

Decorative Painting, Legally Speaking **Part 2 of 3**

Intellectual Property, or The Cure for the “I Can Do Better Than That” Syndrome

Every day I work with inventors and creators who shape the future of our industry. These clients are no different than most of you reading this article. The main difference between them and you? They know that what they do is valuable not only to themselves but to others. How many times have you gone into a store or opened a magazine and said, “I can do better than that.” Well, it’s time to take the mystery out of turning your creations into cash.

A decorative painter creates, innovates and expands every time he or she picks up a brush, opens a magazine, takes out the trash, or opens his or her cupboard. To paint is to create. Whether the project comes from a pattern or from the artist’s imagination, creativity remains the one constant in decorative painting. This creativity needs to be harnessed and expanded.

So much of my law practice involves working with creative individuals and companies to help them capitalize on their creativity or defend their creativity when others take advantage of their work. I love going to work. The hardest part of my job arises when I have to tell someone that his or her options are limited because he or she failed to file for a patent, register a copyright, file for a trademark or protect his or her agreement with a license.

During a recent speaking engagement someone asked, “What exactly is intellectual property?” I realized that this question was why I go to work and love what I do; it goes straight to the heart of what I teach at seminars and write in articles. Intellectual property is more than patents, copyrights, trademarks, trade secrets and licensing. Intellectual property means those items of our intellect (ideas, creativity, etc.) can be valuable assets, or valuable property, if you will.

I want to clear up one misconception. Protecting your ideas, designs, inventions and more doesn’t have to break your bank. Today, in a market-driven society, many law firms and self-help resources avail themselves to consumers at reasonable rates. Terms such as contingency fee

agreements, sweat equity and others slowly but surely continue to become part of the landscape in intellectual property law. Gone are the days that competent legal help for intellectual property is out of your financial reach.

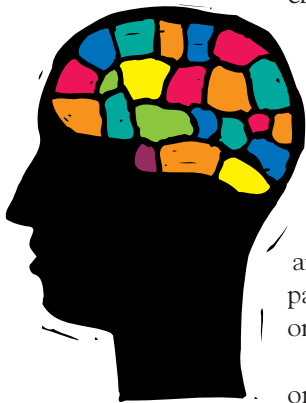
The following scenarios illustrate the various types of protection that one may seek for his or her work to protect it to the fullest extent of the law and potentially capitalize on its worth.

Scenario 1

Cassandra Creator can’t stand how long it takes to put all those tiny lines in when she makes pine boughs. So, she tapes 12 script liners together and creates the ultimate “pine bough paintbrush.” Cassandra wants to protect her invention. She hasn’t decided on a name yet, or colors for her handle, but she wants to protect her idea since Christmas is just around the corner.

The most widely used legal protection for ideas is a patent. Patents grant an inventor the right to exclude others from producing or using the inventor’s discovery or invention for a limited period of time (usually 20 years), but it depends on many different circumstances. An invention must be novel, useful and not of an obvious nature to be patentable. There are two types of patents: a utility patent (products, processes and ideas) and a design patent (covering the ornamental features of a product).

The key to patents remains documentation. From the moment you create or develop, it’s imperative you document everything from where you received your inspiration to what materials you used and how the object works. The other key component to this process is to contact competent legal counsel *before* you display your new invention to the public. While it may be tempting to bring it out at the next trade show, chapter meeting or sale on the Internet, it could harm your possibilities of seeking protection. You may have a grace period of one year to file your application after initial introduction to the market, but you want to work with legal counsel to ensure you obtain initial protection and a priority filing date. Be careful not to wait too long. The key to patents remains: seek competent legal counsel.



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Even if you decide not to manufacture your own product, someone else may want to manufacture it for you under a license. Many companies search the patent records (along with copyright and trademark records) to find new business ventures. The patent process can turn ideas, methods, machines and useful designs into gold, but you, the creator, must be willing to claim your work and treat it like the valuable asset that it is.

Scenario 2

Christmas comes too early at the G. E. Wrench home. Hustle and bustle fill the rooms as the children prepare for Santa's arrival, much to the dismay of their father. The littlest child, Virginia, decides that this year she is going to send out Christmas cards that she decorated herself. With her box of brushes and paint in hand, she makes a beautiful rendition of the family dog with reindeer ears tied around his head pulling a sleigh. She sends them to her relatives and friends. Christmas comes and goes and in February she uncovers that the neighborhood bully dug through her trash and used her design on his Christmas cards. Virginia begins to cry.

Copyright law may be the most familiar to you out of all of the intellectual property disciplines. However, it's considered the easiest protection to seek, yet most decorative painters fail to take advantage of the extensive benefits a copyright registration can offer. While copyright protection attaches at the moment of creation, protections such as statutory damages and attorney fees can only be sought if a registration is timely filed. Timely filing constitutes either filing a registration with the U.S. Copyright Office before the work is published or within three months of publication. The cost is \$30 (as of time of publication).

While opinions differ, if a design is going to be a pattern packet or book, I encourage my clients to file both a Form TX (text) and Form VA (visual work) to cover both the project and the instructions. Furthermore, the creator wants to make sure he or she owns all the rights to the project; this includes photographs, design and layout. Looking at a design in several different ways helps the creator to find avenues to gain revenue from his or her work.

Finally, it's necessary to mention registering a group of your works as a collection. While the U.S. Copyright Office permits a collection of works to be registered under one form, this may not be a good idea. It's better than nothing, but the filing of a collection may diminish any relief you receive. Collections should be filed cautiously.

Scenario 3

The craft show season bustles in the fall as the holidays are in the air! Ima Crafty sells handpainted bells of every shape and size and decides to name her business and subsequent booths, "For Whom The Bell Tolls." Soon the name of her shop takes off! Ima can't believe it. Ima wants to protect her name and ensure that no one else can use it.

Words or slogans fall under the category of a trademark. A trademark is a word, phrase, symbol or design, or a com-

ination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others. You can establish rights in a trademark based on legitimate use of the mark. However, owning a federal trademark registration on the Principal Register provides several advantages. These advantages include constructive notice to the public, ability to enforce your trademark, ability to file with the U.S. Customs Office to prevent importation of infringing goods, and a legal presumption of the registrant's ownership of the mark.

Trademark searches and registration should be left up to a competent professional. Since another user of your proposed trademark may not have registered with the U.S. Patent and Trademark Office, you could waste money and time by submitting an application just to find out that the name is already in use.

Licensing

The final cure for the "I Can Do Better Than That" Syndrome is licensing. Licensing can be as simple as working with another artist or as complicated as working with several companies. A decorative painter can use an agent or try it on his or her own. Licensing presents challenges that need to be determined in advance. The agreement must contain more than the name of the parties, name of the work, any dollar amounts and dates. Agreements should state whether or not the decorative artist plans on retaining his or her copyright or if the decorative artist is giving up those rights. Furthermore, questions regarding derivative works, quality control, jurisdiction and termination must be addressed. Licensing works best when you secure your intellectual property rights in advance. This allows you the opportunity to present a complete package to a potential licensee. Licensing does not have to be complicated and the rewards can be substantial. ∞

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Author's Sketch

Tammy L. Browning-Smith is an associate attorney with Foley & Mansfield, P.L.L.P in Bingham Farms, Mich. Tammy specializes in Intellectual Property Law, specifically Copyright, Trademark and Licensing Law. She is also a decorative artist and teaches decorative painting. Tammy gives seminars around the United States regarding Intellectual Property Law and the hobby and craft industry. She recently co-authored a book with Laurie Speltz titled *Crafters Mean Business II*. Most of her clients are in the arts and crafts industry.