

# ***Worldmaking: Property Rights in Aesthetic Creations***

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The mind, that ocean where each kind  
Does straight its own resemblance find;  
Yet it creates, transcending these,  
Far other worlds and other seas;  
Annihilating all that's made  
To a green thought in a green shade.

“The Garden”  
Andrew Marvel

## **I. Introduction**

The purpose of this article is to provide new insights concerning intellectual property in art. The principal legal and aesthetic questions are, What is intellectual property in art? and, What does the copyright owner or other proprietor really own? A subsidiary question is, What is the work of art from a legal perspective?<sup>1</sup>

The importance of this inquiry is underscored by two interrelated developments of the 20th century. One is that the Age of Science is almost as much an Age of Art because urban centers of industrialized nations are dominated not only by the machine but also by the total aesthetic<sup>2</sup> environment, be it ugly or beautiful. This environment comprises the products of fine and commercial artists, and the entertainment industry, including art reproductions, objets d'art, motion pictures, and broadcast programs. It also consists of the surrounding architecture; music and Muzak; advertising art in the form of neon, photography, and graphics; the aesthetic design components of mass-produced commodities developed to appeal to the consumer and to express the commercial identity of the producer; and all the man-made shapes, sounds, colors, and even tastes and smells<sup>3</sup> which permeate the experiences of millions of people.

In this environment there are scarcely any manufactured articles not designed for some aesthetic appeal.<sup>4</sup> Another remarkable aspect of this aesthetic domain is that it is cluttered with mass-produced commodities whose market values are largely determined by aesthetic considerations. The exchange values of motor vehicles, furniture, buildings, eating utensils, and all the accoutrements of everyday life are enhanced just as much by better design as by increased utility.

The second concomitant development is the expansion of intellectual property laws<sup>5</sup> to embrace almost all products of intellectual labor, including the aesthetic components of mass-produced commodities. Just as patents, once limited to machines, engines, devices, manufactures, and useful arts were extended to genetically engineered life forms, copyrights, originally granted only for books and charts, now protect all "original

works of authorship fixed in any tangible medium of expression, now known or later developed."<sup>6</sup>

It is extraordinary that almost all man-made objects in this aesthetic environment are actually or potentially subject to Intellectual property laws, including copyright, trademark, unfair competition, and patent laws. Even a creative work with minimal artistic form and content, if a work of authorship,<sup>7</sup> may be protected by copyright laws from the moment of fixation<sup>8</sup> in tangible form. The shapes and configurations of goods or the containers in which they are sold, and the design features that distinguish the goods of one party from those of another, may be protectable under trademark<sup>9</sup> and unfair competition laws<sup>10</sup> from the moment the goods are circulated in commerce. Many two- and three-dimensional patterns, configurations, and shapes that are applied to mass-produced articles are eligible for design patent protection.<sup>11</sup> Thus, the surrounding world of objects is subject to hidden residual rights of other persons so that, in relative terms, the effect of law on art is almost as pervasive as the impact of art on society.

## II. Property

But what are these copyrights, design patents, and trademark rights in the surrounding world of objects? How are these rights deemed *property* rights? Before we can determine what is *intellectual property*, we must first determine what we mean by *property*.

We start with the fact that the modern world is characterized by complex property relations exemplified by the hidden residual rights held by people in the surrounding world of objects.<sup>12</sup> In this environment the notion of "property" as a thing that one owns is only an illusion, at least relatively speaking. This illusion is fostered by patterns of thought, language, and behavior originating at a time when one could actually have fee simple,<sup>13</sup> i.e., relatively complete, ownership in land and similar ownership of personalty.<sup>14</sup> It is true that the ancient owner of land may have been subject to water rights and easements owned by other individuals, but such interests could not have rivaled in quantity or quality the divisions of ownership now exemplified by trust deeds and time-sharing, and other rights possessed by persons other than the principal owner. Today, "property," even real estate, is seldom owned outright by the named owner. For instance, real estate is subject to laws on eminent domain; mineral, aviation, and riparian rights; community property laws; zoning laws; laws on security interests; restrictions imposed by nuisance, tort, and pollution laws; and numerous other legal incursions, such as easements, licenses, and rights acquired by prescription.

Therefore, it might be more accurate now to describe property, ultimately derived from the Latin adjective "proprius," meaning "one's own," in terms of the legal relations between the owner and all other persons concerning the use, enjoyment and disposition of a tangible thing.<sup>15</sup> This new mode of thought regarding property is appropriate for our relational universe which has replaced a Newtonian and Cartesian world of separate objects moved around by independently motivated egos. Ownership in a preindustrial

society more often may have connoted discrete "bundles" of exclusive rights, but in the postindustrial age of greatly expanded productive forces and intricate relations of production, the web of legal relationships delineating one's property rights is too complex and tangled to maintain the concept of property as a "thing" and not a set of relationships.

What do we mean when we say that one's property is a set of legal relations between the *owner* and all *other persons* with regard to the *use, enjoyment, and disposition* of a *thing*? This set of legal relations reflects numerous variegated relationships between the owner and other persons in many dimensions of social intercourse. By definition, the *owner* is a living being or else a juristic entity<sup>16</sup> controlled by living beings, but not necessarily a rational being since animals and incompetent human beings may own and inherit property. The *other persons* with whom the owner is related may be either natural persons or juristic entities, but, generally speaking, rational beings or else represented by rational beings since property rights may only be effectively enforced against rational beings.

By the term *use* we mean the employment of the thing to achieve a specified end or ends, i.e., actual behavior of the owner in physically exploiting the thing. The term *enjoyment*, in contrast, refers to the relatively passive pleasure derived from the thing. By *disposition* we mean the alienation of the thing from the owner by destruction, dismantling, lending, transferring, bequeathing, or otherwise disposing of the thing. Together, *use, enjoyment, and disposition* exhaust the possible benefits derived from material objects.

The *thing* itself must have a material existence, that is, it must be tangible and sufficiently stable so that, using the language of the Copyright Act, it should be capable of being "perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>17</sup> The *thing* may actually be a group or concatenation of things used or enjoyed by the owner collectively or in a coordinated fashion.<sup>18</sup>

Because of human ingenuity and the ever increasing complexity of the means of production, distribution, and provision of goods and services, property relations have become correspondingly complex. After all, this is the age of time-sharing, trust deeds, and futures. The complexity is manifested in a number of dimensions in time, space, and matter.

### **III. Intellectual Property**

What, then, is this special type of property, i.e., *intellectual property*? What are the things subject to use, enjoyment, and disposition of the owner?

Almost all man-made goods are potentially the product of three kinds of labor, both mental and physical: the labor of the scientist or engineer, the labor of the craftsman or workman, and that of the artist or other aesthetic designer, which respectively correspond to *inventorship, workmanship, and authorship*. The scientific or engineering

labor, often largely mental, gives the product its utilitarian characteristics so the product functions, has stability, and serves its intended purpose. The labor of the craftsman or workman, largely physical, gives the product its physical form and content and its "workmanship." Finally, the labor of the artist or other aesthetic designer is used to make the product appeal to the eye of the beholder or express the personality of the creator. All three kinds of labor embodied in a product were often performed by one person, for example, by the medieval guildsman who designed, crafted, and ornamented his products. Furthermore, each of these kinds of labor may be embodied in the work to varying degrees. Certain works of "fine art," especially contemporary art, embody little or no craftsmanship or scientific labor, whereas most mass-produced articles incorporate significant investments of each kind of labor to give the product full value to the consumer.<sup>19</sup>

Intellectual property rights, which represent special kinds of monopolies, were developed to promote investment in these three kinds of labor.<sup>20</sup> No one would be encouraged to hire an inventor or invest in research if legal protection in the form of *letters patent* were not granted for the resulting products. Neither would a publisher be inclined to publish an author's manuscript unless security were afforded by a copyright. Nor, for that matter, would one necessarily invest in producing high quality products unless they could be sold with a trademark or trade name that could be identified by the public to indicate the source of the products, and unless the trademark or trade name could be monopolized by its first user.<sup>21</sup>

Since this article concerns aesthetic creations primarily governed by the law of copyright, we shall examine copyright law to discover the nature of intellectual property as it applies to aesthetic creations. Therefore, we ask, in what does the copyright subsist?

A copyright is a conglomeration of rights in relation to a work of authorship. For instance, as defined by Section 106 of the Copyright Revision Act of 1976 (17 United States Code §106), a copyright may comprise as many as five exclusive rights including the rights to (1) reproduce, (2) adapt, (3) publicly distribute copies of, (4) publicly perform, and (5) publicly display the protected work (in addition to the right to license others to exercise these rights). Actually, these five kinds of rights exhaust or virtually exhaust the means by which a work may be commercially exploited.<sup>22</sup>

As mentioned above, the subject matter of copyright is "original works of authorship fixed in tangible media of expression." Of course, this definition set forth at Section 102 of the Copyright Act ipso *facto* infers that the "work of authorship" is *not* a tangible thing,<sup>23</sup> as does Section 202 which confirms that:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.

The work of authorship, thus, may only be a mental creation, the melody or poem in the mind, the ballad or epic poem passed from generation to generation over centuries by oral tradition, or in certain cases may comprise both the conception and the labor involved in fixing it in a tangible medium of expression. Insofar as the work represents the labor of fixation, it reflects the bodily experience of that labor, or, in Collingwood's words, "an imaginary experience of total activity."<sup>24</sup>

The copyright does not cover all works of authorship, only "fixed" works. This does not mean, of course, that property rights may not apply to unfixed works if capable of being described and identified;<sup>25</sup> it only means that fixation adds a desired measure of certainty in delineating protection for the work.<sup>26</sup>

The copyright owner, then, has certain legal rights in relation to other persons, but--and this is the principal question--in connection with what *thing*? In connection with the original copy of the work, the template, mold, or manuscript? Certainly not, because other persons affected by the copyright may be affected in relation to other things, for example, other copies.<sup>27</sup> The original copy, and perhaps even all copies, may cease to exist without impairing the copyright or the continued existence of the work of art.<sup>28</sup> Copyright infringers, in fact, may never actually experience the original fixed version, nor are they necessarily using, enjoying, or disposing of such a copy or any other copy, physically or otherwise, when they create a reproduction or derivative work in the same or other medium of expression.<sup>29</sup> At least there may not be any physical use of the original copy or any other copy manufactured by the owner. Even if copying an object were considered using it, what of the copyist who copies indirectly by employing a reproduction as her model?<sup>30</sup>

It should also be noted that the original copy is not the fixed and stable thing it is imagined to be. Land that one owns is subject to constant accretion, erosion, and change caused by plant and animal life and the elements. In the same way, the original copy of the work of art is subject to deterioration and continual molecular change. And, of course, where there is common law or statutory protection for unfixed, intangible works of authorship, no theory can be based upon the existence of any copy.

Another alternative, consistent with present-day legal terminology, is the notion that property exists in intangibles;<sup>31</sup> thus, in owning a work of authorship one has legal relations with others concerning the use, enjoyment, and disposition of an intangible that may or may not be notated in tangible form. This alternative is inconsistent with the hypothesis that property represents legal relations between people concerning the use, enjoyment, and disposition of tangible things. Moreover, we might ask, how does one use, enjoy, or dispose of an intangible when it is almost contradictory to say that an intangible can be used, enjoyed, or disposed of? Perhaps one can argue that it is possible to use and enjoy an intangible work of art that exists only in the imagination. However, how does one dispose of an intangible by gift, devise, or destruction? In addition to this objection, there are still other difficulties in enforcing property rights in intangibles.

Works of authorship, the subject matter of copyright, have been analyzed in terms of three components: *ideas*, their *patterning*, and the ultimate *expression* of the ideas and patterning.<sup>32</sup> By *ideas* we refer to motifs, subject matter, concepts, emotions, lessons, feelings, and principles conveyed by the work. By *patterning*, especially with a literary work, we mean the direction, development, and structure of the ideas in terms of plot, character, and composition. The ultimate *expression*, of course, is reflected by the notation and rendering of the work which colors in all the details and gives flesh, sinew, and blood to the skeletal structure already devised.

If the owner lays claim to the work of authorship, his or her title or relations with others usually does not extend to the use, enjoyment, and disposition of the ideas alone since property rights in ideas have seldom been recognized.<sup>33</sup> Perhaps one reason is that the law cannot countenance a monopoly on a literary idea, for to do so would impinge upon the rights of expression of others without compensatory benefits.<sup>34</sup> Additionally, ideas in themselves often have little creative or aesthetic content. As the cases show, protection begins at the level of patterning and certainly extends to expression.<sup>35</sup>

However, as soon as one considers infringement, this model for intellectual property, based on special relations with others concerning the intangible pattern or expression, runs into problems. The owner of a "pattern-expression" may be confronted with a competing work of authorship characterized by an expression that is totally different but having a pattern sufficiently similar to justify further inquiry. In this case, without direct proof of copying, copyright law will generally look to "substantial similarity" judged by the ordinary reasonable observer.<sup>36</sup> As Judge Learned Hand said, to find infringement the plaintiff must show that "the ordinary observer, unless he set out to detect the disparities [between the two works], would be disposed to overlook them, and regard their aesthetic appeal as the same."<sup>37</sup> Nevertheless, the owner's argument that s/he "owns" his or her pattern is open to attack. This is because the alleged infringer may contend that s/he never used, enjoyed, or disposed of the owner's pattern and because his or her pattern is slightly different. Then, the owner will be forced to claim that his or her ownership of the pattern-expression may be used to prevent construction of a similar pattern-expression. But property rights are not defined or delimited by the original pattern; there is no legal relationship regarding the use, enjoyment or disposition of a pattern which can prevent the use of a different but similar pattern. What the owner really should be saying is that "your pattern-expression produces the same type of imaginative experience in an audience as does mine, even though the pattern and the expression are different."

But then, one is going around in circles because the scope of ownership rights in the pattern-expression is measured in conceptual and perceptual terms. There can never be a fixed physical aspect of a work, even the notation, which measures the scope of property protection.<sup>38</sup> It would make better sense if one could say that his or her ownership was directed at one defined physical entity an approach that would mimic the worldview change from geocentricity to heliocentricity.

#### **IV. A Suggested View**

A better view is that the thing *used, enjoyed, and disposed of* is not any particular copy, embodiment, or discernable pattern of ideas but the entire *terra firma* or material universe. In other words, the property rights of a copyright owner, or his legal relations with others, pertain not just to one isolated object or even class of objects but to all matter which may be formed to simulate the work of authorship. Or expressed in another fashion, the owner controls the earth's use, enjoyment, and disposition in a very limited way.

Therefore, copyrights and related rights in aesthetic creations reflect legal relations regulating the shaping of the world in aesthetic forms. The owner of a copyright in a sculpture, for instance, may prevent others who have seen the work<sup>39</sup> from shaping any part of the universe, using any materials, to simulate the sculpture.<sup>40</sup> The use, enjoyment, and disposition subject to legal rules is the use, enjoyment, and disposition of all matter.

This outlook is better illustrated with patents.<sup>41</sup> The patentee (who receives open letters, *literae patentes*, from the sovereign granting exclusive rights to use natural and man-made resources in certain ways) is given a monopoly on the making, use, and sale of certain processes, articles of manufacture, machines, and compositions of matter, including some life forms. In essence, the monopoly extends to use of the material universe. With a patent for a composition of matter, the patentee can prevent others from combining the same elements regardless of location. The original patents issued by the Crown in England before the Statute of Monopolies 1624, i.e., the exclusive rights to quarry metals, manufacture foodstuffs, and practice inventions, clearly show how property rights in intellectual creations, including processes, can be monopolies on the management of natural resources.

This theory with its overtones of universality is well suited to the world of today. For example, with international treaties establishing patent, copyright, and trademark rights for owners in almost all countries, these rights are almost universally applied and affect the whole planet. Thus, a plagiarist without authorization may not be entitled to copy a copyrighted work in a treaty country regardless of the source of materials used for making the copy.

This paradigm for intellectual property as a monopoly on shaping the physical universe also fits in with new developments in art and the rapid development of the aesthetic environment. In an age of mass-replication when certain aesthetic designs and works of art are experienced by millions or even billions of people worldwide, and when large environmental works and urban redevelopment projects with aesthetic pretensions are undertaken, the creator of the work is really changing the social environment worldwide or shaping a portion of the world's material surroundings.

With works of visual art this new outlook, as simple as a change from phlogiston to oxygen, is immediately viable. The copyright owner of a sculpture prevents the use of matter by others to duplicate or simulate his or her work. But what if the shaped matter

does not itself mimic the protected shape, for instance, holographic plates which, when projected, depict the sculpture three-dimensionally? The copyright still holds and the unauthorized maker of the plates is an infringer, with the assumption that copyright covers both substance and appearance. Another example is suggested by Professor Goodman's analysis of representation in art.<sup>42</sup> Even though the painting does not reproduce the optics of the scene depicted or of other types of representations of the scene (e.g., photographic),<sup>43</sup> the copyright is infringed by different types of representations, including the *tableaux vivant*, which create the impression of the original. Really, the copyright regulates the shaping of the material universe so that the works of others do not give the perception of mimicking the protected shape, or more correctly, do not create the same or similar types of imaginary experiences in the minds of the audience.

As an aside, it should be noted that what may constitute an infringement at one time, at one location, or in one culture may not amount to an infringement in another. After all, the fixed physical aspects of a copy of a work have different meanings and effects at different times, at different locations, and in different cultures.

## **V. Literary Works**

The new approach may apply to the visual arts, including painting, sculpture, and drawing, and even to the performing arts, such as dance, silent film, and mime where the physical expression of the work appears without notation. But with works embodying mostly literary content, in written or oral form, problems emerge. Such works in their full splendor are often much more complex than statuary or inventions.



With literary works the *materia universi* is not regulated by controlling its shaping in the form of notation, e.g., inked letters, because the literary work's aesthetic content does not lie primarily in its sounds or lettering.<sup>44</sup> At most the sounds and letters denote an imaginary shaping of the world by the author.

If the literary work is to be protected by the owner, s/he must prevent others from shaping the material universe so that the patterning of ideas, the expression of visual, auditory, and other sensual experiences, and the dialogue and narration are not duplicated or mimicked. Thus, the would-be infringer is barred from shaping the real world in the form of notation or performance which duplicates the patterning of ideas and the world depicted in the protected work. But is the prospective infringer shaping the world by fixing a new work in the form of notation? Yes, because, after all, most fictional literary works, except certain forms of poetry, are dramatic works played on a planetary stage without the spatial, temporal, and other practical restraints imposed upon the playwright."<sup>45</sup>

However, protection is usually limited to patterning and expression and is not often extended to ideas alone. The idea when expressed in text will only be protected if readily identifiable, sufficiently elaborate, and aesthetically significant. That is, the articulation and elaboration of the idea must reach a certain point where quantity changes quality, and where it is detailed enough to have its own pattern and sufficient creative or aesthetic content.<sup>46</sup>

The best expression of legal reasoning with regard to literary works and infringement is the opinion of Judge Learned Hand in Nichols v. Universal Pictures, a case which concerned two similar dramatic works.

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times may consist only of its title; but there is a point in this series of abstractions where they are not protected, since otherwise the playwright could prevent use of his "ideas " to which, apart from their expression, his property is never extended. But nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work, but the analogy is not a good one, because, though the skeleton is part of the body, it pervades and supports the whole. In such cases we are rather concerned with the line between expression and what is expressed. As respects plays, the controversy chiefly centers upon the characters and the sequence of incidents, these being the substance.<sup>47</sup>

A test suggested by Judge Hand is to take the most detailed pattern common to the works of owner and plagiarist and to see whether this pattern is so old, common, bloodless, and emaciated that it should belong in the public domain."<sup>48</sup> Of course,

Hand was chiefly concerned with maintaining free access to ideas and restricting unnecessary and pernicious monopolies. However, another rationale is that ideas alone usually have little creative or aesthetic content worthy of protection. Only when ideas are patterned by the development of characters and the weaving of plot is there protectable creative or aesthetic content. Thus, although intellectual property law could provide protection for any identifiable idea,<sup>49</sup> in the literary realm it waits until the idea is clothed with some creative or aesthetic content. For example, a brief sketch of the plot of *Hamlet* will not protect the idea, nor will the copyright in the completed play protect the idea for a tragedy about a Danish prince who seeks to avenge the murder of his father. More is needed than Orestes in Danish garb.

Poetry represents a most intriguing example because the aesthetic content is expressed in its purest form, for as Hegel argued, in some sense poetry is the pure essence of all art.<sup>50</sup> Poetry is rife with metaphor and metonym; it transforms the exterior world into aesthetic relations. A line of poetry generally conveys more aesthetic meaning than a line of prose in a novel or short story, which itself is only a constituent part of a patterning process completed after the passage of pages of text. Thus, there is literary property and even copyright in haiku even though words and short phrases are not ordinarily protectable because they reflect minimal creativity and labor.

With poetry, especially lyric in contrast to epic, the ideas and feelings themselves have aesthetic content. The copyright in the poem usually can only be infringed by another poem having almost the same words. (The paraphrased copy almost surely would fail unless it were a parody.) The author's rights pertain to the use of the material world to shape it in the form of sounds and letters so that the experience of the poem is recreated in the imagination.

## VI. Conclusion

Our final conclusion is that property rights in an aesthetic creation enable the owner to restrain plagiarists from using the material world to recreate in the audience the imaginative experiences first created by the protected work.

The author doesn't own the work of authorship *per se* but has legal relations to others regarding the use of the material world to copy the work. The rights conferred on the owner are not plenary but only sufficient to prevent others from commercially exploiting the real world with reference to the work.

This notion that property rights in aesthetic creations involve shaping the entire material universe is consonant with the underlying reality that art pervades the whole environment and that certain mass-produced aesthetic creations pervade the experiences of millions of people around the world. The seamless universe which has been delicately carved up into discrete objects is returned to its full plasticity.

In the world of the near future we can anticipate, for better or worse, hidden residual rights not only in the flora and fauna surrounding us but also in the shaping of the whole environment. It will not be as important to own tangible things as to control how the planet will be shaped in our own images.

Art, then, will be perceived in its true form, the shaping of the exterior world to reflect man's inner nature.

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**1** Compare Peter Karlen, "What Is Art? A Sketch for Legal Definition," *Law Quarterly Review* 94 (1978): 383; Peter Karlen, "Legal Aesthetics," *British Journal of Aesthetics* 19 (1979): 195 (articles on the definition of art from a legal perspective).

**2** Notwithstanding *Berman v. Parker*, 348 United States Reports 26 (1954) and its progeny, which sustained "aesthetic" zoning in the interest of pleasing and beautiful surroundings, legally speaking, by *aesthetic* one does not necessarily refer to that which is beautiful or pleasing. See Uddo, "Land Use Controls: Aesthetics, Past and Future," *Loyola Law & Review* 21 (1951): 851. The urban environment, in any case, is not always attractive or pleasing. Instead, *aesthetic* refers to that which has artistic qualities or that which relates to perception by the senses, insofar as the perception is an artistic one. As Professor Collingwood noted: "Aesthetic theory is the theory not of beauty but of art." Robin Collingwood, *Principles of Art* (New York, 1958), p. 22. See also Peter Karlen, "What is Art: A Sketch for a Legal Definition," supra note 1 at 383, 396.

**3** One cannot doubt after reading J. Huysmans, *Against Nature* (trans., R. Baldrick, 1959) that the senses of taste and smell as well as those of sight, hearing, and touch are the concern of aesthetic experience. See Quinet, "Food as Art: The Problem of Function," *British Journal of Aesthetics* 21 (1981): 159, Fretter, "Is Wine an Aesthetic Object?" *Journal of Aesthetics and Art Criticism* 30 (1971): 97. *Contra* Monroe Beardsley, *Aesthetics: Problems in the Philosophy of Criticism* (New York, 1958), pp. 98-99 (denying role of gustatory and olfactory senses informing works of art).

**4** In other words, it is very difficult to pick any man-made object in our surroundings which does not have an aesthetic component. Even purely utilitarian devices including cookware and computers are designed not only for utility but also for appearance.

**5** Intellectual property laws are those laws designed to create property interests in products of intellectual labor such as inventions and works of authorship. Copyright and patent statutes are the principal intellectual property laws, though trademark laws also have a role to play.

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**6** Copyright Revision Act of 1976 (Title 17, United States Code). Section 102(a) [hereafter "Copyright Act"].

**7** *A work of authorship is a creative work, usually having significant aesthetic content, and usually being a product of the arts. According to Section 102(a) of the Copyright Act, 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; and sound recordings."*

**8** A work is deemed "fixed" in a tangible medium of expression, according to Section 101 of the Copyright Act:

when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. . . .

**9** A trademark, according to Section 45 of the Lanham Trademark Act of 1946 (*15 United States Code*, Section 1127):

includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.

Such marks include words, phrases, logos, shapes and configurations, signatures, and any other distinctive devices that can be used as commercial symbols. The Lanham Trademark Act of 1946 and other trademark legislation protects those who first use trademarks in commerce.

**10** The law of unfair competition concerns itself with maintaining proper competitive practices within the free market economy and, in particular, is concerned with preventing merchants and manufacturers from passing off their products as those of other merchants or manufacturers by using, for example, misleading advertising and similar techniques which create a likelihood of public confusion as to the source or origin of goods or services (Rudolf Callahan, *Unfair Competition, Trademarks, and Monopolies* [4th ed., 1981] Section 109). The law of trademarks is subsumed under the law of unfair competition.

**11** Design patent protection is allowed by Title 35, *United States Code* Section 171, which says:

Whoever invents any new, original, and ornamental design for an article of manufacture may obtain a patent therefore, subject to the conditions and requirements of this title. . . .

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The purpose of design patent protection is to grant protection for industrial designs that are aesthetically pleasing but not otherwise protectable under copyright law, which does not extend protection to products' aesthetic components that are inseparably linked to the products' utilitarian features. See Section 101 of the Copyright Act on limited copyright protection for utilitarian articles.

**12** These residual rights not only include intellectual property rights in terms of patents, trademarks, and copyrights but also other property rights in realty and personality. See text following note 14 *infra*.

**13** A fee simple estate in land is:

The estate which a man has where lands are given to him and to his heirs absolutely without any end or limit put to his estate (2 *Blackstone's Commentaries* 106).

*Black's Law Dictionary* (5th ed., 1979), p. 554.

**14** *Personalty* is personal property; movable property; chattels. *Ibid.* p. 1030.

**15** Further reflection shows that a property right is not to be identified with the fact of physical possession. Whatever technical definition of property we may prefer, we must recognize that a property right is a relationship not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals. This becomes unmistakably clear if we take specifically modern forms of property such as franchises, patents, goodwill, etc., which constitute such a large part of the capitalized assets of our industrial and commercial enterprises.

Morris R. Cohen, *Law and the Social Order* (Archon Books, 1967), p. 45.

Property, then, in a determinate object, is composed of certain constituent elements, to wit: The unrestricted right of use, enjoyment, and disposal of that object.

*City of St. Louis v. Hall*, 116 *Missouri Reports* 527, 533-34 (1893).

**16** The most common juristic entities are trusts, corporations, associations, and partnerships. See *Black's Law Dictionary* (5th ed., 1979), p. 477 (definition of *entity*).

**17** This is the definition for "fixed" at Section 101 of the Copyright Act. See note 8 *supra*.

**18** For example, the owner of a condominium owns more than just the real property constituting the living space; in addition, s/he owns rights to use other facilities in the condominium complex.

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**19** For notes on craft, art, and the division of labor, See Osborne, "The Aesthetic Concept of Craftsmanship," *British Journal of Aesthetics* 17 (1977): 138 (*designer, workman, and engineer*); Fethe, "Craft and Art: A Phenomenological Distinction," *British Journal of Aesthetics* 17 (1977): 129; Martland, "Art and Craft: The Distinction." *British Journal of Aesthetics* 14 (1974): 231; Dufrenne, "The Aesthetic Object and the Technical Object," *Journal of Aesthetics & Art Criticism* 23 (1964): 113. As Plato said in "Politicus," quoted in *Esquire, Inc. v. Ringer*. 414 *Federal Supplement* 939, 941 (District Court, District of Columbia 1976):

All the handicrafts possess a scientific content which has grown up along with them and is embodied in their practice. The manufactured article is the joint product of the science and the practice [technique] which are combined in the handicraft.

**20** Article 1, Section 8, clause 8 of the United States Constitution granted the right to the federal government:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries.

In other words, the copyright or patent is not granted to reward the author or inventor but rather to promote the sciences and arts by encouraging investments in monopolies.

**21** A trademark is more than an indication of source or origin, it is also an indication of quality. Under Section 5 of the Lanham Trademark Act of 1946 (15 *United States Code* Section 1055), for example, the registrant may take advantage of use of the mark by a related or licensed company, provided that the mark is not used so that its use deceives the public, i.e., by using it with substandard goods. In the case of a certification mark, under Section 14 of the Act (15 *United States Code* Section 1064), registration for the mark may be cancelled if the owner does not control or is not able to legitimately exercise control over use of the mark, that is, by permitting the mark to be used in connection with substandard goods.

**22** There are no other means of commercial exploitation, especially since the adaptation right is so broad. The right to adapt a work includes the right to prepare "derivative works" a derivative work is:

A work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. . . .

Copyright Act, Section 101.

**23** Professor Nimmer says succinctly:

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As used in the Copyright Act, a "literary work" is a work of authorship, but a "book" is not. A "book" is merely a material object which may embody, and hence constitute, a copy of a given literary work.

Melville Nimmer, *Nimmer on Copyright* (New York, 1983), Section 2.03[C].

**24** Robin Collingwood, *Principles of Art* (New York, 1958), p. 151.

**25** See, e.g., California Civil Code Sections 980-82, which refer to "original works of authorship not fixed in any tangible medium of expression." The present Copyright Act at Section 102(a) is confined to works of authorship fixed in tangible media of expression and preempts all state laws which cover the same subject matter with the same exclusive rights. (See Copyright Act, Section 301.) Thus, the source of law for protection of unfixed works must be the States, although it is conceivable that Congress could even preempt state laws with federal legislation concerning unfixed works since the constitutional provision at Article 1, Section 8, Clause 8 refers to *Writings* which arguably may be fixed or unfixed. See note 20 *supra* for the constitutional clause.

**26** When the work is fixed, by definition it is reproducible, perceivable, or communicable for more than a period of transitory duration (See note 8 *supra*), and there is less confusion about what constitutes an infringement than if the work were to remain unfixed and merely subject to oral descriptions.

**27** For instance, the plagiarist who wrongfully copies a literary work rarely has access to the original manuscript but rather uses copies of the original.

**28** Section 101 of the Copyright Act requires only that the work be fixed in a tangible medium of expression; it does not require permanent fixation. If it did, then someone could destroy the author's copyright in a work of authorship, such as a painting, merely by destroying all copies. For a work appearing in only one copy or a few copies, this result makes no sense. Moreover, this type of rule might mean that mutilation of a work appearing only in one copy would change the scope of the copyright to cover only the changed version of the work.

**29** For instance, one who unlawfully copies a musical composition may only have heard its performance and may never have had access to a physical copy of the musical notation or recorded performance.

**30** Cf. *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 Federal Supplement 518 (Eastern District New York 1965). Here Jean Genet's book, *Thief's Journal*, originally in French, was translated with authorization into English. The English version fell into the public domain. The defendant copied the public domain English version and was sued for copyright infringement based upon the original copyright in the French edition. The plaintiff prevailed.

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**31** *Black's Law Dictionary* (5th ed., 1979). p. 726 defines *intangibles* as: Property that is a "right" rather than a physical object. Examples would be patents, stocks, bonds, goodwill, trademarks, franchises, and copyrights. *Black's Law Dictionary*, *ibid.* p. 726. refers to an *intangible asset* as:

A non-physical, non-current asset which exists only in connection with something else, as the goodwill of a business.

**32** See Gorman, "Copyright Protection for the Collection and Representation of Facts," *Harvard Law Review* 76 (1963): 1569.

**33** Section 102(b) of the Copyright Act explicitly rules out protection of ideas. See *Baker v. Selden*. 101 *United States Reports* 99 (1879) (bookkeeping system is not protected by copyright of literary and pictorial work containing bookkeeping forms).

**34** Comparatively speaking, a literary idea not fully developed by a complete expression in the form of words has very little social value. In other words, the vague idea of a plot for a play is of little value compared to the completely written play. Given that basic dramatic plots are restricted in number but the expression of such plots is unlimited, it makes no sense to grant a monopoly for any particular plot or plot idea.

**35** See, e.g., *Nichols v. Universal Pictures Co.*, 45 *Federal Reporter*, 2d Series 119 (1930) (copyright infringement case involving two plays having somewhat similar characters and themes, "Abie's Irish Rose" and "The Cohens and the Kellys").

**36** Melville Nimmer. *Nimmer on Copyright* (New York, 1983) Section 13.03[A] (substantial similarity): *ibid.*, Section 13.03[A] (judged by the average reasonable man).

**37** *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 *Federal Reporter*. 2d Series 487, 489 (2d Circuit 1960) (copyright infringement case involving similar fabric designs for women's dresses).

**38** *Cf.* text accompanying note 47 *infra* (opinion of Judge Learned Hand, which indicates that no one can fix the boundary at which the patterning of an idea is no longer an unprotectible idea but rather a protected expression). It should be noted that Section 106(2) of the Copyright Act gives the copyright owner the exclusive right to prepare derivative works. See note 22 *supra*. According to Section 101 of the Copyright Act, in the literary field, derivative works include not only translations, abridgements, and condensations, but also dramatizations, fictionalizations, motion picture versions, and "any other form in which a work may be recast, transformed, or adapted." Once again, using the language of Judge Hand, no one can objectively fix the boundary between that which is an infringing derivative work and that which represents a new work of authorship. As mentioned above, at note 36, infringement is determined by "substantial similarity" judged by "the ordinary reasonable observer."



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**39** It is not a copyright infringement to recreate the protected work if such recreation is an independent creation. (See Melville Nimmer, *Nimmer on Copyright* [New York, 1983] Section 2.01[A], n. 13 (1998). In fact, the independently created work identical or similar to the protected work enjoys its own copyright protection. The requirement for copyright protection is *originality* (Copyright Act, Section 102(a)), whereas for patent protection one must establish novelty in addition to originality (Title 35, *United States Code*, Section 101). In other words, patentable subject matter must be entirely new, but copyrightable subject matter need only be original with the author, that is, the author need only establish that the work was not copied from the material of others. The reason for the difference between copyright and patent law is simple. The odds of independently creating an identical or substantially identical work of authorship are extremely small, whereas with the continuing progress of science and engineering, simultaneous or near simultaneous developments of the same invention are quite commonplace, so that protection must be given to the first inventor.

**40** We use the word *simulate* rather than *reproduce* to indicate that the creation of the plagiarist must subjectively give the appearance of the copyrighted work rather than objectively reproduce it. See text accompanying notes 42, 43 *infra*.

**41** Of course, with patents there is not the same element of subjectivity. As mentioned above, at note 39 *supra*, patentable subject matter must be novel rather than merely original. A patent infringement takes place where the new subject matter substantially performs the same functions in substantially the same manner to obtain the same result as the patented subject matter. (See *Sanitary Refrigerator Co. v. Winters*, 280 United States Reports 30, 42 [1929]. This "form and function" test is much more objective than the test for copyright infringement which depends upon substantial similarity judged by the ordinary observer.

**42** See Nelson Goodman, *Languages of Art* (Indianapolis, 1976), pp. 34-39.

**43** *Ibid.*, pp. 10-18.

**44** Compare Richard Shusterman, "Aesthetic Blindness to Textual Visuality," *Journal of Aesthetics & Art Criticism* 41 (1982): 87.

**45** For example, the modern novel, especially the modern historical novel, is characterized by its unrestrained travels through time and space. Cf., e.g., Jeoraldean McClain, "Time in the Visual Arts: Lessing and Modern Criticism," *Journal of Aesthetics & Art Criticism* 44 (1985): 41 and authorities cited therein on the temporal and spatial aspects of the visual and literary arts.

**46** See Melville *Nimmer on Copyright* (New York, 1983) Section 1.10[B][2] on minimal requirements for copyright protection.

**47** 45 *Federal Reporter*. 2d Series 119 (2d Circuit 1930), cited at note 35 *supra*.

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**48** Ibid. at P. 122, following *Dymow v. Bolton. II Federal Reporter*, 2d Series 690 (2d Circuit 1926), opinion of Hough, Judge.

**49** Ideas may be protected but usually not as property. Rather, the sanctity of certain interpersonal relationships is respected so that a breach thereof, involving theft of an idea, may be remedied. For instance, a contractual relationship whereby one party promises not to disclose an idea may allow protection for the idea via a breach of contract action. Within the context of a confidential relationship between the parties, such as a relationship between attorney and client, physician and patient, or penitent and preacher, wrongful disclosure constitutes an actionable breach of the relationship, thus indirectly protecting the idea. See Melville Nimmer, *Nimmer on Copyrights* (New York, 1983), ch. 16.

**50** As Hegel says:

Thus the genuine mode of poetic representation is the inner perception and the poetic imagination itself. And since all types of art share in this mode, poetry runs through them all and develops itself independently in each. Poetry, then, is the universal art of the spirit which has attained inner freedom and which does not depend for its realization upon external sensuous matter but expatiates only in the inner space in the inner time of the ideas and feelings.

Georg Hegel, Preface to *Vorlesungen iiber die Aesthetik* (trans. J. Loewenberg) in *Hegel Selections*, ed. J. Loewenberg (New York, 1975), p. 336.