

Using Intellectual Property To Establish and Protect Your Firm's Architectural, Interiors and Industrial Design Domain

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If you were to hear a story about a painter that hosted an exhibit in Manhattan early in the afternoon and then simply left the gallery for a celebratory dinner leaving the front door to the gallery wide open for any and for all to come through and take her works of art, wouldn't you consider this painter to be somewhat foolish? Likewise, wouldn't you be puzzled if you were told a story about a movie producer that knew bootleggers were likely to copy his newest blockbuster and sell it on the city streets in advance of the release date, but the producer refused to do anything to stop these thieves even though he knew how to prevent the bootleg copies from coming into existence? Lastly, if you read in the morning paper that a company decided to let its main competitor sell duplicate copies of its best selling products, but did not receive any royalties whatsoever in exchange, wouldn't you suspect there was a misprint in that paper?

While each of these scenarios sounds outrageous, blatant misappropriations as severe as these are very real. Perhaps even scarier is the fact that ***equally substantial misappropriations may be happening to you or your company on a regular basis.*** Designers, architects and virtually any person or entity that makes a living based upon the creative products or services they provide may simply be giving their most valuable asset away and not even know it. And what is this "most valuable asset?" It's your creative talents, genius and work product. In the legal world, we call the manifestation of this creative genius "intellectual property" and we have a number of ways to protect it.

Intellectual property is loosely used to refer to several areas of law that often include patents, trademarks, copyrights, trade dress, unfair competition, anti-trust and related areas of law. Each of these areas of law have advantages, disadvantages, strengths and weaknesses worth considering when determining whether it may be effective in protecting your intellectual capital, rights and property. A variety of

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intellectual property tools, or IP tools, are available for use in protecting your creative works, products, and genius. You may however want a little knowledge and help in choosing the right tool or tools for a particular product, work or scenario. Accordingly, below is a brief description of some of the tools found in a typical “IP toolbox.” Each of these tools can be customized in its use to make it more effective for your particular needs. Similarly, as one becomes more familiar with the goals and the typical environments for using the tools, these tools can be used in more effective, efficient and creative manners to protect the “business works of art” you desire. Four of the more basic tools in a typical IP toolbox are: (1) design patents, (2) utility patents, (3) trademarks and/or trade dress, and (4) copyrights.

(1) Design Patents

Design patents protect against identical or substantially similar designs. More technically, design patents are directed to the ornamental appearance of articles of manufacture. *See 35 U.S.C. §171*. From sinks and light fixtures to computer screen icons and graphical user interfaces and everywhere in between, design patents can be used to protect the appearance of non-functional aspects of virtually any product on the market. Multiple applications can be filed covering varied aspects of a given article of manufacture. Mere portions of articles are regularly and effectively protected by design patents.

Does your award winning faucet have uniquely shaped handles that others are likely to mimic? Cover it with a design patent. Does your light fixture have an innovative and well liked configuration or surface ornamentation? Stop others from making a duplicate; get a design patent on it.

Tell me more about these design patents you say? Well in short, anyone who files a design patent application claiming an ornamental design that is novel/original, non-obvious and clear and definite to a designer of ordinary skill, is entitled to receive a design patent. *See 35 U.S.C. §§ 102, 103, 112*. Once a patentee (the inventor or other entity that has been assigned the rights) receives a design patent, he or she has a right to exclude others from, making the design, using the design, selling the design, or offering the design for sale for 14 years from the date of issuance. *See 35 U.S.C. §173*. In certain instances, especially when certain expedited procedures are utilized, a design patent may

issue within a few months after the initial filing. However, more typically, it will take approximately six or eight months to over a year until the design patent issues. The issued design patent can be licensed, leveraged or enforced against competitors or used to open doors for further sales of your product.

(2) Utility Patents

While design patents are focused on the “appearance” of products, utility patents are the tool that is often pulled out of the toolbox when the functionality of a product or service is worth protecting. From the new way that a washing machine oscillates the agitator inside of it, to the ergonomically shaped keyboard or the chair that breaks down into simple cardboard, if a product has usefulness and it has not been done before, it is ripe for protection by a utility patent.

Utility patents may be used to protect products, processes and systems. At the core of the requirement for a utility patent is the requirement that the invention claimed be new and useful. *See 35 U.S.C. §101*. Additionally, as with design patents, an invention claimed in a utility patent must be novel/original, non-obvious and clear and definite. *See 35 U.S.C. §§ 102, 103, 112*. Utility patents provide a right to exclude others from making, using, selling, or offering for sale the patented device or method for 20 years from the date patent application is filed. *See 35 U.S.C. §154*.

For our purposes here, we may illustratively identify two general types of utility patents, (i) those generally driven by “functional considerations” and (ii) those generally driven by aesthetic consideration. First, we are all generally clear on examples of functionally driven utility patents. A patent on a more efficient way to heat a home is a clear and timely example that falls in the area of architecture and interior design. Another example may be a patent on any of a number of new folding tables or storage cabinets including the manner or methodology in which they move or fold. Lastly, a patent directed to a new chemical or organic coating for carpets or wood floors that provides enhanced durability or extends the life of the carpet or flooring is yet another example of subject matter protectable by a utility patent focused at improved functionality. Second, as for those utility patents driven by aesthetic considerations, these may be methods or structures that accomplish aesthetics in new and useful ways. From mechanisms for attaching decorations to lighting fixtures to a design tire camouflaging features such as

vents or even blemishes, these patents are directed to new structures and methods for arriving at desired aesthetic results.

(3) Trademarks & Trade Dress

We see trademarks and trade dress daily. But what are they, really? *They are words, phrases, symbols, designs or combinations thereof used by a person or persons to identify or distinguish goods or services of one party from those of others. See 15 U.S.C. §1127.* In short, they are how we distinguish one hamburger maker from another hamburger maker or one carpet manufacturer from another carpet manufacturer. While they are protected under U.S. law because they serve as source identifiers and encourage consumer confidence in making purchases, we know there is more to them than just that. Trademarks can illicit emotions or even inspire. They can be used to identify clout, status, prestige and envy. Trademarks often become more valuable than the products themselves.

Trademark and trade dress rights, unlike patent rights, can be acquired simply by using the trademark or trade dress. Additionally, trademark and trade dress rights are especially attractive because they can extend on for a seemingly indefinite amount of time as compared to patents and copyrights each of which expire after a limited amount of time. Additionally, trade dress can be used to even protect esoteric creations such as themes of interiors of restaurants and associated menus and related concepts.

However, when we ourselves create new products or product lines, are we aware that *all trademarks are not created a like*? For example, are you aware trademarks may be generally recognized as either “inherently distinctive” or “inherently non-distinctive” depending on the particulars of the mark. Only those marks recognized as “inherently distinctive” are entitled to protection or enforcement privileges from the outset without further showings, something that is certainly advantageous in business.

(4) Copyrights

Copyrights provide protection for “original works of authorship” that are “fixed in a tangible medium.” *See 17 U.S.C. §102.* These original works of authorship can be works of literature, songs, paintings, sculptures or drawings, to name a few. While copyrights are created once the “original works” are “fixed in the tangible medium,” an author (the default owner of a copyright) must register the copyright with the Copyright

Office before a suit to enforce can be successful brought. Registration includes submission of a registration form including information about the work and the author, payment of a minimal governmental fee (a \$45 registration fee), and submission of a deposit of a copy of the work to be registered. www.copyright.gov. This deposit becomes part of the collection of the Library of Congress in Washington, D.C.

In the world of design and architecture, three general categories are especially worth considering in the context of copyright: (1) pictorial, graphical, and sculptural works, (2) architectural works (after 1990), and (3) computer programs (classified as literary works). *See U.S.C §§ 102 (a)(5), (a)(8), and (a)(1), respectively.*

Not surprisingly, blueprints, architectural markups and schematic diagrams can all be protected under copyright as pictorial, graphical and sculptural works, so can sculptures and similar art. Other creative visual designs such as carpeting patterns, textiles, tapestries and other visual designs also fall under this same provision of protection.

However, it is noteworthy that prior to 1990 “architectural works” or “buildings” themselves outside of the blueprints were not protected under federal copyright law. As such, reverse engineering of a building and creation of similar or duplicative building (if it was not done based upon the protected blueprints etc.), was not protected. However, as of 1990, “architectural works” (i.e. “buildings” per the wording of the statute) are now protected under federal copyright law. Accordingly, an architect may have two causes of action against someone misappropriating their building design: (1) one based upon copying or building of an infringing building based on their architectural drawings and (2) one for copying or building an infringing building based on the physical building itself.

Lastly, computers are now vital to a number of industries including architecture and interior design. Should designers, manufacturers or architects develop new programs for use in the design or manufacturing process, the computer code is protectable under copyright. Registration of computer codes in various industries is common and continues to grow as standard practice in areas in which computer programs are susceptible to copy and implementation. Little more is required than submission of a printout of the code

along with a registration form and payment of the registration fee to register the computer code under federal copyright law.

Conclusion

While design patents, utility patents, trademarks/trade dress, and copyrights are four of the more common, powerful and versatile tools in any IP toolbox, they are by no means exhaustive of potential intellectual property rights that can be used to protect innovation. Numerous other forms of intellectual property such as trade secrets and unfair competition can also be found in an IP toolbox. While it will take significant practice, expertise and advice to maximize the tools in your toolbox, it is hoped that now that you are further aware that a variety of tools are available to help protect your most valuable assets, you will no longer merely leave the art gallery unlocked without investigating some means of intellectual property protection or security to prevent theft and misappropriation of your creations.