

Guide to Intellectual Property

A Resource for Merit Badge Counselors

Introduction

Scouts encounter intellectual property (or “IP” for short) every day, and many are not aware of their moral and legal responsibilities concerning IP. The information provided here is an introduction to IP for merit badge counselors. Our hope is that this information will help you guide Scouts as they earn merit badges that deal with IP issues. With your help, Scouts will have a better understanding of IP laws so they will respect the intellectual property of others and understand how to protect their own IP. You are free to share anything in this Guide with your Scouts if you think it would help them.

Intellectual property is the work of human creativity and intelligence. IP can include games, music, software, movies, photos, art, books, and magazines. It may also include useful inventions and technologies, such as new machines and devices, chemical compounds, and the methods and processes to make and use them, all of which are also creative in nature. IP includes secret technical and business information. Finally, IP includes product and brand names, company names, logos, and slogans that businesses and organizations use to identify their products or services.

Because intellectual property is becoming ever more important to our national and world economy, it is something Scouts should consider when working on merit badges. Just as physical property can be misused or stolen, so can IP. State, federal, and international laws protect various forms of intellectual property. IP laws also cover licenses and granting permission for the authorized use of others’ IP. The law is flexible enough for content creators to make limited use of existing materials under certain circumstances.

To demonstrate what IP is and how laws are designed to protect it, we will describe basic information about each area of protection by using the example of a hypothetical Scout named Justin, who is developing a mobile phone game as part of the Game Design merit badge. Justin will be programming the game and may want to commercialize the game in the future.

Although we talk about Justin’s game, the issues we will explore go far beyond game design and apply to many types of content that Scouts could create or use in their daily lives. For instance, Scouts listen to and compose music, they enjoy movies and make their own videos, and they read books and magazines while doing their own writing. We describe some basic information about each type of IP protection by using the example of Justin’s game. But we also focus most of the paper’s content on copyright law, because copyright is the area of IP law Scouts are most likely to encounter in doing their merit badge work and in their daily lives, such as in school, in their extracurricular activities, or at home.

Please keep in mind that the information in this guide is provided as an introduction to key intellectual property concepts. The following information is intended for educational purposes only and is not legal advice. You should consult with an intellectual property attorney if you have any questions about how the law applies to a specific situation.

Respecting IP and Scouting

The Scout Oath and Scout Law relate directly to observing intellectual property law. Young people frequently have an opportunity to copy or share music, movies, or games with others without permission of the publisher. They may ask a friend to make a copy for them to avoid having to pay for a new copy.

Scouts who knowingly make copies without permission are violating the Scout Oath’s pledge to be “morally straight” and the point of the Scout Law calling on Scouts to be “trustworthy.” Adult Scout leaders should educate Scouts about unauthorized and illegal content sharing and how it harms others. They should then make it clear that such conduct is contrary to the Scout Oath and Scout Law.

Types of Intellectual Property Protection

Returning to our hypothetical Scout, let's say Justin creates a game, an instruction manual, and a name for the game. In particular, Justin has created computer source code as part of the game development process. *Source code* consists of computer instructions that people can write and edit. Let's also say that Justin's game includes visual displays that are novel—brand new in the video game industry—and the display technology is not obvious to other video game developers. What kinds of IP could Justin obtain by his work here?

First, Justin could protect his software and instruction manual under copyright law. Copyright protects computer code and visual displays made by the program. In general, copyright law protects creative, literary, and artistic works. He could use copyright to prevent others from making copies of his code, its displays, or his manual. He could also stop others from making new games derived from his game code, displays, or manual.

Second, Justin may have a patentable invention—his video display technology. Patent law protects useful inventions that are novel and not obvious to people in the field. For instance, key inventions in history such as the airplane, the telephone, and the laser have received patent protection. Patent law can prevent others from performing his method, or making or selling games that utilize his video display invention.

Third, if Justin maintains the secrecy of his source code, he may have trade secret protection. Trade secrets are items of information or technology that provide the owner with a competitive advantage in the marketplace and are kept confidential by reasonable measures. Prominent examples of trade secrets include the formula for Coca-Cola[®] and the recipe used to make Kentucky Fried Chicken[®]. If Justin's software source code provides him an advantage in the marketplace, and he uses reasonable measures to protect his source code and methods, he could protect his source code under trade secret law.

Finally, the name of Justin's game can serve as a trademark. Trademarks and service marks protect words, names, symbols, sounds, or colors that distinguish goods and services of a business from those of others. McDonald's[®], Nike[®], and Apple[®] are examples of famous trademarks. Here, the name of Justin's game can act as a trademark to show that he or his business is the source of the game.

Copyright—©

What Does Copyright Cover?

As mentioned above, copyright law protects a wide variety of content. Examples are books, magazine articles, movies, music, plays, sculptures, paintings, software, and photos. Under copyright law, protected items of content are called “works of authorship,” and their creators are called “authors.” Content creators own their work, unless they are creating a “work made for hire” or have assigned their rights to another. A work made for hire is usually a work created by an employee for his or her employer within the scope of his or her employment. Certain specially ordered or commissioned works can also be works made for hire. In the case of a work made for hire, the hiring party owns the copyright.

Copyright protection length can vary, depending on a number of factors, including who created the work, the lifespan of the author, when the author created the work, and, for older works, whether the work displayed a proper copyright notice. The American Library Association's copyright website has an easy-to-use tool that can help determine if copyright protection on a work is still in force or not based upon these factors. Go to <http://librarycopyright.net/resources/digitalslider>.

Copyright law gives the copyright owner a set of exclusive rights:

1. The right to reproduce the work—i.e., to make copies.
2. The right to make “derivative works” of the original work. See below for examples of derivative works.
3. The right to distribute copies of the work.
4. The right to publicly perform the work (e.g., music concerts, play performances, and showing a movie in public places).
5. The right to publicly display a work (e.g., showing a painting, photo, or sculpture in a gallery or public park).
6. The right to perform an audio recording via a digital audio transmission (e.g., satellite radio or webcast).

Keep in mind that copyright protects a set of legal rights; it does not cover ownership of copies of the work themselves. Just because a reader owns a single copy of a book does not mean the reader can legally make copies of it. In addition, although the copyright owner has the right to publish and distribute a work, people are entitled to resell items they have legally purchased. For instance, a person can resell his or her books.

A “derivative work” is a work based on a preexisting work. For instance, if someone translates an English-language book into French, the French version is a derivative work. Also, if a producer creates a movie based on a book, the movie is a derivative work of the book, and if a designer makes a souvenir replica of a sculpture on display, that replica is a derivative work of the sculpture.

In our example, Justin is the copyright owner. If another person, without Justin’s permission, exercises one of the above exclusive rights, outside the limits of the law, the other person has “infringed” on Justin’s copyright.

Another example would be someone making a copy of a music file (song) without permission. The copier has infringed on the owner’s rights. However, not all copying is an infringement. See the section below discussing fair use.

There are limits on what copyright law protects. Copyright law does not protect an idea, procedure, process, system, method of operation, concept, principle, or discovery. These may be protectable under patent law, but not under copyright law.

Copyright also does not protect facts, such as “twelve inches equals one foot,” or “the Declaration of Independence was adopted by the Continental Congress on July 4, 1776.” Whether historical or scientific in nature, or simple news of the day and so on, facts are not protected by copyright laws.

How to Obtain and Maintain Copyright Protection

Today’s copyright laws give an author automatic copyright protection at the time of the work’s creation. More particularly, copyright protection applies when works becomes “fixed in any tangible medium of expression.” For instance, when Scout Justin stores his game code on a hard drive, it becomes fixed in the tangible hard drive storage medium. Likewise, when an author writes text on a piece of paper, it becomes a concrete, physical expression of an idea and “fixed” on that piece of paper.

A copyright owner has limited copyright protection even if the owner does not register a copyright on the work. A copyright owner, however, can gain additional benefits by registering the copyright

with the U.S. Copyright Office. To register a copyright, the owner must submit an application with a copy of the work to the U.S. Copyright Office in Washington, D.C. (www.copyright.gov).

Enforcement of Copyrights

Copyright owners can sue individuals or businesses that infringe their copyrights. In order to assert a legal claim for copyright infringement, the author must register the work with the U.S. Copyright Office. Moreover, the author must show that copyright law protects his or her work or portions of a work. That is, copyright owners cannot base an infringement claim on ideas, methods, processes, and the like, which copyright law does not protect. Again, the creation must have a tangible, fixed form such as writing in a notebook or information stored on a CD, computer hard drive, or a flash drive.

In addition, there are some aspects of a work that are not protectable. For example, in literary works, stock characters and plot concepts cannot be protected. No one can prevent someone else from writing a book based on the well-used plot outline of “boy meets girl; boy loses girl; boy gets girl.” Software copyrights have a similar limitation. Code or programming structures, sequences of steps, and the organization of code may be so standard in the industry that they become unprotectable. Likewise, if there are items of code that are dictated by the requirements of the operating system or hardware, the author cannot obtain exclusive rights to these items.

If a competing business makes, sells, or distributes exact copies of Justin’s copyrighted game, Justin would likely have a copyright claim against that business. To win his copyright claim, he would have to show that the business did not have Justin’s permission to make or distribute copies of his game.

When dealing with derivative works, the question can become a little more complicated. If Justin’s friend, Tommy, develops a similar game, Justin might believe Tommy infringed on his copyright. If Justin pursued a copyright lawsuit against Tommy, Justin would have to prove Tommy had access to his original game and that Tommy’s game was substantially similar to Justin’s game.

If Justin wins his lawsuit, he might be able to stop the sale and production of Tommy’s game and he may be able to recover money from Tommy. The goal of winning a copyright suit is often to stop the infringement, but it can also result in Justin receiving an award of money damages. Also, a judge can order the destruction of Tommy’s unauthorized copies or award Justin an amount to pay his attorneys’ fees and the costs of litigation.

Fair Use

As mentioned above, the mere fact that someone copied something from a copyrighted work does not automatically mean an infringement occurred. The most important defense in U.S. copyright laws to a claim of infringement is the “fair use” defense. Under the fair use defense, it is not infringement to make limited copies for purposes of criticism, comment, news reporting, education (including multiple copies for classroom use), scholarship, or research.

Examples of fair use include:

- An editorial writer quoting a politician’s manuscript for the purpose of disagreeing with the politician’s position.
- A newspaper quoting sections of a book to report on newsworthy insights of the author and to tell the public what the author said.
- A teacher making limited copies of a work for purpose of teaching the subject of the work to the class.

- A college professor writing a paper quoting portions of another paper to explain the preexisting works and building on the scholarship of the previous paper.
- Creating a parody of a work, for example to make fun of the author or the author's belief, or to make a point.

Whether copying is fair use or not depends on the application of four factors:

1. *The purpose or character of the use.* For instance, copying for profit by a commercial business is more likely to be infringement than copying by a nonprofit organization.
2. *The nature of the copyrighted work.* For example, fair use is more likely found where the copying concerned nonfiction works of important issues of public interest.
3. *The amount and substantiality of the portion of the work that was copied.* The more that the person copied, the less likely it is to be fair use. Likewise, there is a distinction between taking the heart of the work versus unimportant parts. Taking the heart of the work is less likely to be fair use than copying unimportant parts.
4. *The effect of the use on the market for, or the value of, the copyrighted work.* This is the most important factor. The issue is whether the copying will cause the copyright owner to lose significant revenue in the market for the work. If so, it is much less likely the copying is fair use.

Fair use also does not justify the use of another's work and trying to pass it off as your own, i.e., plagiarism. For example, if portions of another person's work are used in a school paper, the source should be cited even if it does not violate copyright law. This is especially important for young people to understand, since they often have to do research for schoolwork. It can be tempting for students to copy what they find on the Internet, in books, etc.

The fair use defense is very fact-specific and is inherently subjective. It is not always easy to prove. In most cases, the prudent course of action might be to contact the property owner and ask for permission, or a "license," to use his or her work.

Respecting Copyright Rights

Technology can now allow us to easily copy or share digital copies of music, movies, or games with others, but Scouts and Scouters alike must make certain choices. For some digital content, technology enables us to purchase a single copy and make an unlimited number of new copies for friends. Also, peer-to-peer file sharing systems permit people to download or share unauthorized copies of content without paying for it.

It is true that sometimes content owners authorize people to make copies of their work. For instance, some bands hungry for recognition and publicity ask people to make copies of their music and pass it around freely. When copies are licensed, Scouts and others can make copies within the license's limits.

Nonetheless, the more common pattern of content sharing involves making unauthorized copies. Adult Scout leaders should emphasize to Scouts that such conduct is a form of theft. Most of us would never consider shoplifting from a store. Nonetheless, content sharing without authorization is just like physical theft. It deprives the content publisher of revenue it otherwise would receive. It is most definitely not a victimless crime.

Scouts who make copies without permission are violating the Scout Oath's pledge to be "morally straight" and the point of the Scout Law calling on Scouts to be "trustworthy." Adult Scout leaders should educate Scouts on the reality of unauthorized content sharing and how it harms others. They should make it clear that such conduct is contrary to the Scout Oath and Scout Law—and is illegal.

Patent

When people think of IP, they often think of patents, perhaps because they believe patents require the most effort to obtain. When most people talk about patents, they are thinking of what are called “utility patents.” Utility patents cover useful technology in the form of machines, methods, manufactured products, and compositions of matter (e.g., chemicals). They cover useful inventions of technology that are both novel (not seen before) and not obvious to someone employed in the field. Patent law also protects ornamental designs and certain plant varieties.

A patent is a document issued by the U.S. government granting certain exclusive rights in an invention for a limited term. Specifically, patent law gives the inventor the right “to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.” In exchange for these exclusive rights, the inventor must publicly disclose the invention. And after the patent expires, anyone is free to use the invention. Foreign governments also issue patents that provide protection within their countries.

In the United States, an inventor must file a patent application with the U.S. Patent and Trademark Office (www.uspto.gov). An examiner will look at the application to ensure that it meets the requirements for a patent. The government will grant a patent based on the application only after the examiner is satisfied that it meets the requirements.

If our hypothetical Scout Justin obtains a patent, he can stop others from making and selling new games that use his invention. He can also stop others from using the video display methods that he has invented.

Trade Secrets

Unlike copyright and patent law, trade secrets are covered by state law. For most states, the four requirements of trade secret protection are:

1. The proper subject of protection, namely some kind of information. Examples include formulas, compilations, patterns, devices, methods, techniques, and processes. Trade secret law also commonly protects customer lists and business plans.
2. Independent economic value derived from the information not being known or readily ascertainable by others who could use it. There must be some value to the information. That value may exist today or it may be potential value in the future. Moreover, information cannot be a trade secret if it is known to those in the relevant field, or if people in the business could easily find out the information using legitimate ways, such as referring to publications.
3. The information is not generally known. The public should not have access to the information, such as through public Internet sites.
4. The owner of the information protects it through reasonable measures to maintain its secrecy. What are “reasonable” measures? Examples include disclosing trade secrets only pursuant to nondisclosure agreements, keeping paper documents and tangible secrets under lock and key, and maintaining computer and network security to preserve the secrecy of trade secrets in electronic form stored in computers, computer networks, storage devices, and electronic media.

If a business develops or obtains information meeting the above requirements, it can protect the information under trade secret law. As long as the business ensures that the information continues to meet these requirements, it can maintain trade secret protection indefinitely.

Unlike patents, no registration with a government agency is necessary to obtain or maintain trade secret protection.

If our hypothetical Scout Justin protects the secrecy of his source code using reasonable measures, he may be able to maintain it as a trade secret. He may also be able to stop others from misappropriating his source code, for example if someone copies his source code from his computer or hacks into his computer network.

Trademarks—™ and ®

A trademark is any word, name, logo, symbol, or device, or a combination of them, used to identify and distinguish one business's goods from those of another business. Service marks work in the same way, but are used for services rather than goods. You are no doubt familiar with a large number of trademarks, some of which are very famous, such as Coca-Cola® for the soft drink, McDonald's® for the restaurant, and Apple® for the electronics manufacturer. You are also likely familiar with the logos they use, such as the golden arches for the McDonald's® restaurant chain.

In the United States, it is possible to obtain limited protection of a mark without registration. As soon as a business starts using the mark "in commerce," the business obtains some protection of the mark as an unregistered mark. Nonetheless, registration of a mark with the U.S. Patent and Trademark Office (www.uspto.gov) provides the owner of the mark with additional benefits. Businesses can also obtain trademark registrations from foreign governments.

If Justin wishes to protect the name of his game, he can place a "TM" next to the name when advertising the game. TM is used for unregistered marks. He can also apply for a federal registration and, once it is granted, he can place the symbol ® next to the name. Since he owns the mark, he can stop others from selling games or related products that use the same trademark or a confusingly similar trademark.

The BSA National Council itself is a trademark owner. In fact, the Boy Scouts of America owns and controls many trademarks. It manages the use of BSA trademarks by third parties through its trademark licensing program. Only the National Council, and not local councils, may grant third parties permission to use the BSA's trademarks for a commercial purpose. You can learn more about the BSA's licensing program and its trademark use policies by visiting www.scouting.org/licensing.

Respecting IP Rights

As merit badge counselors and adult leaders, it is our obligation to remind Scouts to always live up to the standards within the Scout Oath and Scout Law as well as possible. It is our duty to set the right example. Taking advantage of the intellectual property rights of others, even in the name of Scouting, is not acceptable behavior. As Scouts grow into adulthood, they may run into copyright, patent, trade secret, and trademark issues. We hope they will continue to apply the principles in the Scout Oath and Scout Law to business situations that raise IP issues.

Putting them on the right path now will help set them in the right direction for their future.

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