



**The Journal of Robotics,
Artificial Intelligence & Law**

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Articles and Submissions

Direct editorial inquires and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 646.539.8300.

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Morgan Morrisette Wright, Publisher, Full Court Press at mwright@fastcase.com
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For questions or Sales and Customer Service:

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
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Sales
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sales@fastcase.com (email)
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Obstacles in the Road: The Multi-Faceted Approach to IP Protection in the Autonomous Vehicle Sector

Paul Keller and Alexis Wilpon*

This article highlights the different intellectual property rights that are relevant to the autonomous vehicle space—patents, trade secrets, and copyrights—and provides insights into how they can be used together to effectively protect the valuable innovations that may be key to a company's success.

From automated navigation systems to trajectory sensors and from forward facing cameras to maneuvering algorithms, today's autonomous vehicles (“AV”) operate through the use of thousands of different innovations. Many of the functions necessary for autonomous driving is achieved through novel software or unique physical equipment, or a combination of the two. These components may be created in-house, outsourced to third-party manufacturers, or created collaboratively through a joint venture. The proper protection of the various innovations that can be created and the careful consideration of their assignment or licensing can be critical to the financial future of a company operating in this ever-evolving and highly competitive space. This article highlights the different intellectual property (“IP”) rights that are relevant to the space—patents, trade secrets, and copyrights—and provides insights into how they can be used together to effectively protect the valuable innovations that may be key to a company's success.

Patents

A patent is one of the most popular protections for IP, and is often considered the strongest form of protection. In the United States, a patent is a grant from the federal government that allows the owner of the patent to prevent others from making, using, selling, or offering for sale the owner's invention for a period of

20 years. There are three types of patents, the first two of which are most relevant to the automotive field: (1) utility patents, which apply to processes, machines, composition of matter, or any improvement thereof; (2) design patents, which apply to design for an article of manufacture; and (3) plant patents, which apply to a new and distinct variety of an asexually reproduced plant.

In order to obtain a patent, an inventor must file an application through the U.S. Patent and Trademark Office (“USPTO”) within one year of publicly disclosing the invention. If the patent is granted, the USPTO will publish a description of the invention and its purpose. However, patent rights are limited to the country or region in which the patent has been granted. Thus, if a patent is only obtained in the United States, there is little to address the use of the technology that occurs entirely outside of the United States.

A patent owner may license, or give permission to another party to use the invention, or may sell the right to the invention altogether. However, if a patent owner believes that someone is using his or her invention without permission, the owner is entitled to bring a patent infringement lawsuit in which, in order to prevail, it needs to prove by the preponderance of the evidence that the claims of the patent have been improperly used. Once the patent expires, the invention becomes part of the public domain and anyone can replicate or sell the invention without liability concerning the expired patent.

What Type of Subject Matter Can Be Patented?

In order to qualify as patentable subject matter, the alleged invention must first be one of four enumerated statutory categories: processes, machines, manufactures, and compositions of matter. Next, the alleged invention must qualify as patent-eligible “subject matter.” In short, other than limited exceptions, everything is patentable. The limited exceptions, however, are very relevant to the patenting strategies relating to AV technology—the exceptions that relate to abstract ideas and laws of nature. This naturally raises questions about the patentability of software and algorithms. Fortunately, the U.S. Supreme Court has emphasized that an invention can be patent eligible even if an element of the claims involve judicial excepted material. Although an algorithm by itself might not be patentable, its application to the decision-making of a vehicle may

be patent eligible. The line between eligibility and not should be thoroughly considered during the course of patenting algorithmic innovations in the AV space.

The Patenting Process

The patenting process begins by the inventor (or the lawyer representing the inventor) preparing a patent application to be filed with the USPTO. A significant amount of strategy and thought go into the drafting of an application, especially when crafting the patent claims, the actual description of the metes and bounds of the invention for which the patent is being sought. Once the application is filed and accepted by the USPTO, an examiner will review, among other things, the contents of the application to determine whether or not the invention is in fact patentable. If the examiner finds that the application does not meet the requirements, he or she may explain the reasons why and give an inventor the opportunity to amend the application. Final denials issued by the examiner may be appealed to the Patent Trial and Appeal Board. On average, the patent application process can take about three years and can cost between \$10,000 and \$50,000 per patent.

Key Considerations of a Patenting Strategy

Some of the most important patent strategy considerations are coverage and enforceability. These elements affect the ability of the patent owner to protect their innovations and potentially monetize the patent asset. To assess the elements, businesses typically assess how they would provide that a patent has been violated and how the enforcement would assist the business. As for proving infringement, during the drafting phase, patent owners typically consider how they may or may not be able to police the unauthorized use of their innovations. For example, if the patent claims relate to manufacturing methods that are not generally publicly described, it may be difficult to learn that anyone is improperly using the technology. This challenge may very well affect the “value” of the patent. As such, a contrary approach may be to claim particular elements (or a combination) of elements in the finished, publicly available product.

With regard to the benefit to the business, enforcement measures may allow a company to protect its market share. It also may increase operationalized freedom such that the business can analyze potential threats to its IP and how the business wants to proceed. Moreover, patent coverage may inform a business of whether it is in its interest to buy or sell patent rights. In order to make a decision to buy or sell, a business can look to the market in which the patent applies to determine what other patents exist in that market, the size of the relevant market, and whether the patent coverage falls outside the business's core activities.

Another key aspect of a patenting strategy relates to the geographies in which to seek patent protection. Some companies, typically start-ups, seek to file a select number of patents in a particular geography to build up their IP assets and, correspondingly, their valuation. Other companies adopt a "mining the field" strategy, which aims to protect not only the identified key innovation, but variants of that technology that competitors might try and use in order to achieve the same benefits of the innovation but without infringing on the key concepts that were patented. A "mining the field" strategy critically considers those competitive responses and tries to limit their options.

The Current Patent Landscape

In 2017, the USPTO granted over 350,000 patents out of over 380,000 patent applications, most of which were utility patents. There has been significant growth in the number of patents pertaining to AVs in particular. Last year the USPTO granted over 1,000 patents pertaining to sensors (primarily for adaptive cruise control and anti-collision systems) and over 400 patents in the areas of machine learning applications and vehicle-to-vehicle ("v2v") or vehicle-to-infrastructure ("v2i") technologies. As of July 2017, there were over 5,800 worldwide patents related to AVs in general.¹ Most of these patents focus on sensors, machine learning applications, and v2v and v2i technologies.

Patent Litigation Snapshot

Last year in the United States, over 4,000 patent cases were filed, which is about 10 percent fewer cases than in 2016. Perhaps

the most notable patent case in 2017 was the *T.C. Heartland* case in which the Supreme Court narrowed available venues for patent litigation. Previously, patent lawsuits could be filed wherever the infringement allegedly occurred; however, the Court held that a domestic corporation “resides” only in its state of incorporation for purposes of venue in patent suits.² As a result of the Supreme Court’s holding, the District of Delaware has overtaken the Eastern District of Texas as the most popular location for patent case filings (although the Eastern District of Texas had the most filings in 2017 overall). Further, Lex Machina’s Annual Patent Litigation Year in Review Report indicated that while only 27 percent of injunctions were denied, there were more attorneys’ fees awarded in patent cases than royalty awards. This illustrates the financial risk of patent litigation on all sides.

Patent Considerations in Agreements

Of the many benefits of patenting components of AVs, patent procurement strategies should be considered carefully during collaboration efforts with other parties. AVs, or select systems within them, are frequently the result of collaborations between automotive manufacturers, component manufacturers, and technology companies. Collaborators need to consider how to handle the IP rights that they had before the collaboration, but are needed to actually perform the work during the collaboration, and how the IP rights that are created during the collaboration are shared, if at all, once the collaboration is over.

A patent agreement, or license, is merely a form of contract. The right to make, use, or sell a patent initially belongs to the inventor, who may exclude others from making, using, or selling the invention. Inventors may pass legal title to others through an assignment, which may apply to the entire patent, or a share of it. Alternatively, the inventor may grant a license in which a licensee receives the right to make, use, or sell the patent without owning the title. In considering whether to assign or license a patent, the owner must first determine whether he or she wishes to retain any rights to it. A license is revocable by a breach of contract, expiration, or failure to meet contractual obligations. Alternatively, with an assignment, the original owner will surrender all future rights to the patent.

An inventor will also consider the financial benefits of an assignment versus a license. An inventor who licenses a patent may stipulate a one-time payment, royalties or both, for use of the patent. Royalties are typically about three percent of the price of the product itself, and may last the lifetime of the patent. Typically, inventors who choose the assignment route typically receive lump sum payments. The usefulness, novelty, and likely success of the product may determine whether royalties or a lump sum would be more beneficial.

Trade Secret Protection

Trade secrets are another option to be considered either instead of or alongside patent protection. Trade secrets—information that is confidential and proprietary to the company—may protect those things that patents cannot, including algorithms, manufacturing secrets, or commercial strategies. For example, in the AV context, technical approaches to assembling a component (including those that did not work), the compounds used in a specific sensor, and algorithms behind a particular laser technology have all been claimed as trade secrets by various manufacturers. Further, despite the fact that many AV manufacturers use various pieces of equipment that may have been purchased off-the-shelf from third parties, the unified process, design, and operation of the equipment is a competitive advantage that may constitute a trade secret.

Unlike patents, trade secrets are protected without the government's approval or assistance. They certainly do not get registered. Trade secret protection applies to "information, including a formula, pattern, compilation, program, device, method, technique, or process." The secrecy must generate "independent economic value" and the owner of the trade secret must take "efforts that are reasonable under the circumstances to maintain its secrecy."³ Examples of AV components that may be protected by trade secrets are algorithms for navigation or communications systems.

In 2016, the Defend Trade Secrets Act ("DTSA") was signed into law, which created a federal, private, civil cause of action for misappropriation of trade secrets. Although the DTSA does not preempt state statutes on trade secret appropriation, it provides a powerful tool for companies to sue in federal court. It also provides a broad definition of trade secret, which is defined as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information.

The Act provides for a civil seizure mechanism, by which a court may issue an order for the seizure of property to prevent propagation or dissemination of a trade secret that is the subject of a pending judicial action. Should the court determine that misappropriation occurred, the court may grant an injunction, damages, including exemplary damages for willful and maliciously misappropriated trade secrets, and attorney's fees. Finally, the statute includes whistleblower immunity for employees who disclose a trade secret to an attorney or government official in the process of reporting or investigating a suspected violation of the law.

In addition to federal trade secret law, states have their own trade secrets laws that provide means in which companies can protect their proprietary information. Forty-seven states have adopted the Uniform Trade Secrets Act ("UTSA"), which attempts to make state trade secret laws uniform. The UTSA has a similar definition of trade secret than the DTSA, which includes information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. This is a slightly broader definition than that in the DTSA because it applies to all information that may derive independent economic value, rather than the specifically delineated financial, business, scientific, technical, economic, or engineering information. Moreover, the DTSA requests that the owner of the

information take reasonable measures to keep the information secret, while the UTSA does not designate who must undertake these efforts. The UTSA also allows a court to issue an injunction and award damages and attorney's fees for misappropriation.

Some states, such as Arizona, have adopted identical versions of the UTSA, while others, such as Michigan, have tweaked the Act slightly. For example, Michigan does not allow for exemplary damages in cases of willful or malicious misappropriation nor does it require "exceptional circumstances" for a court to award reasonable royalties.

New York has not adopted the UTSA but has its own trade secret law through a mix of common law and statutory law. New York defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."⁴ New York courts also apply a balancing test to determine whether or not information constitutes a trade secret, in which they examine:

- (1) the extent to which the information is known outside of [the] business;
- (2) the extent to which it is known by employees and others involved in [the] business;
- (3) the extent of measures taken by [the business] to guard the secrecy of the information;
- (4) the value of the information to [the business] and [its] competitors;
- (5) the amount of effort or money expended by [the business] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁵

Another major difference is that New York typically does not allow for attorney's fees absent a contractual provision providing for them. Moreover, where the UTSA allows a trade secret owner to obtain an injunction against "threatened disclosure," New York law requires a plaintiff to demonstrate reasonable likelihood of success on the merits in order to obtain an injunction.

Differences Between Patent and Trade Secret Protection

There are several key differences between patents and trade secrets. Primarily, many types of information pertaining to AVs,

such as algorithms, mathematical formulas, and test strategies, are not patentable. They may, however, be protected as trade secrets. Another important difference is the duration of protection. Patent protection has a finite duration of 20 years, whereas a trade secret lasts for however long the information remains confidential. Further, patents can be asserted against those who were unaware of the patent and the scope of the limited monopoly held by its owners. Misappropriation of trade secrets, on the other hand, is a claim against those who had access to the trade secret and have taken or used it without authority. According to a 2016 study, more than 85 percent of trade secret misappropriation cases involve a trade secret owner's employee or business partner.⁶

Trade secrets also cannot be used to prevent another party from independently creating the same or similar technology. This means that a competitor that creates more or less the same technology that a company maintains as a trade secret, may patent the invention and prevent the original company from replicating it.

AV developers should think critically about the IP protection that is best suited for their needs and strategic goals. The public disclosure required for the patent application process conflicts with the strict confidentiality requirements of trade secret law and thus it is unlikely, though not impossible, for an organization to obtain both protections for the same specific component. Typically, patents may afford greater protection to software developments than trade secret law because trade secret protection will do little to protect technology that may be reverse engineered by a competitor without reliance on confidential information.

The recent highly publicized litigation between Waymo and Uber emphasizes the precautions that organizations must take with regard to protecting their components through trade secrets. The case, which settled in the middle of the trial, involved allegations that a former employee of Waymo, Google's AV company, conspired with Uber to steal trade secrets from Waymo pertaining to components of AVs. The former employee allegedly downloaded 14,000 files of Google's data just before leaving the company, which was argued to have been used in Uber's own AV project. The dispute highlighted the risks that companies encounter when valuable employees leave a company. Of course, both the old and new employer can take steps to ensure that trade secrets are protected, such as preventing a former employee from having further access to systems and requiring the employee to contractually agree that

they have not downloaded information before departing and will not use any prior employer's information in their new role.

Considerations for the Integrated Use of Patenting and Trade Secret Protection

There is significant overlap between patents and trade secrets. It is not the case that an inventor must always choose between a patent or a trade secret. Although patent law requires some level of disclosure, the disclosure required is the best way to make and use the invention, known as the "best mode" requirement. However, the best mode disclosure requirement does not necessarily violate trade secret status. For example, the requirement only necessitates disclosure of the best mode known to the inventor at the time. However, this is not necessarily the way it is used in practice. Thus, the other various modes of utilizing an invention as well as the algorithms underlying the invention may be retained as trade secrets. Further, an inventor is not required to disclose production details or operating conditions pursuant to the best mode requirement, thus disclosure does not necessarily make it possible for competitors to duplicate the best mode.

Thus, while algorithms and other formulas are not patentable alone, it is possible to patent the technology around those items while protecting the remaining, non-patentable elements as trade secrets. This takes thought and oversight to make sure that the trade secret elements do not seep into the patenting process, which may take years, as well as ensuring that the trade secrets elements are not published or otherwise publicly disclosed.

Copyrights

A copyright is a form of protection to authors of "original works of authorship" such as artistic, musical, literary, dramatic, and certain other works. The owner of a copyright reserves the right to reproduce or record copies of the work, distribute and display the work, and create new works based on the original. Further, work only qualifies for copyright protection if it is fixed in some tangible, physical form. Thus, an author cannot copyright an idea, but only the expression of that idea. Several aspects of AVs may be copyrighted. For example, the design of individual components,

such as sensors or lasers, and of the vehicle itself may all be protected by copyright. The software and code used in AVs may also have copyright protection.

What Can Be Copyrighted?

Essentially any creative work may be covered by a copyright so long as the work is original, fixed in a tangible medium, and demonstrates at least a modicum of creativity. Further, copyrighted material must be purely creative as opposed to functional. For example, a logo or slogan is not copyrightable material because it has a function and falls within the realm of trademarks. On the other hand, marketing materials, sections of source code, the artistic elements of automotive body designs, and other creative features may be protected by copyright.

Perhaps of most interest to the AV industry, copyrights are useful protections for the code used in AVs. However, copyright protections would be limited to the vehicle's (or its individual components') design and software code. Thus, the proprietary software behind AVs may be protected by copyright; however, the protection will extend only to the source code and not the functionality of the software. Further, some copyrights may not prevent individual AV owners themselves from repairing or modifying the software code of AVs they purchase because copying the code for a limited purpose or modifying it may constitute "fair use," which is a protected activity under the Copyright Act. Of course, any such modifications may null the warranty or have other consequences on the purchaser.

The Copyright Process

Once an expression is fixed in a tangible medium, such as drafting the required code for the AV system or the consumer educational piece, the author automatically holds the copyright to that work; therefore, there is no formal copyright application process. Once a copyright exists, it will protect the work for the author's life plus 70 years. However, in order to enjoy the benefits offered by the federal copyright statute, including its statutory damages provisions, the work must be registered with the U.S. Copyright Office. In order to register a copyright, the owner submits a registration

form to the U.S. Copyright Office either online or through the mail with a copy of the work to be registered. This process takes on average seven-to-nine months.

Consideration for an Integrated IP Strategy

Patents, trade secrets, and copyrights may all be used to protect different aspects of the vehicle, and in some instances, different elements of the same vehicle component. Although each category of IP has differing requirements, with some being in tension with the other, a thoughtful IP strategy should consider using all three types of IP protections to properly guard the innovations developed. Of course, given the fact-specific nature of the decisions, a precise strategy to employ in the context of AVs is difficult to provide. There are, however, some useful guides:

- If the innovations need to be disclosed publicly, consider patents or copyrights and not trade secrets;
- Materials that should or could be kept secret, consider maintaining as a trade secret;
- Innovative ideas can be patented; the expression of those ideas might be copyrightable;
- Identify the trade secrets in a log and consider how to patent around them;
- Enforcement can be distracting and expensive; consider the resource requirements when deciding how many and what type of rights to pursue;
- Trade secrets traditionally protect against employees or other business partners from using the company's confidential innovations. Consider how trade secrets can be managed to protect against those parties' improper use of the company's assets.

Conclusion

With the advent and continued development of AVs, the automotive industry is going through a dramatic revolution. Hundreds of different manufacturers and component suppliers are working feverishly to develop the technology needed or most desired in tomorrow's cars. Companies in this space, therefore, are well-served

to consider not just how well the market will receive their innovations, but how others may improperly use those innovations for their own purposes. Implementing a comprehensive IP procurement strategy that seeks to protect those critical innovations and positions the company to effectively enforce its IP rights can provide real value to the company when it may need it most—when it is faced with a competitive threat. The various IP rights should be considered together to ensure that the company obtains all rights assets to meet its strategic goals.

Notes

* Paul Keller, a partner at Norton Rose Fulbright US LLP focusing his practice on patent and trade secret litigation, is a member of the Board of Editors of *The Journal of Robotics, Artificial Intelligence & Law*. Alexis Wilpon is an associate at the firm on the Commercial Disputes team. The authors may be contacted at paul.keller@nortonrosefulbright.com and alexis.wilpon@nortonrosefulbright.com, respectively.

1. Felix Richter, *Who Leads the Autonomous Driving Patent Race?*, STATISTA 2017.

2. *TC Heartland*, 137 S.Ct. 1514 (2017).

3. 18 U.S.C. § 1893.

4. *Ashland Mgmt. Inc. v. Janien*, 624 N.E.2d 1007, 1013 (N.Y. 1993).

5. *Id.* at 1013 (alterations in original) (quoting Restatement of Torts §757 cmt. b).

6. Vivek Mani and Sachin Sancheti, *Economic Approaches to Remedies in Trade Secret Cases*, CORNERSTONE RESEARCH (2016).