

**The Growth of Intellectual Property:  
A History of the Ownership of Ideas in the United States**

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In 1987, Taco Cabana, a chain of Mexican restaurants in Houston, Texas, brought suit against Two Pesos, a rival chain, claiming that Two Pesos had deliberately copied Taco Cabana’s décor. A combination of nonfunctional features -- overhead garage doors used to separate a patio area from the dining room, a bright color scheme intended to create a “festive atmosphere,” a distinctive roof design, etc. -- lent a distinctive overall image to each of its restaurants, Taco Cabana argued. Two Pesos had acted wrongfully in appropriating that image without permission. Five years and several court rulings later, Taco Cabana prevailed. Two Pesos was required to pay several million dollars in damages and alter the appearance of its restaurants.<sup>1</sup>

Last year, a group of intellectual-property lawyers argued in an article in the *National Law Journal* that athletic maneuvers could and should be patented. A method “for sailing an America’s Cup yacht wherein the yacht sails 10 degrees closer to the wind, for high-jumping higher or for skiing downhill 10 percent faster,” they claimed, could easily be classified as a “useful process” within the meaning of the federal patent statute. If nonobvious and novel, such a technique should qualify for patent protection. After all, if one can patent a new surgical procedure, why not the Fosbery Flop?<sup>2</sup> The chances that the courts would adopt this proposal are not great, but the argument is colorable.

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<sup>1</sup> See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

<sup>2</sup> See Robert M. Kunststadt, F. Scott Kieff, and Robert G. Kramer, “Are Sports Moves Next in IP Law?,” *National Law Journal*, May 20, 1996, p.c1. Kunststadt defends his proposal on the following grounds: “Although the norms of sports enthusiasts might be offended, sports is now big business, and big business demands this protection. Entire industries exist to sell and promote goods and services at sporting events and for use by sports participants. Players in this vast market may benefit from the efficiency of fixed property rights in the fuel that drives these market transactions. A key element of that fuel is the sports moves themselves, and patents, copyrights and trademarks may provide the best tools for securing those

Where did these claims come from? How did it come to pass that, in the United States, one can now own the décor of a restaurant, and lawyers argue seriously about exclusive rights to athletic moves? This essay seeks to answer those questions.

## I.

The field of law in which such claims arise has recently come to be known as “intellectual property.” It encompasses several, partially overlapping doctrines. Copyright law protects “original forms of expression” -- *Magic Mountain*, “Star Wars,” “Fiddler on the Roof.” Patent law protects inventions -- windsurfers, chemical processes, genetically engineered mice. Trademark law protects words and symbols that identify goods and services -- “McDonalds,” the distinctive shape of a Ferrari Testarosa. Trade-secret law protects information that a company has tried but failed to conceal from competitors -- secret formulas for soft drinks, confidential marketing strategies. The “right of publicity” protects celebrities’ interests in their images and identities.

The history of each of these doctrines (like the histories of most areas of the law) is involuted and idiosyncratic, but one overall trend is common to all: expansion. With rare exceptions, the set of entitlements created by each of the doctrines has grown steadily and dramatically from the eighteenth century to the present.

### A.

Within copyright law, the most obvious axis along which this expansion has occurred is duration. The original, 1790 Copyright Act established a copyright term of 14 years; if the author were still living at the end of that period, he could renew the copyright for an additional 14 years.<sup>3</sup> Over the next two centuries, Congress periodically added to these time periods.<sup>4</sup> Most copyrights acquired today will last for the life of the author plus 50 years, and Congress is seriously considering extending that term for another 20 years.

A less straightforward but equally important respect in which copyright has grown concerns the definition of a copyrighted “work.” Until the middle of the

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rights.” Not everyone is convinced. See, e.g., March Walsh, “Patently Ridiculous, Some Say; People Dunk Basketballs. People Lift Boxes. Should the Patent Office Protect Their 'Inventions'?” *Legal Times* (August 19, 1996), S32.

<sup>3</sup> See Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

<sup>4</sup> See Stewart E. Sterk, “Rhetoric and Reality in Copyright Law,” *Michigan Law Review* 94 (1996): 1197, 1217-18.

nineteenth century, a copyright owner enjoyed little more than protection against verbatim copying of his or her language. In other words, the “work” shielded by the statute was the literal text, nothing more. So, for example, in 1853 a federal Circuit Court rejected the claim of Harriet Beecher Stowe that a German translation of *Uncle Tom’s Cabin* infringed her copyright.

By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. . . . All her conceptions and inventions may be used and abused by imitators, playwrights and poetasters. . . . [Her entitlements are limited to] the copyright of her book; the exclusive right to print, reprint, and vend it, and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing or vending with her license, "copies of her book." A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.<sup>5</sup>

Toward the end of the nineteenth century, this constricted view of an author’s rights came under increasing attack. Eventually the courts, with Congress’ encouragement, abandoned it in favor of the concept that the “work” protected by copyright consists “in the substance, and not in the form alone. That which constitutes the essence and value of a literary composition, which represents the results of the author's labor and learning, may be capable of expression in more than one form of language different from that of the original. . . . [Thus] translation is not in substance a new work. It is a reproduction in a new form of an existing one.”<sup>6</sup> This modern understanding confers upon copyright owners many more entitlements than the right to prepare translations. Close approximation of the plot of a novel or play, preparation of a screenplay based on a novel, use of the characters from a movie or book to create an unauthorized sequel -- all these are now understood to constitute infringement.

The kinds of works to which copyright law may apply has also grown enormously. For example, in 1884, the Supreme Court concluded that photographs could be copyrighted.<sup>7</sup> In 1971, Congress decided that musical recordings (not just musical

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<sup>5</sup> *Stowe v. Thomas*, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (No. 13,514).

<sup>6</sup> Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship,’” *Duke Law Journal* 1991: 455, 478 (quoting Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (1879), 451-52).

<sup>7</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

compositions, but recorded performances thereof) should be shielded from copying.<sup>8</sup> Twenty years ago, computer software was added to the list of protectable works.<sup>9</sup> The most recent major addition was architectural works.<sup>10</sup>

## B.

Like copyright, patent law was gradually extended over the course of the 19th and 20th centuries to an increasingly wide array of inventions. Some examples:

*Industrial Designs.* In 1842, hoping to provide “encouragement to the decorative arts,” Congress extended the reach of the patent statute to cover “new and original designs for articles of manufacture.” The degree of originality demanded by the Patent Office and the courts before recognizing a patent of this sort has varied over the years, but recently a wide array of “ornamental objects” -- from eyeglass display racks to containers for dispensing liquids -- have been deemed protectable.<sup>11</sup>

*Plants.* Until the early twentieth century, plants were considered products of nature and hence unpatentable.<sup>12</sup> The Plant Patent Act of 1930 overrode this principle, extending a modified form of patent protection to new varieties of asexually reproducing plants.<sup>13</sup> In 1970, Congress went even further, reaching new and “distinct” sexually reproducing plant varieties.<sup>14</sup>

*Surgical Procedures.* Until the Second World War, the Patent Office took the position that “the methods or modes of treatment of physicians of certain diseases are not patentable.”<sup>15</sup> In the 1950s, it

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<sup>8</sup> Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 392. Previously, some states had provided - either through statute or through common-law adjudication -- comparable protection.

<sup>9</sup> 17 U.S.C. §101.

<sup>10</sup> Before 1990, architectural works were not shielded by copyright law. Architectural plans were protected, but only in the narrow sense that they could not be copied without permission. If a builder lawfully obtained a set of blueprints for a building (or determined how to build it without blueprints), he was free to build an identical structure. A 1990 statute (catalyzed by the American ratification of the Berne Convention) extended copyright protection to “the design of a building as embodied in any tangible medium of expression” and made clear that the building itself constituted such a “medium of xpression.” The upshot is that, as long as a building contains original design elements that are not functionally required, its “overall shape” may not be imitated without permission. Admirers may photograph, draw, or paint the building (as long as it is “visible from a public place”) but cannot build an identical structure or even (it seems) a scale model of it.

<sup>11</sup> See Donald S. Chisum, *Patents* (1992), 1:180ff.

<sup>12</sup> See *Ex parte Latimer*, 1889 Commn. Dec. 123 (1889).

<sup>13</sup> 35 U.S.C. secs. 161-164.

<sup>14</sup> Plant Variety Protection Act, 7 U.S.C. §§ 2321-2582.

<sup>15</sup> *Ex parte Brinkerhoff*, New Decisions, 27 J. Pat. Off. Soc'y 797, 797 (1945).

abandoned this categorical rule,<sup>16</sup> but the continued wariness of the courts<sup>17</sup> combined with doctors' qualms concerning the monopolization of potentially life-saving processes kept the number of such patents low.<sup>18</sup> Recently, however, the rate has increased sharply. The Patent and Trademark Office now typically grants over a dozen medical procedure patents each week.<sup>19</sup> In 1996, Congress curtailed the use of such patents - - not by eliminating them, however, but rather by exempting physicians and "health care entities" (e.g., nursing homes, hospitals, and medical schools) from liability for infringing them.<sup>20</sup>

*Software.* Until the 1980s, both the Patent Office and the courts resisted the patenting of software programs, primarily on the ground that they constituted "mathematical algorithms" and thus unpatentable "phenomena of nature."<sup>21</sup> In 1981, the United States Supreme Court signaled a slight weakening in this resolve, upholding the patent on a software program (embedded in a computer) that served to monitor continuously the temperature inside a synthetic rubber mold.<sup>22</sup> Since that time, the Federal Circuit has adopted an increasingly receptive posture; today, virtually any software program (if novel, nonobvious, etc.) is patentable, so long as the applicant describes it as being programmed into a general purpose computer.<sup>23</sup> The predictable result has been an enormous surge in software patent applications.

This proliferation of the kinds of potentially patentable inventions has been paralleled by expansion of the set of entitlements encompassed by a patent. The doctrine

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<sup>16</sup> See *Ex parte Scherer*, 103 U.S.P.Q. (BNA) 107 (Pat. Off. Bd. App. 1954) (approving a patent for a method of injecting medicaments by a pressure jet).

<sup>17</sup> See *Martin v. Wyeth, Inc.*, 96 F. Supp. 689 (D. Md. 1951).

<sup>18</sup> See Edward Felsenthal, "Medical Patents Trigger Debate Among Doctors," *Wall Street Journal*, Aug. 11, 1994, at B1, B6.

<sup>19</sup> See Joel Garris, "The Case for Patenting Medical Procedures," 22 *American Journal of Law and Medicine* (1996): 85; Jeffrey I.D. Lewis, "No Protection for Medical Processes; International Posture May Be Hurt by New Law," *New York Law Journal* (March 10, 1997), S1. Garris lists the following as examples of such patents: "a method of diagnosing heartbeat disorders, U.S. Patent No. 4,960,129; a method of treating arthritis, U.S. Patent No. 5,026,538; a method of administering insulin, U.S. Patent No. 5,320,094; and a method of treating diabetes, U.S. Patent No. 5,321,009." *Ibid.*, n. 1.

<sup>20</sup> 35 U.S.C. §287(c). The legislation does not extend to "biotechnology patents."

<sup>21</sup> See *Gottshalk v. Benson*, 409 U.S. 63 (1972); Pamela Samuelson, "Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer-Related Inventions," *Emory Law Journal* 39 (1990): 1025, 1032-99.

<sup>22</sup> *Diamond v. Diehr*, 450 U.S. 175 (1981).

<sup>23</sup> See Julie E. Cohen, "Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of Lock-Out Programs," *Southern California Law Review* 68 (1995): 1091, 1153-63.

that best exemplifies that expansion is the concept of “equivalents.”<sup>24</sup> Ordinarily, the rights of a patent owner are defined, not by the scope of his invention, but by the language of his “claims”; a rival’s product will infringe the patent if and only if it falls within the bounds of a valid claim. In the nineteenth century, rivals would sometimes take advantage of this principle. By constructing products that differed in minor respects from patentees’ claims, they sought to avoid liability. Toward the end of the century, the courts developed the equitable doctrine of “equivalents” to prevent such evasive maneuvers.<sup>25</sup> Since that time, four developments have transformed the doctrine into a powerful weapon in the hands of patentees. First, the courts have abandoned the notion that an “equivalents” inquiry is only appropriate when there is evidence that the defendant has deliberately copied the plaintiff’s invention or engaged in some other kind of fraud; now the doctrine is available in every case.<sup>26</sup> Second, the formulas used by the courts to define the ambit of the doctrine have become more favorable to patentees; now plaintiffs need only show that defendants’ products are not “substantially” different from the patent’s claims.<sup>27</sup> Third, the increasingly common use of juries in patent cases has resulted in increasingly generous (to patentees) interpretation of the doctrine.<sup>28</sup> Finally, courts have held that the doctrine of equivalents may be invoked by patentees even when the defendant’s product or activity only became possible as a result of new technology -- in other words, even if the defendant’s product or activity could not have been foreseen at the time the patent was granted.<sup>29</sup>

What about the manner in which the Patent Office and courts have interpreted and applied the standard requirements of patentability -- novelty, nonobviousness, utility, etc.? Here the dramatic shift in favor of patentees has been more recent. Roughly

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<sup>24</sup> The emergence of this doctrine can perhaps be seen as an analogue to the expansion of copyright protection from literal copying to appropriation of the gist of a work. See text accompanying note 6, *supra*. Another doctrine whose emergence has benefitted patentees is “contributory patent infringement” -- which has had the effect of significantly expanding the set of persons who will be deemed infringers.

<sup>25</sup> Peter K. Schalestock, “Equity for Whom? Defining the Reach of Non-Literal Patent Infringement,” *Puget Sound Law Review* 19 (1996): 323, 324; Mark A. Lemley, “The Economics of Improvement in Intellectual Property Law,” *Texas Law Review* 75 (1997): 989, 1004.

<sup>26</sup> See *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512 (Fed. Cir. 1995) (en banc) (per curiam) (holding that in every infringement case the trial judge must apply the doctrine of equivalents), *rev'd on other grounds*, 65 U.S.L.W. 4162 (U.S. Mar. 3, 1997); Schalestock, *supra* note 25, 324.

<sup>27</sup> See Lemley, *supra* note 25.

<sup>28</sup> See Schalestock, *supra* note 25, 346.

<sup>29</sup> See Robert P. Merges and Richard R. Nelson, “On the Complex Economics of Patent Scope,” *Columbia Law Review* 90 (1990): 839, 855-56.

speaking, the nineteenth century was characterized by ever more generous interpretation of the statutory criteria. Partly as a result, patents became important to many companies and industries.<sup>30</sup> Between the First and Second World Wars, however, the tide turned. Angered by anticompetitive uses of patents by large companies, both the Patent Office and the courts became substantially less willing to grant or uphold questionable patents. Beginning in the 1950s, the Patent Office became more generous, but the federal courts varied widely in their willingness to go along. The creation in 1982 of the Court of Appeals for the Federal Circuit eliminated these variations. Equally importantly, the new court (as its advocates had foreseen) has been much more favorable to patentees -- sharply lowering the bar of “nonobviousness”<sup>31</sup> and encouraging more generous damage awards.<sup>32</sup>

### C.

It is in the area of trademark law that the explosion of intellectual property has been most striking. The notion that a manufacturer who places on his goods a particular mark can prevent others from using the same mark to sell similar goods first appeared in American law in the middle third of the nineteenth century.<sup>33</sup> For many years, however, the kinds of marks shielded by this principle were limited. Initially, for example, most courts (and the leading commentator) insisted that, to be protected, a trademark had to include the name of the manufacturer. Arbitrary or fanciful names (e.g., “Balm of a Thousand Flowers” soap) did not qualify,<sup>34</sup> nor did geographic names (referring to the place a product was manufactured).<sup>35</sup> Gradually, these and other restrictions were lifted. By the end of the century, courts were willing to protect arbitrary names, symbols, and

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<sup>30</sup> See Thomas P. Hughers, *American Genesis: A Century of Invention and Technological Enthusiasm, 1870-1970* (1989).

<sup>31</sup> See Robert P. Merges, “Commercial Success and Patent Standards: Economic Perspectives on Innovation,” *California Law Review* 76 (1988): 803, 820ff (1988).

<sup>32</sup> See Paul M. Janicke, “Contemporary Issues in Patent Damages,” *American University Law Review* 42 (1993): 691.

<sup>33</sup> See Andrea M. Gauthier, “The Evolution of the Concept of Property in American Trademark Law” (unpublished paper 1990). As Gauthier observes, the first American case to invoke this principle, *Thomson v. Winchester*, did not use the word “trademark,” relying instead on the general tort of fraud. 36 Mass. (19 Pick.) 214 (Sup. Ct. 1837). Not until the 1840s did American judges (relying partly on earlier English cases) recognize a distinct cause of action for “trademark” infringement. See, e.g., *Taylor v. Carpenter*, 11 Paige Ch. 292 (N.Y. Ch. 1844).

<sup>34</sup> See *Fetridge v. Wells*, 4 Abb. Pr. 144 (N.Y. Super. Ct. 1857); Francis Upton, *A Treatise on the Law of Trademarks* (1860), 101.

<sup>35</sup> See, e.g., *Wolf v. Goulard*, 18 How. Pr. 64.

geographic names provided that they had acquired “secondary meaning” (i.e., if in the minds of consumers they had come to be associated with particular products).<sup>36</sup> The names of newspapers, hotels, and other businesses, previously protected only against fraud, were also swept into the general category of trademarks.<sup>37</sup>

In the twentieth century, the expansion of the set of protectable identifiers continued apace -- most notably through the doctrine of “trade dress.” The antecedents of this doctrine lie in a few late nineteenth-century decisions in which courts shielded, as adjuncts to trademarks, “[t]he package, case, or vessel in which the commodity is put, if prepared in a peculiar or novel manner.”<sup>38</sup> By the late twentieth century, they had gone much further, shielding against imitation such things as the uniforms of the cheerleaders for the Dallas Cowboys football team and the layout and appearance of greeting cards.<sup>39</sup>

The entitlements a manufacturer acquires through “ownership” of a trademark have likewise grown enormously. Initially, only the use by competitors of identical marks (or portions thereof) was actionable. Later, competitors were prevented from using marks sufficiently similar as to cause consumer confusion, a standard the courts construed ever more generously. Most recently, trademark owners have been able to halt the use of identical or similar marks by *non*competitors, on the ground that such usage would “tarnish,” “blur,” or “dilute” the mark.<sup>40</sup> The geographic range of a trademark has also expanded radically. Initially, trademark owners’ entitlements were limited to the territories in which they were actually selling or advertising their products.<sup>41</sup> The adoption of the Lanham Act in 1946 allowed users of marks to establish “nationwide constructive use” of their marks as of the date of their application for trademark registration.<sup>42</sup> The Lanham Act (and its subsequent amendments) enlarged owners’

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<sup>36</sup> See e.g., *Burnett v. Phalon*, 9 Bosw. [N.Y.] 192 (“Cocoaine” for hair tonic); *Messerole v. Tynberg*, Am. Trade-Mark Cas. 479 (“Bismark” for collars); *Colman v. Crump*, 70 N.Y. 573 (bull’s head for mustard); *Newman v. Alvord*, 51 N. Y. 189; *Lea v. Wolf*, 46 How. Pr. 157, 158.

<sup>37</sup> Gauthier, *supra* note 33, at 31-32.

<sup>38</sup> *Cook v. Starkweather*, 13 Abb. [N. S.] 392. See Gauthier, *supra* note 33, at 32-33.

<sup>39</sup> See *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (1979); *Hartford House, Ltd. v. Hallmark Cards, Inc.*, 846 F.2d 1268 (CA10 1988). Most of these modern rulings are founded on section 43(a) of the Lanham Act, of which more will be said below.

<sup>40</sup> See, e.g., *Mead Data Central v. Toyota Motor Sales, Inc.*, 875 F.2d 1026 (2d Cir. 1989); 15 U.S.C. sec.1125(c).

<sup>41</sup> This restriction was tempered, however, by two exceptions: a rival could not use an identical or similar mark in an area in which the original trademark owner had already established a reputation (e.g., through media coverage) and could not deliberately seek to take advantage of the original owner’s good will.

<sup>42</sup> 15 U.S.C. §1057(c).

rights in many other respects as well -- perhaps most importantly by establishing a generous set of remedies for trademark infringement, including treble damages and attorneys' fees.

During the same period, American courts through common-law adjudication have developed several doctrines ancillary to trademark law. The most important of these is a line of decisions initiated by the 1918 case of *International News Service v. Associated Press*, in which the Supreme Court enjoined the defendant news organization from appropriating information contained in the plaintiff's newspaper stories until such time as the "commercial value" of that information had "passed away." Courts in succeeding years differed sharply on the merits of the "misappropriation" doctrine announced in *INS*. Some -- most notably, the influential Court of Appeals for the Second Circuit -- have done what they could to evade or limit it.<sup>43</sup> Others, however, have enthusiastically extended it to a variety of circumstances arguably involving "piracy" of information. In the *Dow Jones* case, for example, the Supreme Court of Illinois held that the Chicago Board of Trade could not develop a stock index futures contract keyed to the "Dow Jones Industrial Average," without first obtaining the permission of the company that had originally created that famous market index.<sup>44</sup>

#### D.

The final intellectual-property growth area is perhaps less economically important than copyright, patent, or trademark law, but has considerable cultural significance. In 1954, the leading copyright scholar in the United States published an article advocating the recognition of a "right of publicity," which he defined as "the right of each person to control and profit from the publicity values which he has created or purchased."<sup>45</sup> Since that date, the large majority of American jurisdictions to have considered his proposal have adopted some version of it -- either through statute or through common-law adjudication.<sup>46</sup> In its modern form, this doctrine enables celebrities to prevent others

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<sup>43</sup> See, e.g., *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir.), cert. denied, 311 U.S. 712 (1940); *National Basketball Association v. Motorola, Inc.*, 1997 U.S. App. Lexis 1527 (1997).

<sup>44</sup> *Board of Trade of City of Chicago v. Dow Jones & Co.*, 92 Ill. 2d 109 (1983). For descriptions and analyses of other cases applying the "misappropriation" doctrine, see Douglas Baird, "Common Law Intellectual Property and the Legacy of *International News Service v. Associated Press*," *University of Chicago Law Review* 50 (1983), 411.

<sup>45</sup> Melville B. Nimmer, "The Right of Publicity," *Law and Contemporary Problems* 19 (1954), 203, 216.

<sup>46</sup> See Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights," *California Law Review* 81 (1993): 127.

from making use of the “depiction” or “endorsement” value of their identities. A few examples should suggest the scope and power of the principle. In 1983, Johnny Carson, whose long-running late-night comedy show had traditionally begun with the phrase, “Here’s Johnny,” successfully invoked the doctrine to prevent the sale of “Here’s Johnny Portable Toilet’s.”<sup>47</sup> Five years later, Bette Midler, a popular singer, recovered \$400,000 from the Ford Motor Company on the ground that Ford had deliberately used in one of its advertisements a singer whose voice closely resembled Midler’s.<sup>48</sup> And in 1992, the Samsung Electronics Company was held to violate the right of publicity when it included in one of its advertisements “a robot, dressed in a wig, gown, and jewelry” and posed in a “stance” that made it resemble Vanna White, a famous game-show hostess.<sup>49</sup> A few very recent decisions have sought to curtail the reach of the doctrine,<sup>50</sup> but for the most part it continues (despite much gnashing of teeth by academic commentators<sup>51</sup>) to be widely accepted.

## II.

What produced this dramatic expansion of intellectual-property rights? No single force was responsible. Rather, a host of factors -- some of them economic, some ideological, some political, and some peculiar to the sphere of the law -- converged to cause the growth.

### A.

Perhaps the most obvious contributing circumstance was the gradual transformation of the basis of the American economy. Until the late eighteenth century, the British North American colonies that became the United States depended heavily on agriculture; no more than ten percent of the workforce of any colony was engaged in

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<sup>47</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

<sup>48</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Midler v. Young & Rubicam, Inc.*, Nos. 90-55027, 90-55028, 1991 U.S. App. LEXIS 22641 (9th Cir. Sept. 20, 1991) (mem.), cert. denied, 112 S. Ct. 1513 (1992).

<sup>49</sup> *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

<sup>50</sup> See *Cardtoons, L.C. v. Major League Baseball Association*, 95 F.3d 959 (CA10 1996).

<sup>51</sup> See, e.g., Rosemary J. Coombe, “Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders,” *Cardozo Arts & Entertainment Law Journal* 10 (1992), 365; Madow, *supra* note 46.

manufacturing.<sup>52</sup> Over the course of the nineteenth century, the economy became ever more dependent upon industry.<sup>53</sup> During the twentieth century, industry has been gradually supplanted by information processing as the principal source of American jobs. The impact of this familiar but fundamental change was an increase in the perceived need for intellectual property rights. During the colonial period, few people stood to gain from copyright or patent protection; not surprisingly, few copyrights or patents were granted.<sup>54</sup> Since that time, the demand for intellectual-property protection has steadily increased.

A second, related long-term change was the transformation of the United States from a net consumer of intellectual property to a net producer. Until approximately the middle of the nineteenth century, more Americans had an interest in “pirating” copyrighted or patented materials produced by foreigners than had an interest in protecting copyrights or patents against “piracy” by foreigners. The shift in the “balance of trade” had a predictable effect on the stance taken by the United States in international affairs. In the early nineteenth century -- as Charles Dickens learned to his dismay -- the American government was deaf to the pleas of foreign authors that American publishers were reprinting their works without permission.<sup>55</sup> In the late twentieth century, by contrast, the United States has become the world’s most vigorous and effective champion of strengthened intellectual-property rights.<sup>56</sup> Thus, for example, the American delegation successfully took a very hard line in the negotiation of the TRIPS agreement, demanding that other nations acquiesce in their generous version of patent and copyright laws.<sup>57</sup> And software piracy in China has triggered a much sterner reaction from the United States than has widespread human-rights violations.<sup>58</sup>

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<sup>52</sup> See Edward C. Walterscheid, “To Promote The Progress Of Science And Useful Arts: The Background And Origin Of The Intellectual Property Clause Of The United States Constitution,” *Journal of Intellectual Property Law* 2 (1994): 1, 16.

<sup>53</sup> See W. Elliot Brownlee, *Dynamics of Ascent: A History of the American Economy* (1974), 189; Edward C. Kirkland, *Industry Comes of Age, 1860-1897* (1961).

<sup>54</sup> Walterscheid, *supra* note 52, p. 16; P.J. Federico, “State Patents,” *Journal of the Patent Office Society* 13 (1931): 166.

<sup>55</sup> See Sidney Moss, *Charles Dickens Quarrel with America* (1984); Benjamin Kaplan, *An Unhurried View of Copyright*.

<sup>56</sup> See James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996), 3.

<sup>57</sup> See Jerome H. Reichman, “Intellectual Property in International Trade and the GATT,” in *Exporting our Technology: International Protection and Transfers of Industrial Innovations* (1995), 3.

<sup>58</sup> See Keith Aoki, “(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship,” *Stanford Law Review* (1996) 1293, 1297-98.

A third economic development that had a particularly strong impact on trademark law was a dramatic increase during the early twentieth century of the importance of advertising. The watershed was the 1920s. To be sure, manufacturers and retailers had used advertising before then. But a combination of circumstances during the '20s led to a surge in advertising expenditures: the proliferation of national brands; manufacturers' experimentation with advertising as a way of stabilizing consumer demands and thus reducing investment risks; and increased reliance upon rapid product style changes (promoted by advertising) to stimulate consumers' thirst for their products. "By 1928, for example, the Ford Model T in basic black had become the Model A, available in four colors and in seventeen body styles, and to promote the style changes, in one exceptionally expansive week Ford spent about \$2 million on advertising."<sup>59</sup> By the end of the decade, approximately 3 percent of the national product (\$3.4 billion) was being devoted to advertising.<sup>60</sup> Much of that money was devoted to establishing and maintaining the reputation of trademarks and tradenames. For obvious reasons, manufacturers wished to prevent others from "free-riding" on their investments -- and sought strengthened trademark protection.

## B.

To this point, the expansion of intellectual-property rights would seem readily explainable in functional terms. The law, it appears, evolved so as to serve the changing "needs" of the American economy. Viewed from this angle, law seems to be superstructural -- its development driven by changes in the underlying mode of production and associated relations of production.<sup>61</sup> But this is not the end of the story. To account fully for the development of intellectual-property law, one must also take into account some cultural and ideological factors.

The first (if not most important of these) has been the durable and widespread popular commitment in the United States to a labor-desert theory of property. The notion (commonly associated by academics with John Locke) that a person deserves to own something that he or she has created through productive labor has long had considerable currency in America.<sup>62</sup> This was perhaps more true in the nineteenth century than today,

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<sup>59</sup> Brownlee, *supra* note 53, at 270.

<sup>60</sup> *Ibid.*

<sup>61</sup> Cf. Karl Marx, *The Critique of Political Economy* (1859).

<sup>62</sup> For the original version of this argument, see John Locke, *The Second Treatise of Government* in *Two Treatises of Government* 303-20 (P. Laslett ed. 1970). For an application of the argument to intellectual

but social psychologists tell us that, even now, most Americans (as well as most Western Europeans) subscribe to the closely related “equity theory” of distributive justice -- the notion that each person who contributes to a collective enterprise deserves a reward commensurate with the magnitude of his or her contribution to the enterprise.<sup>63</sup>

Since the late eighteenth century, such attitudes have contributed to the willingness of legislators and judges first to establish and then to expand intellectual property rights. Thus, for example, the committee that persuaded the Continental Congress to recommend to the states that they adopt copyright laws justified the proposal partly on the ground that “nothing is more properly a man's own than the fruit of his study.”<sup>64</sup> Similar statements by other lawmakers may be found throughout American history. For example, in 1837 Henry Clay argued that it is “incontestable” that “authors and inventors have, according to the practice among civilized nations, a property in their respective productions . . . ; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence.”<sup>65</sup> More recently, Justice O'Connor justified her narrow reading of the fair-use doctrine (which privileges certain sorts of nonpermissive uses of copyrighted materials) on similar grounds: “The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”<sup>66</sup>

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property, see Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown Law Journal* 77 (1988): 287, 296-314.

<sup>63</sup> For a sympathetic presentation of this theory, see Joel Feinberg, *Social Philosophy* 114-15 (1973). For documentation of the popularity of this theory among Americans and Western Europeans, see Adams & Freedman, “Equity Theory Revisited: Comments and Annotated Bibliography,” in 9 *Advances in Experimental Social Psychology* (L. Berkowitz & E. Walster eds. 1976), 43, 47-49; Morton Deutch, *Distributive Justice: A Social Psychological Perspective* (1985), 163-79, 202-03.

<sup>64</sup> Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (1967), 113. Similar sentiments seem to have influenced the various state legislatures in complying with this recommendation. For example, the first Massachusetts copyright statute was grounded in the following, composite justification: “Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the Efforts of learned and ingenious Persons in the various Arts and Sciences: As the principal Encouragement such Persons can have to make great and beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no Property more peculiarly a Man's own than that which is produced by the Labour of his Mind.” *Ibid.*, 114.

<sup>65</sup> Report of Henry Clay, submitted with S. 223, 24th Cong., 2d Sess. 148 (1837), reprinted in Tyerman, “The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer,” *UCLA Law Review* 18 (1971), 1100, 1100 n. 3.

<sup>66</sup> *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 546 (1985). See also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (arguing that the Copyright Act is grounded in two objectives:

A second, related ideological current has been the widespread popular suspicion in the United States of governmental involvement in the process of identifying and rewarding good works of art and socially valuable inventions. This attitude crystallized later than the labor-desert theory just discussed. Until the middle of the nineteenth century, Americans were remarkably receptive to the notion that governments could and should advance the public interest by identifying and encouraging socially valuable ventures of all sorts. This general disposition had many manifestations in early American legal and economic history -- including, for instance: selective grants of corporate charters to enterprises that, in the legislators' view, promised to redound to the public welfare; "Mill Acts," which empowered landowners who wished to install mills on streams running through their property to build dams that flooded their neighbor's property (provided they paid compensation); and generous delegations by state legislatures of the power of eminent domain to private railroads.<sup>67</sup> This same general mercantilist sentiment underlay several proposals early in American history that inventors be rewarded, not with patents, but with public funds. For example, in 1787, Tench Coxe proposed the following scheme to the Pennsylvania Society for the Encouragement of Manufactures and the Useful Arts:

Premiums for useful inventions and improvements, whether foreign or American, for the best experiments in any unknown matter, and for the largest quantity of any valuable raw material, must have an excellent effect. They would assist the efforts of industry, and hold out the noble incentive of honourable distinction to merit and genius. The state might with great convenience enable an enlightened society, established for the purpose, to offer liberal rewards in land for a number of objects of this nature. Our funds of that kind are considerable, and almost dormant.<sup>68</sup>

The first draft of what ultimately became the intellectual-property clause of the Constitution similarly incorporated a system of governmental awards and subsidies.<sup>69</sup> Edward Walterscheid argues convincingly that this approach was ultimately rejected, not

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"secur[ing] a fair return for an 'author's' creative labor" and "stimulat[ing] artistic creativity for the general public good").

<sup>67</sup> See William Fisher, "The Law of the Land" (Ph.D. diss. Harvard 1991).

<sup>68</sup> See Walterscheid, *supra* note 52, pp. 39-40.

<sup>69</sup> The first draft would have empowered Congress: "To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; and To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures." Walterscheid, *supra* note 52, at 44-45.

because of principled opposition to governmental involvement in the identification of worthy inventions, but because it was deemed too expensive.<sup>70</sup>

By the late nineteenth century, however, this receptivity to direct governmental supervision of inventive activity had been eroded by the complex of attitudes commonly known as classical liberalism -- including, most importantly, the notion that the public and private spheres (the “state” and “civil society”) were and should be distinct, combined with a general distrust of governmental tinkering with the market. In the altered ideological climate, intellectual-property rights were more palatable than governmental prizes as a way of stimulating creativity. To modern lawyers, both systems plainly involve governmental adjustments of the market; to that extent, both entail departures from an ideal of *laissez-faire*. But the intervention by government was (and is) less apparent when it consists of conferring property rights on classes of authors and inventors than when it consists of the identification and support of particular persons.

Classical liberalism has also contributed in many more detailed ways to the expansion of intellectual-property rights. The most important, probably, has been the strong commitment of both courts and legislators when administering the copyright laws to the principle of aesthetic relativism. Unwilling to differentiate between good and bad art (or art and advertising), we extend the umbrella of copyright protection to everything -- from brilliant bursts of creativity to (at least in theory) minor deviations from existing works caused by a “copyist's bad eyesight or defective musculature, or a shock caused by clap of thunder.”<sup>71</sup> Residues of classical liberalism also, incidentally, continue to shape many other, related aspects of American politics and law -- for instance, the distressingly low levels of public funding for the arts in the United States (compared, for instance, to most countries in Western Europe), and the apparently successful recent efforts of conservative Republican congressmen to stunt the National Endowment for the Arts.

A third ideological current that had a particularly powerful impact on American copyright law was the popularization and then persistence of a “romantic conception of authorship.” A great deal of recent scholarship has been devoted to the exploration of this theme.<sup>72</sup> In brief, the story goes as follows: Until the eighteenth century, neither

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<sup>70</sup> See *ibid.*

<sup>71</sup> The quotation is from Jerome Frank's famous opinion in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). The seminal judicial decision on this issue is *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>72</sup> See, e.g., Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* *Eighteenth-Century Studies* 17 (1984): 425; *idem*, “On the Author Effect:

popular nor elite culture in Europe or North American placed a high value on the individual artist or author. Tradition, skill, and connection with the past were more important than originality.<sup>73</sup> The convergence of several forces (Romanticism, the political theory of possessive individualism, the self-interest of English book publishers, the scheming of French monarchists, etc.) precipitated a widespread repudiation of this attitude toward art in favor of a celebration of individual artistic genius. Wordsworth captured the new ideal:

Genius is the introduction of a new element into the intellectual universe: or, if that be not allowed, it is the application of powers to objects on which they had not before been exercised, or the employment of them in such a manner as to produce effects hitherto unknown.<sup>74</sup>

Copyright law in Europe and the United States grew out of -- and to some extent helped popularize -- this romantic vision. Combined with the general labor-desert theory (discussed above), it helped support the notion that an artist deserves to own his creations. And, as Peter Jaszi has shown, it helped shape myriad specific doctrines in copyright law -- usually (though not invariably) in a fashion that expanded the entitlements of copyright owners. A few examples: the elaboration of a generous conception of a copyrighted “work” and a concomitant expansion of the rights of copyright owners; the extension of copyright protection to photographs; and the curious way in which the “work-for-hire” doctrine has evolved in the United States.<sup>75</sup>

What is most striking -- and to contemporary scholars, most distressing -- about this ideological current is its continued strength. The image of the lone author working in her garret is almost wholly obsolete. Today, most writing (indeed, most creativity of all sorts) is collaborative. Equally importantly, the extent to which every creator depends upon and incorporates into her work the creations of her predecessors is becoming ever

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Recovering Collectivity,” *Cardozo Arts & Entertainment Law Journal* 10 (1992): 227; Peter Jaszi, “On the Author Effect: Contemporary Copyright and Collective Creativity,” *Cardozo Arts & Entertainment Law Journal* 10 (1992): 279; Boyle, *supra* note 56, chpt. 6; Bernard Edelman, *Ownership of the Image* (1979); Jane M. Gaines, *Contested Culture: The Image, the Voice and the Law* (1991); Mark Rose, *Authors and Owners: The Invention of Copyright* (1993); Susan Stewart, *Crimes of Writing: Problems in the Containment of Representation* (1991).

<sup>73</sup> Similar ideas have endured far longer in China, See William P. Alford, “Don’t Stop Thinking About . . . Yesterday: Why There was No indigenous Counterpart to Intellectual Property Law in Imperial China,” *Journal of Chinese Law* 7 (1993): 3.

<sup>74</sup> William Wordsworth, “Essay, Supplementary to the Preface,” quoted in Woodmansee, “Author Effect,” *supra* note 72, p. 280.

<sup>75</sup> See Jaszi, *supra* note 6, 472ff.

more obvious. Yet American lawmakers cling stubbornly to the romantic vision.<sup>76</sup> There are few signs that it is losing its grip on the law. Indeed, the recent introduction into American copyright law of (a variant of) the Continental theory of moral rights suggests that its power may be waxing, not waning.<sup>77</sup>

Less well studied than the romantic image of the author -- but equally important to the overall shape of American intellectual property law -- is an analogous heroic image of the inventor. As Keith Aoki observes, this ideal has an even older pedigree than the idea of original authorship. Grounded in “the Renaissance exaltation of the originary human subject as inventive genius, as embodied in Leonardo de Vinci’s work,” amplified by the “Enlightenment elevation of scientific geniuses such as Descartes, Leibnitz, and Newton,” the glowing image of the inventor was already well established in Western culture when American patent law began to take shape.<sup>78</sup> In the United States, the attractiveness and importance of this image was reinforced by at least three cultural forces: the frontier ethic, which envisions man as pitted against nature, harnessing it through ingenuity as much as through force;<sup>79</sup> the associated “pastoral ideal,” celebrating the transformation of the wilderness into the garden;<sup>80</sup> and the premium placed on social mobility, from which standpoint inventiveness is seen as an important way in which a talented youth can achieve wealth and fame.<sup>81</sup> The net result is the reverence with which Americans have treated -- and continue to treat -- our major inventors: Thomas Edison, Alexander Graham Bell, the Wright Brothers, Bill Gates, etc.

The impact of this imagery on patent law has been enormous. Not always has it operated to increase the availability of patents. For example, the establishment and sometimes severe application of the requirement that, to be patentable, an invention must be “nonobvious” to a person having ordinary skill in the pertinent art<sup>82</sup> is plainly

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<sup>76</sup> See, e.g., Jaszi, “On the Author Effect,” supra note 72, 300-01, 306-11 (showing the influence of this ideal on the opinions in *Feist* and *Rogers v. Koon*).

<sup>77</sup> See Jaszi, supra note 6, 496-500.

<sup>78</sup> Keith Aoki, “Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain,” *Columbia VLA Journal of the Law and Arts* 18 (1994): 191, 215-16. Indeed, the better-known romantic ideal of authorship, described above, arose in substantial part in opposition to this rationalist, Enlightenment ideal. *Ibid.*

<sup>79</sup> See, e.g., William Cronon et al., *Under an Open Sky: Rethinking America's Western Past* (1992).

<sup>80</sup> See Leo Marx, *The Machine in the Garden: Technology and the Pastoral Ideal in America* (1964).

<sup>81</sup> See, e.g., Abraham Lincoln, Address at the Wisconsin State Fair (1859), in *The Political Thought of Abraham Lincoln* (Richard Current ed. 1967), 125-38.

<sup>82</sup> The history of this requirement is sketched in the text accompanying note 31, supra.

traceable to the heroic image of the inventor. What we wish to reward are “flashes of creative genius,”<sup>83</sup> not mere works of craftsmanship. The net effect of this orientation has been to constrict rather than to expand the zone of creations covered by patents.<sup>84</sup> But, in general, the high regard in which inventors have been held in the United States has worked to support and expand the patent system.

Like the romantic ideal of authorship, the image of the inventor has proved distressingly durable. For example, Keith Aoki observes that the debate over the patenting of DNA fragments from the Human Genome Project was permeated with heroic imagery (researchers analogized to Lewis & Clark; the project as a whole likened to the search for the Holy Grail, etc.)<sup>85</sup> The rhetoric persists (and continues to shape patent policy) despite the ubiquity of collaborative research and development (of which the Human Genome Project is a prime example) -- to which the image of the lone genius seems singularly inapt.

### C.

The two forces just reviewed -- economic needs and ideological pressures -- have been reinforced in the United States by a recurring political dynamic. The advocates of increased intellectual property protection have consisted, for the most part, of creators, their surrogates (publishers, movie studios, etc.), businesses interested in protecting their trademarks, patent portfolios, or trade secrets, and celebrities eager to capitalize on their reputations. Most have had strong financial interests in statutory reform that would protect them against nonpermissive use of their “property.” The interests of persons who would benefit from reduced intellectual-property protection, by contrast, have tended to be more diluted. The largest and most important such group consists of consumers -- each of whom typically has had only a small stake in the content of the pertinent laws. The result is that lobbying efforts have repeatedly been biased in favor of the expansion of intellectual property. Enthusiasts have made themselves heard, while skeptics have been largely silent.

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<sup>83</sup> At one time, this phrase was the touchstone for the nonobviousness requirement. See *Cuno Corp. v. Automatic Devices Corp.*, 314 U.S. 84 (1941). That approach has since been displaced by the framework announced in *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

<sup>84</sup> See Monroe Price & Malla Pollock, “The Author in Copyright: Notes for the Literary Critic,” *Cardozo Arts & Entertainment Law Journal* 10 (1992), 703, 708.

<sup>85</sup> Aoki, *supra* note 78, pp. 213-14.

There are many examples of this dynamic in the course of American history. A quaint but perhaps important early instance involves the efforts of John Fitch, one of the persons who claimed to have invented the steamboat, to obtain patent protection for his invention. During the week of August 20, 1787, Fitch invited at least three (and perhaps many more<sup>86</sup>) members of the Constitutional Convention to see a demonstration (and perhaps to ride upon<sup>87</sup>) his invention. What exactly was discussed during this demonstration we will never know, but the chances are good that he pressed on the delegates the need for firmer, national patent laws. Fitch's timing was either shrewd or fortuitous. On August 18, the first draft of what ultimately became the intellectual-property clause had first been presented to the delegates.<sup>88</sup> By September 5, they had settled on the language that was ultimately incorporated into the Constitution.<sup>89</sup>

Many examples of exertion of the same kind of pressure can be found in the legislative history of the 1976 general reform of the Copyright Act. As Jessica Litman has shown, the Congressional committees and subcommittees charged with overseeing that reform typically refused to draft statutory language themselves. Instead, they forced the representatives of organized interest groups that had stakes in the content of the statute to negotiate compromises. Many of the crucial provisions in the act incorporate verbatim the fruits of those deals. Thus, for example, “[t]he wording of the fair use provision, and the language of the committee reports accompanying it, emerged from a hard fought compromise involving protracted, down-to-the-wire negotiations among representatives of authors, composers, publishers, music publishers, and educational institutions.”<sup>90</sup> Similar compromises provided the content for “the statute's treatment of cable television, library photocopying, phonorecord publishing, jukebox operation, and the manufacturing clause.”<sup>91</sup> This is not to suggest that the parties to these negotiations were always in accord. On the contrary, the “affected interests” often disagreed sharply, and many of the compromises were achieved only after protracted discussions and much cajolery by the pertinent Congressional committees.<sup>92</sup> The point, rather, is that the

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<sup>86</sup> In his journal, Fitch suggests that nearly all of the delegates attended the demonstration.

<sup>87</sup> Accounts differ concerning how many, if any, of the delegates actually rode on the boat.

<sup>88</sup> The text of that first draft is set forth in note 69, *supra*.

<sup>89</sup> The incident and its implications are carefully discussed in Walterscheid, *supra* note 52, pp. 41-43.

<sup>90</sup> Jessica D. Litman, “Copyright, Compromise, And Legislative History,” *Cornell L. Rev.* 72 (1987): 857, 869.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, p. 871.

negotiations privileged groups with interests sufficiently strong and concentrated to have formal representatives. Very rarely was the public -- the consumers of intellectual products -- represented in any way. And Congress itself -- whose job, one might think, is precisely to protect the public's interest -- failed to do so.

The examples could be multiplied,<sup>93</sup> but the general proposition is clear enough: The sharply different densities of the "interests" on opposite sides of intellectual-property issues, combined with the important role played by organized interest groups in American politics, means that, more often than not, the proponents of expanded entitlements will win out.

#### D.

The fourth and final force that has contributed to the growth of intellectual-property rights consists of a gradual shift in the terminology used by lawyers to describe and discuss those rights -- in a word, the "propertization" of the field. In the eighteenth century, lawyers and politicians were more likely to refer to patents and copyrights as "monopolies" than they were to refer to them as forms of "property." The popularity of the former term derived partly from the historical origins of patent law: In England, patents in the modern sense originated in section 6 of the 1623 Statute on Monopolies, which both described patents as "monopolies" and exempted them from the general ban on royal grants of such rights.<sup>94</sup> But the currency of the term also derived partly from -- and helped to reinforce -- a substantive position: like other "monopolies," patents and copyrights were dangerous devices that should be deployed only when absolutely necessary to advance some clear public interest. Thomas Jefferson was the most prominent adherent of this view, but many others shared his attitude to varying degrees.<sup>95</sup>

Gradually over the course of American history, this discourse was supplanted by one centered on the notion that rights to control the use and dissemination of information are forms of "property." This transition can be seen most clearly in the context of trademark law. Until the middle of the nineteenth century, legal protection of trademarks

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<sup>93</sup> Another quaint example: Walterscheid suggests that lobbying by authors -- including the young Noah Webster -- may have figured importantly in the recommendation by the Continental Congress that the states adopt copyright laws. See Walterscheid, *supra* note 52, 21.

Many examples similar to those catalogued by Litman vis-a-vis the 1976 Copyright Act could be supplied vis-a-vis the shaping of the "White Paper." See note 114, *infra*.

<sup>94</sup> See Walterscheid, *supra* note 52, 12.

<sup>95</sup> See Edward C. Walterscheid, "Patents and The Jeffersonian Mythology," 29 J. Marshall L. Rev. 269 (1995); Walterscheid, *supra* note 52, 54.

was justified on the basis of the need to protect innocent sellers against “fraud.”<sup>96</sup> In other words, the law in this field was understood to be a branch of (what was gradually coming to be called) tort law,<sup>97</sup> not property law. In the 1849 case of *Amoskeag Manufacturing Company v. Spear*, a sharply different language appears: “the doctrine of an exclusive property in trade-marks has prevailed from the time of the year books.”<sup>98</sup> This new conception did not immediately sweep the field; for many years, tort and property concepts coexisted uneasily in the many subdivisions of the law of trademarks and unfair competition. But slowly, property discourse took precedence.<sup>99</sup>

In the early twentieth century, an influential group of commentators lent their aid to this trend. Led by Frank Schechter, these scholars argued that the true basis of trademark protection was a property interest in the mark itself (or in the goodwill of which the mark was a vehicle), and that the law should recognize and enforce that property right more fully than it already did.<sup>100</sup> Oliver Wendell Holmes and a few like-minded scholars disagreed, but they were clearly in the minority.<sup>101</sup>

Framing arguments in terms of property rights became increasingly common in other doctrinal fields as well. For example, in the 1921 case of *Fisher v. Star*, the New York Court of Appeals ruled that the comic-strip characters, Mutt and Jeff, could not be used by the defendant newspaper without the permission of the creator of the characters.<sup>102</sup> The court founded its judgment on the general proposition: “Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value becomes a property right that is entitled to protection as such.”<sup>103</sup> More recently a federal

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<sup>96</sup> See Gauthier, *supra* note 33, 9-15.

<sup>97</sup> On the gradual emergence during the early nineteenth century of the general category of tort law, see G. Edward White, *Tort Law in America* (1980), chap. 1.

<sup>98</sup> 4 N.Y. (2 Sandf.) 599, 604 (Super Ct. 1849).

<sup>99</sup> See Gauthier, *supra* note 33.

<sup>100</sup> See Frank Schechter, *The Historical Foundations of the Law Relating to Trademarks* (1925); H. Nims, *The Law of Unfair Competition and Trademarks* (1909); E.S. Rogers, *Good Will, Trade-Marks and Unfair Trading* (1914); W. Derenberg, *Trade-Mark Protection and Unfair Trading* (1936); Handler & Pickett, “Trade-marks and Trade Names -- An Analysis and Synthesis,” *Columbia Law Review* 30 (1930): 168.

<sup>101</sup> See 151 Mass. 190, 194, 23 N.E. 1068 (1890); *Cohen v. Nagle*, 190 Mass. 4, 9, 76 N.E.2d 276 (1906); *DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917). As Gauthier observes, Holmes’ rhetoric veers somewhat toward the dominant “property” discourse in *Beech-Nut Packing Co. v. Lorillard*, 273 U.S. 629 (1927), apparently because he was influenced by a reading of Schechter’s dissertation.

<sup>102</sup> *Fisher v. Star*, 231 N.Y. 414 (Ct. App. 1921). At the time, copyright protection had not yet been extended to fictional characters, so the court relied for its ruling on the law of misappropriation.

<sup>103</sup> *Ibid.*, 428

district court in New York held that the digital sampling by a rap artist of a small portion of the classic song, "Alone Again, Naturally," constituted copyright infringement. The court opened its opinion justifying this outcome with the statement: "'Thou shalt not steal' has been an admonition followed since the dawn of civilization."<sup>104</sup>

Another, more general manifestation of the same trend has been the growing power of the phrase "intellectual property." Before the Second World War, use of the phrase as shorthand for copyrights, patents, trademarks, and related entitlements was rare. Since that time, it has become steadily more common.<sup>105</sup> Today, it is the standard way for lawyers and law teachers to refer to the field.

Why does the popularity of the term matter? The answer -- as the Legal Realists recognized long ago -- is that legal discourse has power. Specifically, the use of the term "property" to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally "like" interests in land or tangible personal property -- and should be protected with the same generous panoply of remedies. Felix Cohen (the most insightful of the Realists) put the point forcefully:

There was once a theory that the law of trade marks and tradenames was an attempt to protect the consumer against the "passing off" of inferior goods under misleading labels. Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices. In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field. Conceivably this extension might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization. But no such line of argument has ever been put forward by courts or scholars advocating increased legal protection of trade names and similar devices. . . . Courts and scholars, therefore, have taken refuge in a vicious circle to which no obviously extra-legal facts can gain admittance. The current legal arguments runs: One who by the ingenuity of his advertising or the

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<sup>104</sup> *Grand Upright Music Ltd. v. Warner Brothers*, 780 F.Supp. 182 (S.D.N.Y. 1991).

<sup>105</sup> A search of the Lexis system indicates that the phrase, "intellectual property," appears only once in the reports of the federal courts before 1900 and does not appear at all between 1900 and 1930. Thereafter, its usage by federal courts steadily increases. In the 1930s, it appears in two opinions; in the 1940s, 6; in the 1950s, 10; in the 1960s, 9; in the 1970s, 41; in the 1980s, 287; in the 1990s (as of this writing), 829. To be sure, many circumstances undoubtedly contributed to this extraordinary increase, including the growing caseload of the federal courts and the verbosity of modern law clerks. But much of the increase must be attributed to the growing currency of the phrase in legal discourse in general.

quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value, a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. . . . The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. . . . The circularity of legal reasoning in the whole field of unfair competition is veiled by the "thingification" of property.<sup>106</sup>

Regrettably, the pleas by Cohen and a few others that judges jettison the concept of "property" and frankly confront the public policy implications of protecting certain kinds of information fell largely on deaf ears. The "propertization" of the field continued -- and is now well-nigh complete.

### III.

The various circumstances and forces that have contributed to the proliferation of intellectual-property rights have reinforced one another. Here are a few examples of this dynamic:

The emergence during the early twentieth century of the American film industry soon gave rise to a shrewd and well-funded trade organization, the Motion Picture Association of America.<sup>107</sup> In amicus briefs in important cases, in lobbying before Congress, and in its statements to the public, the MPAA has consistently advocated strong protection of intellectual-property rights.<sup>108</sup> In framing its presentations, the association has capitalized on lawmakers' receptivity to the labor-desert theory as well as their awareness of the position of the United States as the world's largest producer of films.<sup>109</sup> This strategy has been highly effective; with remarkable frequency, the positions the association has supported have prevailed.<sup>110</sup> Power begets power, of

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<sup>106</sup> Felix Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809, 814-817.

<sup>107</sup> See John W. Cones, *Film, Finance and Distribution* (Los Angeles: Silman-James Press, 1992), 311.

<sup>108</sup> See, for example, James Lardner, "Annals of the Law: the Betamax Case" (part 2), *The New Yorker* (April 13 1987), vol. 63, p. 60; Randy Sukow, "MPAA proposes interim copyright fees," *Broadcasting* (Nov 18 1991), vol. 121, no. 21, p. 4.

<sup>109</sup> See, for example, Ian Austen, "Arguments with Muscle," *Maclean's* (March 28, 1988) Vol. 101, No. 14, p. 24.

<sup>110</sup> See, for example, Dennis Wharton, "MPAA's Rebel With Cause Fights for Copyright Coin," *Variety* (August 3, 1992), Vol. 348, No. 2, p. 18.

course. These doctrinal reforms have further strengthened the industry, lending the MPAA even more authority.

The recently adopted federal anti-dilution statute, which shields “famous” trademarks from activities that “tarnish,” “disparage,” or “blur” them, grew out of a similar intersection of forces. Manufacturers of products sold under famous labels complained to Congress that the protection they enjoyed from state anti-dilution statutes was uneven; too often, they insisted, manufacturers of unrelated products were able to “freeride” on the reputations of famous brands by using confusingly similar marks.<sup>111</sup> It should be unlawful, they insisted, to manufacture “DUPONT shoes, BUICK aspirin, [or] KODAK pianos.”<sup>112</sup> Why? If consumers are not misled concerning the source of the products, why exactly is it important to prohibit such activities? The manufacturers offered two reasons: (1) they had invested time and effort in cultivating these famous marks and thus deserved legal protection; and (2) other countries already had such prohibitions and it was important that the United States not lag behind any nation in the strength of its intellectual-property protections. In the absence of any organized resistance from consumers, these arguments prevailed.<sup>113</sup> In short, the combination of a strong interest group, largely unopposed in the lobbying process, able to draw effectively upon the labor-desert theory and the presumptive legitimacy of its members’ “property” rights, secured yet another extension of the law.

The ubiquity of such synergy means that developing a strategy for halting the trend described in this article will be difficult. Not impossible. The fate of the “White Paper” shows that it is possible at least to slow the growth of intellectual property rights. Released in 1995 by President Clinton’s Information Infrastructure Task Force, the White Paper recommended a variety of adjustments of copyright law, all designed to increase the ability of copyright owners to control uses of their works on the internet.<sup>114</sup> Those

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<sup>111</sup> See, for example, the statement of James K. Baughman, Assistant General Counsel of Campbell Soup Co., in the subcommittee hearings on the bill. Madrid Protocol Implementation Act and Federal Trademark Dilution Act of 1995: Hearings on H.R. 1270 and H.R. 1295 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 124 (1995), p. 89.

<sup>112</sup> These examples are taken from the House Report. See H.R. Rep. No. 104-374 (1995).

<sup>113</sup> So, for example, the House Report justifies the legislation on the following ground: “The concept of dilution recognizes the substantial investment the owner has made in the mark and the commercial value and aura of the mark itself, protecting both from those who would appropriate the mark for their own gain.” *Ibid.*

<sup>114</sup> See *Information Infrastructure Task Force, The Report Of The Working Group On Intellectual Property Rights: Intellectual Property And The National Information Infrastructure* (1995). The origins of this report are described in “About The President’s Information Infrastructure Task Force,”

recommendations were quickly embodied in proposed legislation, which, in the absence of organized opposition, initially seemed assured of passage. To the surprise of many observers, the legislative initiative failed. Crucial to that failure was a publicity and lobbying campaign waged by a miscellaneous group of scholars, educators, and public-interest activists.<sup>115</sup> In the face of this outpouring of criticism (during an election year), the Congressional committees decided not to proceed. The victory may have been short-lived; Bruce Lehman, the principal architect and proponent of the White Paper, will likely succeed in securing most (albeit not all) of his reforms through amendments to the Berne Convention. But the tide was turned at least briefly.

Important lessons can be gleaned from this episode. But the opponents of the growth of intellectual property should not be overly optimistic. A mutually reinforcing combination of economic, ideological, political, and discursive conditions makes further expansion of these entitlements likely.

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<http://www.iitf.nist.gov/about.html>. The recommendations of the White Paper are contrasted with the policies adopted by other nations in Ron Reiling, "Intellectual Property Regimes for the Information Age: Policies of the United States, the European Union and the World Intellectual Property Organization," *Boston University Journal of Science and Technology Law* 3 (1997): 9.

<sup>115</sup> See, e.g., Pamela Samuelson, "The Copyright Grab," *Wired* (1995); idem, "Legally Speaking: The NII Intellectual Property Report"; John Perry Barlow, "Property And Speech: Who Owns What You Say In Cyberspace?," *Communications of the ACM* (December 1995), Vol. 38, No. 12, p. 19; "Industry Warns Of Flaws In NII Bill," *Information & Interactive Services Report* (December 1, 1995), No. 24, Vol. 16; "Excerpts Of Letter To Congress By Digital Future Coalition, Representing Librarians, Computer Firms, And Public Interest Groups," *Information Law Alert* (December 1, 1995), No. 19, Vol. 3; J. David Loundy, "Bill To Amend Copyright Act Needs Work," *Chicago Daily Law Bulletin* (October 12, 1995), p. 6; Jonathan Band, "Liability: The Web's big worry," *San Francisco Examiner* (October 8, 1995), p. B-5; "Prepared Statement Of Professor Peter Jaszi, Washington College of Law, American University, Before The Senate Judiciary Committee Re: S. 483, The Copyright Term Extension Act Of 1995," *Federal News Service* (September 20, 1995); James Boyle, "Sold Out," *New York Times*, March 31, 1996. idem., "Intellectual Property Policy Online: A Young Person's Guide," *Harvard Journal of Law & Technology* 10 (1996): 47.