access to computer systems and criminal law, to name a few. Congress has passed significant legislation affecting intellectual property and the Internet, such as: the Anticybersquatting Consumer Protection Act (in addition to the Uniform Dispute Resolution Policy, which provides an optional arbitraton remedy for claims to cancel and transfer an infringing domain.) which gives trademark holders a remedy against persons registering their trademark as a domain name in bad faith; the Digital Millennium Copyright Act which gives copyright holders the ability to protect against the unauthorized distribution and copying of digital works (e.g. written and sound recordings), as well as preventing the unauthorized access to encrypted works; Federal E-Sign Law ensures that most electronic signatures are legally binding; the Children's Online Privacy Protection Act (COPPA) restricts the collection of personal information from children under 13; the Electronic Communications Privacy Act provides for restrictions on the interception of an electronic communication without consent (except for employers in certain circumstances), and the Communications Decency Act, which grants immunity from defamation for telecommunication companies and online publishers.

This pamphlet, which is based on Federal and New York Law, is intended to inform, not to advise. No one should attempt to interpret or apply any law without the aid of an attorney. Produced by the New York State Bar Association in cooperation with the Intellectual Property Law Section.

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Intellectual Property

WHAT IS A COPYRIGHT?

A copyright is a form of protection provided to the authors of original works by the laws of the author's resident country and through international treaties. Copyright owners have the exclusive right to reproduce their copyrighted work and make certain other uses of it. Anyone else who wishes to (a) reproduce the copyrighted work, (b) produce adaptations or other works based on it, (c) perform or display it publicly, or (d) distribute copies of it, either in hard copy or by electronic transmission, must get the permission of the copyright owner to do so.

Photographers, artists, authors, architects, publishers, singers, writers and composers can all be copyright owners. A copyright only protects an author's specific expression, however, and not the general idea being expressed, or any system, process, discovery or method embodied in the work. A copyright exists from the moment the work is first written down or recorded, and no registration or other formality is required to protect the work.

However, in the U.S., a copyright owner must register the copyrighted work with the Library of Congress in order to sue and collect legal damages from anyone who makes unauthorized use of the work. Registration forms can be obtained from the U.S. Copyright Office web site at www.copyright.gov. The site also offers information circulars about how to register specific types of works and many other useful subjects.

Copyright lasts for the life of the author plus 70 years, or for 70 years after the death of the last of multiple authors of a work. If a work is created by an employee of a company, the work is considered a "work made for hire". The hiring company is considered the "author" of the work and copyright protection lasts for the shorter of 95 years from publication or 120 years after creation. If an author is not a formal

INTELLECTUAL PROPERTY

employee, the mere fact that he or she is paid to create a work does not mean the hiring party owns it. Unless there is a signed agreement saying the employer will own the copyright, and unless the work is made for use in a film, a textbook, or one of a few other special types of works, it is owned by the individual author, not the employer.

If someone makes an unauthorized use of a work for purposes such as teaching, scholarship, research, news reporting, commentary or criticism, the use might be considered a "fair use" and the copyright owner might be unable to stop it or collect damages. Fair use is determined on a case-by-case basis, and there are no clear, predictable rules as to when a particular use will be excused on this basis.

WHAT IS A TRADEMARK?

A trademark is a word, symbol, design, sound, color or other subject matter that indicates the origin/source of a product or service – it identifies and distinguishes goods or services of one party from those offered by other parties. In the United States, trademark rights arise from either (1) a prior use of a distinctive mark in commerce or (2) prior registration with the U.S. Patent and Trademark Office (USPTO) of a distinctive mark based on a *bonafide* intent to use it in commerce and demonstration of use in commerce. Trademarks may even take the form of a distinctive color (e.g., pink insulation), sound (e.g., chimes), scent (e.g., scented yarn), product configuration (e.g., the shape of a perfume bottle), or trade dress (e.g., look and feel of a restaurant.) Normally, a trademark appears on the product or on its packaging or in advertising to identify the owner's services.

In the United States, trademark rights arise from either (1) use of the mark, or (2) a bona fide intention to use the mark, along with the filing of an application to federally register that mark with the USPTO. Since trademark

rights arise from use of the mark in commerce, it is not necessary to obtain a federal trademark registration to receive certain rights and protections. There are, however, benefits to federal registration, such as nationwide protection regardless of where the mark is actually being used, the possibility of greater damage awards for infringement, the right to ask the U.S. Customs Service to stop the importation of infringing goods, and the ability to use the registration notice "®." Prior to receiving a federal registration and the right to use the "®," a trademark owner may use either "™" for a trademark or "℠" for a service mark to indicate an unregistered claim of ownership.

Unlike a copyright or patent, trademark rights can last indefinitely if there is continuous use of the mark in commerce. The term of the federal trademark registration is 10 years, with 10-year renewal terms. Between the fifth and sixth year after the date of mark federal registration, the owner of the registration must file an affidavit stating the mark is currently in use in commerce. If no affidavit is filed, the registration will be cancelled.

WHAT IS A TRADE SECRET?

The fundamental underpinning of trade secrets law is simple. If someone develops information others do not know that gives a competitive advantage, the owner can continue to enjoy that advantage as long as the information is valuable and the owner takes reasonable measures to prevent others from learning it. The law of trade secrets can protect high and low-tech information alike: customer information, sales strategies, new product ideas, computer programs, and highly technical scientific formulas. Properly protected trade secrets can enjoy legal protection indefinitely— far longer than items subject to patent or copyright protection—without the need for filing with a government office.

Of course, third parties could learn the confidential information by improper means or by coming up with a similar idea themselves. Trade secrets law protects against the first danger. If someone else can ascertain a secret formula by legitimate means, or can come up with the formula independently, the law of trade secrets will not prevent that person from using it.

The law of trade secrets relies solely on contractual and practical protections. This fact places a substantial burden on the trade secret owner to establish and actually follow workable procedures to safeguard valuable information. The fewer people who know the information, the fewer who can misappropriate it. Common sense safeguards, such as restricting access to the worksite; keeping secret information, machinery and manufacturing techniques out of view of visitors; requiring confidential information to be stored under lock and key or computer password; and using coded or unmarked product ingredients can help keep information secret. Companies should also be careful not to disclose their secrets in advertising literature, trade shows, on their web sites or in public speeches.

Confidentiality "legends" on specific documents (or computer screens) can be useful in identifying what information is to be protected. However, both overuse or under use of the "CONFIDENTIAL" legend should be avoided since each results in providing little practical guidance.

Finally, when trade secret owners need to disclose secrets to third parties, contracts such as confidentiality, license and non-solicitation or non-compete agreements can help protect secrets. The trade secret owner should not rely on boilerplate, since different business needs may require different approaches. Further, state law requirements for such agreements vary widely.

The owner of a trade secret that has been wrongfully acquired by someone else can bring a legal action in New York to try and stop use of the secret, and for monetary damages. The burden is on the trade secret owner to establish that there is a trade secret and that it was properly protected, and that it was, or threatens to be, used or disclosed improperly.

The most famous trade secret in the world? The formula for Coca Cola.

WHAT IS A PATENT?

A patent is the exclusive right to use an invention and to exclude others from making, selling, offering for sale, or importing the invention for a limited period of time. The U.S Constitution (Article I) contains a direction to Congress to provide patent protection "to promote the progress of science and of the useful arts, by securing for limited times to inventors . . .the exclusive right to their . . . discoveries."

Interpretations of the Patent Act by courts have defined certain limits on what can be patented. For example, the laws of nature, physical phenomena, and abstract ideas are not patentable.

There are three kinds of Patents: utility patents cover "utilitarian" inventions such as machines, something that is manufactured, a method of doing something, a process by which something is made, and products resulting from a method or process. The invention must be new and useful, and can be an improvement on something that is not new. Utility patents are effective from the date a patent is granted and last 20 years from the date of filing.

Design patents cover the ornamental appearance of a useful device (see utility patent, above), but not the function of such a device. For example, the unique shape of an item, such as a chair, might be protected by a design patent. Design Patents last 14 years from the date of grant. It is possible for a device to be the subject of both a design and a utility patent.

Plant patents are granted to anyone who invents or discovers a plant which (this is important) asexually reproduces any new variety of certain types of plants. The patent will also last 20 years from the date of filing.

No one else is legally allowed to make or sell the same thing, or use the same design, unless granted a license by the owner of the patent. This is to encourage invention, investment and commercialization of new technologies or improvements of existing technologies.

A patent is secured by first filing an application and paying a fee to the U.S. Patent & Trademark Office. The description of the item, design, or plant must be so complete that the invention can be reproduced by anyone experienced in the art to which the invention relates.

An application must be filed before, or certainly within one year from, the date of first publication of information about an invention anywhere in the world, or the offering for sale, or public use of the invention in the United States. Any application filed after that one year period will be rejected, or, result in a void patent.

WHAT IS INTERNET LAW?

Intellectual property law is at the core of Internet law (i.e. copyrights, trademarks patents, trade secrets), however the law of the Internet touches upon a broad array of legal issues, covering nearly the entire legal landscape, including: domain name disputes, piracy of works, privacy and security of information, online defamation, First Amendment rights, pornography, enforceability of e-signatures, personal jurisdiction, contract law and click-through agreements, interference with and unlawful