CHAPTER 7

Intellectual Property Ethics

Kathrine Andrews Henderson

This chapter examines intellectual property rights as a matter of law and from the perspective of how an owner can assert his or her rights under these various forms of protection. Although it is critical not to conflate law and ethics, without some background about the relevant law, we cannot begin to determine if the law is ethical, fair, and justified in and of itself, and further, if the application of the law is also fair and just. This is a task that truly cannot be contained in these few pages!

ETHICAL CONSIDERATIONS FOR INTELLECTUAL PROPERTY

It is important to note that professionals are expected to be law-abiding citizens even when we recognize that merely abiding by the law is not sufficient to ensure one is behaving ethically. Professional codes of conduct call for us to respect the rule of law, even as one advocates for change. For example, the American Library Association’s (ALA) Code of Ethics states that “We respect intellectual property rights and advocate balance between the interests of information users and rights holders.” Copyright, as noted by ALA, “is the aspect of intellectual property most pertinent for libraries. Further, copyright, as established by the U.S. Constitution and the Copyright Act, is a system of rights granted by the law combined with limitations on those rights.” (ALA 2008).

All forms of intellectual property can be described as a system of rights that are constrained in various ways. These laws and systems are designed to protect creators and, at least indirectly, the public and businesses from certain harms in the marketplace, financial loss, damage to reputation, fraudulent goods, and so forth. Patents, trademarks, and trade secrets differ in that these systems focus on protecting the rights of the creator or owner and do not include countervailing rights for information users such as the right of first sale and exceptions like the Fair Use Doctrine or the TEACH Act, as found in copyright law. On the face of it, it seems reasonable to say that patent protections encourage invention, design, and scientific discovery; trademarks ensure that the public is purchasing goods and services from a specific supplier in which they have placed its trust with regard to quality; and that trade secret protection helps to ensure companies remain viable, thus protecting the livelihoods of their owners and employees.

Justifications for such systems of intellectual property echo the natural rights case for individual property ownership over what would otherwise be held in common. John Locke, for example, argued that man could be justified in accumulation of land and other
goods provided he took no more than he could use before it spoiled, and what remained was both “good” and “enough for others,” and if such property was accumulated through his own labor (Stanford Encyclopedia of Philosophy 2016). This justification for owning physical objects, especially land, is carried over to objects of the mind. Inventions and designs, expressions of ideas through works of literature, and works of art naturally belong to their creator. The difficulty in this application of the “sweat of the brow” justification arises because unlike physical property, when ideas, inventions, and creative works are revealed by the creator, they leave the creator, as Abraham Lincoln noted relative to patent, “with no special advantage over his own invention” (Lincoln 1859). “From the beginning, the United States recognized the critical need to protect authors and inventors from free riders—[who] have . . . taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings (8 Anne, c. 19, 1710) or those who have . . . without the consent of the patentee or patentees . . . devised, made, constructed, used, employed or vended such contraptions or conceived these breakthroughs through their own ingenuity” (Copyright Act, 1 Statutes At Large, 124, 1790).

The natural right of private property is one way of examining the ethics of the laws protecting the various types of intellectual property. However, another approach might also be applied—“justice as fairness.” Justice as fairness is a political theory of society, promulgated by John Rawls, in which each citizen has the same basic rights and works cooperatively within an egalitarian economic system. Rawls argues that reasonable citizens, so long as they have the same basic rights, will be willing to go along with fair terms of cooperation even if it is not in their own best interest if others are also willing to do so. That is, the citizen has a sense of justice. Moreover, Rawls also argues that reasonable citizens have the capacity to understand what is valuable to others in society—a sense of the “good.” These two complementary moral principles taken together allow for the development of public goods and these public goods are desired by all (Stanford Encyclopedia of Philosophy 2017).

Intellectual property protection schemes, copyright and patent in particular, have been enacted because they serve a significant social purpose—to promulgate and advance knowledge to enlighten and inform the public. By and large, reasonable citizens go along with the terms of cooperation—seeking permission, entering into licensing agreements, and so forth. In the case of copyright, this involves making fair use of works and taking advantage of exceptions to the exclusive rights delineated in the Copyright Act. However, as with all human enterprises, there are points of contention.

Justice as fairness is particularly useful in ethical considerations surrounding copyright especially when we analyze for example, the Digital Millennium Copyright Act of 1998. Many argued that the extension of the copyright term was so long that it was essentially perpetual rather than limited as called for within the Constitution. Moreover, technologies that have given rise to the sharing culture and social media make enforcement of protections more complex.

**INTELLECTUAL PROPERTY**

In the simplest terms, governments protect intellectual property—that is, the expressions of ideas, innovations, and designs dreamt up by authors, artists, writers, musicians, inventors, scientists, and scholars—from others who would sell or otherwise use these works without the permission of or compensation for the creator for his or her labor.
In actuality, intellectual property is an amazingly large and complex topic that impacts people globally. For many, these encounters take place every day, sometimes several times a day—including right now as you read this sentence in a copyrighted work. However, intellectual property is not something most people think about in their daily lives even though they encounter all sorts of things, every single day, that are governed by intellectual property laws. Consider for a moment a tall building with which one is familiar. Think back to before it was built, when the architect was designing the facade and other architectural elements. Think about the advanced tools and machinery, with their logos or brands prominently displayed, used by the workers as they constructed the building according to the blueprints. Then later, the “coming soon” posters, designed by graphic artists that advertised retail shops and restaurants, followed by tenants moving into the offices and apartments on the higher floors, the art and photography hanging on the walls, the sculpture in the lobby, the books on shelves, the music wafting out of speakers, the computers and smart devices with programs and applications—even the medicines in the bathroom cabinets are all in one way or another protected by different types of intellectual property schemes.

There are several ways intellectual property is protected—copyright, patent, trademarks and trade secrets, and related rights such as the right of publicity and the right of privacy. Each of these has its own characteristics, which help to ensure rights holders can monetize their creative works and inventions by protecting these works and inventions from infringement and/or other market harms.

The next few pages detail the history and the laws and legal characteristics of several forms of intellectual property. Although this chapter focuses primarily on intellectual property in the United States, one would be remiss to not recognize that intellectual property ethics and law is a global issue.

**INTELLECTUAL PROPERTY HISTORY AND LAW**

Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.

—Thomas Jefferson (1813)

With the notable exception of trade secrets, intellectual property rights have been established in law for hundreds of years, not only in the United States but in other parts of the world as well. Early examples of intellectual property laws include Britain’s Statute of Anne, enacted in 1710, which is the basis of United States copyright law. Another important example is The Berne Convention of 1886, an international agreement under which contracting countries must provide a minimum standard of protection for each work and grant certain rights to authors relative to his or her own works. In addition, Berne also provides for “moral rights,” that is, “the right to claim authorship of the work and the right to object to
any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author’s honor or reputation” (World Intellectual Property Organization 2017).

Both the United States Copyright Act and Patent Act were established through the Patent and Copyright Clause of the United States Constitution, which empowers Congress to create laws, “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” (U.S. Const. Art. 1. sec. 8. cl. 8).

The US Copyright Act of 1790

The US Copyright Act traces back to what is believed to be the first copyright law, Britain’s Statute of Anne, “An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned” (8 Anne, c. 19, 1710). So too goes the Copyright Act of 1790, “An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned.” (Copyright Act, 1 Statutes At Large, 124, 1790).

Section I of the Statute of Anne specifically describes the situation that the act would remedy, “Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books . . . ” (8 Anne, c. 19) The Copyright Act also notes the detrimental effects of other persons copying said works and provides exclusive copyrights and sets forth the idea of infringement, “That any person or persons who shall print or publish and manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury . . . ” (Copyright Act, 1 Statutes At Large, 124, 1790).

Although it has been amended many times, significantly by the Copyright Act of 1976 (below) and significantly and controversially by the Digital Millennium Copyright Act, which extended “limited times” to what many considered perpetual; copyright’s original purpose endures.

The Copyright Act of 1976

Copyright law was amended, “in its entirety” via Public Law 94-553, which is more commonly cited as the Copyright Act of 1976 (17 USC §§ 101 et seq.). This act is the modern legal framework for copyright protection in the United States. It is often the focal point of ethical concerns especially when one considers copyright’s essential purpose is to promulgate science and the useful arts and its protections were meant to be limited. Some specific sections that are of substance and concern to information professionals include the following sections.
17 USC § 102. This section identifies seven categories of authorship. These categories are (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings (17 USC § 102). An eighth category was added December 1, 1990, for architectural works (United States Copyright Office Circular 41).

17 USC § 106. This section describes the five exclusive rights found in copyrighted works. Unless one’s use falls under an exception such as fair use (found in 17 USC § 107), copyright owners are solely able “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.” (17 USC § 106, 1976).

17 USC § 107. This section provides for a key exception to the exclusive rights of the copyright holder, fair use. The fair use exceptions allow others to make non-infringing uses of copyrighted works “including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” In addition, the section includes the four factors that are considered in determining if a use is, indeed, fair: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” (17 USC § 107, 1976).

Under current law, the term of copyright for works created after 1978 are as follows: For a single author, the author’s life plus an additional seventy years. For a “joint work prepared by two or more authors who did not work for hire,” the term lasts for seventy years after the last surviving author’s death. For works made for hire and anonymous and pseudonymous works, the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter (United States Copyright Office Circular 15A).

Other important changes contained in the 1976 revision include the removal of registration requirements and the transfer of copyright ownership.

The Patent Acts of 1790 and 1793

The patent system added the fuel of interest to the fire of genius.

—Abraham Lincoln

Patent is another form of legal protection for intellectual property emerging from the same constitutional clause that empowered Congress to establish copyright. The Patent Act of 1790 is, “An act to promote the progress of useful Arts.” (1 Stat. 109–112, 1790). This early public law authorized the US Attorney General and the Secretary of State to grant patents,
if such requests met the requirements described therein; established exclusive rights to the patent holder and legal process to remedy infringement of these exclusive rights. The Patent Act of 1790, while not expressly recognizing that more than one inventor might apply for a patent, did consider the possibility that an applicant might falsely claim to be an inventor, “If it shall appear that the patentee was not the first and true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent or patents.” (1 Stat. 109–112, 1790). However, The Patent Act of 1793 clarified and settled the issue that there is no legal requirement for patents to be granted to the first to invent. Section 9 of the act states, “That in case of interfering applications, the same shall be submitted to the arbitration of three persons, one of whom shall be chosen by each of the applicants, and the third person shall be appointed by the Secretary of State; and the decision or award of such arbitrators, delivered to the Secretary of State, in writing and subscribed by them, or any two of them, shall be final, as far as respects the granting of the patent . . .” (1 Stat. 318, 1793).

In the United States, “The right conferred by the patent grant is, in the language of the statute and of the grant itself, ‘the right to exclude others from making, using, offering for sale, or selling’ the invention in the United States or ‘importing’ the invention into the United States.” (United States Patent and Trademark Office 2015).

Many other countries grant patent protection for inventors, but may use different terminology to express the same type of protection. There are a number of international agreements relating to patents and inventors can patent their inventions in more than one country. However, there is not a specific international patent for which one can apply.

Patent is quite different from copyright in that not all inventions and designs are patentable and the process by which one is awarded a patent is rigorous and time-consuming. For an invention to receive a patent, it must be new, novel, and/or nonobvious and it may not exist in prior art—that is there must not be any evidence that the invention already exists or has been conceived. Evidence need not be a physical version of the invention nor must the invention exist physically or be commercially available. Most countries including the United States have a grace period from six months to a year, depending on the jurisdiction that allows for the invention to have been presented at conference or discussed in other specific kinds of communications. It can take months if not years to obtain a patent.

There are three types of patents under United States Law (United States Patent and Trademark Office 2015):

1) **Utility patents** may be granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof;

2) **Design patents** may be granted to anyone who invents a new, original, and ornamental design for an article of manufacture; and

3) **Plant patents** may be granted to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant.

In the United States, the current patent term for inventions (called utility patents) and for plant patents is twenty years, while the term for design patents is fifteen years (United States Patent and Trademark Office 2015).
Although most library and information professionals will not be confronted with ethical dilemmas related to patent, it is important to have a basic understanding of this form of intellectual property protection. Patents are valuable assets to companies and universities and increasingly investors, such as venture capitalists, who are concerning themselves with the market value of patents and how patents are or could be monetized through licensing. Although patents are frequently subject to litigation for infringement, patent holders may prefer to bring infringers into the fold through licensure agreements.

In addition to laws protecting creative works and inventions, two other forms of intellectual property are trademark and trades secrets, which also play an important role specific to commerce.

The Lanham Act of 1946

There were laws governing trademark prior to the Lanham Act of 1946; however, most trademarks that are currently in use in commerce fall under this act. The authority is found in the Commerce Clause, which empowers Congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes” (U.S. Const. art. 1. sec. 8. cl. 3). The Lanham Act is also called the Trademark Act and “it provides for a national system of trademark registration and protects the owner of a federally registered mark against the use of similar marks if such use is likely to result in consumer confusion, or if the dilution of a famous mark is likely to occur.” (Legal Information Institute 2017). Although the Lanham Act provides the most extensive trademark protection, there is also state common law governing trademark protection (Legal Information Institute 2017).

Trade and service marks (herein trademarks or marks) include words, phrases, symbols, and designs that are used to differentiate among companies and their goods and services (United States Patent and Trademark Office 2017). Marks, in one form or another, have been around for a very long time; essentially, once we had commerce we had marks ostensibly to protect the buyer from shoddy workmanship or to help the buyer to identify the goods and services of one particular seller over another.

In the United States, trademark rights arise from the use of a particular mark in commerce; as long as a mark continues to be used in commerce, the trademark will not “expire.” In other words, unlike patent and copyright, there is no “limited time” associated with trademarks.

There is no requirement to register a mark; however, it is advantageous to register one’s mark with the United States Trademark and Patent Office. Registering the mark notifies the public of the claim to ownership of the mark, a presumption of legal ownership throughout the United States, and the exclusive right to use the mark in commerce. Trademark registrations do not expire (United States Patent and Trademark Office 2017).

The standard for trademark infringement is the “likelihood of confusion” on the part of the consumer about the source of goods and services sold under a particular mark. Using identical marks to sell the same product is clearly infringement under this standard. Generally, though, the situation is more muddled, and so to determine infringement the court considers several factors: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; and (7) the defendant’s intent (Berkman Klein Center 2017).
In addition to trademark infringement, the Lanham Act also protects trademark owners from dilution (Berkman Klein Center 2017). Under federal law, a finding of dilution is only available to marks that are “famous.” Courts determine whether or not a mark is famous by considering several factors including, but not limited to, the distinctiveness of the mark, its duration of use, and whether or not the mark is registered. Under state laws a mark is not required to be famous for a finding of dilution. Dilution is characterized in two ways. The first is “blurring,” which occurs when a famous mark is weakened because it is associated with dissimilar goods or services. The second is “tarnishment,” which happens when a famous mark is associated with something objectionable—for example, a trademark associated with a family-friendly entertainment center is associated with a business that provides adult entertainment (Berkman Klein Center 2017; United States Patent and Trademark Office 2017).

Defend Trade Secrets Act of 2016

Trade secrets are just that, secrets that are held by a particular firm that are valuable to the firm so long as they remain a secret. There are a wide variety of trade secrets from “secret recipes” for fried chicken and soda to business methods and marketing plans to research and development activities. Because these secrets are valuable, firms will take a variety of steps to ensure that these secrets are not disclosed.

Prior to the enactment of the Defend Trade Secrets Act of 2016, companies whose trade secrets were misappropriated had limited options. Companies could only seek redress in the state courts or if applicable, take action under the Economic Espionage Act of 1996, which was limited to international situations. Definitions and remedies and application of these laws varied from state to state, which was problematic for firms dealing with misappropriation. Fortunately, the Defend Trade Secrets Act provides a legal definition of a trade secret which allows for a broad range of proprietary information to be protected under the statute as long as

(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information (Cohen, Renaud, and Armington 2016). The statute further provides guidance as to acts that constitute a misappropriation and provides penalties and increases the maximum penalty for trade secret theft (currently $5 million) to the greater of $5 million or three times the value of the stolen trade secret (Defend Trade Secrets Act S.1890 2015).

CASE STUDY

Case studies provide an opportunity to apply one’s ethical and legal understanding to a particular situation. The following case study includes issues of fair use, in particular, transformative use and the impact of a particular use on the “market.”

Hope was an overarching message of President Barack Obama’s national campaign. An artist called Shepard Fairey was inspired by Obama and created a now infamous poster, the design of which featured an image of Obama and in bold type, the word Hope. Fairey
used a stock photograph of Obama that he had found online for his design. The photograph was one of hundreds a photographer, Mannie Garcia, had taken of Obama; it was reported in the media that the photographer did not recognize his own photograph until someone pointed it out to him. The HOPE design was ubiquitous and appeared everywhere from street corners to T-shirts. Fairey believed he had made a fair use of the photograph because his design was a transformative use of the photograph. In addition, Fairey has stated that he did not profit from the work and that the money from the work was donated to the Obama campaign. The Associated Press, determined to be the owner of the photograph as it was a “work made for hire,” accused Fairey of copyright infringement because he had used the image without its express permission. Ultimately, Fairey and the Associated Press settled its dispute without disclosing the financial terms. The settlement leaves unanswered the question of whether or not the Obama HOPE poster constitutes a transformative use and whether or not a use is commercial if the creator does not profit.

GLOSSARY OF TERMS

**Fair Use**—A legal doctrine that allows for the use of copyrighted works without the permission of the owner for certain purposes is not an infringement. Such purposes include criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. Four factors are used to determine if a use is fair: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work (17 U.S. Code § 107).

**Natural right**—a right considered to be conferred by natural law. A natural law is a body of law or a specific principle of law that is held to be derived from nature and binding upon human society in the absence of or in addition to positive law (Merriam Webster 2017).

**Free rider**—an individual or group takes advantage of a common resource or public good while contributing little or nothing (Stanford Encyclopedia of Philosophy 2003).

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FURTHER RESOURCES


Copyright Law of the United States, prepared by the United States Copyright Office. See in particular Law and Guidance. This part of the website includes historic versions of copyright laws which were used in this chapter as well as Circulars (www.copyright.gov/circs/), which provide current and authoritative information on United States Copyright law. www.copyright.gov/title17/.

General Information Concerning Patents, prepared by the United States Patent and Trademark Office. www.uspto.gov/patents-getting-started/general-information-concerning-patents. This website provides an extensive list of topical links related to patents including information on the patent office and patent process.


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