

# CHAPTER 1

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## INTRODUCTION



Whenever humans enter into new domains of activity, law soon follows. The development of agriculture, the rise of monarchs, the expansions of empires, the progress towards democracy—each ushered in important changes in legal institutions. The familiar legal systems of tort, contract, and property laws reflect developments in social and economic organizations that shaped and were shaped by each body of law.

In the last century, as more human activity has moved towards the development of knowledge and the accumulation of valuable information has produced critically important resources and assets in many industries and economies, intellectual property law has become increasingly prominent. Intellectual property seems to be everywhere from newspaper headlines to the dockets of almost every court. If you consider some the major revolutions in our times, whether it be globalization, the information technology revolution or the life science/biotechnology revolution, intellectual property issues are at the heart of them all.

While intellectual property law may seem to be a relatively new creation, many aspects of this body of law have a lengthy pedigree. The first pieces of legislation enacted by the first Congress in 1790 were copyright and patent statutes. These statutes were modeled upon similar legislation in England dating back to the Seventeenth and Eighteenth Centuries. Modern patent legislation can be traced back to a prototype enacted by the Republic of Venice in the Fifteenth Century. These ancient roots have generated a lush flora, which to some is a delightful garden, and to others are prickly bramble bushes. However one sees the floral arrangement, there is no doubt as to its vitality and importance.

How one sees intellectual property rests on answers to several critical questions. Where does creativity and invention come from? Are they flashes of genius without context or foundation? Do the Constitutional provisions at the heart of our current intellectual property system recognize this dependency of law on context? Who were the intended beneficiaries of these provisions? Were they those persons that were accorded rights in their intellectual creations or other persons in society who were benefited by access to the creations? What is the optimal institutional design to deal with intellectual property rights?

The influence of these sorts of philosophical questions on the drafters of the Constitutional provisions concerning intellectual property is debated to this date. Much of this discourse centers on the writings of John Locke, particularly the following:

Though the earth and all inferior creatures be common to all men, yet every man has a ‘property’ in his own ‘person.’ This nobody has any right to but himself. The ‘labour’ of his body and the ‘work’ of his hands, we may say, are properly his. \* \* \* For this ‘labour’ being the unquestionable property of the labourer, no man by he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

JOHN LOCKE, TWO TREATISES ON GOVERNMENT (3rd Ed. 1698). While there may have been some debate whether Locke’s views applied to the fruits of one’s mind, Locke is reputed to have had a great influence on the drafting of the copyright and patent clause of the [United States Constitution, Art. I, § 8, Cl. 8](#):

The Congress shall have Power \* \* \*

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.

When Article I, section 8, Cl. 8 speaks of securing an “exclusive right” for “limited times,” it implies, upon expiration of the right having limited duration, a reversionary interest in the public commons. It also hearkens back to the last line in the quote from Locke referencing “. . . at least where there is enough, and as good left in common for others” For more detailed reflection and scholarship on these matters, see generally [Wendy J. Gordon, \*A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property\*, 102 Yale L.J. 1533, 1535 \(1993\)](#); [Justin Hughes, \*The Philosophy of Intellectual Property\*, 77 Geo. L.J. 287, 294 \(1988\)](#); [Adam Mossoff, \*Rethinking the Development of Patents: An Intellectual History, 1550–1800\*, 52 Hastings L.J. 1255 \(2001\)](#); [Malla Pollack, \*The Owned Public Domain: The Constitutional Right Not to be Excluded—Or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.\*, 22 Hastings Comm. & Ent. L.J. 265 \(2000\)](#).

Modern practices regarding the production, transmission, and copying of intellectual works have raised challenging questions about the value of intellectual works that intellectual property laws should protect and where rights should be available to achieve that protection. Consider the situation of someone located in London who writes articles and reviews that are published on a web site controlled and paid for by the author with revenues derived primarily from links directing readers from

this web site to other commercial web sites. Suppose someone comes and downloads these reviews and posts them on their own web site. We can call it a violation of the author's copyright, but what have they taken? Wherein lies both the value and the appropriation of that value to the detriment of the holder of the right? What are the boundaries of the right held by the copyright holder and where and under what circumstances can it be enforced? For example, can it be enforced if the right is created in London, England, and violated in Singapore? These are basic questions arising in the international application of intellectual property laws that are increasingly important given the growth in our global communication system and economy.

The impact of looking to labor in the creation of works as a sufficient basis for wide-reaching intellectual property protections has also come under increasing scrutiny in light of changing capabilities of users to access and use works via digital technologies. Consider the labor involved in completing the critical analyses and written expression incorporated in many copyrighted works. Should the ease of access and copying such works in digital forms alter the rights of the copyright holders? Should that which is "easy" to copy become a part of the commons? Is there a distinction that should be made here between works that are visible and a part of our line of sight which we do not have the power to turn off and works that are easy to access, but which are not dedicated, donated or offered to the public without the permission or control of the copyright holder?

Standards governing the creation, limitation, scope, and enforcement of interests in intellectual works are being shaped by notions of fair use, moral issues of copying and respecting the labor and rights of others, issues of enablement and of treating intellectual works as free goods. These contextual forces, coupled with the temptation and anonymity of easy and remote use of intellectual works made possible by new technologies like the communication infrastructure of the Internet, are rapidly forcing us to rethink the basic principles underlying intellectual property laws. This process of rapid change in legal standards in this field make it an exciting time to study intellectual property law and to participate in the ongoing definition of intellectual property's role in increasingly complex global relations and regulations.

When we consider some of the "grand challenges" of our times from eradicating poverty, providing universal education, advancing health care, providing safe drinking water, and the like, we have often relied on cutting-edge technologies to provide the solutions to these challenges, technologies which are often protected by patent rights. Understanding how patent regimes are defined and shaped by the law to advance different, at times conflicting, policies is another focus area of this book.

As the free flow of goods and services around the world continues to increase, the power of global brands and their influential position in our daily lives continues to rise in importance. Trademark law as an essential component of the study of intellectual property is more important than ever before, and we challenge students with the various dimensions of trademark law.

This book offers a rich introduction to the field of intellectual property. The cases and materials are current and span the depth and breadth of both United States and international law. When you reach the end of the tour of intellectual property topics provided by the readings here, you will, we hope, be inspired to pursue a broader knowledge of this field through readings in the many source materials that are cited throughout the book. As the cliché goes, each journey begins with a single step, and each journey is enriched by an appropriate guidebook. This guide consists of nine chapters, including the one you are reading. After this chapter, you will find one that explores the law of trade secrets, followed immediately by chapters on the three major federal bodies of intellectual property law: copyrights, patents, and trademarks. For each regime, we consider the requirements to qualify for a particular type of intellectual property protection, the basic infringement cause of action under that regime, the applicable defenses, and remedies. After this excursion into federal law, you move on to the state law of intellectual property with readings addressing rights of publicity, moral rights, idea protections, and interrelationships between federal and state intellectual property laws. Then the trip enters what may be less familiar terrain for you through readings addressing the worlds of digital rights in Chapter Seven and international law in Chapter Eight. Finally, Chapter Nine provides you with a glimpse of the future horizons of intellectual property laws and the forces that are likely to shape these laws in the near future. At the end of the intellectual path defined by the readings here, you will have a better sense of intellectual property law, the human activities it is designed to regulate and shape, and the future possibilities for positive interactions of creativity, innovation, and legal institutions.

One final word: the range and depth of the field of intellectual property could not be captured within the pages of this book. As a result, we have supplemented these tangible pages with an online supplement. Your instructor can provide you with the web address for the supplement and may direct you to these materials that provide added depth and substance to the discussion which follows. We hope that you make use of these materials to continue your exploration of the expanding field of intellectual property.