

## **Business Law 210: Chapter 8: Intellectual Property and Internet Law**

**[Instructor]:** This is Chapter 8: Intellectual Property and Internet Law. What we're talking about in intellectual property is also shortened to simply call I.P. I.P. is a significant issue, whether you're at a university, as I worked in the grants department and I.P. was a significant part of the contracts for research grants.

Article 1, Section 8 of the American Constitution authorizes Congress to "secure for limited times to authors and inventors the exclusive right to their respective Writings and Discoveries." Right up front, the founding fathers wanted to make clear there are rights granted to those that invent things, that create things so that there is an incentive to do so and that has been accomplished with the various trademark, copyright, and patent laws that have been enacted. We'll start off with trademarks.

A trademark is a distinctive mark, some emblem that a manufacturer will use to distinguish itself from others. It can be a slogan; it can be simply the name of the company. This first case here, *Coca Cola v. The Koke Co. of America*, is actually most interesting because here you learn that initially when Coca-Cola was developed, it actually had cocaine in it. Although a very small, small amount, it did, in fact, have cocaine in it. And in this case, you have copyright infringement by Koke Co. of America against Coca Cola Co.

The Lanham Trademark Act of 1946 was and still is the most significant trademark and copyright act that is applied today. There have been various modifications and changes since then, but that is the basis for most claims.

In 1995, Congress amended the act with the Federal Trademark Dilution Act making it clear that one can have a cause of action against another who has a trademark that causes confusion for your trademark. Usually, it's a similar trademark that causes that type of confusion and it's called trademark dilution.

Trademarks are registered with the patent and trademark office and it's not that difficult to do; one can do that online. If you look at the trademark and patent government webpage, they have instructions for patents, for trademarks, for copyrights and how to use them, how to apply for them, and particularly for the patent they have a really nice search engine and you can search all of the previous patents. In order to get a trademark, one has to apply and indicate any other significantly similar trademarks and why your trademark would be different and not cause a dilution of the trademark.

If, in fact, there is trademark infringement, the owner has a number of remedies. First of all, the owner of the trademark has a right to an injunction against the other party. An injunction is an important legal maneuver that will prevent someone from continuing to infringe your trademark.

It is an order from the court indicating that whoever is doing the infringing that they can no longer do that. Additionally, there's money damages and in this case, attorney's fees.

A trademark must be distinctive in order to be approved by the trademark office. It has to be a mark that is separate from other trademarks. Generic terms cannot be made into a trademark and no protection is allowed to them.

Next, we move to trade dress. This refers to an image or an overall appearance of a product, a distinctiveness of it. There is some protection in trademark and consumer protection. It's a little bit more difficult of an issue to deal with.

Counterfeit goods can be a problem; a problem for the music industry, for one, but not just the music industry. The clothing industry, watches, a whole variety of things. As a matter of fact, I even went to Mexico and bought a Rolex watch for \$18. I used it as a demonstration in this class of counterfeit goods. Trade names are names such as the book or the text or the slides mention, Pepsi-Cola or Safeway, names that are specifically trademarked and protected by the government.

Cyber marks or otherwise known as internet addresses. The internet addresses are controlled by ICANN. The Internet Corporation for Assigned Names and Numbers, they distribute the names; they control who has access to what names, for the most part and that has been modified by some of the more recent rules in the Anti-Cybersquatting Consumer Protection Act of 1999, it provides protections for internet domain names and various companies that would like to use those names.

An internet webpage has something called meta tags. These tags are words that describe, ideally that's what the purpose is, what the subject of the webpage is. In the case noted on the slide here, *Playboy Enterprises v. Welles*, Welles had been playmate of the year, or playmate of the month, and had included that fact in her website. Playboy sued her for copyright violation and indicated that was an illegal use of their trademark, of Playboy Enterprises. The court ruled that simply stating the fact that she had been playmate of the month was a statement of fact. It was not something Playboy could protect people from saying and, therefore, she was allowed to include it on her webpage

Now we move into patents. A patent is an exclusive federal grant to make, use, or sell an invention for 14 years and the invention must be novel, useful, and not obvious and it's the first person to invent it, not necessarily the first person who files with the patent office that is able to claim the patent interest. The patent office, [uspto.gov](http://uspto.gov), provides a listing of all the patents from patent number one which you'll see on the next slide something to do with railroad traction wheels to patent number 100,000 which is a horse sun-bonnet. I didn't know horses needed sun-bonnets, but it was patented and that is patent number 100,000. Interestingly enough, in searching the patents I found patent number 1,819,862 and this is my great grandmother. She had

a patent for some sort of sewing device. I still have yet to figure out exactly what it is, but I found it in doing the search from the patent office.

There can also be patents for software and the various business processes in creating things. If there is an infringement of someone's patent, first and foremost they can get an injunction. As I mentioned earlier, that's an order from the court preventing someone from continuing to infringe the patent. In addition, they can get damages and attorney's fees. All these remedies are very important in being able to protect one's rights in a patent.

Next, we move on to copyrights. A copyright is an intangible property right granted by federal statute for the creator of some literary or artistic production and works that are created after 1978 are protected for the life of the author plus 70 years. Now, it so happened that in 1998, Disney was concerned that their copyright in Mickey Mouse was going to run out. So, they lobbied very strongly, convinced Congress that they should extend the copyright interest in order to protect Disney. I have a problem with this extension simply because it does not serve any valid purpose with the statute dealing with copyrights. People are not going to be any more creative, they're not going to create any more copyrightable works simply because there's another 20 years of extended time that something that's copyrighted would be allowed protection.

For publishing houses, copyright expires 95 years from publication or 120 years from creation. What can be? What is protected? Copyright can protect only something that can be made into a hard copy. So, it must be fixed in a durable medium. So, you can protect or copyright a pantomime, but you have to fix it in some durable medium. That could be by video, that could be by diagrams, and so on. It just has to be fixed in some durable medium. On the other hand, the expression of an idea can be copyrighted, but not the idea itself. If you were to, for example I represented a physics professor, concerning the copyright of his text. The formulas used in physics are not protectable; that is the idea itself. The expression, how they're expressed, could be protected if it was some unique expression.

The different types of things that can be protected are literary works, musical works, dramatic works, almost anything of this nature that can be fixed in a durable, hard medium. Motion pictures, recordings, architectural works, and so on.

There is an exception to copyrights. Section 102 exclusion any idea, procedure, process, method, system, method of operation, concept, principle, or discovery and that gets back to the formulas. The ideas, procedures, processes, those themselves are not copyrightable. What is copyrightable is the expression of those things. Is a phone book copyrightable? It's simply a compilation of fact where the courts have ruled that the expression in the phone book, that is how it's organized, is copyrightable. The material itself is not.

Whenever an unauthorized copying occurs, the infringing party can be subject to a variety of penalties. The remedies available include, once again, an injunction, damages, attorneys fees, and sometimes there's fixed damages depending on what type of work is being violated.

An example of a copyright violation: Michael Bolton created a song, "Love Is a Wonderful Thing," sold 10 million copies of this song, and I'm sure made a load of money. Well, it just so happens that the Isley Brothers created a song with the same title many years earlier so they decided to sue Michael Bolton indicating they believe he copied their song. Interestingly enough, they never published their song to anyone, but a few radio stations. The chance that Michael Bolton could have even ever heard that song was rather minimal at best and it would have been many years before he wrote his own "Love Is a Wonderful Thing." Well, this went to court and at trial the Isley Brothers' attorneys were able to convince a jury that, in fact, Michael Bolton had somehow remembered that song from years and years ago when he was a kid and had copied it when he wrote "Love Is a Wonderful Thing." The end result was he was ordered to pay several million dollars, the record company several million dollars, and so on. Now, I've included as a reference an excerpt from "Love Is a Wonderful Thing" Isley Brothers' version and the Michael Bolton version and you can click on either one and hear them for yourselves. It was appealed to the 9<sup>th</sup> Circuit Court of Appeals and the Circuit Court of Appeals upheld the jury verdict. My take on this case is that Michael Bolton was out-lawyered; his lawyers did a poor job of representing him. As a matter of fact, several years later Mr. Bolton sued his lawyers for over \$30 million in damages for wrongfully representing him. It appears his contract with Sony provided that if it was ever determined that there was a copyright violation, then he paid personally all of the damages and so this attorney that represented him also represented Sony and that became a significant conflict of interest

Now, not to be left out of the picture is Donald Trump. Donald Trump decided that he wanted to try and trademark the phrase "You're Fired!" It seems to me that the phrase 'You're Fired!' is probably common enough, particularly in the last two years, Donald Trump would not be able to trademark the phrase 'You're Fired!' There might be some very limited use of it that he could trademark, but he certainly would not be successful at that alone.

Copyright infringement, well, there's an exception to copyright infringement called the Fair Use doctrine or the Fair Use exception. Section 107 of the act indicates that there is fair use for material that is used for criticism, comment, news, teaching, and research. How far can that go? Well, if I tried to copy your text and provide it to you in class that would be going too far. On the other hand, if I found another text that dealt with copyright better than your text and copied that one chapter, it's likely that would be within the fair use limits.

Computer software is also protected; there's also the Computer Software Copyright Act that provides a few more specifics in what rights are covered with computer software.

Next, we cover copyright in our computer, digital age. The Copyright Act of 1976 provides rights to the author of a work when it's copied over the internet from computer to computer and more specifically dealing with file sharing. The Digital Millennium Copyright Act of 1998 provides both civil and criminal penalties when someone attempts to circumvent the encryption software, such as used for a DVD, and then to share it with others. File sharing technology or peer to peer networking has been a source of significant problems and issues to the record companies. To that end, they have gone to significant lengths to try and sue people who provide their music on the internet for others to copy.

An example is Jammie Thomas. She was hit with a \$1.5 million verdict. A jury in Minneapolis decided that she should be fined \$62,500 for each song she illegally shared and that was in 2006 and, of course, as the slide notes the record industry applauded the verdict. When you wrongfully copy a song from someone else's computer, you're denying the author their royalties for that work.

There can be significant penalties for storing songs on your computer and sharing them with others or receiving songs that you do not have the copyright rights to. File sharing technologies have progressed significantly in the last ten years such that there is access to a lot of copyrighted works without having to pay any copyright fee. The Supreme Court has even stepped in and held the companies vicariously liable when they distribute file-sharing software. So those companies that created file-sharing software can potentially be liable for those that use it.

Section 6, trade secrets, deals with the business process. Information that should not be patented or copyrighted because they want it protected. It can include customer lists, plans, formulas, marketing information; a whole variety of information comes under the trade secrets category.

The protection does extend to ideas and expressions and there's also the Uniform Trade Secrets Act and Economic Espionage Act of 1996 which can help in this way.

Internationally there's protection for intellectual property. There's the Berne Convention (WIPO) recognized or noted in the text which provides somewhat universal protection; the protection is very somewhat from country to country.