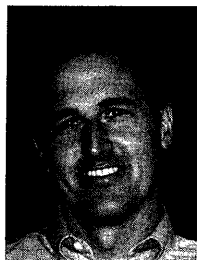


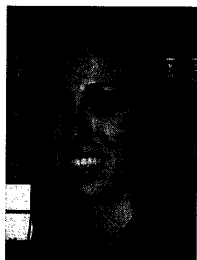
Protecting the Intangibles

by Anthony J. Biller and
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Intellectual property drives corporate valuations and is a major facet of today's economy. Corporate holdings increasingly consist of ideas, identities, and expressions. A half-century ago, nearly 80 percent of assets for domestic, non-financial companies were tangible items, such as machines, inventory, and property. As we continue the rapid transition from an industrial to an information and services economy, nearly half of the value of today's domestic corporations is found in patents, copyrights, and trademarks. Where the money goes, so goes the misconduct and litigation. As a result, courts have seen and likely will continue to see an ever-increasing amount of intellectual property litigation.

Intellectual property law protects impressions of the mind. Patent law provides government-granted, short-term monopolies for useful, novel ideas that have been disclosed in the patent application process. Copyrights provide longer-term protection against having the expression of ideas copied. Trademark law protects the source-originating identity of goods and services. Dilution law protects trademarks from being diminished by encroachment. This article provides a limited overview of the fundamental types of intellectual property, elements of infringement, and some prominent defenses.

Copyrights

Article I, Section 8 of the U.S. Constitution grants, "The Congress shall have 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." In 1790, Congress passed the first Copyright Act, which it has updated continually. The purpose of the Copyright Act is to afford a copyright owner the exclusive right to reproduce, prepare derivative works,

distribute copies, perform in public, and display in public his or her work.

A person may seek a copyright for:

[O]riginal works of authorship fixed in any tangible medium of expression. . . . Works of authorship include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
8. architectural works.¹

One cannot receive a copyright for the ideas or factual information contained in a work. It is the manner in which an idea is expressed that can be protected.

Notice of copyright is not required to protect a work. Affixing notice does provide constructive notice of rights and prevents an infringer from claiming innocent infringement.²

Registration of a work with the United States Copyright Office is not required, but it is recommended. Registration is required prior to filing an infringement suit.³ Registration provides benefits in the case of infringement. If a work is registered at the time of infringement, or within three months of publication, the copyright-holder is eligible for statutory damages: up to \$75,000 per act of infringement, up to \$150,000 per infringement in cases of willful infringement, and attorneys' fees.⁴ Without prior registration, statutory damages and attorneys' fees are not recoverable. In many cases, such recovery would

be far greater than a damages award, and also relieves the causal requirements that are needed to show damages.

The duration of a copyright depends on the type of author and the date (if any) of publication. Copyrights on works created on or after January 1, 1978, by an individual last for the duration of the author's life plus 70 years.⁵ If such a work was created by joint authors and was not a "work made for hire," the copyright term lasts for 70 years after the last author's death.⁶

Works made for hire and anonymous or pseudonymous works are copyrighted for 95 years from publication or 120 years from creation, whichever is shorter.⁷ Under the Sonny Bono Copyright Extension Act of 1998, works created and published or registered prior to January 1, 1978, automatically have a 95-year term.⁸

Proving Infringement

Any copying of a work without permission constitutes infringement. Generally, there are two types of copyright infringement. The first occurs when an infringer uses all or part of a work without permission. For example, if Michael Bolton recorded Michael Jackson's "Thriller" without securing permission, but without alteration, this would be a direct infringement of "Thriller." The second type of infringement occurs when someone uses a work, but modifies it in some way; this is the creation of an unauthorized derivative work.

In proving infringement, the plaintiff must show two things: 1) a valid registration, and 2) copying of the work. Copying may be shown directly by admission or by witness testimony. However, it is much more common to prove copying through indirect, or circumstantial, evidence. To prove copying indirectly, the plaintiff must show 1) access to the copyrighted material, and 2) substantial similarity between the two works. These two factors are on a sliding scale, meaning that they may have different weights depending on the strength of the showing. For example, strong evidence of access reduces the standard for showing similarity; likewise, otherwise inexplicable similarity may allow access to be inferred. Regardless, some similarity must be shown.

Once registration and copying are shown, the burden shifts to the defendant to dem-

onstrate independent creation or some other defense.

Damages

An author who registers her copyright prior to the infringement may seek statutory damages or, alternatively, actual damages plus the infringer's profits to the extent damages and profits are not duplicative.⁹ If the copyright is not registered until after infringement, only actual damages plus profits potentially are available.¹⁰ Where the copyright owner is damaged through losing a sale due to the sale of the infringing article, the copyright owner may only recover the greater of his damages or the infringer's profits. Where the infringing article is other than what the copyright owner sells, the copyright owner may be able to recover both damages and the infringer's profits.

For example, when a builder infringes a designer's architectural works copyright by using an unauthorized copy or derivative of the copyrighted home plan, the copyright owner may recover damages in the form of lost profits in the plan the builder should have purchased, as well as recover all of the builder's profits from the sale of the infringing structure.

In addition to providing potentially large recoveries for copyright owners, the Copyright Act shifts a significant burden to the infringer on the issue of damages. Under the Copyright Act, the copyright owner only bears the burden of showing the gross revenues the infringer obtained through its acts of infringement. The burden then shifts to the infringer to prove deductible expenses and portions of profit that are attributable to non-infringing factors.

Common Defenses

A copyright owner's right to reproduce or make derivatives of his work is exclusive except in the case of fair use. "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."¹¹ The less commercial the use, the less important the portion used, the smaller amount of the work used, and the lesser the effect on the market or the value of the work, the better the chance of successfully claiming fair use.¹²

Joint authorship is another common defense. Co-authors are joint owners of copyright in the work unless the co-authors agree otherwise.¹³ Under the Copyright Act, "co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other for any profits."¹⁴ Should this defense be raised, one way to rebut the charge is to show that there was no intention that the alleged co-authors' contributions be merged into inseparable or interdependent parts.¹⁵ If this defense is successful, the joint author will not have infringed, but only will owe an accounting of profits to the other author(s).

A defendant may also claim reproduction and/or usage rights under an implied license. The Copyright Act requires that a transfer of exclusive rights in a copyrighted work be made in writing.¹⁶ However, a non-exclusive license does not require a writing. Such a license might be granted orally or arise from the parties' conduct.¹⁷ An implied license exists "when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee copy and distribute his work."¹⁸ A copyright owner need only negate one of these elements in order to show that no such license existed.

Again, the intention of the parties is important; a court should not find that an implied license exists when the contemporaneous circumstances indicate otherwise. For example, the existence of a contract, signed or unsigned, which does not contemplate a license, is strong evidence negating a claim of an implied license.¹⁹

Trademarks

A trademark is "any word, name, symbol, or device, or any combination thereof" used by a person or intended to be used by a person in commerce "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."²⁰ A service mark is essentially the same thing as a trademark and generally works the same way. Federal trademark law is governed by the Lanham Act.²¹

Unlike copyrights, trademarks need not have originality. The main requirement for a trademark is whether it differentiates the goods or services of one source from the goods or services of another. Even where a mark seems indistinct, it still may be eligible for protection through acquiring secondary meaning.²² In the same vein, a mark that falls into generic usage, such as aspirin, may not be protected.

Trademark rights arise under common law by adopting and using a mark in association with goods or services. Once the public recognizes a mark as a source indicator, the trademark is established at common law. Common law trademark rights extend only to the area of actual use.

Trademarks also may be "registered" by filing an application with the United States Patent and Trademark Office (USPTO) and through appropriate state agencies. Although registration is not required, it does provide advantages, so it is recommended. The advantages of a federal trademark registration include: constructive notice of ownership; a legal presumption of the registrant's ownership and exclusive use rights; evidentiary presumptions; and the ability to file the U.S. registration with the U.S. Customs Service to prevent importation of infringing foreign goods.

Use of the "TM" or "SM" symbols denotes a user's claim of common law rights in a mark. The federal registration symbol—®—is to be used only after the USPTO registers the mark, and only with goods and/or services listed in the federal registration.

Proving Infringement

In a trademark infringement case based on a federal registration, a plaintiff must show: 1) a valid mark owned by the plaintiff, and 2) that the defendant's use of the mark is likely to cause confusion.²³ Registration is prima facie evidence that the registered mark is valid, and that the registrant owns the mark and has the exclusive right to use the mark in commerce.²⁴

In determining whether a plaintiff has demonstrated the likelihood of confusion, a court in the Fourth Circuit should consider: 1) the strength or distinctiveness of the plaintiff's mark; 2) the similarity of the two parties' marks; 3) the similarity of the goods and services the marks identify; 4)

the similarity of the facilities the two parties use in their businesses; 5) the similarity of the advertising used by the two parties; 6) the defendant's intent; and 7) actual confusion.²⁵

The North Carolina Trademark Act, N.C. Gen. Stat. §§ 80-1 et seq., provides similar remedies. As mentioned above, common law trademarks are also enforceable, but only in the areas in which they are used. Further, trademark infringement is a violation of N.C. Gen. Stat. § 75-1.1.

Damages

The Lanham Act provides for the remedies of injunctive relief, impoundment and destruction of goods displaying infringing marks, the infringer's profits, the trademark owner's actual damages, and court costs.²⁶ "The court, in exceptional circumstances may award reasonable attorney fees to the prevailing party."²⁷ Exceptional cases generally involve malicious, fraudulent, deliberate, or willful infringement. Treble or statutory damages are available in instances of counterfeit marks.²⁸ Monetary damages sometimes are difficult to obtain under the Lanham Act due to the requirement of demonstrating causation. Should a trademark holder claim violation of North Carolina's Unfair and Deceptive Trade Practices Act, the plaintiff also may receive damages under N.C. Gen. Stat. § 75-16.

Common Defenses

One of the most common defenses to trademark infringement is "fair use." Although the Lanham Act contains a statutory fair use provision,²⁹ three other categories of fair use have been created through judicial opinions: 1) nominative fair use, 2) comparative advertising as fair use, and 3) parody as fair use.

Nominative fair use occurs when the defendant uses a trademark to identify the plaintiff's goods or services.³⁰ Such use is permitted provided the defendant meets three requirements:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the use must do nothing that

would . . . suggest sponsorship or endorsement by the trademark holder.³¹

Use of another's trademark in advertising also may constitute fair use. A defendant may use a plaintiff's trademark "so long as it does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity, or sponsorship of the advertiser's product."³²

A defendant may claim his trademark usage was not infringement, but was parody fair use. There is no bright line test for whether or not such usage constitutes parody. "[A] non-infringing parody is merely amusing, not confusing."³³ Courts are most likely to find a parody to be fair use in instances of non-commercial use, and most likely to find against a defendant's parody defense when a trademark is used in connection with illegal drugs or pornography.³⁴

Other common defenses to trademark infringement are outlined by the Lanham Act. The Act provides that certain defenses or defects, including fraudulent registration, abandonment, and functionality, rebut the registration of an incontestable mark.³⁵

Other Potential Causes of Action

The Federal Trademark Dilution Act expands trademark protection by requiring a plaintiff to prove only that a defendant used a "famous" mark that caused dilution of "distinctive quality" of the mark.³⁶ This case is easier to prove than trademark infringement in that dilution does not require the showing of likelihood of confusion. To determine whether a mark is famous, a court may consider several factors: distinctiveness, duration and extent of use, duration and extent of advertising, geographical area of use, channels of trade, degree of recognition, use of the same or similar marks by third parties, and registration of the mark.³⁷

A number of state law causes of action also exist under the Unfair and Deceptive Trade Practices Act: passing off, reverse passing off, and unfair competition.³⁸ When a defendant attempts to claim his own product as the plaintiff's product, the act constitutes passing off. Reverse passing off occurs when a defendant attempts to claim a plaintiff's product as his own. In a

trademark context, proving unfair competition requires the same proof of elements required for trademark infringement.

Patents

The same section of the Constitution that created copyrights also paved the way for patents. Under the Patent Act, a person who “invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent, subject to the conditions and requirements of [the Act].”³⁹

There are three types of patents available from the USPTO: design, plant, and utility patents. Design patents protect the way a useful article looks for a period of 14 years from the date of filing.⁴⁰ Plant patents protect asexually reproduced plants, and they generally last for 20 years from the date the patent certificate is issued.⁴¹ Utility patents, which are the most commonly sought type, protect the way an article is used or works.⁴² Utility patents generally endure for a period of 20 years from the date of filing.⁴³

A patent cannot be obtained upon a mere idea or suggestion. A complete description of the subject for which the patent is sought is required, and it must be in language sufficiently “full, clear, concise, and exact” so as to “enable any person skilled in the art” to make and/or use the disclosed art.⁴⁴

To obtain a patent, the inventor (or a patent agent or attorney on the inventor’s behalf) must file an application with the Patent Office.⁴⁵ The application must include: 1) a written specification that includes a description, claims, and an oath or declaration; 2) a drawing, if necessary; and 3) the appropriate fees.⁴⁶ Because of the complications involved in the application process, it is highly recommended that applications be prepared by a registered patent attorney or patent agent.

The three key requirements for obtaining a patent are novelty, usefulness, and non-obviousness.⁴⁷ Novelty means that the invention must not have been “known or used by others in this country, or patented or described in a printed publication . . . before the invention thereof by the applicant for patent,” and it must not have been “patented or described in a printed publication . . . or in public use or on sale in this

country more than one year prior to the application for patent in the United States. . . .”⁴⁸ Usefulness simply requires that the subject matter have a useful purpose, such as exercising cats, and that it is operative. Non-obviousness means that there must be “differences between the subject matter sought to be patented and the prior art . . . such that the subject matter as a whole would [not] have been obvious at the time the invention was made to a person having ordinary skill in the art” in the field of the invention.⁴⁹

A patent owner may give notice to the public that an article is patented by affixing the word “patent” or “pat.” and the patent number either to the article or its packaging.⁵⁰ Because a patent owner only may recover for damages of infringement from the time the infringer was put on notice, it is recommended that patented articles be so marked.⁵¹

The Other Option: Trade Secrets

Not all inventions should be patented. One of the problems with a patent is that the exclusive right to practice the art taught in the public disclosure lasts for only 20 years. The other option is a trade secret. Coca-Cola is the best example of the utilization of a trade secret. Instead of seeking a limited protection for its formula, Coca-Cola maintains the formula as a well-kept secret. It remains the sole property of Coca-Cola long after a patent on the formula would have expired.

The most important consideration when deciding whether to protect an invention as a trade secret is whether it can be kept a secret. Something that can be reverse engineered will not remain a secret long if it is successful.

Proving Infringement

There are only two elements to proving patent infringement: 1) ownership of a valid patent that 2) the defendant made, used, offered for sale, or sold within the United States or imported into the United States during the term of the patent.⁵² Despite the seeming simplicity of these factors, patent litigation ordinarily is incredibly complex and expensive.

A patent holder is responsible for enforcing his own patents. If the owner is a small company or individual, it may be wiser to

avoid litigation. The owner might offer to sell or license the patent either to the infringing company or to another company who can afford defense of the patent.

Assuming the validity of the patent has been established, there are three stages remaining in a patent infringement lawsuit. The first stage is called “claim construction.” During this period, the parties suggest their meanings of the words in the claims of the patent. If there is disagreement between the parties, the court holds a Markman hearing from which the judge will issue a finding with regard to the disputed terms.⁵³

In the second stage, the parties address infringement, arguing as to whether the claims encompass the accused device or process. To find literal infringement, the trier of fact must find that the accused article infringes each and every element of the patent claims, since the claims are literally interpreted.⁵⁴

Infringement can be direct, indirect, or contributory. Someone who makes, uses, markets, sells, or imports an infringing article is a direct infringer. Indirect infringement can be committed by actively encouraging another’s infringement. Contributory infringement occurs when a party with knowledge of the patent sells or supplies an item for which there is no substantial non-infringing use.

An accused product that does not meet every element and limitation of the claim literally may still fall under the “doctrine of equivalents.”⁵⁵ Infringement under the doctrine of equivalents occurs where the differences between the accused device and the claimed invention are insubstantial. The accused device must include an equivalent of each claim element or limitation that is not met literally.

A common test courts use to determine whether an element of the accused device is an equivalent of a literal claim element is the “function/way/result” test. If the accused element performs substantially the same function, in substantially the same way, to achieve substantially the same result as the literal claim element, then it is more likely to be an equivalent.

The doctrine of prosecution history estoppel limits the range of equivalents available to the patent owner.⁵⁶ Further, narrowing amendments made during prosecution

for reasons relating to patentability give rise to prosecution history estoppel such that there may be no range of equivalents for the amended claim element.⁵⁷ The prior art itself also limits the range of equivalency that can be asserted.⁵⁸

Damages

Once infringement is found, the trier of fact enters an injunction and determines damages. The patent holder is entitled to a reasonable royalty or to lost profits, together with interest and costs as assessed by the court.⁵⁹ To recover lost profits, the patent owner must prove that she could have provided the patented device or process, and that there were no non-infringing alternatives the buyer could have purchased that provided the same function or benefit as the patented idea.

The infringer may introduce evidence that overall market share and total sales would have been less absent the infringer's market expansion. Where the patent owner does not or cannot pursue lost profits, she is entitled to a reasonable royalty. It is calculated to be the rate that hypotheti-

cally could have been negotiated prior to infringement. The court may award treble damages and, in an exceptional case, attorneys' fees.⁶⁰

Common Defenses

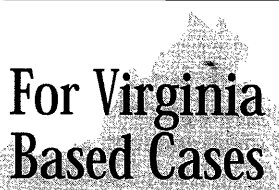
In addition to the common defenses of laches and estoppel, the first defense ordinarily raised is patent invalidity. "A patent is presumed valid."⁶¹ Defendants normally challenge the patent's novelty and non-obviousness. It is not unheard of for a patent infringement suit to result in a determination that the USPTO mistakenly granted a patent. To invalidate a patent, defendants usually try to find at least one of the following: 1) a prior art reference anticipating, showing each element of, the claimed invention; 2) a prior art reference that was not considered by the USPTO, is more pertinent than other references that were considered, and renders the invention obvious; 3) the specification fails to disclose the best method for practicing the invention; or, 4) the inventor committed fraud on the USPTO in obtaining the patent.

As our society continues its swift evolution from an industrial to an information and services economy, our courts likely will continue to see more and more intellectual property litigation. Plaintiffs' attorneys should be aware of the value in ideas, identities, and expressions and have a general understanding of how that value is protected in patents, copyrights, and trademarks. ■

²⁰ 15 U.S.C. § 1127.
²¹ 15 U.S.C. §§ 1051-1127.
²² *Id.* § 1052(f).
²³ *Id.* § 1114.
²⁴ *Id.* § 1057(b).
²⁵ *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984).
²⁶ 15 U.S.C. §§ 1116-18.
²⁷ *Id.* § 1117.
²⁸ *Id.* § 1117(b)-(c).
²⁹ 15 U.S.C. § 1115(b)(4).
³⁰ *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).
³¹ *Id.*
³² *Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968); *accord Saxony Products, Inc. v. Guerlain, Inc.*, 513 F.2d 716, 722 (9th Cir. 1975).
³³ J.T. McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 31.38[1] (1995).
³⁴ *See, e.g., L.L. Bean Inc. v. Drake Publishers Inc.*, 811 F.2d 26 (1st Cir. 1987) (concluding defendant's use of L.L. Bean logo was non-commercial and thus parody fair use); *Coca Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972) (entering injunction against poster featuring slogan "Enjoy Cocaine" in the distinctive Coca Cola script); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (enjoining pornographic film in which star appears clad in a Dallas Cowboys Cheerleaders uniform).
³⁵ 15 U.S.C. § 1115.
³⁶ *Id.* § 1125(c).
³⁷ *Id.*
³⁸ N.C. Gen. Stat. § 75-1.1.
³⁹ 35 U.S.C. § 101.
⁴⁰ *Id.* §§ 171, 173.
⁴¹ *Id.* §§ 161, 154.
⁴² *Id.* § 101.
⁴³ *Id.* § 154(a)(2).
⁴⁴ *Id.* § 112.
⁴⁵ *Id.* § 111.
⁴⁶ *Id.*
⁴⁷ *Id.* §§ 101-03.
⁴⁸ *Id.* § 102.
⁴⁹ *Id.* § 103.
⁵⁰ *Id.* § 287.
⁵¹ *See id.*
⁵² 35 U.S.C. § 271.
⁵³ *See Markman v. Westview Instruments Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996).
⁵⁴ *See In re Robertson*, 169 F.3d 743 (Fed. Cir. 1999).
⁵⁵ *Warner-Jenkinson Co., Inc. v. Hilton David Chemical Co.*, 520 U.S. 17 (1997), *on remand*, 114 F.3d 1161 (Fed. Cir. 1997) (per curiam).
⁵⁶ *Charles Greiner & Co. v. Mari-Med Mfg., Inc.*, 962 F.2d 1031 (Fed. Cir. 1992).
⁵⁷ *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002).
⁵⁸ *Wilson Sporting Goods Co. v. David Geoffrey & Assoc.*, 904 F.2d 677 (Fed. Cir. 1990).
⁵⁹ 35 U.S.C. § 284.
⁶⁰ *Id.* §§ 284-85.
⁶¹ *Id.* § 282.

¹ 17 U.S.C. § 102.
² *Id.* § 401.
³ *Id.* § 411.
⁴ *Id.* § 412.
⁵ *Id.* § 302.
⁶ *Id.*
⁷ *Id.*
⁸ *Id.* § 304.
⁹ 17 U.S.C. § 504.
¹⁰ *Id.*
¹¹ 17 U.S.C. § 107.
¹² *Id.*
¹³ *Id.* § 201(a).
¹⁴ House Rep. 94-1476.
¹⁵ *Id.* § 101.
¹⁶ *Id.* §§ 201(d)(2), 204(a).
¹⁷ *Nelson-Salabes, Inc. v. Morningside Development, LLC*, 284 F.3d 505, 514 (4th Cir. 2002).
¹⁸ *Id.* (quoting *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776 (7th Cir. 1996)).
¹⁹ *Id.* at 515-16.

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