



CHAPTER 1

Copyrights and Intellectual Property

This chapter introduces and distinguishes:

- copyrights;
- trademarks;
- trade secrets; and
- patents.

It also includes an example of copyright law in real life—a profile of author Stephen King.

INTRODUCTION TO COPYRIGHT: STEPHEN KING

In 1710, the English government enacted the Statute of Anne, a law that allowed authors to prevent others from copying their books. It was this right to control copying that evolved into modern copyright law. Over the centuries copyright protection has extended beyond books to include works that are reproduced including drawings, photographs, music, motion pictures, architecture, and computer programs.

For the first three centuries of copyright law, a book could be reproduced only by printing it on paper. By the end of the twentieth century, books could be stored in a digital format and reproduced instantly over the Internet. Many commentators believed that the conversion to digital media would sound the death knell for printed books. Media guru Marshall McLuhan predicted the “death of print.”

Are books headed for extinction? Not according to Stephen King, the world’s best-selling author. Since 1973, King has earned his fortune from copyrights on dozens of books such as *Carrie*, *The Shining*, *Misery*, and *The Stand*. King’s rights are protected under the same principles that have shielded authors since 1710.

When he completes a novel (considered a “literary work”), King acquires a bundle of rights. Included in this bundle is the exclusive right to publish the book. King can either sell this right to a publisher (known as an “assignment”), or he can license the publishing rights for a limited time. King acquires the same bundle of rights when he writes under the pseudonym Richard Bachman because copyright law protects pseudonymous and anonymous authors.

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In order for his works to acquire copyright protection, King's writing must be original and fixed in a perceptible form. In 1994, he had an idea for a novel—he imagined that all the residents of a small desert town were killed by the sheriff. The work was not fixed until King put the words on paper or typed them into his computer and created the novel *Desperation*.

Copyright law also grants King the exclusive right to create new works based upon his books (known as “derivatives”). This derivative right allows him to carry characters from book to book, as in the serialization of his *Green Mile* series in 1996. This derivative right also allows him to sell filmmaking rights based upon his books. In fact, more films are derived from books by Stephen King than from books by any other writer except William Shakespeare, who died before copyright laws existed.

When King's books and stories are sold in collections, the unique or creative way in which the material is selected and organized is protected as a compilation (known as a “collective work”). If excerpts of Stephen King books are read aloud for an audiobook, included in a multimedia CD-ROM, or provided at an Internet site (www.stephenking.com), these words are protected no matter whether they appear in print or digital format.

Like other successful copyright owners, King has been involved in legal disputes. In 1988, King won a lawsuit against an author who claimed King's book *Christine* was copied from (or “infringed”) a ten-page manuscript entitled *Side Swiper*.¹

How long will King's works be protected? The length of protection (or “duration”) of copyright is for King's life plus seventy years after his death. King may transfer his copyright ownership through his will, enabling his estate to profit from his literary legacy through the twenty-first century and perhaps beyond.

INTELLECTUAL PROPERTY LAW

Writers, inventors, businesses, and artists transform ideas into tangible property. Because these creations are products of the mind, they are known as **intellectual property** (IP). In order for a product of the mind to achieve protection under intellectual property law, it must qualify under one of the forms of intellectual property:

- copyrights—protecting music, arts, movies, and writings;
- patents—protecting inventions, discoveries, product designs, and plants;
- trade secrets—protecting confidential business information;
- trademarks—protecting the words, symbols, or other identifiers of products and services; or
- right of publicity—protecting the commercial use of a person's name or image.

The rights and obligations of owners of intellectual property are similar to those of owners of other types of property such as an automobile or house. For example:

- the owner has the right to exclude others from using or taking the property;
- the owner can license, sell, or transfer the property; and
- the owner is subject to rules regarding government registration, recordation, abandonment, and forfeiture.

The various intellectual property rights are related and often mix in intellectual property lawsuits. For example, if without permission a photograph of Stephen King on his Harley Davidson motorcycle were used in an advertisement, the photographer could sue for copyright infringement based on the unauthorized use of the photograph; the Harley Davidson company could sue for trademark infringement based on the unauthorized use of the Harley Davidson trademark; and King could sue for infringement of his right of publicity. The following sections describe the different forms of intellectual property and the standards for protection.

Copyrights

What Is Protected. Copyright law protects music, architecture, writing, computer programs, plays, movies, dance, or visual arts such as graphic arts, sculptures, photographs, or paintings. The person or entity that creates a copyrightable work is known as an author.

How Protection Is Acquired. Copyright protection is acquired once an original work is fixed in a perceptible form. “Original” under copyright law means that the author did not copy it from another source. Registration of a copyright is *not* required for protection. However, registration is recommended because it enhances the value of copyright and provides rights in the event of litigation.

How Copyrights Are Regulated. Copyright laws are created by Congress and interpreted by the federal courts. The Copyright Office, a division of the Library of Congress, administers the registration of copyrights.

How Long Copyright Protection Lasts. Copyright protection begins once a work is created and generally lasts for the life of the author plus seventy years (for works created by a single author). Other works are protected for one hundred and twenty years from date of creation or ninety-five years from first publication, whichever is longer. Determining the duration of copyright depends upon many variables discussed in Chapter 14.

Patents

What Is Protected. There are three types of patents—utility patents, design patents, and plant patents. The **utility patent** is the most common and will protect any new invention or discovery that is:

- within one of the classes described in the patent statute² (a machine, process, composition, article of manufacture, or new use of any of these);
- useful, that is, it has some purpose;

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- novel, that is, it differs in some way from the publicly known or existing knowledge in the field. An invention is not novel if the application for the patent is made more than one year after sale, public disclosure, use, or offer of sale of the invention; and
- nonobvious, that is, persons working in the field would not consider the invention obvious.

Utility patents have been granted for the facsimile machine, the Scotchguard process, the hair-growth formula Rogaine, and the safety pin.

Designs and Plants. The patent statute also protects designs and plants:

- A **design patent** protects new, original, and ornamental designs for useful objects. (The design patent protects only the appearance of an article and not its structure or utilitarian features.) Design patents have been granted for stained glass windows, Adidas shoes, and the shape of an electric guitar.
- A **plant patent** protects distinctive plants that are reproduced asexually (that is, by means other than seeds). Plant patents have been granted for new variations of tulips, roses, and tomatoes. Under some circumstances, a utility patent can cover sexually or asexually reproducible plants.

How Protection Is Acquired. Unlike all other forms of intellectual property, protection does not exist for a patentable invention until a patent is issued by the United States Patent and Trademark Office (PTO). Without the issued patent (or “Letters Patent”), there are no rights under patent law. The application process is technical and requires the use of a special drafting language and drawings. Since the process is expensive and time-consuming, most applicants search the Patent Office records prior to filing an application in order to determine the likelihood of registration.

How Patents Are Regulated. Patent laws are created by Congress and interpreted by the federal courts. The patent registration process is administered by the PTO, which is a division of the Department of Commerce.

How Long Patent Protection Lasts. Plant and utility patents filed before June 8, 1995, enjoy patent protection for seventeen years from the date the patent is issued, provided that fees necessary to keep the patent in force are paid (maintenance fees). Patents filed after June 7, 1995, enjoy protection for twenty years from the date of filing, a change resulting from United States adoption of the GATT treaty (the General Agreement on Tariffs and Trades). A design patent is protected for a maximum of fourteen years. The owner of a patent may exclude others from making, using, or selling the patented subject matter (that is, the invention, design, or plant) throughout the United States. The length of United States patent rights in foreign countries depends upon foreign laws and international treaties.

Trade Secrets

What Is Protected. A **trade secret** is any business information that is kept in confidence and that gives the business an advantage over competitors who do

not know it. Some examples of trade secrets are the Gatorade formula, survey methods used by professional pollsters, a new invention for which a patent application has not been filed, marketing strategies, manufacturing techniques, computer algorithms, recipes, and formulas. A trade secret has value because it is not published or publicly distributed. This is quite different from a copyright or a patent, the owner of which makes money from the publication and distribution of copies or objects embodying the copyrighted or patented material.

How Protection Is Acquired. Protection is acquired if the information is unknown to competitors and if the information is treated like a secret. The information cannot be shown to the public, and people who use the secret have an obligation to maintain secrecy. That is, they must have a confidential relationship or have signed a confidentiality agreement.

How Trade Secrets Are Regulated. Trade secrets are regulated by federal and state trade secret laws and by federal and state case law (or “common law”) rulings. There is no registration process for trade secrets.

How Long Trade Secret Protection Lasts. Trade secret protection lasts for as long as the secret is kept confidential. Once a trade secret is made available to the public, trade secret protection ends. It is not a violation of trade secret law to analyze (or “reverse engineer”) any lawfully obtained product and determine its trade secret.

Trademarks

What Is Protected. A **trademark** is any word, symbol, design, device, logo, or slogan that identifies and distinguishes one product or service from another. Trademarks inform consumers that a product comes from a particular source. For example, the Kodak trademark informs consumers that a box of film has a certain quality or reliability. This consumer connection, known as “goodwill,” strengthens the value of all Kodak products. Examples of trademarks are Viking, the trademark for the publisher of Stephen King’s books; Harley Davidson, the trademark for the manufacturer of King’s motorcycle; and Castle Rock, the trademark for the movie company that produced two Stephen King movies.

A trademark does not have to be a word. It can be anything that identifies and distinguishes a product or service, for example, the yellow McDonald’s arches, the color pink for Corning fiberglass, or the shape of the Absolut vodka bottle.

The owner of a trademark can exclude others from using a similar trademark on similar or related goods or services. In some cases, use of a similar trademark may be stopped if a court determines that the use of the similar mark dilutes or tarnishes the trademark. For example, the unauthorized use of the Adidas trademark made to look like a marijuana leaf would dilute or tarnish the shoemaker’s image.

How Protection Is Acquired. Trademark protection is granted to the first person to sell a product using the mark. Rights are created only when the mark is used in commerce (or as one observer stated, “No trade, no trademark”).

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Trademark registration does not create trademark rights. However, registration offers special rights in the event of infringement.

How Trademarks Are Regulated. Both the federal government and state governments have trademark laws.³ A trademark owner can register the mark with the federal or state government. Federal registrations are administered by the PTO. State registrations are handled by the respective Secretary of State.

How Long Trademark Protection Lasts. Trademark protection lasts for as long as a business continuously uses the trademark in connection with goods or services. Many valuable marks, such as Jell-O, have been in existence for over a century.

Right of Publicity

What Is Protected. The right of publicity is the right to control the commercial exploitation of a person's name, image, or persona. This right is the "baby" of intellectual property law, a relatively new legal right developed over the past three decades. Although everyone has a right of publicity, the right is traditionally associated with celebrities because the name or image of a famous person is most often used to sell products or services. If a child's photograph is used to sell toys, that child could claim a misappropriation of the right of publicity. It is for this reason that all models or persons used in advertisements sign consent agreements.

How Protection Is Acquired. The right of publicity exists without doing anything. However, this right only extends to commercial exploitation. The use of the name, likeness, or persona for news, information, or public interest purposes is not a violation of the right of publicity. For this reason, Madonna cannot prevent the use of a photo of her in a news story in the *National Enquirer*.

How Right of Publicity Is Regulated. The right of publicity is a matter of state law. Some states have passed statutes regulating these rights,⁴ while other states do not have right of publicity statutes but have established common law rights under case law. As of the writing of this book, approximately seventeen states have neither a statute nor case law regarding right of publicity.⁵

How Long Right of Publicity Protection Lasts. The right of publicity exists for the lifetime of a person. Unlike other forms of intellectual property, the right of publicity is not always "descendible" (that is, it does not always survive the death of the person who owns the right). Only eleven states currently recognize that the right of publicity survives death.⁶ Tennessee, the home of the late Elvis Presley, was one of the first states to recognize that the right of publicity could be passed to survivors.

OVERLAPPING INTELLECTUAL PROPERTY RIGHTS

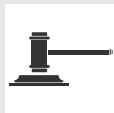
There may be overlapping choices when choosing protection for new works or inventions. Some computer software programs can be protected under copyright

law and patent law. The distinctive design of the Manischewitz wine bottle can be protected as a trademark and as a design patent. The appearance of a *Star Wars* toy can be protected by trademark, design patent, or copyright. How is the correct choice determined? An analysis is made that usually weighs the following factors:

- the cost of the various forms of protection (for example, trade secret protection is free while patent protection can cost thousands of dollars);
- the strength of the protection (for example, a patent owner can stop anyone manufacturing a similar invention, while a copyright owner must prove that the infringer *copied* the work); and
- the length of protection (for example, trademark protection begins when the mark is used in commerce and continues for as long as it is continuously used in commerce, while patent protection lasts less than twenty years).

EXAMPLE

Design Patents and Copyright. One example of overlapping rights occurs when a designer chooses between copyright and design patent protection. Both forms of intellectual property protect artistic design and visual imagery. For example, a three-dimensional cartoon character on a belt buckle could qualify for copyright protection. The same belt buckle also could qualify for a design patent because the design is new, original, and ornamental for an article of manufacture (that is, a belt buckle). Not all designs are protected under copyright *and* design patent law. The PTO will not issue design patents for surface ornamentation (that is, flat illustrations such as labels or drawings). Therefore, two-dimensional illustrations are protected *only* under copyright law and not as design patents.



JUDGE LEARNED HAND ON COPYRIGHT

Many of the chapters in this text include summaries of copyright cases decided by Judge Learned Hand. For over fifty years, Judge Hand served as a federal district and appellate court judge in New York. With the exception of Oliver Wendell Holmes, Judge Hand remains the most quoted jurist of the twentieth century. One reason for his impact and popularity is that he emphasized a simplicity of language. In copyright law, Judge Hand had an uncanny ability to size up the facts and make a determination with timeless implications. Some of his decisions predate changes in the copyright law, such as protection of computer programs, reform of copyright notice rules, analysis of infringement, separate protection for literary characters, and principles of co-ownership of copyright.

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END NOTES

1. Glanzmann v. King, 887 F.2d 265 (6th Cir. 1989).
2. 35 U.S.C. § 1–376.
3. The federal statute is at 15 U.S.C. § 1051–1127.
4. California, Florida, Kentucky, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin.
5. Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Louisiana, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Vermont, and Wyoming.
6. California, Florida, Georgia, Kentucky, Nebraska, Nevada, New Jersey, Oklahoma, Tennessee, Texas, and Virginia.

FOR MORE INFORMATION

The following resources may prove helpful for locating information about the topics discussed in this book. Websites are emphasized as a source of information, as they are current and free to use. Additional resources are provided in Appendix A.

Intellectual Property Resources

Yahoo Intellectual Property Directory

http://www.yahoo.com/Government/Law/Intellectual_Property/

A thorough listing of IP resources on the Internet.

Legal Information Institute

<http://www.law.cornell.edu/topics/topic2.html>

Intellectual property links and downloadable copies of statutes and cases.

Intellectual Property Mall

<http://www.ipmall.fplc.edu>

Intellectual property links and information.

The American Intellectual Property Law Association

2001 Jefferson Davis Highway, Suite 203, Arlington VA 22202, (703) 415-0780

<http://www.aipla.org>

Helpful links and information regarding IP attorneys.

Patents

The United States Patent and Trademark Office

Assistant Commissioner of Patents, Washington DC 20231

<http://www.uspto.gov/>

The PTO offers a number of informational pamphlets, including an introduction to patents (“General Information About Patents”) and an online

searchable database of patent abstracts (short summaries of patents). Most patent forms and publications, including the Manual of Patent Examining Procedures, Examination Guidelines for Computer-Related Inventions, and Disclosure Document Program, can be downloaded from the PTO website.

Patent Portal: Internet Patent Resources

<http://www.law.vill.edu/~rgruner/patport.htm>

Material on patent law, inventor assistance, and licensing.

Shadow Patent Office

<http://www.spo.eds.com/patent.html>

Information about recent patent filings and patent search services.

STO's Internet Patent Search System

<http://www.sunsite.unc.edu/patents/intropat.html>

Patent news, information about searching, and patent documents.

IBM Patent Site

<http://www.patents.ibm.com>

Access to IBM's in-house patent searching engine including some 1.4 million European patents.

Copyrights

United States Copyright Office

Publications Sections, LM-455, Copyright Office, Library of Congress,
Washington DC 20559

<http://www.loc.gov/copyright>

The Copyright Office has numerous circulars, kits, and other publications that can help you, including one on searching copyright records. Frequently requested Copyright Office circulars and announcements are also available via the Copyright Office's fax-on-demand telephone line at (202) 707-9100.

Trade Secrets

Trade Secrets Home Page

<http://execpc.com/~mhalign/>

Case law, legislation, and current news regarding trade secret law.

Trademarks

Trademark Office

Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington VA
22202-3515

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<http://www.uspto.gov>

The Trademark Office website includes the relevant applications and forms and provides a method for searching registered marks.