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By Leonard D. DuBoff, © 2009

Prior to this nation’s Declaration of Independence, Europe set the standards for, manufacturing and cultural sophistication, whereas the colonies provided raw materials and a market for European-manufactured goods. In other words, this continent was the “third world” of the time.

The Founders were cognizant of this fact when the Constitution was written, and therefore, Article 1, Section 8, Clause 8 was intended to provide incentives for Americans to effectively compete with the more sophisticated Europeans. That section provides Congress with the ability to enact patent and copyright laws. Those laws were promptly enacted, and thus these incentives have been part of American jurisprudence since the very beginning.

The patent laws of the United States provide that for 20 years from the date an application is filed, a patent holder may exclude others from practicing the patented invention, giving the patent holder the sole right to create or license that invention during that period of protection.

The copyright laws have a similar, albeit weaker, form of protection. Under this legislation, a copyright owner can prevent others from copying the protected work for the period of protection, though a copyright owner cannot prevent others who have independently created a similar work from exploiting it. The copyright statute provides that any original work of authorship that is put into a tangible form and that has minimal creativity may be protected from copyright for the life of the creator plus 70 years if the creator is an identified individual. When the work is created by a hypothetical person, such as an entity (e.g., a corporation), anonymously or by one using a pseudonym, then the period of protection is either 120 years from creation or 95 years from first publication, whichever period expires first. Once the term has elapsed, the work becomes part of the public domain and may be freely copied.

Trademark is another form of intellectual property protection. The trademark laws protect any name, symbol, logo or combination of these used to identify the source of a product or service. Under the Lanham Act, a mark will be protected if it has been used in interstate or foreign commerce and complies with the other requirements of the law. Trademark registrations need to
be renewed in 10-year increments for so long as the mark remains in use, but marks are not required to be registered and remain protected for the time the mark is used.

These three bodies of law coexist, though throughout history they have periodically clashed and questions have been raised regarding the priority of protection. The courts have thus been required to assist in defining the boundaries of the different forms of protection.

In *Mazer v. Stein*, for instance, the United States Supreme Court was presented with a bronze sculpture of a Balinese dancer that had been converted into a lamp. The Court held that if the aesthetic sculpture could exist separately from and be identified independently of the functional lamp, then the aesthetic work would enjoy copyright protection but that the functional aspects would be protectable, if at all, under the patent laws.

When a novel’s package design was copied by a competitor and the copying was contested, the court hearing the case was presented with an interesting challenge. Since packaging is functional, it could not enjoy copyright protection; yet, it was felt that the unauthorized reproduction of the novel packaging could not be permitted. It was from this dilemma that the *doctrine of trade dress* was first established. The doctrine is similar to copyright in that the protected trade dress must not be functional; yet, it may be registered and protected under the Lanham Act in a manner similar to that of a trademark.

In the case of *Dastar Corporation v. Twentieth Century Fox Film Corporation*, the Supreme Court was forced to determine whether the trademark laws could be used to protect a copyrightable work that has fallen into the public domain because its period of protection had expired. In this case, a book that chronicled Dwight D. Eisenhower’s experience as a wartime general was converted into a television series aired by Fox Broadcasting in 1949. At the time the TV series aired, the period of copyright protection was 28 years, and the copyright owner could renew that copyright registration for an additional 28 years. Unfortunately, Fox allowed the copyright registration to lapse after the initial period, and the work thus fell into the public domain.

Later, Dastar created a video series using much of the same historical footage as was contained in the original work, though Dastar reorganized the material, inserted different captions and renamed the program *World War II Campaigns in Europe*. Fox filed suit against Dastar for copyright infringement and for reverse passing off (failing to identify the new work as having been based on the original Fox work). The court held that the public has the right to copy a copyrighted work without any attribution after the copyright expires, since otherwise the public's right to use “expired copyrights” would be limited.

Because of the complexity of the laws dealing with the various forms of intellectual property law, it is important to seek assistance from a knowledgeable intellectual property lawyer in connection with appropriately protecting that intellectual property.

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