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IP Basics: Advice on IP Careers for those without technical backgrounds

By Thomas G. Field, Jr., Professor Emeritus, University of New Hampshire School of Law Franklin Pierce Center for Intellectual Property

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The golden age of intellectual property law

Those browsing the Internet appreciate why this is regarded as the "information age." Information and ideas are often likened to iron ore and oil in the industrial age -- essential raw materials. But because such things cannot be literally fenced in or locked up, they must be protected with trademarks, copyrights, trade secrets and patents. These legal interests are collectively called "intellectual property" or IP.

It has not been long since intellectual property was not well regarded. Only within the past thirty years has encouraging innovation come to be seen by judges, members of Congress and others as important to preserving the U.S. standard of living in the face of international trade imbalances -- and intellectual property to be seen as offering needed encouragement for innovation. For example, to secure uniform and reasonable recognition of patent rights, Congress has given one federal court exclusive jurisdiction over all U.S. patents. To reduce the risk of illegal copying, it has also provided that software cannot be rented and enacted laws to forbid bootlegging. Thus, many intellectual property owners regard this as a golden age.

If you can spend three more years in school, intellectual property offers a wide range of interesting and rewarding careers. Those without technical backgrounds, however, should not pursue an intellectual property career blindly. Unless your undergraduate degree is in a physical science or engineering -- or you have at least a masters (and probably some experience) in biotechnology, patent opportunities will be slim.

As discussed in more detail below, people without technical training are more apt to deal with copyrights, trademarks and special contracts such as licenses or franchise agreements. Yet intellectual property law covering non-technical subjects is often as interesting as that involving technology. An alumnus who is prominent in advertising law said that his wife would not sit close to him when they watched TV because he was always nudging her and saying, "Hey, I was involved with that ad!" Few legal areas are more interesting or involve matters of such wide impact.

It has been estimated that industries including software, films, television shows and music, represent about 5% of the U.S. gross domestic product. If the Internet were included, it would be much larger. You probably have heard about recent cases concerning music downloading and domain name disputes, for example. Legal professionals involved in such cases were surely well paid but also found many opportunities to discuss them, within the bounds of confidentiality, in social settings.

The global marketplace

The U.S. is said to be the world's largest producer of intellectual property -- covering everything from computer software and hardware to pharmaceuticals, movies and toys. This is directly related to our offering strong legal protection to innovators.

Since Congress ratified the North American Free Trade Agreement, the U.S., Canada and Mexico has become a single free trade area comprising nearly 400 million people with a combined gross annual profit of over \$7 trillion. Much stronger intellectual property protection in Mexico was part of the agreement.

U.S. companies have long complained about losing tens of billions of dollars annually to uncompensated use of intellectual property. This played a major role in their promoting the General Agreement on Tariffs and Trade (GATT). That agreement is expected not only to facilitate world-wide movement of goods but also to provide stronger global intellectual property protection. Sponsors claim that GATT has added hundreds of billions of dollars to world trade.

Such things would not happen if other countries, too, did not recognize the role of intellectual property in improving general standards of living. I see evidence of this each year when new classes of mostly foreign students enroll in our intellectual property masters programs.

Trademarks

Many companies have trade secrets, patents and copyrights, but it is hard to imagine any that does not use identifying marks to distinguish its own goods or services from those of competitors. Moreover, patents and copyrights expire, and trade secrets often become common knowledge, but firms that treats customers well, find their marks to become only more valuable over time.

In the U.S., trademarks are hard to avoid. As a child you may have asked your parents for a Barbie or Bratz doll, Lego building blocks or Hot Wheels cars. More recently, you may have lusted over a Corvette or Ferrari -- or actually considered buying a Ford or Honda automobile. Likewise, you probably have a preference for Burger King, McDonald's or Wendy's sandwiches; for Coke, Pepsi or Dr. Pepper soft drinks.

Marks are, thus, also as valuable to consumers wishing to purchase goods they favor or to avoid others. If trademarks did not exist, consumers would probably invent a substitute. Seen this way, trademarks protect consumers as much as companies that own them.

Trademark and related law probably represents the largest opportunity for lawyers without strong technical training. Lawyers and paralegals spend considerable time tending to registrations of domain names, as well as the registration of marks with various state governments and the U.S. Patent and Trademark Office in Washington, D.C. They also make sure that the same or confusingly similar names are not used by unrelated firms, take action to prevent counterfeit goods from being imported or sold and try to educate everyone about the importance of using marks correctly. Indeed, you are likely to have seen ads asking people not to call products Xerox, Kleenex or Band-Aid when they have no idea who made them (and may not care).

Sports, entertainment and related industries

Sports, estimated to account for 2.5% of world trade, depend on intellectual property law in several ways, for example, to ensure the integrity of endorsements by famous athletes. Some are said to have made more money from endorsements than from their spots directly. Teams also benefit by licensing use of their logos.

Until recently, purchasers of products bearing the name of a college or professional sports team would not have assumed any connection. However, the situation has changed dramatically. Various measures are now taken to regulate the quality of merchandise and to ensure that institutions whose logos are used share income through trademark licensing.

The market for licensed baseball-related merchandise, alone, represents at least \$2.5 billion in sales. This encourages counterfeit goods. One article notes that hundreds of thousand of items, worth about \$1 million,

were seized during the weeks before games -- just in cities hosting Super Bowls. Likewise, as the dates of various Olympics approach, millions of dollars' worth of unauthorized merchandise are seized.

Now, add music, movies and toys. Here too, licensing others to use trademarks is usually an important source of income. Advertising budgets for related merchandise often are several times larger than the advertising budgets for movies themselves!

Again, famous (living and fictional) figures are highly sought for endorsements, and attorneys are often needed. For example, when companies can't get what they want, or at a price they're willing to pay, they sometimes resort to other measures. When one featured a Bette Midler sound-alike singer in an ad, a court ordered it to cease and to pay damages. In another case, the hostess of Wheel of Fortune recovered \$400,000 for use in an ad of a robot that only vaguely resembled her.

Getting into law school

As mentioned, full-time law school takes three years. As most people know, law school culminates in the Juris Doctor (J.D.). Assuming no severe character deficiencies, those with a J.D. from an American Bar Association accredited school can take the bar exam in any state. Having passed it, they can practice in any legal area. [The sole exception is patent law. To apply for patents, a lawyer must have a solid technical background and pass an examination administered by the U.S. Patent and Trademark Office.]

College graduates need not pursue any particular line of study to be accepted into law school. An acceptable score on the Law School Admissions Test (LSAT) and good grades are important, as are writing ability, initiative, curiosity and maturity. Grades usually get close scrutiny, but people who take easy courses or attend schools suffering severe grade inflation gain no advantage. No law school is easy; if they somehow gain admission, people who have not been challenged in undergraduate school will be hard-pressed to succeed.

Professors rarely, if ever, presume that students in law classes have any particular background. One of the great things about teaching and studying law is the extremely diverse educations and experiences that students bring. Professors certainly do not assume that students took undergraduate "law" courses. Do not worry if you have not. On the contrary, one student did miserably in one of my courses after doing well in an undergraduate class that had used the very same book! She did not appreciate that the same subject matter may be approached very differently inside and outside of law schools.

Making the most of increasing opportunities

Partly because technical training is required to apply for patents, lawyers so trained have historically dominated intellectual property practice. This has changed. Because technical backgrounds are, at best, irrelevant to the practice of trademark and most copyright (software aside) law, lawyers practicing in such areas are less apt to have technical training. General firms once content to send intellectual property business to boutique patent firms increasingly keep it for themselves. Being tired of long working in the shadow of patent lawyers, trademark lawyers seem sometimes to go out of their way to hire people without technical backgrounds. Even technology-based companies are now less likely to hire technically trained lawyers for non-patent work. Still, patents aside, it is difficult to differentiate oneself from other lawyers.

In 2008, Law360, a news letter for business lawyers, reported that intellectual property lawyers at the 250 largest U.S. law firms were better paid and more satisfied with their jobs than other lawyers. What was meant by "intellectual property lawyers" is unclear, but just about any lawyer can do the full spectrum of copyright, trademark or other intellectual property work unrelated to patents. As intellectual property becomes more popular, competition is often intense. But there are ways to increase the odds of landing any legal job.

First, people with relevant non-legal backgrounds have advantages. All else equal, clients want lawyers with experience or education related to their business. For example, having been a copywriter in an advertising firm will be helpful if one later seeks to represent such firms. Likewise, prior careers in sports or entertainment can be very helpful.

Second, intellectual property-related courses taken in law school can help. Law schools recognize this. Few offered even a single survey course a few years ago, but growing global importance has induced many to increase intellectual property offerings. Several have also added and expanded specialized programs. Schools that have not may emphasize that all lawyers need basic legal understanding, but this is disingenuous.

- Basic curricula are very similar everywhere. Subjects such as civil and criminal procedure, contracts, property and constitutional law are required. Also, all schools offer, if they do not require, courses such as evidence. Students take them because they are tested on bar exams.
- Required and "bar" courses aside, a solid third of the 85-90 semester hours needed for a J.D. remain. It seems foolish not to take advantage of opportunities to learn about areas of interest if possible.
- Electives, of necessity, also cover basic legal topics -- perhaps more effectively by demonstrating how the bar-tested topics bear on problems of particular student interest. Thus a classic study found enrollment in bar-tested courses not to correlate nearly as strongly with bar passage as one might expect.

Third, surveys often indicate that oral and written communication skills are sought by hiring lawyers more than substantive legal knowledge. In a sense this is reflected in fascination with grades and law review experience. To make good grades, one must not only know the law, but also be able to apply it and effectively communicate the results. In any case, people interested in particular legal careers can improve their understanding, demonstrate their commitment and otherwise improve their chances of getting the job they want by writing and editing papers, as well as by participating in oral competitions.

Fourth, in the global marketplace, knowledge of foreign languages and culture is increasingly important. If you speak Arabic, approach law firms with clients who trade heavily in the Middle East. Similarly, given the growing importance of the Pacific Rim, you could vastly improve your chances for employment by knowing conversational Japanese or Chinese. As the U.S., Canada and Mexico become a single market, Spanish and French are increasingly important. Also, foreign clients appreciate it when lawyers know something about their language and culture.

Last, but hardly least, students should try their best to excel -- not just in IP courses. Ultimately, success is likely to flow from a range of knowledge and an assortment of related skills.

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