Vanderbilt Law Review

Volume 58 | Issue 3 Article 4

4-2005

Special Project: Current Issues in Intellectual Property

W. Russell Taber

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the Intellectual Property Law Commons

Recommended Citation
W. Russell Taber, Special Project: Current Issues in Intellectual Property, 58 *Vanderbilt Law Review* 851 (2019)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol58/iss3/4

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Special Project[+]

Current Issues in Intellectual Property

INTRODUCTION

A single legal concept has produced some of the greatest achievements of the human mind: intellectual property. Thousands of years ago, Aristotle denounced the then novel notion of rewarding those who create inventions beneficial to the state.[1] History has been kind to Aristotle, but not because of his insights on intellectual property. The Venetian Senate's passage of the 1474 Act marked the beginning of systematic patent protection on European soil.[2] Along with blown glassware, Venice later exported its penchant for patent protection to the rest of Europe, including Great Britain by the mid-

---

[+] Each year, the VANDERBILT LAW REVIEW publishes one issue with notes devoted solely to a topic of current interest. These notes collectively constitute the Special Project. Past Special Projects have delved into a wide array of topics, from asbestos litigation, 36 VAND. L. REV. 573 (1983), to criminal constitutional law in state courts, 47 VAND. L. REV. 795 (1994), to the Americans with Disabilities Act, 52 VAND. L. REV. 763 (1999).

1. Aristotle argued that this idea, attributed to Hippodamus of Miletos, could lead to political instability. ARISTOTLE, THE POLITICS OF ARISTOTLE 72 (Ernest Barker ed. & trans., 1946).

2. ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 106 (3d ed. 2003).

sixteenth century.[3] During the same era, the British crown granted the first "copyright" after the printing press came to England.[4]

Across the Atlantic two centuries later, the drafters of the United States Constitution held protecting intellectual property in such high esteem that they reserved the founding document's sole reference to "right"[5] for Congress's power "[t]o 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."[6] Shortly after the Constitution's ratification, Thomas Jefferson, a key proponent of American intellectual property law,[7] elaborated on this right:

> That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.[8]

As Jefferson envisioned, American ingenuity—from inventions like Bell's telephone and Edison's light bulb to the artistry of Hollywood and Nashville—has spread throughout the world, fueled by intellectual property law's twin competing goals of providing an incentive for authors and inventors to create while granting the public access to the fruits of their creativity.[9]

Mixing this ingenuity with technological advances, competing policy rationales, and the complexity of marking the metes and bounds of intangible property rights has produced some of the most challenging legal issues of our time. Internet file-swapping technology, which has facilitated the free downloading of millions of

---

3. *Id.*

4. *Id.* at 320.

5. Shanker A. Singham, *Competition Policy and the Stimulation of Innovation: Trips and the Interface Between Competition and Patent Protection in the Pharmaceutical Industry*, 26 BROOK. J. INT'L L. 363, 365 (2000). The word "right" is, of course, mentioned in various places in the U.S. Constitution as amended. *E.g.*, U.S. CONST. amend. I (protecting "the right of the people peaceably to assemble").

6. U.S. CONST. art. I, § 8, cl. 8.

7. *See* Max Stul Oppenheimer, In Vento Scribere*: The Intersection of Cyberspace and Patent Law*, 51 FLA. L. REV. 229, 236 (1999) (calling Jefferson "the father of the United States patent system").

8. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 334 (Andrew A. Lipscomb ed., 1904).

9. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (describing the limited monopoly grant as "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

songs[10] at a cost of billions to the music industry,[11] has recently come to the Supreme Court.[12] Drug manufacturers stock the United States' shelves with pharmaceuticals that can prolong by decades the lives of those infected with HIV, but twenty-five million Africans with AIDS remain untreated because national patent laws enable manufacturers to set prices those suffering from the disease cannot afford.[13]

This year's Special Project joins the debate over the proper role of copyright and patent protection in the twenty-first century. The first Note addresses a glaring gap left in a statute written almost a hundred years ago that continues to generate litigation today.[14] The Copyright Act of 1909 ("1909 Act") failed to define its key term, "publication," an act which generally determines whether works created before 1978—works like Dr. King's "I Have a Dream" speech—achieved copyright protection or were injected into the public domain.[15] Courts and scholars have debated the definition of publication in part because the term is "a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term."[16] Some advocate narrow definitions of publication with broad exceptions that can have the effect of arbitrarily awarding copyrights, upsetting the congressional balance between the 1909 Act's dual policies,[17] rewarding those who did not comply with the Act's formalities while penalizing those who did, and massively lengthening the copyright term beyond the statutory period.[18] The first Note offers a new definition of publication that, according to the author, avoids these problems and is consistent with the 1909 Act as

10. *See* Kimberly Kerry, Comment, *Music on the Internet: Is Technology Moving Faster than Copyright Law?*, 42 SANTA CLARA L. REV. 967, 970 n.26 (2002) (noting that users of the now defunct free version of Napster downloaded between 12 million and 30 million songs per day).

11. *See* Jon Van & Christine Tatum, *Wireless Broadband Service Migrates from Silos to City*, CHI. TRIB., May 14, 2001, at Business 3 (stating that "[a]rtists and entertainment companies will lose billions of dollars each year" if they are unable to curb free music downloading).

12. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).

13. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 257-261 (2004). However, steps have been taken towards alleviating this crisis. Drug manufacturers have reached agreements to provide some HIV drugs at low costs, and some countries in the developing world have enacted compulsory licenses to authorize the production of cheaper generics. Kevin Outterson, *Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets*, 5 YALE J. HEALTH POL'Y L. & ETHICS 193, 224-25 (2005).

14. W. Russell Taber, Note, *Copyright Déjà Vu: A New Definition of "Publication" Under the Copyright Act of 1909*, 58 VAND. L. REV. 857 (2005).

15. *Id.* at 859.

16. Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 185 (1956).

17. *See supra* note 9.

18. Taber, *supra* note 14, at 889.

written and with the Act's dual policies: "subject to the exceptions of limited publication, performance, and the distribution of a phonorecord embodying a musical composition, publication is the exploitation of a work authorized by the author and/or owner of the work."[19] Unlike some other definitions, this proposal aligns publication with exploitations that encourage authors to create, so that tangible and intangible exploitations of a work can constitute publication.[20] Similarly, the Note limits the performance exception "to those situations in which either a live performance is involved or situations in which practical considerations warrant a broader interpretation of the term 'performance.' "[21] The result is that, for example, the live rendition of a play constitutes a performance, but the radio broadcast of a previously made studio recording of a song is a publication.[22]

The second Note also reaches back into history, this time to investigate how an ancient and venerable art form threatens to transcend the protections of modern copyright law. Poetry poses unique problems to copyright law because a poem's ideas, which copyright does not protect, are often difficult to separate from its expression, which is protected.[23] For example, William Carlos Williams uses simple language coupled with line breaks and spacing to describe *The Red Wheelbarrow*, yet separating Williams' idea of a red wheelbarrow from his expression of that idea may well be impossible.[24] "Copyright fails poetry," the second Note's author argues, because the substantial similarity tests courts use to evaluate infringement claims do not adequately determine whether one poem is impermissibly similar to another.[25] The substantial similarity tests courts currently employ either focus on aspects not central to poetry, such as plot, character, and descriptions, or offer only "thin" copyright protection for works like factual or historical literature.[26] The second Note, therefore, proposes the "Expressive Elements Test" for improper appropriation that compares "two poems based on their word choice, form, and arrangement of words."[27] In implementing the test, the

19. *Id.* at 889-90.

20. *Id.* at 890.

21. *Id.* at 883.

22. *Id.* at 884.

23. Jennifer Josie Understahl, Note, *Copyright Infringement and Poetry: When is a Red Wheelbarrow* The Red Wheelbarrow?, 58 VAND. L. REV. 915 (2005).

24. *Id.* at 916.

25. *Id.*

26. *Id.* at 938.

27. *Id.* at 944.

second Note suggests using a sliding scale to assess substantial similarity so that, for instance, much similarity in the poems' form could allow for less similarity between the poems' word choice.[28] The claimed benefits of the Expressive Elements Test include offering full protection for poetry, reducing arbitrary substantial similarity determinations, focusing on the poem's expressive elements instead of trying to separate ideas from expression, and fostering poetry's creation without overprotecting its elements.[29]

In a sharp departure from the field of copyright, the third Note explores the "Limits of Patent Law in the Face of the Proteomics Revolution."[30] The dizzying recent accomplishments of science in fully characterizing the human genome have accompanied rapid advances in identifying and characterizing proteins.[31] Proteomics, generally defined as "[t]he research effort to completely characterize all proteins normally and abnormally expressed in the human body," holds much greater potential for drug discovery and medical research than even the promising field of genomics, the counterpart of proteomics in gene research and characterization.[32] Not surprisingly, the investment community continues to pour extensive resources into proteomics and is attempting a massive "'land grab' of protein territory" through patents.[33] Current patent law inadequately accommodates proteomics due to issues like the complexity of protein characterization, the possible overlap with genomics patents, and the potential for overprotection of protein subject matter with a corresponding stifling of downstream innovation.[34] Further complicating matters is the tension between the Federal Circuit and the United States Patent and Trademark Office concerning the proper interpretation of biotechnology patents. In response, the author of the third Note proposes *sui generis* legislation that addresses the unique considerations of patenting protein subject matter.[35] According to the Note, this separate legislation should define protection for protein products in such a way that provides the proper incentives for innovation but does not allow any group to dominate the field's

28. *Id.* at 946.

29. *Id.* at 946.

30. J. Jason Williams, Note, *Protecting the Frontiers of Biotechnology Beyond the Genome: The Limits of Patent Law in the Face of the Proteomics Revolution*, 58 VAND. L. REV. 955 (2005).

31. *Id.* at 956.

32. *Id.* at 957.

33. *Id.* at 991.

34. *Id.* at 990-93.

35. *Id.* at 992.

vibrant downstream potential.[36] This proposal, the third Note's author argues, places the responsibility for reform squarely on Congress's shoulders because, compared with the courts, the legislative branch has greater institutional capacity, more political accountability, and less resistance to crafting the legal changes necessary to meet the challenges of proteomics.[37]

As these three Notes attest, intellectual property demands almost as much from lawmakers as law demands from innovators. Yet American intellectual property law has adapted admirably to time's unforeseeable challenges. This year's Special Project aspires to contribute to the law's steadfast mission of encouraging the mind's greatest achievements for the betterment of mankind.

W. Russell Taber
Special Project Editor

36. *Id.* at 993.
37. *Id.*