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Just Right

Trade Secrets & Unfair Competition

If you read the overview of intellectual property, you know there are various ways to protect your thoughts and ideas. Federal law provides protection for some thoughts and ideas with registration for patents, copyrights and trademarks, whichever is applicable to the idea or thought sought to be registered. However, the statutory protection afforded by registration is not applicable to all thoughts and ideas. Some thoughts and ideas, although unique to the inventor, are not sufficiently unique to justify issuance of a patent; some may be too similar to already registered trademarks or too generic in nature to be registrable; and some may be too derivative of already copyrighted works to be afforded significant protection.

Additionally, even if the idea is registrable as a patent, the rights obtained expire after seventeen years, giving the inventor only a limited period in which to exploit the invention. While copyright protection has the longest duration, generally extending fifty years after the life of the creator, it is not perpetual. Trademarks, while having no specific duration, can nonetheless lose their protection if they fall into disuse, or become a generic reference to a type of product, rather than a particular producer.

For various reasons, therefore, an inventor or producer may not be able to seek, or may decide against seeking, statutory intellectual property protection through registration. That does not mean, however, that those thoughts and ideas remain unprotected. Rather, there are various protections which have been developed by the courts over time, referred to as common law protections, and there are some state laws which afford protection to original thoughts and ideas.

One such form of protection is the trade secret, and if properly protected, the idea or thought which is maintained as a trade secret can afford its inventor perpetual protection. To be a trade secret, the protected idea must have value to its owner or to a competitor. That value, however, may be in the future, especially for something in the development stages, or it can be a present value. The idea must also be something that is not generally known or easily discoverable. If known to the general public or even the trade group in which the secret would be of use, there is no basis for protecting it. Indeed, if generally known, the secret's value is substantially reduced. Finally the trade secret must be a secret. If care is not taken to preserve the secret, it can be lost, even by inadvertence or accidental disclosure.

One of the most famous consumer products protected as a trade secret is Coca-Cola®. When faced with the seventeen year limitation if he registered the formula for Coke as a patent, the inventor chose to retain the formula as a trade secret and exploit it perpetually. Just as Coke scrupulously protects its trademark in the design, name and packaging, it is just as scrupulous in

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maintaining the secrecy of its product formula. Stories have long been told about only one copy of the Coke formula being in existence, maintained in a safe in the Atlanta headquarters of Coca-Cola®, and supplied only to a limited number of people on a need to know basis, all of whom have agreed to maintain the confidentiality of the formula under a written confidentiality agreement imposing severe penalties for violation. Whether or not these stories are true, what is true is that there is no competitor producing a cola drink which claims it has the Coke formula.

Most states, including Pennsylvania, have adopted laws establishing a level of protection for trade secrets. In Pennsylvania, no registration is required to protect a trade secret. Rather, the law imposes criminal liability on anyone seeking to obtain a trade secret through theft, industrial espionage, or other forms of misappropriation. For the person who has an idea which is not patentable, or who wants a longer period of exploitation than is afforded under patent laws, the maintenance of that thought or idea as a trade secret does provide some measure of protection.

Another common law protection that has developed, which again may be the subject of state laws, is unfair competition. Any attempt by a competitor to confuse the public as to the origin of goods by adopting a name, or product design deceptively similar to that of another product may be liable for consumer fraud. Enforcement of this right through the courts may be had by the competitor harmed by the consumer fraud. If such protection is provided by statute, the state may also be able to enforce the law through a consumer protection bureau, and individual consumers may be able to enforce the law if they have been harmed by the deceptive practice. Unfair competition laws, therefore, provide an alternative to trademark registration.

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