

5. INTELLECTUAL PROPERTY LAW



KNOW

There are five key areas of **Intellectual Property Law** for nonprofit to be aware of:



1. **Intellectual Property (IP) Defined:** Intellectual Property are assets of an individual or enterprise that are intangible. There are four kinds of IP: Trademarks, Patents, Copyright, and Trade Secrets.



2. **Ownership:** Knowing who owns the Intellectual Property of the key elements of your organization is a good place to start in the process of protecting your IP rights.



3. **Respect:** Just as we want others to honor our rights, we need to respect the intellectual property rights of others. Intellectual Property litigation is expensive. Adopting a policy of respecting the Intellectual Property rights of others involves searching to see if others have adopted IP similar to yours prior to your adoption.



4. **Privacy Policy:** The general public wants to know how you are going to use the information it gives you, particularly if gathered through a website. A privacy policy keeps web communication honest by telling visitors what you will do with their information.



5. **Website & Online Usage:** Your online presence opens the door for Intellectual Property challenges, both in how you use the information from others and how others make use of your information.

KNOW MORE

1. Intellectual Property (IP) Defined

Unlike real property or personal (material) property, Intellectual Property is the assets of an individual or enterprise that are intangible. Intellectual property is the ownership interest a person or company may have in creations of the mind. Intellectual property law grants the creator of intellectual property exclusive rights for exploiting and benefiting from their creation.



There are four main types of Intellectual Property protections:

LET'S GO LEGAL: The Right Road to Compliance & Protection

- A. **Trademarks:** Protects words, symbols and other “marks” that are capable of identifying its owner. A trademark is a name or symbol or other indicator that identifies your enterprise to the public. With continuous use, rights can last forever. Trademark rights are acquired by using the trademark. Use the ™ mark in connection with an unregistered trademark and the ® to indicate a registered trademark.

Trademarks do not create monopoly rights. They are acquired in connection with particular goods and services. For this reason, there could be more than one party with the same mark for different, unrelated services. Trademarks are also not all created equally. Some are stronger than others with stronger rights attaching to arbitrary or made up words than to words that are highly suggestive of the goods or services they cover or even descriptive of such goods or services.

Registration: Registration is available at the State and Federal level. (Note: your corporate name registered with the state is not the same as a trademark and does not give you proprietary rights to a name.) Federal registration is only available if the mark is used in “interstate” commerce. The owner of a federally registered mark acquires additional statutory rights and enforcements by the courts. A Federal registration grants nationwide rights even though the trademark may only be used in as few as two states.

Corporate name: Your corporate name is not automatically a trademark, but it can be a trademark if you register it. The first to use a trademark in connection with particular goods and/or services has prior rights.

Domain names: A domain name is also not a trademark, though they arguably serve an identifying function. Domain names are not acquired in the same way as a trademark nor are treated as a trademark. However, it is possible that a portion of a trademark may be incorporated into a domain name and the domain name itself may be used or registered as a trademark.

Use: A trademark should be used consistently throughout the organization. Improper use of a trademark could lead to erosion or weakening of the mark and sometimes loss.

- B. **Copyright:** Protects rights in the expression of an idea or “artistic works.” Once the copyright term ends, works fall to the Public Domain and may be used by anyone, but it is sometimes difficult to confirm what is in the Public Domain.

Copyright holders have the exclusive rights to reproduce, create derivative works based on the work, distribute copies, perform or display the work. The rights attach at the time of creation but in order to having standing to sue in court, the owner will

LET'S GO LEGAL: The Right Road to Compliance & Protection

need to register the work with the US Copyright Office. The symbol © is used in connection with copyrighted material.

If your organization produces materials, it owns the copyright to those materials. It is a good idea to obtain a written assignment from those individuals involved in creating the materials if there is any uncertainty regarding ownership. If the materials will be marketed or used, it is worthwhile to file to register the copyright in the name of the organization. The fee is inexpensive, and the Copyright Registration Certificate is a powerful attachment to a cease and desist letter should the need arise.

- C. **Patents:** Protects new, non-obvious useful inventions. Utility patents last 20 years. Patents must be registered for rights to attach. A patent attorney should be consulted if you believe you have an invention that qualifies for protection.
- D. **Trade Secrets:** A “Trade Secret” is information that is confidential to the business and held in secret. There is no registration process and Trade Secrets remain protected so long as the information is held in confidence. Intellectual Property counsel should be consulted regarding best practices to ensure information is protected as a Trade Secret.

2. Ownership

Intellectual Property is generally owned by its creator. If created by an employee, the works are generally assigned to the employer either by law or by contractual agreement. Like any other corporate assets, a nonprofit should hold its Intellectual Property in its own name or the name of some other entity it fully controls. Holding IP in the name of an individual puts the company at risk that that individual might abscond with the Intellectual Property or use it for his/her own benefit.

Important note: Though not technically Intellectual Property, your domain name should also be retained by your corporation – in the name of the corporation. Do not allow a webmaster to register or maintain your domain name – it is a corporate asset.



3. Respect

It is important to respect the Intellectual Property rights of others. Before you use a word or symbol in your marketing material or on your website, search for it online. Someone with a similar trademark could challenge your use, even if your use is not considered trademark use. Before adopting a name, search the name on (1) the United States Patent and Trademark Office website, (2) the corporate database with the Secretary of State's Office, and (3) the Internet in general. While these searches will not provide a legal analysis of your rights, they may alert you to some possible issues you may encounter. Requesting a search by a trademark professional will give the



LET'S GO LEGAL: The Right Road to Compliance & Protection

best results, but even then, common law rights may be missed. The cost to defend unauthorized use a trademark held by someone else or to compensate the owner for your unauthorized use can be high.

Ideally, any material used by the organization on its website or otherwise should be original material created by the organization. Other material should only be used with permission of the owner and credit should be given to the owner. (See Section 5 below on **Website & Online Usage**.) Just because a “work” is older or the creator is deceased, do not assume the work is in the Public Domain and freely available for use. Rights may be retained by the creator’s estate.

4. Privacy Policy



A website that collects personal information should have a privacy policy. A privacy policy tells your website visitors what you will do with information gathered from them, how you are gathering that information, and how the information will be stored.

Once you have a policy in place, be sure you adhere to what is in your privacy policy regarding collection, storage and use of information.

Some special considerations related to privacy policies:

- **Links to other sites:** If your website provides links to websites of others, you may need to include third party privacy requirements into your policy.
- **Use by children:** If your website will be used or visited by those under the age of 13, there are specific requirements under the Children’s Online Privacy Protection Act of 1998 (COPPA). The state of California has the “California Office of Privacy Protection” with certain Privacy Policy provisions that apply to any website collecting data from California residents.
- **E-commerce:** If you operate an e-commerce site, there are certain provisions you should include.

See Key Documents for sample privacy policies. Do not just copy and paste one onto your website. It must factually state your actual practices it is a good idea to have the final form reviewed by counsel.

5. Website & Online Usage



Your website is your organization’s front door to your community and the world beyond. It can be easily viewed—and content easily taken—thus it is important to pay attention to how you use others’ content and how you protect your own content.

LET'S GO LEGAL: The Right Road to Compliance & Protection

A. Use of non-original content

You should obtain permission for any non-original content used on your website and always give credit to the owner. When creating your website, remember you cannot clip information from another website and post to your own without risking infringing that third party content. Even if you pay for stock art or clipart, commercial use may be excluded in the fine print associated with your license to use. While there are some exceptions for use by non-profits that could qualify as “fair use” an exception to the rights grant to the Copyright holder by the Copyright Act, use by a nonprofit corporation is often considered commercial use.

B. Photo Release

It is considered best practices to have a signed release for any photograph of a person used on your website or any description or story associated with a particular individual. If you ever receive a complaint from someone regarding use of his/her image or likeness, remove it immediately with your apology.

C. Terms of Use

If you accept third party posts or content, consider a “Terms of Use” page in addition to a privacy policy. It is a good idea to include a copyright notice at the bottom of the home page. While this is not a legal requirement, it might act as a deterrent against copying your site and content contained thereon. The notice can be in most any form but the general format is as follows: © Name, date. All rights reserved.

It is also a good idea to include a trademark attribution line somewhere on the website. It could be in the “Terms of Use” page or at the bottom of the homepage. You should list unregistered trademarks as “_____ is a trademark of Company A.” Federally registered trademarks are listed as “_____ is a registered trademark of Company A.” If you anticipate your marks will be used by others, you may wish to consider including guidelines for proper, acceptable usage of your trademarks.

KEY DOCUMENTS

- Photo Releases/Story Releases
- Privacy Policy template
- Take-down Request – DMCA
- Disclaimer Template

LET'S GO LEGAL: The Right Road to Compliance & Protection

ACTION

If Yes, Date sent or reviewed	No	Intellectual Property Law Checklist
OWNERSHIP		
		Our Organization has proper licenses or permission to use all photos and written information created by other persons or organizations.
		Our Organization has considered whether it should register or obtain other protection for any of its unique logos, designs, trademarks, or services.
		We are confident that our Organization's name does not infringe on the rights of any other organization.
		Our Organization has considered whether it would be appropriate to license any written materials, photographs, recordings, art, policy manuals, seminar materials, etc, that may be available for use by others.
		When contracting with third parties to perform services, our Organization uses an employment or independent contractor agreement that assigns ownership to the Organization of intellectual property created by the employee or contractor within the scope of his or her work for the Organization.
PRIVACY POLICY		
		Our Organization has considered implementing a written privacy policy that describes how the Organization uses and discloses personal information.
		If a privacy policy has been adopted, the Organization periodically confirms that it is in compliance with the commitments it makes in that policy.
WEBSITE		
		If our Organization operates a website, the Organization has posted written terms of use or terms of service that limits the Organization's liability and disclaims warranties. These terms of service are prominently located on the Organization's website.
		If our Organization allows third parties to post information on the Organization's website, the Organization has implemented a Digital Millennium Copyright Act compliant notice and takedown provision as part of its terms of use or terms of service. The organization has also registered an agent with the U.S. Copyright Office to receive notices of copyright infringement under the DMCA.