



# WHAT'S A COPYRIGHT / TRADEMARK / PATENT?

*A PRIMER*

GOTTLIEB, RACKMAN & REISMAN, P.C.  
COUNSELORS AT LAW  
270 MADISON AVENUE  
NEW YORK, NEW YORK 10016-0601

INTELLECTUAL PROPERTY RIGHTS  
PATENTS  
COPYRIGHTS  
TRADEMARKS

TELEPHONE No. 212-684-3900  
FAX No. 212-684-3999  
E-MAIL: [INFO@GRR.COM](mailto:INFO@GRR.COM)  
WEB SITE: [WWW.GRR.COM](http://WWW.GRR.COM)

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## INTRODUCTION

The questions “What’s a copyright; What’s a trademark; What’s a patent?”; “What do they cover?”; and “What is the difference between them?” are frequently asked by our clients, friends and colleagues in general practice. To answer these questions in a clear and straightforward manner, we are pleased to present this Primer on copyright, trademark and patent law (often called “intellectual property” law). This small volume sets forth only basic principles; it is not meant to be exhaustive or to provide more than general guidelines. The reader should therefore consult with our qualified intellectual property attorneys for a detailed review of any specific factual question or legal issue.

In general, a copyright protects various forms of written and artistic expression. A trademark protects the brand or symbol that identifies the source of the product. A patent protects the utilitarian aspects of the product; it can also protect its ornamental aspects. Example: A cosmetic manufacturer markets a new perfume, using the name of a celebrity. The art work on the packaging and the artistic shape of the bottle may be protected by copyright. (The shape might also be protected by a design patent.) The name of the manufacturer and the name of the celebrity may be protected as trademarks. The new tamper-proof closing for the package and for the perfume container may be protected by a utility patent.

## COPYRIGHTS

### What Is A Copyright?

A copyright is a form of protection provided by the Copyright Laws of the United States to authors of “original works of authorship.” These include literary, dramatic, musical, artistic and certain other works. Copyright protection is available both for published (e.g., sold or leased) works, as well as for works in unpublished form. Examples of protectable works are books and pamphlets; songs, including their words and music; plays and other dramatic performances, including parodies, comic routines, fictional and non-fictional works, pantomimes and choreographic works; paintings and drawings, both “original” works and reproductions; textile designs; jewelry and toys with “artistic” aspects; maps and blueprints; photographs; motion pictures and sound recordings in the form of records, disks and tapes; and computer software.

### What Rights Does A Copyright Give To The Author?

The Author (or any individual or company to which the Author has transferred his rights) is the only entity which may lawfully reproduce the copyrighted work, distribute copies of it, perform the copyrighted work, display it publicly or prepare derivative works based upon the copyrighted work, e.g., prepare a translation of it into a foreign language. These are the Author’s “exclusive” rights which others may not exercise without his permission.

## **What Does A Copyright Not Cover?**

There are various categories of materials which are not subject to copyright protection. These include works that have not been “fixed” in a tangible form, as for example, a speech that is not written down or recorded. Other examples of works not subject to copyright protection include titles and slogans; ideas; procedures; principles and concepts; works that are purely factual in nature and do not contain artistic expression; conventional geometric figures; and forms such as blank diaries and bookkeeping forms.

## **Who Is The Copyright Owner?**

The Author of a work owns it as soon as it is created or “fixed.” The Author is usually an individual. If the individual creates the work in the course of his or her employment, then the work is considered to be a “work made for hire” and the employer is deemed by operation of the law to be the “Author.”

## **How Do You Obtain A Copyright Registration?**

Although copyright arises as soon as a work is fixed in a tangible form, it is highly desirable (but not mandatory) to promptly register the copyright claim with the Copyright Office of the Library of Congress. Prompt filing of a copyright application in the Copyright Office establishes a public record of the copyright owner’s claim, creates a presumption that the copyright is valid, and enables the owner to claim certain “statutory” damages and even to recover the attorneys’ fees expended in asserting the copyright against an infringer. Registration is generally mandatory, however, before any copyright infringement suit can be filed, and such a suit must be filed in a federal court.

## **How Is A Copyright Transferred?**

Initially, the Author of a work owns the copyright, but the Author may transfer any or all of the copyright rights to another entity. Such transfer can only be made in a written document.

## **How Do You Obtain International Copyright Protection?**

Copyright protection is available to United States citizens in foreign countries; the United States is a member of the Universal Copyright Convention and the Berne Convention, which in general terms offer reciprocal copyright rights in their respective member countries. In most other countries, there is no need to register a copyright.

## **Is A Copyright Notice Required?**

While no longer mandatory, it is still desirable to place a copyright notice on all works subject to copyright, in a location where it can be readily seen. The purpose of the notice is both to notify the public that the copyright is claimed and to prevent an infringer from asserting that he is “innocent” because he was not aware that the work was the subject of the copyright.

The desirable form of copyright notice is as follows: © 2005 David Smith. The year “2005” would be the year in which the work was first “published,” e.g., sold, distributed or leased, and “David Smith” would be the name of the copyright owner. Such notices are widely used on books, magazines, films and videotapes, and even on software programs.

## **What Is The Term Of Copyright Protection?**

Currently, copyright protection lasts for the life of the author plus 70 years, or where a work is created by an employee and is thus owned by the employer, the copyright term lasts for 95 years from the date of first publication or 120 years from the year of creation, whichever expires first.

## **How Do You Apply To Register A Copyright?**

Most authors will be able to file their own copyright applications in the Copyright Office, at least after an initial consultation with an intellectual property attorney. Application forms can be obtained from the Copyright Office Web site, which is easily accessible.

To obtain a copyright registration, the author needs to send to the Copyright Office a completed application form, a filing fee of \$30 for each application, and generally two copies of the work being registered, known as “deposit copies.” There are specific guidelines regarding the nature of the deposit which vary based on the type of work. For example, where software is involved, the Copyright Office Regulations permit you to submit the first 25 and the last 25 pages of the source code of the program.

Under certain circumstances, and upon payment of further fees, the Copyright Office will examine a copyright application on an expedited basis. This is sometimes necessary if a registration certificate is needed immediately in order to commence a legal action based on the copyright.

## **How Do You Enforce Copyright Rights?**

If a copyright owner becomes aware of an infringement (that is, an unauthorized exercise of copyright rights), it is strongly suggested that the matter be brought to the attention of your intellectual property counsel. You and your counsel will then evaluate whether (a) the alleged infringer has had “access” to the copyrighted work, and (b) whether the allegedly infringing work is “substantially similar” to the copyrighted work. “Access” means that the infringer had an opportunity to copy the copyrighted work, and “substantial similarity” means that the allegedly infringing work improperly appropriates the copyrightable elements of the copyrighted work.

If your intellectual property counsel decides that there is an infringement, generally the first step is to write a “cease and desist” letter to the infringer. If the matter cannot be resolved at that point, the copyright owner may institute a civil action against the alleged infringer in the appropriate federal court in the United States. In such an action, the copyright owner may seek from a court an award of either the profits of the infringer, or his or her own damages, or statutory (i.e., fixed) damages, together with attorney’s fees, as well as a permanent injunction against continued infringement. The copyright owner may also attempt to obtain a “preliminary” injunction, thereby preventing the sale or other use of the infringing work even before the ultimate trial of the action.

## **Are Copyrights Of Any Value?**

Large numbers of copyrightable works are constantly being improperly copied by competitors in today’s highly aggressive marketplace. Copyrights are strong legal weapons, looked upon favorably by the courts. If the prevention of copying, i.e., the “theft” of artistic and written material, is important to you and your company, copyright protection is available and the copyright can be enforced against adverse parties.

## TRADEMARKS

### **What Is A Trademark?**

A trademark is any word, phrase, symbol or design which identifies a product or a service and distinguishes it from the products or services of others. A trademark, for example, can be the name of an individual, a completely made up or arbitrary term, or a phrase which has become associated with a product or service through long use. Examples of very well-known trademarks are “Calvin Klein” for clothing, “Coca-Cola” for carbonated beverages, “Mercedes-Benz” for automobiles, “FTD” for the service of delivering flowers and “Don’t Leave Home Without It” for credit card services.

### **Should You Undertake A Trademark Search?**

It is important that before you begin using a trademark, a thorough trademark search be conducted to determine whether there might be any conflict with prior users of the same or similar trademarks. A qualified intellectual property attorney should conduct the search through prior federal trademark registrations and applications, trademark registrations in the 50 states (each state maintains its own register of trademarks and service marks), and unregistered “common law” uses, such as trade and telephone directories and Internet domain names. Owners of previously used trademarks have the right to object to the use of the same or a similar mark as used on the same or related goods or services. A trademark search should also be conducted prior to incorporation of a company under a particular corporate name. However, so-called “clearing” of a corporate name with a Secretary of State’s Office, by which a name is reserved and/or a corporation is formed, is no guarantee that the name will not be challenged by a prior trademark owner, whether in that State or elsewhere.

## **Should A Trademark Be Federally Registered?**

The registration of a trademark in the United States Patent and Trademark Office is highly desirable but not mandatory. The owner of a trademark may file an application to register its trademark if either (a) the mark has been used on goods or services in interstate commerce, or (b) the owner has a good faith intention to use the mark in interstate commerce with respect to specified goods or services – the latter has become known as an intent-to-use or “ITU” application.

Applications to register trademarks are filed with the United States Patent and Trademark Office. Approximately 3 to 6 months after the application is filed, a Trademark Examiner reviews the application to determine whether it is in proper form and whether the mark conflicts with any other prior registered or pending trademark. If the Trademark Examiner raises an objection or issues a refusal to register (usually via a written “Office Action” sent to the applicant’s attorney), the owner has six months in which to overcome the objection or rejection by submitting an argument that the Examiner Attorney’s view is incorrect, or by amending the application (if possible) to comply with the Examiner Attorney’s requirements.

If the Trademark Examiner approves the application, it is published in a weekly publication, the Official Gazette, and other parties have thirty days in which to oppose issuance of a registration. If no such opposition is filed, or the differences between the owner and a third party are resolved, the Patent and Trademark Office will issue a certificate of registration.

In the case of ITU applications, the process is similar, but instead of initially receiving a registration, the applicant is given a “Notice of Allowance,” providing for a six-month interval within which the mark must be placed into use. If the mark cannot be used in that time period, the applicant is allowed up to five successive six-month extensions of time within which to use the mark by paying appropriate fees and filing the necessary documents. Thus, for intent-to-use applications, the applicant has a total of three years from the allowance of the application to place the mark into actual use. Once the mark is registered, the registrant’s rights in the mark automatically relate back to the date on which the ITU application was filed even though the mark was not actually used until much later.

### **What Is The Term Of A Trademark?**

A trademark’s term is perpetual as long as it is still in commercial use. A federal registration is valid for ten years (provided that an initial maintenance declaration is filed by the sixth anniversary of the registration) and may be renewed indefinitely for further ten-year terms, provided the trademark continues to be used on the goods or services specified in the registration.

## **How Do You Give Notice Of Trademark Rights?**

The symbol <sup>TM</sup> next to a trademark indicates that the owner is making a claim of ownership of that trademark. This is used in the following form:

SweeTart<sup>TM</sup>

Once a federal registration is obtained, the ® symbol, signifying registration, should be substituted:

SweeTart®

## **What If Your Trademark Is Infringed?**

If you find that a third party is using a trademark identical to or confusingly similar to a trademark owned by your company, and it is being used on the same or related goods or services, this should immediately be brought to the attention of intellectual property counsel. Your counsel will review with you the nature of the use by the third party, its length of use, the products or services on which it is used, and the geographical markets in which it is being used. If you and your counsel agree that the use by the third party is likely to cause confusion or mistake in the marketplace, then your counsel will usually write a “cease and desist” letter to the third party. If the matter cannot be resolved at this point, you may file an action for trademark infringement in an appropriate state or federal court, seeking from the court an injunction against further infringing use as well as damages and, in certain “exceptional” cases, attorneys’ fees. If the infringement is deemed willful, treble damages are also available.

## **How Do You Obtain International Trademark Protection?**

Given our global economy, the need to obtain trademark rights in foreign countries often arises. Unlike the United States, most foreign countries require that applications be filed and registrations be obtained before the mark will be protected in that country – in other words, mere use of an unregistered mark will not generally afford coverage in most foreign countries. In the past, applications had to be filed in each country in which protection was desired (often dependent on where products carrying the trademark were being made or sold). In recent years, however, various international treaties have allowed U.S. registrants to obtain rights in certain foreign countries based on a single international filing.

One of the most useful arrangements is that provided for the European Community. Based on a system set up in the European Union (“EU”), a central filing can be made in the Community Trademark (“CTM”) Office located in Spain, and when the mark is approved, this registration will be effective in the 25 countries that are currently members of the EU; a CTM registration will automatically be extended to countries which join the EU in future years.

Very recently, the United States became a member of another international trademark arrangement, the “Madrid Protocol,” which allows U.S. applicants to file in more than 60 foreign countries that are current members of the Protocol by submitting a centralized application to the World Intellectual Property Organization (“WIPO”) in Geneva, Switzerland. Individual filing fees for each selected country still have to be paid, and separate examinations will take place in each of those countries, just as if separate national applications had been filed. This centralized filing process saves a considerable amount of time and money and is expected to expedite the filing and registration process for U.S. applicants seeking to obtain protection abroad where they previously had to file in numerous countries individually.

## **Why Bother Registering Your Trademark?**

Federal registration of trademarks gives the owner valuable procedural and substantive rights. While a “common law” or unregistered trademark can only be enforced in the geographical areas in which it has been used, a federal registration is valid nationwide. Federal registrations are respected by the courts and are more readily protected than are unregistered marks. If your company is using a brand name for a product, a product ingredient, a process or a service, federal registration will enhance and preserve that asset.

Another “hidden” advantage of federal registration is that the trademark becomes part of the Federal Trademark Register, accessible to other interested parties conducting their own searches when adopting a new mark. If they find your registered trademark on the Register and it is too close to the one that they are seeking to adopt, competent trademark counsel will advise them not to choose a mark that is too similar to yours and to select another one. In this manner, a federal registration for your mark acts as a barrier to the undesirable adoption of a confusingly similar mark but gives you this advantage without your even knowing about it.

## **How Does The United States Customs Service Protect Trademarks And Copyrights?**

Trademark and copyright registrations can be recorded by their owners with the United States Customs Service, accompanied by a list of authorized importers and licensees. Infringing goods will be detained by Customs Inspectors, and entry into the United States will be denied if the importation violates either the owner’s trademark or copyright.

Customs recordations are relatively inexpensive filings, which should be done routinely to protect your intellectual property rights from unauthorized foreign “knock-offs” coming into the United States.

## PATENTS

### What Is A Patent?

A patent is a grant issued by the United States Patent and Trademark Office of a legally enforceable right to exclude others, for a certain number of years, from making, using, selling, offering to sell or importing the invention claimed in the patent. A patent does not actually give its owner the “right” to make, use or sell the invention of the patent since there is a possibility that the use of that invention may infringe upon the rights of owners of prior patents. It is often said that a patent is an “exclusionary” right, enabling the owner to prevent others from making, using, importing, offering for sale, or selling the invention claimed in the patent. The exclusionary rights granted by a patent can be very valuable, allowing patent owners to license others to practice the invention claimed in the patent.

### What Can Be The Subject Of A Patent Application?

Any person who “invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new and useful improvements thereof,” may obtain a utility patent. By way of example, patents may be obtained on mechanical devices, such as motors and carburetors, on electrical circuits and electrical appliances, including microprocessors and their programming, on chemical processes such as the process for making specific medicines and chemical products such as Teflon, and for new genetically derived products. Certain computer software is also patentable, and patents are available for methods of doing business as well. A specific type of patent, a design patent, may also cover the ornamental “look” of an invention. Certain plants and agricultural products are also patentable.

## **How Do You File A Patent Application?**

Applications for United States utility or design patents are filed with the United States Patent and Trademark Office. After the application is filed, a Patent Examiner reviews the application to determine whether the disclosed invention is entitled to patent protection. This review is careful and technical, and the Patent Examiner is trained in the technology which he is reviewing – most Patent Examiners not only have science or engineering degrees but have obtained law degrees as well. Among other things, the Patent Examiner will do a search of “prior art” patents and printed publications, in a database maintained by the United States Patent and Trademark Office, to determine whether or not the invention is “new” and “unobvious” compared to what has been done previously by others.

The Examiner will also scrutinize the application to make sure that no portions of it are indefinite or otherwise confusing and that the subject matter is presented properly from a technical standpoint – it is required that the most effective version of the invention known to the inventor must be disclosed (this is called the “best mode” requirement). If the Patent Examiner raises an objection, again in an Office Action, the inventor has up to six months to correct any deficiency or to submit an argument that the Examiner’s position is unsound.

Patent applications are generally fairly complex legal and technical documents. Applications are normally prepared by a registered patent attorney or agent working in close association with the inventor. It is highly desirable, before a patent application is prepared and filed, to conduct a search at the United States Patent and Trademark Office to determine whether or not the invention is patentable. Such searches will also allow the patent attorney to present the invention more precisely by enabling the attorney to distinguish it from the prior art found in the search.

United States patent applications should be filed before any sort of public disclosure is made or promptly after the invention becomes “known” to others, since patents cannot be obtained here if, for more than one year before the patent application is filed, (a) the invention has been on sale in the United States, or (b) has been the subject of a printed publication in the United States or (c) has been the subject of a printed publication in any foreign country. If time is running out or if it is not certain whether a complete patent application should be filed, a less extensive “provisional” application may be filed. This may be followed by a more complete and formal application which must be filed within one year. Any public disclosure of an invention (unless preceded by the filing of a U.S. patent application) generally results in the immediate loss of rights in almost all foreign countries, which do not allow a one year grace period for filing.

### **What Is Patent Marking?**

Notice of patent rights should be given on products made in accordance with a patent application or patent. The purpose of this notice is, of course, to make competitors wary of copying. “Patent Pending” means that an application for a patent is pending in the United States Patent and Trademark Office. (Pending patent applications – “patent pending” – are kept secret by the Patent Office but will be published 18 months after filing). “Patent No. \_\_\_\_\_” or “Patent No. Des. \_\_\_\_\_” means that a patent or a design patent, respectively, has been issued. If an infringement occurs, the use of such a notice is important and beneficial since it will generally extend the time period for which damages can be collected from the infringer.

Patent copies can be obtained from the Patent Office, from major public libraries, and quite easily from the Patent Office Web site at [www.uspto.gov](http://www.uspto.gov).

## **What Is The Term Of A Patent?**

Once issued, a utility patent has a term of 20 years from the filing date, although maintenance fees are due 3-1/2, 7-1/2 and 11-1/2 years after issuance in order for the patent to last for its full term. Design applications have a term of 14 years from the date of issuance and no maintenance fees are required. As a rule, once a patent expires, its claimed subject matter enters the public domain.

## **Can You Obtain International Patent Protection?**

An issued United States patent gives protection only in the United States. It is frequently desirable, however, to obtain patent protection in other countries which may be of commercial importance to the inventor or to his company. The United States is a member of several conventions and has signed treaties which enable a United States patent application to be eligible for filing in other countries.

A patent attorney should be consulted regarding filing of a patent application in foreign countries since the attorney is usually familiar with patent laws in foreign countries and/or has worked with patent agents in foreign countries who are well-versed as to their own country's patent laws and practices.

## **How Do You Take Action To Prevent Infringement?**

If you find that a third party is using your patented invention, you should consult with intellectual property counsel. Your counsel will review with you the nature of the use by the third party and whether the product sold by or the process used by the third party is within the coverage of the "claims" of your patent. If your counsel determines that a third party has infringed your patent rights, your counsel may recommend that a "cease and desist" letter be sent to the third party. If the

matter cannot be amicably resolved, you are entitled to file an action for patent infringement in federal court, seeking an injunction against further infringing use and requesting damages, generally the infringer's profits or a reasonable royalty based on what the infringer has sold. Damages can be trebled where the court makes a finding that the infringement was willful, and in certain "exceptional" cases, attorneys' fees can be recovered as well.

### **Are Patents Of Any Real Value?**

Today, patents are highly respected by the courts and as a result, more and more companies are recognizing the benefit of protecting inventions with patents. While more difficult and costly to obtain than copyrights or trademarks, a patent, carefully thought out and finely-tuned with the help of your intellectual property counsel, can give you a competitive edge for many years.

### **Are Patent Clearance Opinions Important?**

Yes! Before you launch a new product or process, you should consult intellectual property counsel to confirm that the product or process is not covered by another's patent. You should, however, consult with and seek a formal opinion from your counsel if a third party accuses you of patent infringement. This will help you gauge what your defense strategy should be.

## **SOURCES OF ADDITIONAL INFORMATION**

Further information about copyright, trademarks and patents can be obtained from the following sources:

### **Information on Copyrights is available from:**

Library of Congress Web site: [www.copyright.gov](http://www.copyright.gov)

Copyright Office Telephone No.: 202-707-3000

Copyright Office Mailing Address:

Information Section, LM-401 or Publications Section LM-445

Library of Congress

Washington, D.C. 20559

### **For Copyright Forms and Publications:**

All necessary forms and instructions can be obtained at the Copyright Office Web site under the “Forms” link.

### **General Information on Patents and Trademarks:**

The best source of general information is their official Web site, [www.uspto.gov](http://www.uspto.gov)

### **To speak to a representative on Patents and Trademarks:**

The Help Line Telephone Numbers: 800-786-9199 or 703-308-4357

To inquire about a specific trademark or patent, go to either the “Patents” or “Trademarks” link at the Patent and Trademark Office home page. You may also call the Help Line numbers given above.

**You can also check on the current status of a trademark at:**

The Trademark Status Line Telephone Number: 703-305-8747

**For information on patents, write to:**

Commissioner for Patents

Washington, D.C. 20231

or send an e-mail to [usptoinfo@uspto.gov](mailto:usptoinfo@uspto.gov).

**For information on Trademarks, write to:**

Commissioner for Trademarks

P.O. Box 1451

Alexandria, Virginia 22313-1451

or send an e-mail as noted above under the Patents section.

**Trademark owners may wish to join or consult:**

International Trademark Association

655 Third Avenue, 10th Floor

New York, New York 10017-5617

(212) 768-9887

Web site: [www.inta.org](http://www.inta.org)

## **INFORMATION ABOUT THE FIRM**

Since 1970, Gottlieb, Rackman & Reisman, P.C. has provided legal advice and guidance to its clients in all aspects of patent, trademark, copyright and unfair competition law. We are qualified to practice before the United States Copyright Office, the United States Patent and Trademark Office, and in federal courts throughout the country. Our practice involves not only the acquisition of intellectual property rights for our clients but also the enforcement or defense of those rights in the United States and throughout the world. Our international practice relies on our long-established relationships with a network of associated counsel in each country of the world.

Every client gets our full attention. We tailor our representation to our clients' real needs and real budgets, and we make it a point to understand their businesses and to appreciate our clients' business goals.

We counsel our clients on their intellectual property rights while providing guidance to avoid infringing on the rights of others. If litigation is necessary, we are aggressive, thorough and well-prepared. In today's complex world of business, protection and enforcement of intellectual property assets can be instrumental to the success or failure of a company. Gottlieb, Rackman & Reisman has in-depth technical knowledge as well as the broad experience to meet the expectations of its clients and to protect their important proprietary rights.