Often the hardest part of figuring out how to protect your idea is to determine what kind of protection is most appropriate. This is made even more complicated by the fact that ideas, as such, cannot really be protected. What you can protect is the expression of an idea in the form of a product, a computer program, a painting, a photograph or even a name for a product or service.

Intellectual property law can be intimidating and confusing. Below is a basic introduction to the different types of intellectual property protection: patents, trademarks, copyrights and trade secrets.

**PATENT**

Patents are appropriate for “useful things” or methods of doing something. There are three main kinds of patents:

- **Utility Patents** cover “inventions” — a machine, an article of manufacture, a method of doing something, a chemical composition or the method of its use, products of genetic engineering or improvements to any of these things.

- **Design Patents** cover the ornamental appearance of a useful device but not its function. For example, the body shape of a Ford F-150 pickup truck and the housing of the Apple iPod® were the subject of design patents.

- **Plant Patents** may be granted to anyone who creates, and asexually reproduces, a new variety of certain kinds of plants. (Note that other kinds of plants, especially those altered by genetic engineering, may be protected under utility patents).

**TRADEMARK**

Trademarks cover a name or symbol (logo) that represents the source of a product or service. Sometimes the appearance of a product or its packaging can be considered a trademark (often called “trade dress”).

For example, the name “Coca-Cola®”, or the shape of a Coke® bottle are registered trademarks. In rare instances, other things, such as: sounds (Tarzan’s yell or the MGM lion’s roar), a sequence of notes (the NBC chimes), a piece of music (the Harlem Globetrotter’s “Sweet Georgia Brown” or the Lone Ranger theme), or even colors (pink Fiberglas® insulation), may be registered as trademarks.

**COPYRIGHT**

Copyrights protect works of authorship, composition or artistry. Copyright covers books, sculptures, paintings or photographs, computer programs, architectural works, movies and records, musical compositions, etc. In the case of musical recordings, the copyright may extend to the music itself (tune and lyrics) and the recording of the performance.

**TRADE SECRET**

Trade secret protection is available, as the name suggests, for secrets used in business - the method of making a product or the ingredients which go into it, customer or prospect lists, any fact which, if known, would give your competition an advantage. The inner workings (algorithms, source code) of computer programs are often protected as trade secrets. The formula for Coca-Cola® is a famous example of a trade secret.

While intellectual property law can seem intimidating and confusing, our experienced attorneys provide advice on patent, trademark, copyright, trade secret and matters and litigation. Cummings, McClorey, Davis & Acho assists clients in determining which form of protection is right for their situation. Attorneys in our intellectual property law group can be contacted in our Livonia office at (734) 261-2400.
The U.S. Supreme Court recently issued an important decision affecting trademark owner’s rights by making it easier for a party sued for infringement by a trademark owner to successfully defend against the claim. Under federal law, a trademark holder can sue users of their trademarks when the “use is likely to cause confusion, or to cause mistake, or to deceive.” The trademark holder must prove that the alleged infringer’s actual use of the trademark is likely to produce confusion in the minds of customers about the origin of the goods or services in question. The alleged infringer may be able to defend against such a claim by relying upon the fair use exception.

The fair use exception allows the trademark to be used by someone other than the owner if the use of the trademark is a good faith attempt only to describe the goods or services of the user or their geographic origin. The exception protects the right of competitors to engage in comparative advertising, using the trademarked names of goods or services to draw comparisons between their product and the trademark owner’s product.

Under the exception, competing products can be named on the labels of others, as long as the trademark accurately describes the products and distinguish them so as to avoid confusion. This benefits consumers, who are able to make accurate comparisons across products.

Fair use also protects the right to use a trademark to specifically refer to the trademarked good or service. This is sometimes called “nominative” fair use, and it allows speakers to criticize, comment upon, compare, and even satirize companies, products and advertising slogans.

In K-P Permanent Make-Up Inc. v. Lasting Impression I, Inc., the Supreme Court resolved disagreement between the lower courts over the application of the fair use exception. The case involved a dispute between two cosmetic companies over the right to use the term “micro color” in their marketing and sales of products. The trademark holder claimed that for the alleged infringer to establish the fair use defense, it had to prove there would be no likelihood of consumer confusion.

The Supreme Court did not agree and instead explained that when the trademark holder shows a likely confusion by a preponderance of the evidence, an alleged infringer can utilize the fair use exception. If the alleged infringer had to prove that no likelihood of confusion existed, the fair use defense was meaningless. The Court explained that to show a fair use, an alleged infringer need not negate likelihood of confusion, but instead need only show a descriptive use.

Patrick Sturdy is an associate in our Livonia office where he concentrates his practice on Intellectual Property Law, Franchise Law, Commercial Law and Land Use and Regulation. He can be reached by calling (734) 261-2400 or via e-mail at psturdy@cmda-law.com.

TRADEMARK SYMBOLS

Several symbols are used to indicate claims in a trademark. Symbols for trademarks include the 7, TM and SM. The 7 symbol can be used to indicate that a trademark has been registered with the United States Patent and Trademark Office, and it should only be used after the registration process is complete. Using the 7 prior to official registration could result in loss of rights in the mark. The 7 symbol is used for both trademarks and service marks.

The TM is used to indicate the mark is used in connection with both goods and services, while the SM symbol indicates the mark is being exclusively used in connection with services. The TM and SM symbols should be used when you begin using your trademark (or service mark), as the TM and SM symbols put others on notice that you are claiming rights in the trademark (or service mark). However, you should never use either symbol until a property trademark search has been conducted by an experienced attorney who can determine your right to claim ownership in the mark.
The National Labor Relations Board (NLRB) has finally classified a longstanding dispute over whether certain charge nurses can be considered supervisory and therefore excluded from coverage under the NLRA. This case may also serve to clarify the status of other managerial employees.

The NLRB determined that nurses, who serve permanently as charge nurses on every shift they work, must be considered supervisors. Even though these nurses do not have employees who report to them, they are responsible for overseeing their patient care units that includes assigning other registered nurses to patients on their shifts based upon the skill, experience and temperament of other nursing personnel and matching the nursing personnel to the specific needs of the patients. (Oakwood Health, Inc. and the U.A.W., Case No. 7-RC-22141).

The three member majority explained that an employee is a supervisor within the meaning of the NLRA if that employee engages in any one of 12 supervisory functions listed in the Act. Examples applicable to this case included such functions as to assign employees and to responsibly direct them, where such functions involve the use of independent judgment.

The NLRB analysis, while focused on the specific facts of each case, does broaden the scope of those who may be considered supervisors despite lack of those functions more commonly associated with supervision, such as in-line authority over disciplinary matters. The majority interpretation more faithfully follows the intent of the legislators in recognizing the importance of not allowing supervisors to be lumped into a union organizing campaign where an employer has to depend on the loyalty of its supervisors in order to carry out its functions. Those who assign employees to significant overall tasks are encompassed in the Act’s definition of a supervisory function.

While this decision may not mean sweeping changes in the number of employees excluded from joining unions, it does provide a measure of flexibility for management and recognition on the part of this important governmental agency of the real-world needs of employers.

Recommendation: If an employer has one or more employees who may fall under this more expansive view of supervision, legal counsel should be obtained to fully evaluate whether such individuals are properly to be excluded from being included among the unionized employees.

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Steve Clemmons

Steve M. Clemmons has recently joined the firm as an Of Counsel attorney. He concentrates his practice on trademarks, patents and copyrights. He is a member of the State Bar of Michigan (Intellectual Property Section), the Livonia Bar Association, the American Intellectual Property Law Association and the National Asian Pacific American Bar Association.

Mr. Clemmons received a Juris Doctorate degree from Wayne State University (2002) and a Bachelor of Science degree in Mechanical Engineering from the University of Michigan. He is registered to practice before the United States Patent and Trademark Office.

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**Our Vision**

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.