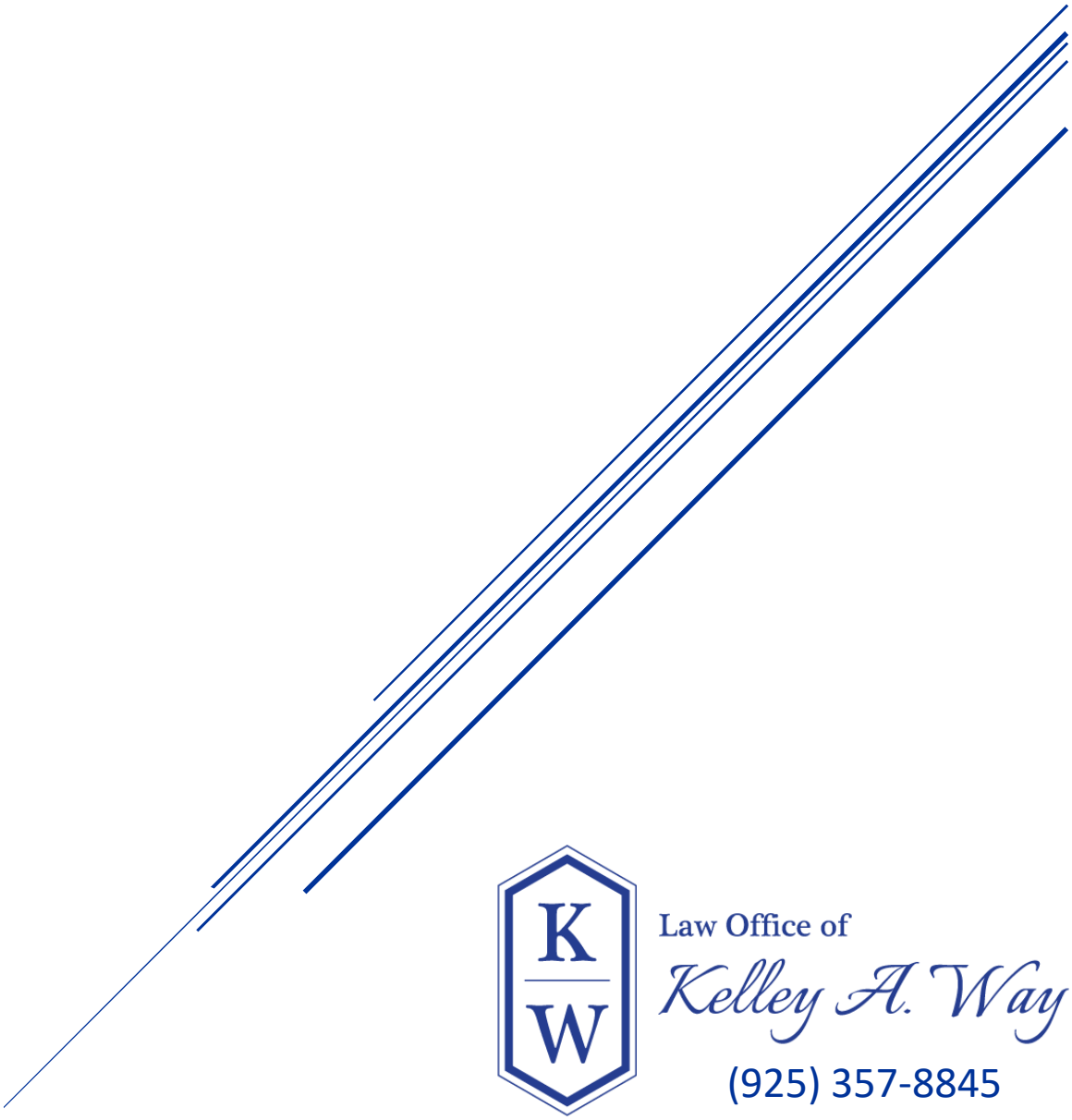
WHAT IS INTELLECTUAL PROPERTY?

A Guide to Copyrights, Trademarks and Patents



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Intellectual property (IP for short) is a subject of some confusion to many people, even the people who actually own intellectual property assets. This document will explain some of the most common types of intellectual property – copyrights, trademarks and patents. Here is a very brief summary of what each one does, with a more detailed explanation on the following pages:

Copyrights protect creative expression – books, movies, art, music, etc.

Trademarks protect your branding – your logo, company name, tagline, or anything else you use to identify yourself in the marketplace.

Patents protect inventions, formulas, processes, or other things of a more scientific nature.

(Legal Disclaimer – Please note that nothing in this document constitutes legal advice. For advice on your specific situation, please contact an attorney)

Copyrights

Copyrights protect creative expression. To be specific, copyrights protect "original works of authorship fixed in a tangible medium of expression." (17 U.S.C. §102) If you translate that into plain English, you need two things in order to have a copyright:

1. *An "original work of authorship."* Whatever was created (the "work") must be original to the person who created it (the "author"). You can't pick a piece of wood up off the forest floor and copyright it, because you didn't create it. If you were to whittle or carve it, however, then you can copyright it, because you have now created something.
2. *"Fixed in a tangible medium of expression."* All this means is that the work must be in some format that can be accessed by others – it can't be locked away in your brain. You can write it down, type it up, dictate into a recording device, film it – the exact format doesn't matter, only that some other person can perceive it.

Under the current copyright law, as soon as you've met these two requirements, you have a copyright. Registration with the Copyright Office is not required, though it may be a good idea in order to protect your work from infringers.

A copyright is actually a bundle of rights. Think of it like a bundle of sticks: each stick is a right you possess to your work. You can keep the whole bundle to yourself, or you can give away your bundle, or you can pull out one or two of those sticks and give those away while keeping the rest. A copyright owner has six basic rights:

- *The right to copy (literally, the "copy right").* This is the first right ever granted, and it's where the name "copyright" comes from. The copyright owner is the only person allowed to make copies of their work. Anyone else who makes a copy (whether it's on a Xerox machine or a computer) has committed copyright infringement.
- *The right to make derivative works.* "Derivative works" are works that are based on the original. For an idea of what constitutes a derivative work, just think of a very famous book, and all the places you've seen that book outside of a printed novel. Some examples would be movies, audiobooks, and translations into foreign languages. Sequels are also considered derivative works of the original book (that's why fanfiction is so problematic for authors and their legal teams - technically these fans are infringing, but they're still fans, so going after them runs the risk of alienating your fan base). Some derivative works are newer and don't come as easily to mind: toys, games, and apps, for example. Even music using lyrics from a book is considered a derivative work.
- *The right of distribution.* The copyright owner is the only person allowed to sell their work in the marketplace. This right is limited to the first sale of any specific copy of the work; Congress didn't want to stifle legitimate sales on the secondhand market. To give an example, the author of a book has a right to the first sale, but then the buyer is free to turn around and sell his copy of the book to someone else.
- *The right of public performance.* The owner is the only person allowed to perform the work in public. This sounds like something that only applies to plays, movies and music, but reading a book in a public place (or playing a recording over a loudspeaker) also falls under this right.

- *The right of public display.* This right applies primarily to artwork. Only the owner is allowed to display their work in a public place. Museums, art galleries, and other venues would have to get permission to display a copyrighted work.
- *Public transmission of sound recordings.* This was originally intended for music being played over the radio (showing just how much technology has evolved). Now, this could apply to streaming over the Internet, or even playing in a restaurant (there's a bit of an overlap here with public performance).

Trademarks

The U.S. government defines a trademark as "any word, name, symbol, or device... used...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." (15 U.S.C. §1127) To rephrase in plain English, anything that can be used to identify yourself in the marketplace can act as a trademark. The point is that consumers can identify the source of the product, and sellers can build a reputation around their brand.

The most common trademarks are company names, logos, and slogans or taglines. However, anything that sets your product or company apart can act as a trademark. Here are some examples of unusual trademarks currently registered with the U.S. Patent and Trademark Office:

Coca-Cola has trademarked the shape of its bottles. That way, even if the logo has been removed, you can still recognize it as a Coke product.

NBC has trademarked the three-note chime that plays when its logo appears on the screen.

T-Mobile has trademarked the color magenta. No other phone company is allowed to use that shade in their marketing.

Not to be outdone, Verizon has trademarked the scent it uses in its retail stores.

Last but not least, Dairy Queen has trademarked the curlicue that tops all of their frozen yogurt offerings.

As with copyrights, registration is not required to have a trademark, but it is still recommended in order to protect your trademark from infringers.

Patents

A patent is defined as "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." (35 U.S.C. §101) In other words, patents protect things of a more scientific nature. Patents have the shortest lifespan of any IP asset, largely because Congress wanted to limit how long a patent owner could keep a useful product or invention from becoming widespread.

There are actually three different types of patents. The most common one it the utility patent, which is issued for the scientific inventions listed above. 90% of all patents issued are utility patents.

The next most common is the design patent. Design patents are issued for an ornamental design on a functional item. There is a bit of overlap with copyright here; if a creative work is tied to a functional item, then it may be worthwhile to consult an attorney to decide which would be better for your purposes. As an example, Coca-Cola's bottle was originally protected by a design patent before it became a trademark. Another example of a design patent would be the shape of the iPhone.

There is also a patent to protect certain kinds of plants. This is, quite appropriately, called a plant patent. In order to get a plant patent, the plant must be new and distinct, and it must be reproduced asexually. If the next generation of the plant has different DNA from the first, then it would no longer be protected under the plant patent. Rose hybrids are one example of a plant that is often protected under a plant patent.

Unlike copyrights and trademarks, patents must be registered with the U.S. Patent and Trademark Office in order to receive protection. There is also a deadline to submit the patent application, starting from the time the invention or product is first made available to the public.

Kelley Way was born and raised in Walnut Creek, California. She graduated from UC Davis with a B.A. in English and a minor in Music, and proceeded from there to attend the UC Davis School of Law, where she received her juris doctorate in 2010.

After law school, Kelley did a one year fellowship at the Pacific Justice Institute, during which time she was approached by her first client, the copyright holder of a New York Times bestselling fantasy series. After the successful resolution of the case, she opened her own law firm.

Kelley is a member of:

- The California State Bar, including the Section of Intellectual Property Law
- The American Bar Association, including:
    - ABA Section of Intellectual Property Law
    - General Practice, Solo and Small Firm Division
    - ABA Forum Committee on Entertainment and Sports Industries
- The Contra Costa County Bar Association, including:
    - The Estate Planning and Probate Section
    - The Intellectual Property Section
    - The Solo and Small Firm Section
- Christian Legal Society

When Kelley is not practicing law, she spends her time reading, knitting, singing, and spending time with her family. She also enjoys learning new languages, though she currently is only fluent in English.