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MY COMPANY HAS NO INTELLECTUAL PROPERTY ... OR DOES IT?

By: [William Y. Klett, III](#)

Intellectual property is the most valuable asset virtually all companies have. Unfortunately, without a robust portfolio of patents or registered trademarks, many companies believe that they have no intellectual property to protect. Accordingly, because most companies believe they have no intellectual property to protect, they make no effort whatsoever to put appropriate safeguards in place to protect their most valuable asset. A thorough review of a company's confidential or proprietary information – its trade secrets – will go far in protecting those valuable but often overlooked assets.

If your company has a business strategy, it has intellectual property to protect. Obviously, all of your competitors would love to have a peek at your proprietary, confidential business strategy. Likewise, your marketing plan is also proprietary and a trade secret. Again, your competitors would love nothing more than to ride on your advertising coattails and have access to your marketing plan.

If you manufacture goods, you likely have many processes and company know-how that your competitors would like to take advantage of. Again, this is intellectual property that should be protected. Your cost of doing business is also protectable. Presumably, your company has negotiated prices with third party vendors or suppliers, and this overhead cost structure may provide an advantage over your competitor.

Your employees are also one of your most valuable assets - until they walk out the door with all of your proprietary or confidential business information. Advanced planning will help keep this from happening. And if it does happen, safeguards will allow you to be in a position to do something about it.

If you have customers, you have intellectual property. Customer lists are one of the most common forms of confidential and proprietary information that your competitors are interested in obtaining. Again, advanced planning will assist in keeping this information confidential.

If you have vendors or other third parties that work for you or with you, advanced planning and implementing legal safeguards will assist in keeping these relationships friendly and profitable. Like many relationships, the "partners" are amicable and friendly at the beginning, but may end up claiming individual ownership of that jointly developed new product that turns out to be worth millions. And if one of those third parties is the government, watch out. A company should not find its confidential and proprietary information subject to a Freedom of Information Act request.

All of these issues should be considered by every business. With advanced planning and putting legal protection in place, a business may be comfortable that its most valuable assets are not walking out the door (or e-mailed to a competitor, or captured in a snap shot from a cell phone camera, or downloaded onto a zip drive, or....).



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BRAIN CHILD

By: [Michael A. Mann](#)

I had an idea once. I thought it was a pretty good one, too. This was back in the early 90's when most businesses had fax machines and very few people had email addresses.

I envisioned a big computer somewhere, maybe in the Rocky Mountains, that was tied to massive phone lines so that it could receive faxes from anywhere in the world. You could send a fax to the big computer using the fax number 1-800-POSTOFFICE. On the fax transmittal form, you would enter an address corresponding to, say, your friend in Seattle or your customer in

Cleveland. The big computer would read that address and then automatically retransmit the fax to the U.S. Postal Service branch office nearest to the recipient's address.

Post offices would have one or more receive-only fax machines, each with two large hoppers for paper. One hopper would have letter-size paper; the other hopper would have oversized paper. As each fax was received, it would be printed automatically on the letter-size paper and then wrapped within a sheet of the larger paper, thus forming an envelope. These fax machines would next print the address of the recipient of your fax message in human and machine readable characters on that envelope and convey the envelope automatically to the sorters for next day delivery.

If the idea were implemented, anyone could send a physical letter or bill from a fax machine anywhere in the world to anyone else in the world living near a post office that had one of these special receive-only fax machines. Just think of the efficiency! Nothing physical to deliver from anywhere in the world until the last few miles for next day delivery

I did a patent search. Bummer! Some guy who worked for RCA in the 1970s had envisioned this same idea. Not only was I out of luck, but I was depressed about it for weeks.

The experience emphasized to me just how important people's ideas are to them. That idea was my *brain child*, until... oops! Sorry! Not mine. Oh, well!

Our ideas, like our children, come out of our bodies, and they are nearly as important to us as our children. We can connect on a personal way with other types of property: heirlooms, for example, or a farm that has been in the family for generations. Our ideas, however, are invariably at the top of the list, and the harder we have worked on them, the more intense is our parent-like attachment.

The metaphor of parenthood for the relationship to our ideas is old and widespread. Plato is credited with the saying, "The true creator is necessity who is the mother of our invention." This fundamental theme has seen its variations. Gallileo said, "Doubt is the father of invention." (Somewhat oblique to the metaphor but still intriguing is Susanna Centivre's statement: "Want is the mistress of invention," or then there is: "Laziness is the brother-in-law of invention.")

Necessity may be the mother of invention but not all ideas are born out of the usual type of necessity. Edward Teller is the Father of the H-

Bomb. Al Gore could be the Father of the Internet, or not.

Plato's association of inventions with necessity and his use of the maternal parent rather than the paternal is telling. Aristotle said, "This is the reason why mothers are more devoted to their children than fathers; it is that they suffer more in giving them birth and are more certain that they are their own." Many inventors labor long and hard in giving birth to their ideas. It is no wonder that they are all the more certain that their inventions are indeed their own.

The use of parental metaphors in connection with inventions is widespread but often subtle. We use the term *conception* in regard to the moment an inventive idea arises. We even describe patent applications as *maturing* into patents. However, the time it currently takes to get a patent application issued as a patent suggests that the word "maturing" should be replaced by *going gray*.

Patents last 20 years from when their patent applications are first filed; children are dependents for about the same length of time.

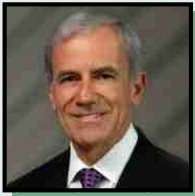
Patents and children are both "granted" only by the sovereign – the federal government in the case of patents; God, in the case of children. That similarity is not just a trite coincidence. Trademark rights, in contrast, do not require a grant from the federal government but simply arise on use of the mark in commerce. In fact, in the case of trademarks, we say that trademarks are "adopted" by the user, signifying that a mark was not conceived by the user but somehow found.

Is the intense personal relationship between inventors and their inventions important other than as a curiosity? Yes, absolutely. Disputes over who was the first inventor are intense. Disregarding an inventor, particularly in the employer-employee context can be a huge mistake on the part of an employer, even if it has the right to help itself to the invention. Taking an employee's idea is tantamount to depriving her of her children.

Inventors are also notorious about preferring to license their inventions rather than selling them outright. They don't want to let go. Many inventors have told me that they want to continue to be involved in the development of their invention even if the invention is to be sold. It is as if they were parents putting their children up for adoption and unable to accept severance of all ties.

Finally, it is fundamentally good that there is this parental relationship between inventions and their inventors. Without it, few inventions

would survive for long. The world is a hard place and new brain children are not generally greeted with joy except by the inventors who conceived them and who mother them to the point where they can stand on their own two feet.



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WHAT THE LIBRARIAN OF CONGRESS HAS TO DO WITH YOUR CELL PHONE

By: Amy Allen Hinson

Section 1201(a)(1)(A) of the Digital Millennium Copyright Act (“DMCA”) prohibits circumvention of technological measures that control access to copyrighted works. The DMCA also, however, authorizes the Librarian of Congress to grant exemptions to this prohibition. Specifically, the DMCA provides that every three years the Librarian of Congress, upon recommendation of the Register of Copyrights and consultation with various other agencies and officials, shall exempt particular classes of copyrighted works from this prohibition because users of those classes are, or are likely to be, adversely affected by the prohibition “in their ability to make noninfringing uses of that particular class of work.”

On July 20, 2010, the Librarian of Congress announced its newest three-year exemptions from the prohibition of circumvention of technological measures that control access to copyright protected worksⁱ. Of the mere six exempt classes, two concern technological measures that control access to cell phone computer programs.

The first cell phone related exemption concerns the circumvention of technological measures contained on

wireless phone handsets (known as smartphones, and more particularly the iPhone[®]) that prevent third party software applications from being installed and run on such phones – colloquially known as jailbreaking a phone. Apple argued against the exemption stating that having the technological measures protects consumers of the iPhone[®] and Apple from harm, modifying the iPhone[®] operating system to allow unauthorized applications constitutes the creation of an infringing derivative work, and finally, jailbreaking activity does not constitute fair use.

In response, the Register of Copyrights concluded, relying on the Section 107 fair use factors in the Copyright Act, that (1) the purpose and character of adding functional applications specifically created for the iPhone[®] was favored, (2) Apple is really improperly using Section 1201(a)(1)(A) of the DMCA to protect its business model rather than protecting a legitimate fear that its exclusive copyrights will be infringed, (3) the amount of copyright protected work modified in a typical jailbreaking scenario is (approximately 1/160,000), and (4) since one cannot engage in the practice of jailbreaking unless one has acquired an iPhone[®], Apple’s potential market for the iPhone[®] will likely increase because of the advantage of a wider array of third party applications.

In summary, the Register of Copyrights recommended and the Librarian of Congress agreed that jailbreaking a smartphone purely for the purpose of allowing the operating system to be interoperable with unauthorized applications is fair use and does not adversely affect the market for or value of the copyright protected works to the copyright owner and is therefore exempt from Section 1201(a)(1)(A) of the DMCA.

The second cell phone related exemption continues a prior exemption concerning computer programs that prohibit used wireless telephone handsets from connecting to a different wireless telecommunication network when a user intends to switch network service providers. Despite the fact that 23 percent of U.S. AT&T iPhone[®] users say they would switch to Verizon if they couldⁱⁱ, the wireless networks banded together and argued that using a cell phone on another network infringes the copyright holders exclusive right to reproduce copies of the computer

software (because use of mobile phones necessarily involves the making of copies in the random access memory of the mobile phone) as well as the exclusive right to make derivative works. Moreover, the wireless networks also argued that such use constituted a breach of contract with the customer.

In response, the Register of Copyrights concluded that if the mobile phone owner is the owner of the copy of the computer program on the mobile phone, making RAM copies of the software in order to operate the phone on any network is a noninfringing use under Section 117 of the Copyright Act because the making of a copy is an "essential step in the utilization of that software." Moreover, modifications in the computer program to enable the mobile phone to operate on another network is also a noninfringing use under Section 117 of the Copyright Act because these minor modifications "do not implicate any of the exclusive rights of copyright owners." The Register of Copyrights also noted that the primary purpose of the cell phone locking software was to keep consumers bound to their existing networks rather than to protect a legitimate copyright protection concern.

It should also be noted, however, that the Register of Copyrights did not establish a federal policy of ensuring that cell phone customers have the freedom to switch cell

phone providers. Consumers may still face potential breach of contract claims if the cell phone owner is not the owner of the copy of the computer program on the mobile phone. Because of the exemption, however, the service provider must bring a breach of contract action against its former customer rather than a Section 1201(a)(1)(A) claim.

In summary, the Register of Copyrights recommended and the Librarian of Congress agreed that computer programs that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program and is done solely in order to connect to another wireless telecommunication network, are exempt from Section 1201(a)(1)(A) of the DMCA.

37 CFR Part 201.

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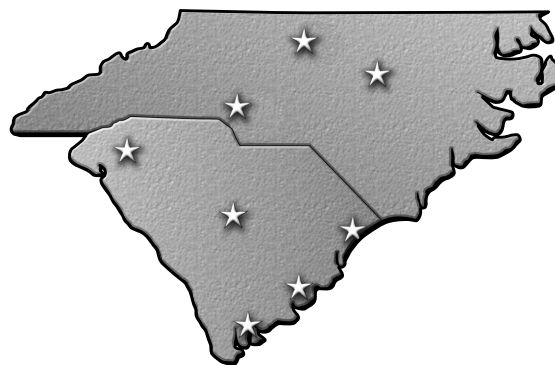
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