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Intellectual property requires careful estate planning

If your estate includes forms of intellectual property (IP), such as patents and copyrights, it's important to discuss with your estate planning advisor how to address them in your estate plan. Although these intangible assets can have great value, in many ways they're treated differently from other property types.

Copyrights and Patents

IP generally falls into one of four categories: 1) patents, 2) copyrights, 3) trademarks and 4) trade secrets. Here we'll focus on only patents and copyrights, creatures of federal law intended to promote scientific and creative endeavors by providing inventors and artists with exclusive rights to exploit the economic benefits of their work for a predetermined time period:

Patents: Patents protect inventions. There are several types of patents; the two most common are utility and design patents. A utility patent may be granted to someone who "invents or discovers any new and useful process, machine, article of manufacture, or compositions of matters, or any new useful improvement thereof." A design patent is available for a "new, original and ornamental design for an article of manufacture." To obtain patent protection, inventions must be novel, "nonobvious" and useful.

Under current law, utility patents protect an invention for 20 years from the patent *application filing* date. Design patents last 14 years from the patent *issue* date. There's a difference between the filing date and issue date. For utility patents, it takes at least a year and a half from date of filing to date of issue.

Copyrights: Copyrights protect the *original* expression of ideas that are fixed in a "tangible medium of expression," typically in the form of written works, music, paintings, sculptures, photographs, sound recordings, films, computer software, architectural works and other creations. Unlike patents, which must be approved by the U.S. Patent and Trademark Office, copyright protection kicks in as soon as a work is fixed in a tangible medium.

For works created in 1978 and later, an author-owned copyright lasts for the author's lifetime plus 70 years. A "work-for-hire" copyright expires 95 years after the first publication date or 120 years after the date the work is created, whichever is earlier. More complex rules apply to works created before 1978.

2 estate planning questions

For estate planning purposes, IP raises two important questions: 1) What's it worth? and 2) How should it be transferred? Valuing IP is a complex process. So it's best to obtain an appraisal from a professional with experience valuing IP.



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After you know the IP's value, it's time to decide whether to transfer the IP to family members, colleagues, charities or others through lifetime gifts or through bequests after your death. The gift and estate tax consequences will affect your decision, but also consider your income needs, as well as who is in the best position to monitor your IP rights and take advantage of their benefits.

If you'll continue to depend on the IP for your livelihood, for example, hold on to it at least until you're ready to retire or you no longer need the income. You also might want to retain ownership of the IP if you feel that your children or other transferees lack the desire or wherewithal to exploit its economic potential and monitor and protect it against infringers.

Achieving your objectives

Whichever strategy you choose, it's important to plan the transaction carefully to ensure that your objectives are achieved. There's a common misconception that, when you transfer ownership of the tangible medium on which IP is recorded, you also transfer the IP rights. But IP rights are separate from the work itself and are retained by the creator — even if the work is sold or given away.

Suppose, for example, that you leave a painting, a written manuscript or a film to your child. Unless your estate plan specifically transfers the copyright to your child as well, the copyright may pass as part of your residuary estate and end up in the hands of someone else.

Revise your plan accordingly

If you own patents or copyrights, you probably have great interest in who'll take possession of your work after you're gone. Addressing IP in your estate plan can give you peace of mind that your wishes will be carried out, but the law surrounding such property can be complex. Discuss with your estate planning advisor before taking any action.

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