Intellectual Property: Moral, Legal, and International Dilemmas
(Rowman & Littlefiled, New York, 1997), p. 9-23

1

Introduction to Intellectual Property: Moral, Legal, and International Dilemmas

Adam D. Moore

With the rise of the information age where digital recording, storage, and transmission are the norm, problems centering on the ownership of intellectual property have become acute. Computer programs costing thousands of research dollars are copied in an instant. Digital bootleg versions of almost any musical artist are available at rock-bottom prices. Moreover, there is a general asymmetry between the attitudes individuals have about physical property and intellectual property. Many who would never dream of stealing cars, computers, or VCRs regularly copy software or duplicate their favorite music from a friend's CD. The information superhighway, better known as the internet or the world wide web, is poised to become the scene of information superhighway robbery. Finally, a salient feature of an on-line information age is that these concerns take on a global perspective.

Needless to say, developing answers to these problems is philosophically challenging. This anthology was put together so that a number of important articles centering on the ownership of intellectual property and digital information could be found in one work. My hope is that this volume will help education and research in this rapidly expanding area.

Before providing a summary of the articles included in this volume, I have given a brief overview of the subject matter or domain of intellectual property. Apart from owning cars, computers, land, or other tangible goods, intellectual property law enables individuals to obtain ownership rights to control works of literature, musical compositions, processes of manufac-ture, computer software, and the like. Setting aside concerns of justifying rights to intellectual property, which is the primary focus of this volume, a brief exposition of what counts as intellectual property would be helpful.

The Domain of Intellectual Property

At the most practical level the subject matter of intellectual property is codified in Anglo-American copyright, patent, and trade secret law, as well as in the moral rights granted to authors and inventors within the continental European doctrine.[1] Alt-hough these systems of property encompass much of what is

thought to count as intellectual property, they do not map out the entire landscape.[2] Even so, Anglo-American systems of copyright, patent, and trade secret law, along with certain Continental doctrines, provide a rich starting point. We'll take them up in turn.

Copyright

The domain of copyright is expression. Section 102 of the 1976 Copyright Act determines the subject matter of copyright protection.

> § 102: (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Works of authorship include: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; architectural works; and computer software.[3]

The scope or subject matter of copyright, as protected under federal law or the Copyright Act, is limited in three important respects. First, for something to be protected, it must be original. Thus the creative process by which an expression comes into being becomes relevant. Even so, the originality requirement has a low threshold. Original in reference to a copyrighted work means that the particular work "owes its origin" to the author and does not mean that the work must be novel, ingenious, or even interesting. Minimally, the work must be the author's own production; it cannot be the result of copying.[4] When deciding the issues of originality and copyright infringement, courts examine expressions and not the abstract ideas from which the expressions are derived.[5]

A second requirement that limits the domain of what can be copyrighted is that the expression must be "nonutilitarian" or "nonfunctional" in nature. Utilitarian products, or products that are useful for work, fall, if they fall anywhere, within the domain of patents. As with the originality requirement, the nonutilitarian requirement has a low threshold because the distinction itself is contentious. An example of an intellectual work that bumps against the nonfunctional requirement is copyright protection of

computer software. While a computer program as a whole is functional and useful for producing things, its object code and source code have been deemed to be protectable expressions.

Finally, the subject matter of statutory copyright is concrete expression, meaning that only expressions as fixed in a tangible and permanent medium can be protected.[6] The crucial element is that there be a physical embodiment of the work. Moreover, within the system of copyright, the abstract idea, or *res*, of intellectual property is not protected.[7] Author's rights only extend over the actual concrete expression and the derivatives of the expression—not to the abstract ideas themselves. For example, Einstein's theory of relativity, as expressed in various articles and publications, is not protected under copyright law. Someone else may read these publications and express the theory in her own words and even receive a copyright in her particular expression. Some may find this troubling, but such rights are outside the domain of copyright law.[8] The individual who copies abstract theories and expresses them in her own words may be guilty of plagiarism, but she cannot be held liable for copyright infringement. The distinction between the protection of fixed expressions and abstract ideas has led to the "merger doctrine": If there is no way to separate idea from expression, then a copyright cannot be obtained. Suppose that I create a new recipe for spicy Chinese noodles and there is only one way, or a limited number of ways, to express the idea. If this were the case, then I could not obtain copyright protection, because the idea and the expression have been merged. Granting me a copyright to the recipe would amount to granting a right to control the abstract ideas that make up the recipe. According to many copyright theorists, this kind of expansion of copyright would have disastrous effects.[9]

There are five exclusive rights that copyright owners enjoy and three major restrictions on the bundle of rights.[10] The five rights are the right to reproduce the work, the right to adapt it or derive other works from it, the right to distribute copies of the work, the right to display the work publicly, and the right to perform it publicly.[11] Each of these rights may be parceled out and sold separately. The Copyright Act says, "The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title."[12] Moreover, it is important to note the difference between the owner of a copyright and the owner of a copy (the physical object in which the copyrightable expression is embodied). Although the two persons may be the same, they

typically are not. Owners of copies or particular expressions who do not own the copyright do not enjoy any of the five rights listed above. The purchaser of a copy of a book from a publisher may sell or transfer that book, but may not make copies of the book, prepare a screenplay based on the book, or read the book aloud in public.

The three major restrictions on the bundle of rights that surround copyright are fair use, the first sale doctrine, and limited duration. Although the notion of "fair use" is notoriously hard to spell out, it is a generally recognized principle of copyright law. Every author or publisher may make limited use of another's copyrighted work for such purposes as criticism, comment, news reporting, teaching, scholarship, and research. The enactment of fair use, then, restricts the control that copyright holders would otherwise enjoy. The first sale doctrine as codified in section 109(a) limits the rights of copyright holders in controlling the physical manifestations of their work after the first sale.[13] It says, "once a work is lawfully transferred the copyright owner's interest in the material object (the copy or the phonorecord) is extinguished so that the owner of that copy or phonorecord can dispose of it as he or she wishes."[14] The first sale rule prevents a copyright holder who has sold copies of the protected work from later interfering with the subsequent sale of those copies. In short, the owners of copies can do what they like with their property short of violating the copyrights mentioned above. Finally, the third major restriction on the bundle of rights conferred on copyright holders is that they have a built-in sunset, or limited term. All five rights lapse after the lifetime of the author plus fifty years—or in the case of works for hire, the term is set at seventy-five years from publication or one hundred years from creation, whichever comes first.[15]

Patents

Patent protection is the strongest form of protection, in that a twenty-year exclusive monopoly is granted over any expression or implementation of the protected work.[16] The domain or subject matter of patent law is the invention and discovery of new and useful processes, machines, articles of manufacture, or compositions of matter. There are three types of patents recognized by patent law: utility patents, design patents, and plant patents. Utility patents protect any new, useful, and nonobvious process, machine, article of manufacture, or composition of matter, as well as any new and useful improvement thereof. Design patents protect any new, original, and ornamental design

for an article of manufacture. Finally, the subject matter of a plant patent is any new variety of plant.

As with copyright, there are restrictions on the domain of patent protection. The Patent Act requires usefulness, novelty, and nonobviousness of the subject matter. The usefulness requirement is typically deemed satisfied if the invention can accomplish at least one of its intended purposes. Needless to say, given the expense of obtaining a patent, most machines, articles of manufacture, and processes are useful in this minimal sense.

A more robust requirement on the subject matter of a patent is that the invention defined in the claim for patent protection must be new or novel. There are several categories or events, all defined by statute, that can anticipate and invalidate a claim of a patent.[17] In general, the novelty requirement invalidates patent claims if the invention was publicly known before the applicant for patent invented it.[18]

In addition to utility and novelty, the third restriction on patentability is nonobviousness. United States patent law requires that the invention not be obvious to one ordinarily skilled in the relevant art at the time the invention was made. A hypothetical individual is constructed and the question is asked, "Would this invention be obvious to her?" If it would be obvious to this imaginary individual then the patent claim fails the test.[19]

In return for public disclosure and the ensuing dissemination of information that supposedly contributes to social utility, the patent holder is granted the right to make, the right to use, the right to sell, and the right to authorize others to sell the patented item.[20] Unlike copyright, patent law protects the totality of the idea, expression, and implementation. Moreover, the bundle of rights conferred by a patent exclude others from making, using, or selling the invention regardless of independent creation. For twenty years the owner of a patent has a complete monopoly over any expression of the idea(s). Like copyright, patent rights lapse after a given period of time. But unlike copyright protection, these rights preclude others who independently invent the same process or machine from being able to patent or market their invention. Thus, obtaining a patent on a new machine excludes others from independently creating their own machine (similar to the first) and securing owner's rights.

Trade Secret

A trade secret is almost unlimited in terms of the content or subject matter that may be protected and typically relies on private measures, rather than state action, to preserve exclusivity.

> A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.[21]

As long as certain definitional elements are met, virtually any type of information or intellectual work is eligible for trade secret protection. It may be a formula for a chemical compound, a process of manufacturing, a method of treating or preserving materials, a pattern for a machine or other device, or a list of customers.

The two major restrictions on the domain of trade secrets are the requirements of secrecy and competitive advantage. Secrecy is determined in reference to the following three rules of thumb: (1) an intellectual work is not a secret if it is generally known within the industry; (2) if it is published in trade journals, reference books, or elsewhere; or (3) if it is readily copyable from products on the market. If the owner of a trade secret distributes a product that discloses the secret in any way, then trade secret protection is lost. Imagine that Coke's secret formula could be deduced from a simple taste test. If this were the case, then Coca-Cola would lose trade secret protection for its recipe. Competitive advantage is a weaker requirement and is satisfied so long as a company or owner obtains some benefit from the trade secret.

Although trade secret rights have no built-in sunset, they are extremely limited in one important respect. Owners of trade secrets have exclusive rights to make use of the secret but only as long as the secret is maintained.[22] If the secret is made public by the owner, then trade secret protection lapses and anyone can make use of it. Moreover, owner's rights do not exclude independent invention or discovery. Within the secrecy requirement, owners of trade secrets enjoy management rights and are protected from misappropriation. This latter protection is probably the most important right given the proliferation of industrial espionage and employee theft of intellectual works.

Moral Rights: Continental Systems of Intellectual Property

Article 6 *bis* of the Berne Convention articulates the notion of "moral rights" that are included in continental European intellectual property law. It says,

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have

> the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

The doctrine protects the personal rights of creators, as distinguished from their economic rights, and is generally known in France as "droits morals" or "moral rights." These moral rights consist of the right to create and to publish in any form desired, the creator's right to claim the authorship of his work, the right to prevent any deformation, mutilation or other modification thereof, the right to withdraw and destroy the work, the prohibition against excessive criticism, and the prohibition against all other injuries to the creator's personality.[23] Much of this doctrine has been incorporated in the Berne Convention:

> When the artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect.[24]

It should noted that granting moral rights of this sort goes beyond a mere expansion of the rights conferred on property holders within the Anglo-American tradition (see table 1.1). While many of the moral rights listed above could be incorporated into copyright and patent law, the overall content of these moral rights suggests a new domain of intellectual property protection. The suggestion is that individuals can have intellectual property rights involving their personality, name, and public standing. This new domain of moral rights stands outside of the economic- and utilitarian-based rights granted within the Anglo-American tradition. This is to say that independent of social and economic utility, and sometimes in conflict with it, authors and inventors have rights to control the products of their intellectual efforts.

Table 1.1 Systems of Property

Property regime	Subject matter	Restrictions on subject matter	Rights conferred on property holders	Limitations on rights
Copyright	expression: writings, photos, music, computer software	fixation, originality, nonutility	rights to: reproduce, adapt, distribute copies, display, and perform publicly	limited term: rights lapse after author's lifetime plus 50 years, allows independent creation, fair use, first
Patent	inventions, processes, compositions of matter, articles of manufacture	usefulness, novelty, nonobviousness	exclusive rights to: make use of, sell, and produce	limited term: rights lapse after twenty years, excludes independent creation
Trade secret	expressions, inventions, processes, compositions of matter, articles of manufacture, words, ideas	secrecy, competitive advantage	rights to: use, manage, derive income, capital, and no term limits, rights against	does not exclude independent creation
Trademark	words, symbols, marks, or combinations thereof	common use restriction (i.e., generic or merely descriptive symbols are excluded)	exclusive rights to: use, manage, security, transmissibility (no term limits on	no limitations on rights so long as the word or symbol does not become generic
Law of ideas	ideas or collections of ideas	novel and original, mature or concrete, misappropriated	rights to: use, manage, derive income, security, transmissibility, and no term limits	owner's rights lapse when idea becomes common knowledge; does not exclude
Tangible/ physical property	individual physical or tangible items	separable or distinct-ness, dangerous weapons, hazardous materials	full ownership rights, including liability to execution	eminent domain, taxation on income, inheritance tax

Note: Obviously within the Anglo-American tradition there are number of exceptions to the subject matter, rights, and limitations, found in this table. For example, a corporation may receive a patent on a nuclear devise but not obtain a right to use the devise. For a more precise account of the rights conferred on property holders within each system please see the relevant statute or code along with Hohfeld and Honeré's analysis of rights (see note 10 below).

Overview of This Volume

The articles contained in this volume center on the ethical, legal, and applied issues surrounding the ownership of intellectual property. Part I, The Moral Foundations of Intellectual Property, begins with "Justifying Intellectual Property" (chapter 2) by Edwin Hettinger. Hettinger criticizes a number of mainstream attempts to justify intellectual property and argues that the non-exclusive nature of intellectual works grounds a case against ownership. "Why should one person have the exclusive right to use and possess something which all people could possess and use concurrently?" The well-known Lockean labor and desert arguments, as well as arguments based on privacy and sovereignty, are found to be problematic and are ultimately rejected as justifications of intellectual property. Hettinger also examines the utilitarian argument based on providing incentives which he considers to be only partially successful. He concludes with the claim that justifying intellectual property is a daunting task and we should think more imaginatively about alternative methods of stimulating intellectual labor short of granting full blown property rights.

Lynn Sharp Paine, in "Trade Secrets and the Justification of Intellectual Property" (chapter 3), criticizes and replies to a number of problems raised by Hettinger. Paine develops a defense of intellectual property, and in particular trade secrets, that focuses on the privacy and sovereignty of individuals. She argues that in general individuals have initial disclosure rights with respect to the ideas, opinions, plans, and knowledge found within their own minds. These rights are grounded in respect for individual privacy and autonomy. While Paine acknowledges that this kind of justification has limits and may not work at all beyond trade secrets, she argues that some kinds of intellectual property may be justified along these lines.

James Child in "The Moral Foundations of Intangible Property" (chapter 4) argues that rights to intangible property can be justified on Lockean grounds. He finds fault with the "zero-sum" (more for some means less for others) conception of property that has led many to conclude that any appropriation violates John Locke's proviso that acquisitions leave "enough and as good" for others. Child argues that while the acquisition of tangible property may be zero-sum and therefore does not leave "enough and as good," this is not obviously the case for intangible property like owning shares in business enterprises.

In the next selection, "Toward a Lockean Theory of Intellectual Property" (chapter 5), Moore continues the themes intro-

duced by Child and argues that rights to intellectual property can be justified given a suitable reading of Locke's "enough and as good" proviso. Locke claimed that so long as the proviso is satisfied, an acquisition can be of prejudice to no one. This can be understood as a version of a "no harm no foul" principle. If the appropriation of an unowned object leaves enough and as good for others, then the acquisition is justified. Moore offers a defense of this moral principle and argues that it grounds a case for the ownership of intellectual works.

Part II, Intellectual Property Issues and the Law, begins with "The Philosophy of Intellectual Property" (chapter 6) by Justin Hughes. Hughes provides an analysis of Lockean and Hegelian justifications of intellectual property with respect to Anglo-American and European legal institutions. He argues that both theories have shortcomings and a combination is needed to justify intellectual property. For example, Locke's labor theory cannot account for the idea whose creation has nothing to do with labor and Hegel's personality theory is "inapplicable to valuable innovations that do not contain elements of what society might recognize as personal expression." Hughes provides a basis for both labor theories and personality theories within Anglo-American systems of intellectual property.

Tom Palmer, in "Intellectual Property: A Non-Posnerian Law and Economics Approach (chapter 7), argues that the Anglo-American systems of copyright and patent protection are "constructivistic," "interventionistic," and "utilitarian," and attempt to reorder economic institutions to attain a particular end. He claims that copyrights and patents are forms "not of legitimate property rights, but of illegitimate state-granted monopoly" and should be dismantled in favor of market forces. In place of copyrights and patents, Palmer proposes a number of free market-based mechanisms to protect the intellectual effort of authors and inventors. Contracts, technological fencing (restricted access), tie-ins with complementary goods, and certain marketing strategies are possible market solutions for protection that do not rely on illegitimate governmental granted monopolies.

Next, Michael Krauss argues in "Property, Monopoly, and Intellectual Rights" (chapter 8) that Palmer's view of copyrights and patents is mistaken. As well as challenging Palmer's claim that "constructivistic," "interventionistic," and "utilitarian" justifications of protections are somehow illicit, Krauss argues that free market-based fencing will not provide adequate coverage. Moreover, the question of fencing presupposes that those

who engage in these activities have rights to control what they fence. Krauss asks, "Are patent and copyright the legal backdrops required to *allow for* subsequent fencing, or are they analogous to the *destruction of competitor's* fences?" The former would allow for protection of rights that already existed while the latter would create rights. Krauss argues that if copyright and patent institutions merely provide legal mechanisms for protection of *already existing* rights, then Palmer's criticisms are largely nullified.

According to Marci Hamilton, the Agreement Involving Trade-Related Aspects of Intellectual Property Rights, TRIPS for short, attempts to remake global and specific cultural perspectives about owning intellectual property in the image of Western copyright law. In "The TRIPS Agreement" (chapter 9), Hamilton claims that, if successful, TRIPS will become "one of the most effective vehicles of Western imperialism in history." The problem she finds with the agreement and the emerging global information infrastructure is that the war between information access and copyright protection is being won by the latter. This movement is particularly troubling as we move to an on-line age where the free-use zones of "first sale" and "fair use" are in danger of being abandoned because of protection-enforcement problems. Hamilton concludes that the copyright protections found in TRIPS should be tempered to ensure the widest possible dissemination of information consistent with fair remuneration to authors and inventors.

Hugh Hansen, in "International Copyright" (chapter 10), continues the discussion of the international aspects of copyright protection. He draws an analogy between the defenders of Anglo-American copyright protection and religious missionaries. The TRIPS agreement can be understood as an attempt to convert newly industrialized and developing countries to Western views about copyright protection. Given what is at stake, Hansen argues that voluntary conversion probably will not suffice, prompting those who would defend copyright protection to rely on sanctions or involuntary conversion.

Part III, Information and Digital Technology, begins with "Why Computer Software Should Be Free" (chapter 11) by Richard Stallman who argues that software ownership and hoarding is "one form of our general willingness to disregard the welfare of society for personal gain." Stallman claims the fencing of software has led to a number of harms, which include the restricted use of programs, the inability to adapt or fix programs, the loss of educational benefits for programmers, and

what he calls "psychosocial" harm. The latter kind of harm refers to the loss of social cohesion and altruistic spirit that would prevail if ownership were eliminated. He concludes by arguing that the free software movement will contribute to sending the right message—that a good individual is one who cooperates, "not one who is successful in taking from others."

David Carey considers in "The Virtues of Software Ownership" (chapter 12) how a virtue-centered ethics in the Aristotelian-Thomistic tradition might aid Stallman's call for the elimination of software ownership. Carey maintains that computer software should be privately owned, but at the same time property holders should be encouraged to share and widely distribute their works. In such an environment, Carey argues, incentives to produce are optimized and virtuous character traits are cultivated.

In chapter 13, Eugene Spafford examines computer ethics ("Are Computer Hacker Break-Ins Ethical?") as well as other on-line problems such as internet viruses and programs designed to invade and damage other software. He argues that computer break-ins are only justified in extreme cases and criticizes many of the reasons given in support of computer intrusions.

Charles Meyer, in "National and International Copyright Liability for Electronic Systems Operators" (chapter 14), claims that the international aspects of the on-line age have led to new problems in protecting intellectual property for both authors and system operators. He argues that "the need of users for access must be balanced against the need to protect creator's rights in order to maximize the benefits of creation and access for society." System operators are caught in the middle and may be held liable for infringements that occur on their systems. Meyer presents an ideal copyright system and attempts to balance these issues in light of the new transnational information age.

In the final chapter, "The Economy of Ideas," John Barlow of the Electronic Frontier Foundation argues that the traditional legal institutions of copyright and patent cannot accommodate the "galloping digitization of everything not obstinately physical." Rather than trying to "patch" or "retrofit" these legal institutions, Barlow claims that digital property must be protected by moral norms and new technological mechanisms such as encryption.

Conclusion

With the proliferation of the internet and the world wide web into everyday life, along with the corresponding international

concerns of the information "haves" and "have-nots," the ranks of those with a vested interest in the control of intellectual property and digital information have swelled. In large part, this is why the ownership of intellectual property is currently one of the hottest areas of applied ethics. As we move further into the information age, marked by the shift from an industrial economy to an information-based economy, clarity is needed at the philosophical level so that morally justified policies and institutions can be adopted with respect to intellectual property. It is my hope that this volume will facilitate and further philosophical inquiry in this important area.

Notes

1. It should be noted that the restrictions on both the subject matter and the rights of property holders in each of these systems are intimately tied to how the systems are justified.

2. Trademark, the law of ideas, stock options, and the like are areas of intellectual property not included in this overview.

3. The 1990 Architectural Works Copyright Protection Act amended the 1976 Copyright Act to afford explicit protection to works of architecture; see also Copyright Act, 17 U.S.C. sec. 102 (1988).

4. See *Bleistein v. Donaldson Lithographing Co*., 188 U.S. 239 (1903), and *Time Inc. v. Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968). In *Feist Publications, Inc. v. Rural Telephone Service Company*(1991), the United States Supreme Court made it clear that the originality requirement is a crucial prerequisite for copyrightability. "The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author" (499 U.S. 340 [1991]).

5. Infringement is determined often by substantial similarity tests. See *Nichols v. Universal Pictures Corp*., 45 F.2d 49 (2d Cir. 1930), and *Sheldon v. Metro-Goldwyn Pictures Corp*., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

6. See *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n,* 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987), and *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986). It should be noted that state, or common law copyright, still protects unfixed works.

7. 17 U.S.C. sec. 102(b) (1988).

8. This kind of worry is, in part, the basis for the moral rights championed by the European continent. See the section on moral rights below.

9. For more about the merger doctrine see, *Morrissey v.*

Procter & Gamble Company, 379 F.2d 675 (1st Cir. 1967), and *Kregos v. Associated Press,* 937 F.2d 700 (2d Cir. 1991).

10. For a lucid account of "rights" see W. N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919); A. M. Honeré, "Ownership" in *Oxford Essays in Jurisprudence*, edited by A. G. Guest (Oxford: Clarendon Press, 1961), p. 107-47; and Lawrence Becker, *Property Rights, Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), 19.

11. Copyright Act, 17 U.S.C. sec. 106. For certain types of works, works of "visual art," recent amendments to the Copyright Act provide a sixth category of rights—the moral rights of attribution and integrity. See 17 U.S.C. sec. 106(a) (as amended 1990).

12. 17 U.S.C. sec. 201(d).

13. See 17 U.S.C. sec. 109(a).

14. S. Halpern, D. Shipley, and H. Abrams, *Copyright: Cases and Materials*, (St. Paul Minn.: West Publishing, 1992), 216.

15. The limited term of copyright, and patent as well, is required by the Constitution. Article I, Section 8 empowers Congress to "promote the Progress of Science and useful Arts, by securing *for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" [emphases mine]. Currently there is a bill in Congress that would increase the term of copyright protection by twenty years.

16. Patent Act, 35 U.S.C. sec. 101 (1988). The 1995 version of the Patent Act has added three years to the term of patent protection—from seventeen to twenty. See 35 U.S.C. sec. 154(a)(2).

17. 35 U.S.C. sec. 101 (1988).

18. 35 U.S.C. sec. 101-4 (1988). See also *Christie v. Seybold*, 55 Fed. 69 (6th Cir. 1893), *Hull v. Davenport,* 24 C.C.P.A. 1194, 90 F.2d 103, 33 USPQ 506 (1937).

19. 35 U.S.C. sec 103. See also *Ryko Manufacturing Co. v. Nu-star, Inc.,* 950 F.2d 714 (Fed. Cir. 1991); *Environmental Designs, LTD. v. Union Oil Company of California,* 713 F.2d 693 (Fed. Cir. 1983); *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572 (Fed. Cir. 1984); and *In Re Oetiker*, 977 F.2d 1443 (Fed. Cir. 1992).

20. 35 U.S.C. sec. 154 (1984 and Supp. 1989).

21. The Restatement (Third) of Unfair Competition, sec. 39 (1995).

22. See *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d

621 (7th Cir. 1971), and *E. I. duPont deNemours & Co., Inc. v. Christopher,* 431 F.2d 1012 (5th Cir. 1970).

23. Generally these moral rights are not recognized within the Anglo-American tradition. See *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570 (N.Y.S. 1949). Recently, given the inclusion of the United States in the Berne Convention treaty, there has been a move toward indirect recognition. See note 12 above, *Gilliam v. American Broadcasting Companies, Inc.,* 538 F. 2d 14 (2d Cir. 1976), *Wojnarowicz v. American Family Association*, 745 F. Supp. 130 (S.D.N.Y. 1990), and the Berne Convention Implementation Act of 1988.

24. M. A. Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators," *Harvard Law Review* 53 (1940): 554.