornell.edu/uscode/text/15/chapter-22 (Last Accessed 20 June, 2013)
2. "Crunchyroll Trademark Registration". http://tess2.uspto.gov/bin/showfield?f=doc&state=4802:y349m3.2.1 (Last Accessed 29 June 2013)
3. Hadley, Peter."Ghibli Museum features nostalgic Japanese animation". Comox Valley Record. 26 June 2013. http://www.comoxvalleyrecord.com/lifestyles/213178171.html.
4. U.S. Patent Act. 1 U.S.C. §§ 390. http://www.law.cornell.edu/uscode/text/35/. (Last Accessed 30 June 2013)
5. Copyright Act. 17 U.S.C. §§ 101-122. http://www.law.cornell.edu/uscode/text/17/chapter-1 (Last Accessed 30 July 1 2013)