**Intellectual Property**



Intellectual property is intangible property that arises out of mental labor. It encompasses inventions, designs, and artistic work. Federal and state laws give certain rights and protections to those who develop creative works to exclusively control intangible assets in the form of:

* Copyrights
* Patents
* Trademarks
* Trade Secrets

The Constitution gives Congress the power to pass laws related to intellectual property. Article I, Section 8 of the U.S. Constitution gives Congress the authority to grant authors and inventors copyright and patent rights. Federal copyright law is found in chapters 1 through 8 and 10 through 12 of title 17 of the United States Code. Patent law is found in Title 35 of the United States Code.

Congress’ power to enact federal trademark protection is derived from the Commerce Clause. The Lanham Act is the primary statute that covers trademark law, but there are also state laws associated with trademarks. Most states have adopted part or all of the Uniform Trade Secrets Act, which protects any confidential business information that gives an enterprise an edge over the competition. Trade secrets include manufacturing, industrial, and commercial secrets.

In general, intellectual property rights are enforced by rights holders through civil lawsuits against the party that is infringing against the right through its conduct. The particular remedies for infringement vary depending on the types of intellectual property at issue.

**Copyrights**

Copyright protection is afforded to “original works of authorship.” Copyright protection includes the right to reproduce, the right to create derivative works, the right to distribute, and the right to publicly perform. Contrary to popular perception, copyright protection does not extend to mere ideas, systems, concepts, principles, or discoveries in their abstract forms.

Instead, to be eligible for copyright protection, a work must be fixed in a tangible medium of expression from which it can be communicated either directly or with the help of a device. The medium can be known now, or it can be later developed. Copyrightable works include literature, music, dramas and plays, choreography, pictorial work, graphics and sculptures, motion pictures, sound recordings, and architectural work.

**Patents**

A patent is a monopoly that provides an exclusive right to make, use, offer to sell, or sell a particular invention in the United States, or import it into the United States, for a limited period. The purpose of giving inventors patent protection is to encourage inventers to invest their time and resources in developing new and useful discoveries. In order to obtain the limited monopoly, inventers must disclose patented information to the U.S. Patent and Trademark Office (USPTO). In order to get a patent, the application to the USPTO must demonstrate subject matter that can be patented, usefulness, novelty, non-obviousness, and enablement.

**Trademarks**

To obtain trademark protection, a word, phrase, logo, symbol, shape, sound, fragrance, or color must be used in commerce by a producer to identify goods, and it must also be distinctive. Exclusive rights to a trademark are awarded to the first producer to use it in commerce. The second requirement of distinctiveness encompasses four traits: arbitrary/fanciful, suggestive, descriptive, and generic.

**Trade Secrets**

Under the Uniform Trade Secrets Act (UTSA), trade secrets are information that derives independent economic value from not being generally known through appropriate means by other people who might obtain economic value from its disclosure or use, and that the holder of the trade secret strives to keep secret with reasonable efforts. In the past, improper use or disclosure of a trade secret was a common law tort, which required six factors to be considered when deciding whether information counted as a trade secret. However, the majority of states have enacted the UTSA. In addition to proving that the trade secret qualifies for protection, a trade secret holder trying to enforce a trade secret under the UTSA needs to prove that a defendant wrongfully acquired and misappropriated the secret information.

**Patents**

A patent is a limited-time monopoly for a new invention or discovery. Congress is empowered to make laws to grant patents to inventors under Article I, section 8 of the U.S. Constitution. The Patent Act governs the granting of patents and the workings of the United States Patent and Trademark Office (USPTO). Those who are able to secure a patent have the right to exclude others from making, using, or selling their patented inventions.

Aspects of patent law include:

* Types of Patents
* Patent Search
* Applying for a Patent
* Licensing
* Patent Prosecution
* Patent Appeals
* Infringement
* Enforcement

There are three types of patents: utility patents, design patents, and plant patents. The most frequently sought-after type of patent is the utility patent, which protects new, useful processes, machines, manufactures, compositions, or improvements. A design patent can be granted to someone who invents a new design for a manufactured item. A plant patent can be granted to anybody who invents or discovers and asexually reproduces a new kind of plant.

**How to Obtain a Patent**

Those who want to obtain a patent submit applications to the USPTO, which reviews applications to determine whether a particular invention is patentable. Under Section 101 of the U.S. Patent Act, an invention may be patentable if it is statutory, new, useful, and nonobvious. Certain items that have been deemed to be not statutory are data structures, nonfunctional descriptive material like literature or music, and electromagnetic signals. The patent application must adequately describe the invention, and the inventor must claim it in clear and definite terms.

Whether an invention is novel requires a search for prior art, which is the body of knowledge involving similar and earlier products or processes, and an analysis of whether the public knew of the invention before the invention was invented, whether it was described in a publication more than a year before the filing date, and whether it was used publicly or sold to the public more than a year before the filing date. In general, there is just a one-year period after disclosing the invention to someone without a confidentiality agreement during which “novelty” will be found. It is important to be diligent about filing a patent application.

Usefulness means not only that there is a useful purpose to the invention, but also that the invention is operable. A composition that does not operate to serve its purpose will not meet this requirement.

An invention must be not only novel, but must also be a nonobvious improvement over prior art. The invention will be compared to the prior art in order to figure out whether a person who had ordinary skill with the technology used in the invention would have found it to be obvious.

A patent office examiner must review previous patents to determine which patents are similar to the invention that is the subject of the patent application. The examiner will look at whether the features of the invention can be found in a single patent to determine novelty, and in two prior patents to determine nonobviousness. In general, simply substituting one material for another in an invention or changing its size or appearance will not be sufficient to obtain a patent.

# Applying for a Patent

In order to obtain a patent on an invention, you will have to file an application with the United States Patent and Trademark Office (USPTO). The process by which you obtain the patent is known as patent prosecution. Your application will include a specification, a summary of the invention with drawings when appropriate, one or more claims listed at the end of the specification, an inventor’s declaration that he or she was the first to invent the subject matter in the specification, and filing fees. Two aspects of patent prosecution to keep in mind are provisional patent applications and patentability requirements.

The patent prosecution process can be expensive, so it is important to determine whether you are likely to be able to get a patent. Part of this determination is reviewing any prior art and the body of knowledge related to your invention, including any prior similar inventions.

Before filling out a patent application, you will need to conduct a preliminary patent search and probably retain an attorney or agent to conduct a more comprehensive patent search. The patent application itself must be accurate and very well-written, so that you can receive the best possible protection for your invention.

## Types of Patent Applications

There are two types of patent applications: provisional and non-provisional. Provisional applications give United States applicants 12 extra months to put them on equal footing with foreign applicants who file their patent applications in a foreign country first, before filing in the United States. Provisional patents are cheaper than non-provisional patents, allow “patent pending” status, and do not require you to write your claim.

A non-provisional utility patent application is very difficult to fill out without the help of an attorney. If there is more than one inventor, all the inventors must be listed.For a utility patent, the application has to include a written document with a specification including a description and claims, an oath by the inventor, drawings if drawings are necessary, and a filing fee.

## What is the Most Important Part of the Application?

The description and claims are a crucial aspect of your application. They must show the patent examiner that your invention has a patentable subject matter and is novel, socially and beneficially useful, nonobvious, and reduced to practice. Your claim will have to show that your invention has value in the real world and that it is more than an idea or starting point for further research. Your claim will either explain the purpose of the invention or show how it can be used. Somebody with ordinary skill in the art from which your patent arises should be able to understand why your claim is useful. You written description should explain the significant of different features of the invention and explain how it relates to the prior art.

Your claims will also need to define the property rights that you want for your patent. The claims must set limitations that restrict and define the scope of the protection, including the scope of the subject matter. If the invention is a process, the claim limitations will define the steps to be performed for the process. If the invention is a product, such as a machine, manufactured item, or composition, the claim limitations will define physical structures or materials.

Once you have completed the patent application, you will need to submit it to the USPTO and pay a fee. After obtaining an understanding of what the applicant invented, the examiner will conduct a search of the prior art and determine whether the invention as claimed is in compliance with the statutory requirements. It can take up to three years for a patent application to be granted. It is not uncommon for the examiner to ask an applicant to amend the claims, or for an applicant to have to appeal a rejection.

# Patentability Requirements

The U.S. Patent Act has one of the broadest standards for what is patentable of all countries. When you are filing a non-provisional or provisional patent application, you will need to bear in mind the requirements of patentability. To be patentable, the invention must be statutory, novel, useful, and nonobvious. Certain requirements, such as novelty and non-obviousness, will require you to conduct a preliminary patent search and retain an attorney or agent to search comprehensively.

## Statutory

“Statutory” simply refers to the question of whether the invention involves subject matter that can be patented. Among the subject matter that can be patented are processes, machines, manufactured articles, and compositions of matter.

Certain inventions are not patentable under the Patent Act and would not meet the requirement that the invention be “statutory.” Examples of clearly non-statutory inventions are data structures, nonfunctional descriptive material like books or music, electromagnetic signals, laws of nature, and other abstract ideas.

## Novelty

Under 35 U.S.C. § 102, in order for an invention to be patentable, it must be new and not the subject of a public disclosure more than a year before your patent application filing date. When has a “public disclosure” been made? This is a complicated analysis. Generally, an invention is not novel if it was known to the public before you invented it, it was described in a publication more than a year before you filed, or it was used or sold publicly more than one year before you file.

This means that there is only a one-year period after the first public disclosure or sale during which a patent application can be filed, and your failure to file within this period can act as a statutory bar to obtaining a patent. The clock can start running even if all you did was explain the invention to your friends.

A patent examiner will examine the prior art and look at all previous patents for the same or highly similar inventions. When all the features of your invention are found in a single earlier patent, the patent will be rejected for lacking novelty. In order to make sure an invention is novel, inventors should conduct a patent search before filing. The purpose of this requirement is to stop prior art from being patented again.

## Usefulness

The patent law specifies that the subject matter must be “useful.” This traditionally meant three things: practical utility, operability, and beneficial utility. However, the question of whether something has a beneficial use, something that is considered not immoral or deceptive, has not recently barred applications. Generally, a process, machine, or composition must operate to perform an intended purpose in the real world to meet this requirement.

## Non-obviousness

As with the novelty requirement, an inventor must conduct a patent search and study the prior art to predict whether an examiner will find his or her invention non-obvious. The examiner will decide whether the invention would be considered obvious to somebody with ordinary skill in the art. This can be a difficult analysis, involving a review of previous patents of inventions similar to the invention for which you seek a patent.

Next, the patent examiner will try to combine two or more patents to find features in a combination of the previous patents. When the examiner succeeds at finding a combination, the examiner is likely to find the invention is an obvious combination. Simple changes to earlier products that are not patentable include substituting materials or changing sizes.

# Timeline for Patent Applications

Getting a patent can take two or three years after you file your application. This process, which is known as patent prosecution, may become longer and more complicated if your patent faces opposition, or if the U.S. Patent and Trademark Office asks for more information. You can make the process smoother and more efficient by making sure to comply with technical and procedural rules.

During the process of examining a patent, the USPTO examiner will rely not only on patent laws but also on regulations known as the Patent Rules of Practice. Like other federal regulations, the Rules of Practice control how the agency applies the law. The laws and the regulations are contained in the Manual of Patent Examining Procedure. The USPTO examiner will refer regularly to this manual during the process of considering the application. It will provide guidance for virtually any conceivable situation that could arise. You may want to explore the MPEP as well so that you can anticipate an examiner’s response to certain features of your application. It is available on the USPTO website.

## Steps in Patent Prosecution

Once the USPTO receives a patent application, it will catalog the application in its records and assign it to an examiner. The examiner will determine whether the claims in the application meet the requirements for patent protection. If the examiner accepts the claims, the patent will be granted. However, an examiner often will reject at least some claims in the first phase of the application.

If the examiner rejects a claim in your application, you can decide whether to abandon the claim and limit the patent to the other claims, or whether you want to try to preserve the claim. This involves amending the claim in response to the notification of rejection. The examiner will consider the amendment and decide whether to accept or reject it.

If everything goes well, the examiner eventually will issue a statement called a Notice of Allowance. This indicates that the claims in the application are eligible for patent protection. If the examiner rejects the application and sends the applicant a final office action, the applicant may be able to appeal the rejection. You can read more [**here**](https://www.justia.com/intellectual-property/patents/patent-appeals/) about patent appeals.

## Keeping Records

Record-keeping can make the process of keeping track of your application much easier. You should keep the receipt and other automatic records related to your application. Applicants who file online will receive an Acknowledgment Receipt, while applicants who file through the mail will receive a stamped return postcard if they provided a postcard with the application.

On the Acknowledgment Receipt, you will find the application number (sometimes called the serial number), the confirmation number, and information about the parts of the application. On the postcard, you will find the date on which the USPTO received the application and the application number. You will need to use this information in any communications with the USPTO regarding your application.

Sometimes an applicant makes a simple mistake, such as forgetting to pay a fee or sign a form. They will receive a deficiency notice from the USPTO that will tell them about the further steps that they need to take to complete the application. The applicant must correct the deficiency and pay any required penalty fees before the application will be considered filed.

**Copyright**

Congress has the authority to protect original works of authorship or “writings” under the U.S. Constitution, Article I, Section 8. The United States Copyright Act (17 U.S.C. §§ 101-810) is the federal law that details the rights and protections of copyright holders. Works of authorship must be fixed in a tangible medium of expression and fall within the subject matter of copyright to be protected. They must be able to be perceived or otherwise communicated directly or indirectly with a device. Ideas, concepts, procedures, principles, discoveries, and systems are not protected by copyright.

What counts as “writing” has expanded as the number of technological means of communication increases. Writing includes literary works, dramatic works, software, graphic arts, motion pictures, sound recordings, and choreographed dances. Important aspects of copyright law include:

* Registration
* Copyright ownership
* Fair use
* Infringement
* Enforcement

A copyright holder has the following exclusive rights: reproduction, distribution, performance, display, licensing, and preparation of derivative works. A copyright holder can enforce these rights through copyright infringement litigation. However, the copyright holder’s interests are balanced against the interests of society under the fair use doctrine. Courts balance multiple factors to determine whether a defendant’s actions or work should be considered fair use. However, generally, using a copyrighted work in order to criticize it, comment on it, report the news, teach, research, or produce other scholarly work is not considered infringement.

Under Section 106A, known as the Visual Artists Rights Act (VARA), authors of works of certain visual arts also have moral rights, specifically rights of attribution and integrity. This means visual artists of particular types of works have the right to claim authorship of their work and to prevent the use of their name on any work they did not create. Artists of works covered by the legislation also have the right to prevent the use of his or her name on a work of art if it is distorted, mutilated, or otherwise modified and could cause harm to their honor or reputation.

Unlike other authors, visual artists have a moral right to prevent intentional distortion, mutilation, or any other modification of their work and to prevent destruction of their work, if the work is of recognized stature. For example, if someone mutilates a mural that is recognized as a work of great value, the painter has the right to sue the person who mutilated the work. VARA covers only fine arts such as paintings, drawings, prints, still photographs for exhibition, and sculptures.

**Registration for Copyright**

Registering a copyright is voluntary. An author obtains copyright as soon as he or she creates an original work of authorship in a fixed medium. In other words, it is immediately his or property, and no other action, such as providing notice of copyright by using a copyright symbol, is required under the law. When a work is made for hire, the employer is the author and holds the rights and protections.

However, in order to enforce a right through litigation, copyright must be formally registered with the Copyright Office. In addition to registering the copyright, United States copyright holders should deposit copies with the Copyright Office for use by the Library of Congress, except with regard to certain materials.

**How Long Does Copyright Last?**

The length of time during which an author has copyright protection in his or her work depends on when the work was created. Work that was created and fixed on or after January 1, 1978 is protected for a term of the author’s life plus 70 years. When there are two or more authors of a joint work, the term continues for 70 years after the death of the last surviving author. Works for hire are protected for the lesser of 95 years from the first publication or 120 years from creation. However, if the Copyright Office records later reveal the author’s identity, the ordinary terms of protection apply.

The term of protection for works that were published before 1978 varies depending on the exact year. After a term of protection expires, the work falls into the public domain, and the copyright holder loses his or her rights.

# Copyright Forms

Creators of written content may wish to pursue formal copyright registration in order to have enforceable rights related to their work, which in this context can include literary work, sound recordings, motion pictures, software, dramatic works, and more. All of the US Copyright Office forms you may need to complete in order to register your copyright are available **[here](https://www.copyright.gov/forms/" \t "_blank)**. You can read more [**here**](https://www.justia.com/intellectual-property/copyright/) regarding copyright law, and review the questions and answers below to develop an understanding of some of the primary features of the copyright application process and identify some of the specific forms you may need.

**How Do I Submit a Copyright Application?**

According to the Copyright Office, it is preferable for copyright holders to submit applications for registration through the **[Electronic Copyright Office (eCO)](https://www.copyright.gov/registration/" \t "_blank)** system when possible, and if available for the type of work they wish to register. To apply online, you will need to establish an eCO account (email address required), complete your application, pay any required fees, and submit a copy of your work.

If you prefer to submit your application on paper, forms are available for literary works (**[Form TX](https://www.copyright.gov/forms/formtx.pdf" \t "_blank)**), visual arts works (**[Form VA](https://www.copyright.gov/forms/formva.pdf" \t "_blank)**), sound recordings (**[Form SR](https://www.copyright.gov/forms/formsr.pdf" \t "_blank)**), performing arts works such as motion pictures (**[Form PA](https://www.copyright.gov/forms/formpa.pdf" \t "_blank)**), and single serial issues (**[Form SE](https://www.copyright.gov/forms/formse.pdf" \t "_blank)**).

Though online applications are generally preferred, note that you must submit a paper application for some types of registrations, including for mask works (**[Form MW](https://www.copyright.gov/forms/formmwi.pdf" \t "_blank)**) and vessel designs (**[Form D-VH](https://www.copyright.gov/forms/formdvhi.pdf" \t "_blank)**).

**How Much Does It Cost to Register a Copyright?**

For basic registration, filing online costs $45 for a single application (single author, same claimant, not for hire, one work) and $65 for a standard application, whereas filing your application on paper costs $125.

The cost for registrations for groups of related claims can range from $35 to $500 depending on the type of work. Other fees that may apply depending on your situation can include $100 to $150 to file corrections to registrations, $350 and up for requests for reconsideration, a $125 minimum for renewal, and several hundred dollars for expedited processing.

**How Do I Send in a Copy of My Work?**

You can submit a copy of your work electronically if you meet one or more of certain conditions, which include that the work must be unpublished or has only been published electronically, best edition requirements do not apply to the work, or you are utilizing group registration for serials, unpublished works, newspapers, photographs, newsletters, secure test items, or contributions to periodicals. Certain group registration options, such as for unpublished works by the same author or co-authors, require digital submission of a copy of each work you are registering. Other classes of works require the submission of a physical copy to the Copyright Office, though you can still file your application and fees online.

**How Do I Renew a Copyright?**

You can renew a copyright for works published or registered between January 1, 1964 and December 31, 1977 using **[Form RE](https://www.copyright.gov/forms/formre.pdf" \t "_blank)**, which currently can only be submitted on paper (not electronically). For works published but not registered during this timeframe, you may also need to file **[Form RE/Addendum](https://www.copyright.gov/forms/formrea.pdf" \t "_blank)**. Works that established copyright protection after that timeframe are generally provided with copyright protection for the lifetime of the author plus 70 years.

**How Can I Protect the Rights to My Work Before It is Finished or Released?**

If you are concerned that someone may infringe upon your work before you finish or release it, and the work in question is being prepared for commercial distribution as a sound recording, motion picture, musical composition, computer program, literary work, or advertising or marketing photograph, you may be able to **[preregister](https://www.copyright.gov/prereg/" \t "_blank)** your work with the Copyright Office.

**Can I Request Expedited Processing?**

You can ask to expedite a registration or document recordation by filing a **[Special Handling Request Form](https://www.copyright.gov/forms/special_handling_request_forms.pdf" \t "_blank)** under circumstances involving pending or prospective litigation, publishing or contractual deadlines, or customs matters. The special handling fee is $800 per claim.

**Copyright Infringement**

When any of the exclusive rights of copyright are exploited without a copyright owner's permission, copyright infringement has occurred. There are two types of infringement: primary and secondary. A primary infringement involves a direct infringement by the defendant. Secondary infringement happens if someone facilitates another person or group in infringing on a copyright.

There are two types of secondary infringement, contributory and vicarious infringement, neither of which is expressly prohibited under the Copyright Act, but which have arisen as prohibitions under case law. Somebody who knowingly induces, causes, or materially contributes to copyright infringement can be held liable as a contributory infringer if he or she knew or had reason to know of the infringement. Courts will determine whether a person or organization is vicariously liable to see whether the superior party (such as an employer) profited from the infringement of the primary or direct infringer and had supervisory authority over the direct infringer.

To enforce a copyright, a copyright holder typically sends a cease and desist letter to the person or entity exploiting an exclusive right. In some cases, multiple cease and desist letters are sent. However, if correspondence fails, the copyright holder may sue in federal district court to enforce his or her rights. When a copyright is registered with the Copyright Office, the infringer may have to pay the copyright holder statutory damages and possibly attorneys' fees. An infringer will also be prohibited from continuing to use the work.

**What Does a Plaintiff Have to Prove in a Copyright Infringement Lawsuit?**

When a plaintiff brings a copyright infringement lawsuit for primary infringement, he or she must prove copyright ownership and that the defendant copied or otherwise violated his or her rights in original aspects of the copyrighted work. Often, proof of copying is accomplished through circumstantial evidence when a plaintiff demonstrates that the defendant had access to the original work and that there is a substantial similarity between both works. Courts determine substantial similarity by looking for similarities between the two works, including their formats, appearance, sound or words, and sequence. While owners do not need to put a notice on their work or register it with the Copyright Office, taking these steps in a timely fashion makes it easier to establish a copyright infringement case later.

**Copyright Infringement Damages**

A copyright holder can recover actual damages and the infringer's profits if he or she successfully proves copyright infringement. Actual damages are measured by the "lost market value" at the time of infringement. When establishing profits, the copyright owner must prove the infringer's gross revenue, and the infringer must prove deductible expenses and elements of profit that can be attributed to factors other than the original work of authorship. A copyright owner can elect before judgment to recover statutory damages for all infringements in an amount between $750 and $30,000 as the court considers fair.

If the work was registered with the Copyright Office within three months of the work's publication or before the infringement, the owner can recover statutory damages and attorneys' fees without proving actual damages. Statutory damages, rather than actual damages, must be awarded when an infringer had reasonable grounds for believing his or her work falls under the fair use doctrine if the infringer is an employee or agent of a nonprofit educational institution or library that infringes within the scope of employment by reproducing the work, or the infringer is a public broadcasting entity that infringes by performing or reproducing a nondramatic literary work.

Criminal penalties are available when infringement is "willful." If the court finds that the infringement was willful, the court can increase the statutory damages award to a sum of up to $150,000. However, when an infringer did not have reason to believe his or her use was infringing, the court also has the discretion to reduce damages to no less than $200.

**Defenses**

If you are sued for copyright infringement, common defenses your attorney may be able to raise are:

* The statute of limitations has expired;
* You had no reason to know the work was protected by copyright;
* Your infringement is permitted under the doctrine of fair use;
* You created your work independently without copying; or
* You had a license to use the work from the copyright owner.

The least predictable of these defenses is the fair use defense. However, usually fair use is found when the allegedly infringing work is a criticism of the earlier work, reports the news, is considered scholarship, is considered a nonprofit educational use, or constitutes parody.

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When any of the exclusive rights of copyright are exploited without a copyright owner's permission, copyright infringement has occurred. There are two types of infringement: primary and secondary. A primary infringement involves a direct infringement by the defendant. Secondary infringement happens if someone facilitates another person or group in infringing on a copyright.

There are two types of secondary infringement, contributory and vicarious infringement, neither of which is expressly prohibited under the Copyright Act, but which have arisen as prohibitions under case law. Somebody who knowingly induces, causes, or materially contributes to copyright infringement can be held liable as a contributory infringer if he or she knew or had reason to know of the infringement. Courts will determine whether a person or organization is vicariously liable to see whether the superior party (such as an employer) profited from the infringement of the primary or direct infringer and had supervisory authority over the direct infringer.

To enforce a copyright, a copyright holder typically sends a cease and desist letter to the person or entity exploiting an exclusive right. In some cases, multiple cease and desist letters are sent. However, if correspondence fails, the copyright holder may sue in federal district court to enforce his or her rights. When a copyright is registered with the Copyright Office, the infringer may have to pay the copyright holder statutory damages and possibly attorneys' fees. An infringer will also be prohibited from continuing to use the work.

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