Intellectual Property

by Sophia

WHAT'S COVERED

In this lesson, you will receive an introduction to the concept of intellectual property. Specifically, this lesson will cover:

1. What Qualifies as Intellectual Property?

You have already learned about the difference between tangible and intangible property.**Intellectual property**, or IP, is a specific type of intangible property.

IN CONTEXT

The years of software and hardware development that Apple undertook to create the iPhone involved labor, just as building a skyscraper involves labor. In Apple's case, the product of its labor is not a skyscraper or other tangible property— it is intangible property. The law protects Apple's intellectual property just as it protects tangible things from being stolen, so any attempt by a competitor to make an iPhone clone has consequences.

Intellectual property has been a part of the country's foundation from its very beginning. There are four major types of intellectual property protected by the law:

- Patents
- Trade secrets
- Trademarks
- Copyright

Throughout this unit, you will learn about each of these types in depth. For now, consider the role of intellectual property in the following case.

CASE STUDY: *Apple v. Samsung*

Since its introduction in 2007, the Apple iPhone has redefined the "smart phone" segment of the wireless phone industry and left its competitors scrambling to catch up. Its sleek lines, gorgeous full-color display, built-in GPS navigation and camera, visual voice mail, and Web surfing capability made

it an instant hit, with thousands of consumers lining up for hours to have their chance to buy one. Its revolutionary business model, where thousands of software programmers could write small programs called “apps” and sell them on the App Store through Apple’s iTunes software, created a win-win-win business model for everyone who touched the iPhone.

For software programmers, it was a win because small, untested, and first-time programmers could “strike it rich” by selling thousands of their apps directly to consumers without having to find a software publisher first. For Apple, it was a win because thousands of talented programmers, not on Apple’s payroll, were developing content for their product and enhancing its appeal. Apple also wins because it collects a percentage fee from every app sold on its iTunes store. And finally, consumers win because they have access to all sorts of creative programs to help them do more on their iPhones than simply make a phone call.

Apple makes a lot of money selling iPhones, and by 2011 found itself having to ward off competitors from developing similar phones. Apple sued Samsung in 2011 in the U.S. District Court for the District of Columbia; a jury found that Samsung had infringed on Apple’s patents and awarded Apple $1 billion. Samsung appealed, and, in a re-trial, was ordered to pay Apple $399 million. On appeal to the U.S. Supreme Court, the issue raised by Samsung was whether damages should be based on the entire phone or only certain component parts.

This was a case of first impression for the Supreme Court, which ordered that damages could be determined either way as a jury found appropriate, remanding the case back to District Court yet again for a re-trial on the issue of damages. **The litigation ended in 2018** when Apple was awarded a total of $539 million by the U.S. District Court that included the amount previously awarded.

Apple v. Samsung, 580 U.S. 1301 (2016).

TERM TO KNOW

Intellectual Property

A type of personal property derived from a person’s creativity, such as a patent, trademark, copyright, etc.

2. Constitutional Roots of Intellectual Property

Anyone alive when the U.S. Constitution was adopted would be surprised at the size and scope of the U.S. federal government today. What would not surprise them, however, is the existence of the U.S. Patent and Trademark Office (USPTO), since the establishment of a system to protect patents is one of those few congressional powers enumerated in Article I, Section 8 of the Constitution.

That clause, known as the **Copyright Clause**, says that Congress may “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

TRY IT

The USPTO website is a treasure trove of information, as it includes a searchable database for trademarks and patents. See if you can search these databases for well-known trademarks or patents.

Although the Constitution addresses only **copyrights** and **patents**, modern intellectual property (IP) law also includes **trademarks** (probably left out of the Constitution because of the relative unimportance of corporations and branding at the time) and **trade secrets** (a relatively new form of IP protection).

Unlike other controversial portions of the Constitution, such as state rights and the role of the judiciary, the value of laws that protected authors and inventors was well accepted in 1787, when inventions of new machines were shaping up to be part of the fabric of our new nation. Indeed, the attendees at the Constitutional Convention took a break from their work to watch the first steamship in the Delaware River!

IN CONTEXT

One of the early patents granted was to Abraham Lincoln, who drew on his experience as a young man making his way from Indiana to New Orleans along the Ohio and Mississippi rivers on a flatboat to devise a system to lift and drop boats over shallow water without dropping off their cargo. A scale model of his invention is on display at the Smithsonian. Lincoln, whom many historians described as mechanically inclined and fascinated by engineering, felt that the patent system added "fuel of interest to the fire of genius."

TERMS TO KNOW

Copyright Clause of the U.S. Constitution
Located in Article I, Section 8, enumerating multiple powers of Congress, this clause states, "The Congress shall have power to… promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries…."

Copyright
Exclusive right granted to authors or creators of original works placed in an tangible medium, such as literary, choreographic, musical, dramatic, pictorial, sculptured, audiovisual, etc. works. Ideas alone are not copyrightable.

Patent
A right given by a government granting an inventor the exclusive right to make and sell an invention.

Trademark
A distinctive mark or symbol that identifies and distinguishes the manufacturer or merchant of a product and granted exclusive rights to usage thereof.

Trade Secret
A secret, not patented, used in business and not known to competitors.

3. The Copyright Clause and Monopolies

Essentially, the Copyright Clause permits (even commands) the federal government to protect certain products of the mind, just as much as it protects personal land or money.

↱ EXAMPLE If someone trespasses on your property, you can call the police and have them removed, or you can sue them in court for damages. In either case, the full force and power of government is involved. The same thing can be said about intellectual property.

On the other hand, you may know from any economics classes you've taken that, in general, our capitalist economy frowns on **monopolies**. We believe that monopolies are immune from competitive pressures and can therefore charge exorbitant prices without any regard for the quality of their product. Efficiency suffers when monopolies are allowed to exist, and ultimately the consumer loses in choice and price.

If you think about it, though, the Copyright Clause essentially allows the government to create a special kind of monopoly around intellectual property.

IN CONTEXT

Consider a pharmaceutical company that invents a certain kind of drug and applies for a patent on that drug. If the government grants the patent, then the company can charge as much as it wants (some drugs can cost tens of thousands of dollars per year for consumers) without worrying about competitors, since competitors are shut out of that drug market by virtue of the patent. If any competitor dares to copy the drug to compete against the inventing company, the full force and weight of the government will be brought down on the competitor. Violations of patent law carry extremely stiff penalties.

TERM TO KNOW

Monopoly

Domination of a market for a particular commodity, product, or service.

3a. Length of Monopolies

How can we say that monopolies are bad, and yet grant Constitutional protection to monopolies on intellectual property? The answer lies in the genius of the Copyright Clause itself. As in all monopolies, there are two sides: the producer and the consumer.

The producer always wants the monopoly to last as long as possible, while the consumer wants the monopoly to end as quickly as possible. The Copyright Clause strikes a compromise between the producer and the consumer in two ways.

First, the Clause states that Congress can grant the monopoly only to “promote the progress of Science and Useful Arts.” In other words, the monopoly exists for a specific purpose. Note that “making Beyoncé rich” or “allowing Pfizer to make billions of dollars” is not the purpose. Rather, the purpose is progress. Granting monopolies can encourage progress by providing a financial incentive to producers.

Singers, songwriters, inventors, drug companies, manufacturers— they all invent and innovate in the hope of making money. If they knew that the law wouldn’t protect what they came up with, they’d either not invent at all or they’d simply do it for themselves and their families, without sharing the fruits of their labor with the rest of society.

Second, the clause states that whatever monopoly Congress grants has to be for a “limited time.” In other words, at some point the monopoly will end. When the monopoly ends, science has once again progressed because society can then freely copy and improve upon the producer’s products. Society benefits greatly

from the expiration of these intellectual property monopolies.

↱ EXAMPLE Important drugs, such as aspirin and penicillin, can now be purchased inexpensively and are accessible to the entire human population. Grand literary works, such as Shakespeare's *Hamlet* or Beethoven's *Fifth Symphony*, can be performed and enjoyed by anyone at any time without seeking permission or paying any fees or royalties. These inventions and works are in the **public domain**, to be enjoyed by all of us.

TERM TO KNOW

Public Domain

Intellectual property that is no longer or never was protected by license, patent, trademark, copyright, or the like.

3b. Role of Congress

The Copyright Clause does not state how long the monopoly can last; it leaves that task to Congress. Congress must make the decision based on what's best to promote progress. Remember, though, that producers want monopolies to last as long as possible.

IN CONTEXT

To illustrate this, consider how long copyrights last. Prior to 1978, copyrights lasted for fifty years after the death of the author. After that, copyrighted works fall into the public domain (such as works by Shakespeare or Beethoven). Today, as a general rule, copyrights last for the life of the author plus an additional 70 years.

In the early part of the twentieth century, the United States experienced a cultural renaissance that accompanied the Industrial Revolution. The invention of the phonograph and cameras allowed the creative genius of Walt Disney, George Gershwin, and Charlie Chaplin (to name a few) to flourish. Under the 1976 copyright law, though, some of these early works (including early versions of *Winnie the Pooh*) were about to fall into the public domain by 1998. The United States was also under some pressure from international trading partners to increase the copyright term.

As a result of these pressures, U.S. Representative Sonny Bono (himself a popular artist together with his former wife Cher) introduced the Copyright Term Extension Act to add twenty years to copyrights. During hearings on this bill, Congress heard testimony from Jack Valenti, then president of the Motion Picture Association of America, an industry group that represents film studios and corporations. When asked how long he thought copyrights should last, he answered "Forever minus a day."

Although Sonny Bono's bill passed, whether or not "forever minus a day" will eventually become the law as Congress seeks to strike the right balance between protection and access, and whether it satisfies the Constitution's demand that the monopoly last for a "limited" time remain unresolved questions.

SUMMARY

In this lesson, you learned that patents, trade secrets, trademarks, and copyrights all **qualify as intellectual property**, a type of intangible personal property. The **constitutional roots of intellectual property** lie in Article I, Section 8 (also known as the Copyright Clause), which commands Congress to provide monopoly protection for intellectual property for the purpose of progressing science and useful arts.

The **Copyright Clause creates monopolies** on products of the mind, but the **length of these monopolies** is finite. Content producers will always want legal protection to last as long as possible to maximize profits, while the public good benefits when content falls into the public domain. **Congress** is responsible for balancing this tension by setting temporal limits on patents.

Best of luck in your learning!

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TERMS TO KNOW

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Patent
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Public Domain
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Trade Secret
A secret, not patented, used in business and not known to competitors.

Trademark

A distinctive mark or symbol that identifies and distinguishes the manufacturer or merchant of a product and granted exclusive rights to usage thereof.