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FOREWORD: SYMPOSIUM ON INTELLECTUAL PROPERTY LAW THEORY*

KENNETH L. PORT**

I. INTRODUCTION

In this issue of Chicago-Kent Law Review we have asked several people to comment on intellectual property from their own academic perspectives. Their responses developed along two themes—questioning the nature of an author's claim and questioning the nature of the copier.

As the area of intellectual property grows and gains not only in academic interest but also in financial significance, the conceptual justification for the various systems of protecting the manifestations of ideas becomes critical. This issue concentrates on proposed justifications of the intellectual property legal regime as it is developing today and as viewed from other perspectives than standard intellectual property discourse.

We are delighted to bring together here the comments of several philosophers, a philosopher economist, a practitioner fascinated by literary theory, and an artist. We have asked them to discuss intellectual property law from the perspective of their given fields. None of the lead authors are traditional intellectual property law scholars. Rather, we selected individuals from other disciplines in order to institute a dialogue between intellectual property people on the one hand and property theorists and artists affected by intellectual property law on the other hand.

Our objective in starting this dialogue is to begin a cross-discipline debate between intellectual property theorists and property theorists as well as intellectual property practitioners and artists. Too often scholars

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** Visiting Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; B.A. 1982, Macalester College; J.D. 1989, University of Wisconsin. The author would like to express his appreciation to Wendy Gordon for her efforts in making this Symposium a reality and for reading and commenting on earlier drafts of this Foreword.


from each of these fields conceptually exist within the confined space of their own disciplines. In asking people from other fields to comment on intellectual property, our objective is to inform intellectual property law discourse with the insight of their perspective and thereby greatly enrich intellectual property discourse.

In defining "intellectual property" as a term of art, there are two levels of analysis. The first is the practical, specific level whereby intellectual property is made up of three primary subfields—namely, patents, copyrights, and trademarks. On this level, it is fundamental to recognize that patents, copyrights, and trademarks are not interchangeable. Each is intended to protect a very specific type of work with very distinct methodologies of protection. Although there is some interplay regarding, for example, whether an inventor/author is best served by claiming copyrights to a computer program or obtaining a patent for the program, each of these subfields has developed along distinct lines of analysis, discourse, and, most importantly, subject matter of protection.

On another more generalized level, intellectual property is the legal regime by which authors or inventors protect their intellectual creations. On this level, distinguishing with any particularity the conceptual differences between the subfields may not be necessary because each begins with the same inquiry—who owns the creation and what is the scope of those ownership rights. On this level, the analysis can begin with this common starting point to determine if a proposed answer or model is justified in differing circumstances within the various subfields.

At this level, as a general regime for protecting intellectual creations, the debate focuses on the theoretical justifications for protecting these creations, the extent to which such protection is or is not justified, and the actual and theoretical ramifications of the regime in general.

This Symposium issue engages intellectual property law more on the second level of analysis rather than the first. Before comment is really possible on the second more generalized level, however, an understanding of the first level is necessary. Therefore, for the benefit of the non-intellectual property specialist and/or future commentators on the subject matter, I establish below the generally accepted views of each of the subfields as they exist at the first level. I present copyright law first and in most detail because most of the contributors to this Symposium issue

3. Although trademarks are not considered creations as such, and certainly the creative element is not what is protected in trademark law, trademarks are generally included in the larger category of intellectual property. Plasticolor Molded Prods. v. Ford Motor Co., 713 F. Supp. 1329, 1346 (C.D. Cal. 1989). See also Kregos v. Associated Press, 937 F.2d 700, 709 (2d Cir. 1991).
focus on this subfield. However, because references are also made to patents and trademarks, I also summarize each of these subfields.

II. COPYRIGHTS

Copyrights, like patents, exist with express constitutional authorization. The Copyright Clause of the Constitution provides that copyrights are to be granted "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."  

The generally accepted purpose of copyright law is to grant protection to specific authors to encourage all authors to create and disseminate their works. As a result, the public at large will have access to this information. Without such protection, the law assumes that authors would not create as much as they would with the protection; that without copyright protection ensuring exclusivity publishers would not publish as much as they would with protection; and that without copyright protection authors would be more inclined to sit on their ideas and choose not to make them public.

Copyright law generally protects works of original authorship that are fixed or expressed in a tangible medium of expression. Copyrightable subject matter includes literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.

Copyright protection subsists from the moment of creation regardless of registration or notice formalities and continues for the life of the author plus 50 years. Copyrights in anonymous works, pseudonymous

4. This section focuses on copyright law according to the Copyright Act of 1976. Unless otherwise indicated, general references to copyright law are to post-January 1, 1978 works (the effective date of the 1976 Act).

5. U.S. Const. art. I, § 8, cl. 8.


8. Id.

9. Id. § 302(a). Joint works—that is, works that were authored by more than one person—last for life plus 50 years of the last surviving author. Id. § 301(b). For a discussion of the rationale for extending protection from a maximum of 56 years under the prior 1909 Act to life plus 50 years, see H.R. Rep. No. 1476, 94th Cong., 2d Sess. 133-36 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5749-55; Zechariah Chafee, Jr., Reflections on the Law of Copyright II, 45 Colum. L. Rev. 719 (1945).
works and "works made for hire" last for 75 years from the year of publication or 100 years from creation, whichever expires first.

Copyright grants the author of the work the exclusive right to reproduce the work, to prepare derivative works based upon the work, to distribute copies of the work for public sale or transfer ownership, to perform the work publicly, and to display the work publicly.

There are three generally accepted limitations to the assertion of copyrights. First, unlike patent law, copyright only grants the holder the exclusive right to copy the protected work. True independent development is a complete defense to an otherwise infringing act.

Secondly, copyright only protects the expression of an idea and not the underlying idea itself. This is generally referred to as the idea/expression dichotomy. Although a never ending source of confusion by the courts and analysis by commentators, the idea/expression doctrine's purpose is to prevent monopolies in ideas and encourage expression and publication of ideas.

Finally, copyright does not protect the underlying facts, systems, processes, or methods described in the work. Therefore, if I write a book regarding the Civil War, that expression in the form of the book and the words I choose as well as the organization and design should be copyrightable; however, the underlying facts upon which my book is based are not protected and anyone may use those facts even if my research to discover those facts was difficult and expensive. However, if I compile mere facts in a telephone book, for example, as long as I add some originality to that compilation, such as by organization or design, the resulting work would most likely be copyrightable but only as to that organization or design.

10. A "work made for hire" is a work that was prepared by an employee within the scope of his or her employment or a commissioned work expressly stating that the work is a work made for hire. 17 U.S.C. § 101 (1988). The author of a work made for hire is the corporation or hiring party. Therefore, the copyright to a work made for hire is owned by the corporation or hiring party unless expressly provided for in writing to the contrary. Id. § 201(b). For a fuller discussion of proprietary interests in works made for hire, see Community for Creative Non-Violence v. Reid, 450 U.S. 730 (1989).

12. Id. § 106(1)-(3).
17. See Miller, 650 F.2d at 1368-70.
18. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991) (Mere compilations of fact in the form of white pages listings in a telephone directory are not copyrightable without some minimum level of creativity. Such a compilation with a minimum level of creativity is copyrightable but only to the extent of the creativity added.).
Copyright litigation generally presents two issues. The first is the copyrightability of the work. The second is whether the copyrighted work was infringed. The infringement test is easy to state and difficult to apply: Copyrighted work A is infringed by subsequent work B if the author of work B was actually or arguably exposed to A (that is, had “access” to the work) and the resulting work B was substantially similar to A.\(^{19}\) Substantial similarity has been defined by Learned Hand as whether the ordinary observer would look at two works and, not focusing on any dissimilarities, would overlook such dissimilarities and consider the two works aesthetically the same.\(^{20}\)

Whether a particular work constitutes copyrightable subject matter is difficult to conceptualize and difficult to apply. Furthermore, the range of appropriate copyrightable subject matter is forever expanding.\(^{21}\) Therefore, the parameters of copyrightability are extremely flexible. This unpredictable nature of copyright law gives some courts as well as commentators fits.

Therefore, below I state simply some of the underlying principles regarding copyrightability.

1. Although copyright protection does not extend to underlying ideas or facts themselves, if assembled or compiled with some originality, that expression of originality is generally sufficient to warrant copyright protection; however, it would only be protected to the extent contribution was original.\(^{22}\)

2. Copyright protection is available only for the non-utilitarian aspect of a work. To the extent a work is useful, it is not copyrightable.\(^{23}\)

3. Copyright law also protects derivative works\(^{24}\) even when the underlying work is already in the public domain. If an author contributes enough originality,\(^{25}\) that author's contribution will

\(\text{\textsuperscript{19}}\) Of course, the question of substantial similarity is a question of fact for the fact finder. International Luggage Registry v. Avery Prod. Corp., 541 F.2d 830, 831 (9th Cir. 1976). As such, it would be in the purview of the jury to find no substantial similarity.

\(\text{\textsuperscript{20}}\) Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 484, 489 (2d Cir. 1960).


\(\text{\textsuperscript{22}}\) Feist, 111 S. Ct. at 1282.

\(\text{\textsuperscript{23}}\) See 17 U.S.C. § 101 (1988) (“... only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article”); Mazer v. Stein, 347 U.S. 201, 308-13 (1954).

\(\text{\textsuperscript{24}}\) A derivative work is a work that is based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted. 17 U.S.C. § 101 (1988).

\(\text{\textsuperscript{25}}\) What amounts to sufficient originality to establish copyright protection in derivative works
result in a protected derivative work.

4. The copyright act has no minimum level of aesthetics.\textsuperscript{26} The level of originality required for copyrightability is quite minimal. Some define originality as merely not copying.\textsuperscript{27}

5. Copyrights subsist from the moment the work is fixed in a tangible medium of expression.\textsuperscript{28} Nothing else need be done by an author to have valid and existing copyrights in and to a work.

6. Registration of copyrights is necessary prior to litigation.\textsuperscript{29} Timely registration is required to obtain statutory damages and attorney's fees. Formal requirements for notice have also been relaxed.\textsuperscript{30}

III. PATENTS

Patents also received their genesis in the Constitution.\textsuperscript{31} However, on the first level of analysis, patents and copyrights are conceptually quite distinct. Whereas copyrights protect creative works of authorship for a long duration of time, patents protect inventions of useful machines, processes, or manufactures for a much shorter period of time—17 years for most patents rather than life plus 50 years of the author for copyrights. Whereas copyrights subsist upon creation, patents only exist with

\begin{thebibliography}{9}
\bibitem{26} See, e.g., Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 853 (5th Cir. 1979) (Obscenity is not a defense to copyright infringement.), \textit{cert. denied}, 445 U.S. 917 (1980).
\bibitem{27} \textit{Batlin}, 536 F.2d at 490.
\bibitem{28} 17 U.S.C. § 102(a) (1988).
\bibitem{29} If the Copyright Office refuses registration, the owner of a work can still file suit but he must deposit copies of the work with the Library of Congress prior to instituting suit. At the time of this writing, legislation is pending before the United States Congress that would abolish virtually all registration requirements but maintain certain incentives. \textit{See} Copyright Reform Act of 1993, S. REP. No. 373, 103rd Cong., 1st Sess. (1993); H.R. REP. No. 897, 103rd Cong., 1st Sess. (1993).
\bibitem{31} U.S. CONST. art. I, § 8, cl. 8.
\end{thebibliography}
express government recognition in the form of letters patent.\textsuperscript{32} Also, whereas copyright law does not protect against independent creation or development, patent law does.\textsuperscript{33}

The express purpose of granting greater rights to patentees than to other owners of intellectual property is to encourage invention and thereby benefit the development of the sciences.\textsuperscript{34}

Although various theories justifying the granting of the patent monopoly exist, the generally accepted version is referred to as the "incentive theory."\textsuperscript{35} According to the incentive theory, the patent monopoly must be granted to inventors to compensate them for the time, money, and energy they invest in the invention and to assure them any monetary gain resulting from their invention.\textsuperscript{36}

The other justification for granting a patent monopoly to an inventor is more of a natural rights argument: an inventor should own title to the creations of his/her mind. A statute cannot grant or deny rights in one's own intellectual creations. Rather, an inventor has title in and to these inventions regardless of any statutory monopoly.\textsuperscript{37}

Patent law protects novel, non-obvious, and useful inventions generally embodied in machines, processes, or chemicals. Patent rights do not exist independent of the express government grant of letters patent. Unlike copyright registration, patent registration is an expensive, time-consuming task.\textsuperscript{38} Because the patent does not exist apart from the letters of patent, it is of primary importance to "claim" as broad coverage as possi-

\textsuperscript{34} Sears, Roebuck & Co. v. Stiffel, 376 U.S. 225 (1964).
\textsuperscript{35} I am indebted to Timothy J. Shea, Jr., Chicago-Kent College of Law Class of 1995, for his research and suggestions regarding these justifications of the patent system.
\textsuperscript{37} These are the two basic conceptual justifications generally given for the existence of the patent monopoly—reward inventors or they won't invent vs. inventors already own title to their creative endeavors. There are other economic justifications of the patent system of which the reader should be aware. One is the "prospect theory." See Kitch, supra note 36. Kitch analogized his theory to the old system for mineral claims (thus the name "prospect"). According to Kitch, the patent is an award for early investment in the development process. After the patent is secured, the patentee commences commercial development of the invention not unsimilar to how individuals were encouraged and rewarded for prospecting for gold, etc. Another economic theory explaining the patent monopoly is "rent dissipation." See Mark F. Grady & Jay I. Alexander, Patent Law and Rent Dissipation, 78 Va. L. Rev. 305 (1992). See also Donald Martin, Reducing Anticipated Rewards from Innovation through Patents: Or Less Is More, 78 Va. L. Rev. 351 (1992). Pursuant to this theory, a patent should only issue where the "size of the patent rent corresponds to the quality of the signal for improvement." Grady & Alexander, supra, at 321.
\textsuperscript{38} Copyright registration is accomplished by filing one of the appropriate forms, including an appropriate specimen of the works and including a $20 filing fee. It costs approximately $2,200 to file, obtain, and maintain a patent for the patent term. See 35 U.S.C. § 41 (1988).
ble. Many patentees have been greatly disappointed to have a minor technical mistake or shortcoming in drafting the claims invalidate their patent or preclude its enforcement. Therefore, patent registration is the first fundamental step in establishing patent rights.

The substantive requirements for a valid patent are as follows:

1. Patenable subject matter;
2. Novelty;
3. Utility;

Statutory patentable subject matter includes "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . ." Although these parameters are quite broad, this section of the Patent Act has been interpreted as not allowing patents on laws of nature or physical phenomena like electromagnetism. Also, because of this statutory subject matter restriction, mathematical formulae or algorithms for making mathematical computations are not appropriate patentable subject matter. That is, similar to copyrights, patent protection is not available for an idea itself outside of some embodiment of that idea.

Inventions must also be useful before they are granted patents. In practice, an invention need only be operable and capable of performing some function (actually useful or not) to humanity in order to satisfy the usefulness requirement. In reality, only those inventions that directly conflict with known principles of physics or other sciences—such as a perpetual motion machine or inventions that are unreasonably dangerous—fail the utility test.

Novelty is a slightly more difficult hurdle to pass. To determine if an invention is novel, what is known as the “single source” rule applies.

41. Id. §§ 101, 102.
42. Id. § 101.
43. Id. § 103.
44. Id. § 101.
45. See O'Reilly v. Morse, 56 U.S. 62 (1853).
47. Gottschalk, 409 U.S. at 67.
49. Chisum & Jacobs, supra note 46, § 2C[2].
That is, if a single instance of prior art discloses each claimed element of an invention, that invention is "unnovel"—"anticipated" in patent jargon.\textsuperscript{52} For example, if the prior art discloses one single magazine article that describes elements of a machine that processes hazardous waste into biodegradable garbage, a subsequent patent application on that machine by another would be invalid because it was anticipated.\textsuperscript{53}

Most of the cases and literature in patents, however, deal with the concept of nonobviousness. The nonobviousness doctrine developed as a judicial construct to avoid granting a patent when public policy or other less articulable reasons dictated against granting a monopoly for an invention that otherwise satisfied the other statutory requirements.\textsuperscript{54}

Specifically, the nonobviousness requirement prevents patents from issuing when a person with ordinary skill in the art would have thought the invention "obvious" on the day the invention was made.\textsuperscript{55} The general test is derived from\textit{Graham v. John Deere Co.}\textsuperscript{56} There the Supreme Court identified the practical test to determine whether an invention is obvious along the following lines:

1. Identify the scope and content of the prior art;
2. Identify the difference between the prior art and the claims of the invention;
3. Determine what is the ordinary level of skill in the pertinent art; and
4. Look to secondary considerations such as commercial success, long felt but unsolved needs, and failure of others.\textsuperscript{57}

With these technical requirements satisfied, only then can an inventor obtain a patent for the invention. However, once a patent does issue, the patentee is the exclusive owner of a comparatively strong monopoly. For most patents the duration is only 17 years, and independent creation


\textsuperscript{53} See, e.g., In re O'Farrell, 853 F.2d 894 (Fed. Cir. 1988). There the court rejected for obviousness the co-inventors' claim for controlling the expression of cloned genes where two of the three co-inventors had published a paper on their work approximately two years prior to filing the patent application. The court held this "prediction publication" to constitute prior art that made the applicant's claim anticipated.


\textsuperscript{56} 383 U.S. 1 (1966).

\textsuperscript{57} \textit{Id.} at 17-18.
of the same invention is no defense to infringement.\textsuperscript{58}

IV. TRADEMARKS\textsuperscript{59}

Trademark law is completely distinct from both patents or copyrights. Whereas both patents and copyrights exist because of an express constitutional grant,\textsuperscript{60} trademarks do not enjoy such recognition. In fact, when confronted with the issue, the United States Supreme Court expressly held that the Patent and Copyright Clause of the Constitution did not envision protection of trademarks as well.\textsuperscript{61}

Rather than being based on the Patent and Copyright Clause, Congress has the authority to regulate trademarks based on the Commerce Clause. This is why interstate commerce or "use" of a trademark is crucial for federal protection rather than simply its creation.\textsuperscript{62} Trademark protection is a common law concept that exists independent of any statute. In fact, the Lanham Act, the current trademark law, is said to be only a registration statute codifying common law.

The Supreme Court has reasoned that trademarks do not "depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. [Trademarks are] simply founded on priority of appropriation."\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{58} 35 U.S.C. § 271 (1988).
  \item \textsuperscript{60} U.S. Const. art. I, § 8, cl. 8.
  \item \textsuperscript{61} The Trademark Cases, 100 U.S. 82, 94 (1879).
  \item \textsuperscript{62} With the 1988 amendments to the Lanham Act, a bona fide intention to use a mark will protect it from infringing use if the mark ultimately is used. If the owner of an intent-to-use trademark registration successfully enjoins an infringer but ultimately does not use the mark, the injunction would be dissolved. See 15 U.S.C. § 1051(b) (1988). See also Imperial Tobacco Ltd. v. Philip Morris, Inc., 899 F.2d 1575, 1578 (Fed. Cir. 1990).
  \item \textsuperscript{63} Trademark Cases, 100 U.S. at 94. The Act of 1870 also contained an "intent-to-use" provision. The constitutional legitimacy of the intent to use portion of the Act was not clearly determined. The Supreme Court found the Act unconstitutional because it was not based on the Commerce Clause. In 1988, Congress amended the Lanham Act to include an intent-to-use provision allowing trademark holders to register their marks for three years if they had a bona fide intention to use them. 15 U.S.C. § 1051(b) (1988). Because use of the mark in commerce is not required and therefore no actual interstate commerce use occurs, the intent-to-use provisions should fail constitutional review based on the Commerce Clause not unsimilar to the Trademark Cases. However, several commentators have argued that the current intent-to-use provisions are constitutional because they are part of the "flow of commerce" notion and that the Supreme Court shows great deference toward congressional power and Commerce Clause issues. See Charles J. Vinicombe, The Constitutionality of an Intent to Use Amendment to the Lanham Act, 78 Trademark Rep. 361, 369-73 (1988). See generally Frank Z. Hellwig, The Trademark Law Revision Act of 1988: The 100th Congress Leaves its Mark, 79 Trademark Rep. 287 (1989).
\end{itemize}
Trademark jurisprudence has developed over centuries of time. The use of a mark to identify the source of a product actually began at least 3500 years ago when potters made scratchings on the bottom of their creations to identify the sources. The first judicial recognition of trademarks did not come, however, until 1618 in Southern v. How when an English common pleas judge made an obscure reference to a mark used on cloth. There are various renditions of how the subject of trademarks arose in Southern v. How because the reference is actually to a prior unreported case which denied trademark rights. The notion of protecting a commercially viable indication of source, therefore, had a rather dubious beginning, but it soon became a well accepted judicial notion in England that a mark deserved protection at common law to indicate source or origin of goods.

The American concept of trademark law followed this English common law notion. Today, the Lanham Act defines trademarks as any

64. See generally Edward S. Rogers, Good Will, Trade-Marks and Unfair Trading 34-39 (1919); see also Benjamin G. Paster, Trademarks—Their Early History, 59 Trademark Rep. 551 (1969); Gerald Ruston, On the Origin of Trademarks, 45 Trademark Rep. 127 (1955); Abraham S. Greenberg, The Ancient Lineage of Trade-Marks, 33 J. Pat. & Trademark Off. Soc'y 876 (1951); Edward S. Rogers, Some Historical Matter Concerning Trade-Marks, 9 Mich. L. Rev. 29 (1910). In addition, see Gilson, supra note 59, § 1.02[1]; William H. Browne, A Treatise on the Law of Trademarks 1-14 (1885). Browne traces the use of proprietary and trademarks back several millennia to China, India, Persia, Egypt, Rome, and Greece, among other cultures, as well as citing marks used during the time of the Old Testament. Id. at 8 (the blocks of stone used to build the temple of Solomon bore quarry marks so the “mechanics” could “prove[e] their claims to wages”). Id. at 10 (Abraham paid for the cave in which he buried Sarah with coins bearing a mark of authentication). “Seals and other emblems of ownership were coequal with the birth of traffic.” Id. at 2. “Such emblems had their origin in a general ignorance of reading the combinations of cabalistic characters that we call writing.” Id. at 3. Browne discusses proprietary marks such as seals, sign-boards, watermarks, quarry and pottery marks, currency, identifying marks on merchandise in general, and books. Id. at 3-14.

67. See also Blanchard v. Hill, 26 Eng. Rep. 692 (1742) (court refused to grant injunction against alleged infringer because such injunction would give plaintiff a monopoly in sales of the relevant product—playing cards).
68. In Sykes v. Sykes, 107 Eng. Rep. 834 (1824), the court regarded trademark protection as well established and awarded an injunction to the plaintiff where the defendant had used the plaintiff's mark, SYKES PATENT, on inferior shot-belts and powder-flasks and passed them off as products of the plaintiff. Another case still relied upon today is Millington v. Fox, 40 Eng. Rep. 956 (1838), where plaintiff sued in equity to enjoin use of his mark. The court, in awarding the injunction, stated that the plaintiff had a right to enforce title to its mark and that an injunction was appropriate even though there was no direct proof of defendant's intent to defraud and that defendant may not have even known of plaintiff's mark. The United States Supreme Court has adopted this case as controlling. See Saxlehner v. Siegel-Cooper Co., 179 U.S. 42 (1900). See also Gilson, supra note 59, § 1.01[1].
69. The Trademark Cases, 100 U.S. 82, 92 (1879); Patricia K. Fletcher, Joint Registration of
“word, name, symbol, or device or any combination thereof . . . used . . . to indicate the source of the goods . . . .” Trademarks are generally categorized into one of four groups: generic, descriptive, suggestive, and arbitrary or fanciful. The strongest mark is an arbitrary or fanciful one such as KODAK” or EXXON. The weakest mark is a generic mark such as cellophane or aspirin. All marks fit somewhere on this continuum, although some courts have recognized that no clear lines separate these categories. The assignment of a specific trademark to one of these categories is not necessarily static. A mark can conceivably change status from one category to another based on the owner’s use of the mark and the degree of consumer recognition developed in the mark.

Generic marks refer to the specific genus of which the particular product is a species. In other words, generic marks are terms for which

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72. Clipper Cruise Line v. Star Clippers, Inc., 952 F.2d 1046, 1047 (8th Cir. 1992); Cellular Sales, Inc. v. Mackay, 942 F.2d 483, 486 (8th Cir. 1991); General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 625 (8th Cir. 1987).
75. See Dranoff-Perlstein Assn. v. Sklar, 967 F.2d 852, 855 (3d Cir. 1992) (finding “if we hold a designation generic, it is never protectable”); Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983); Miller Brewing Co. v. G. Helleman Brewing Co. 561 F.2d 75, 79 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). In fact, a generic mark would not have trademark status at all.
77. Bayer Co. v. United Drug Co., 272 F. 505, 509 (S.D.N.Y. 1921) (holding that although the trademark ASPIRIN started out as a strong, fanciful mark, use of the mark as the only English language noun for the product caused it to become generic).
79. See Miller Brewing Co., 561 F.2d at 79 (“As the ease with which hues in the solar spectrum may be classified on the basis of perception will depend upon where they fall in that spectrum, so it is with a term on the trademark spectrum.”); Union Nat'l Bank of Texas, Laredo v. Union Nat'l Bank of Texas, Austin, 909 F.2d 839, 846 (5th Cir. 1990) (“Although meant as pigeon-holes, these useful labels are instead central tones in a spectrum; they tend to merge at their edges and are frequently difficult to apply.”) (quoting Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1183 (5th Cir. 1980)); see also Blinded Veterans Ass'n v. Blinded Am. Veterans Found., 782 F.2d 1035, 1039 (D.C. Cir. 1989); In re Merrill Lynch, Pierce, Fenner, and Smith, Inc., 828 F.2d 1567, 1569 (Fed. Cir. 1987).
80. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985); Clipper Cruise Line v. Star Clippers, Inc., 952 F.2d 1046, 1047 (8th Cir. 1992); Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976); Union Nat'l Bank, 909 F.2d at 845 (“A generic term is one which identifies a genus or class of things or services, of which the particular item in question is merely a member.”).
no other descriptive word exists in the English language. A mark becomes generic when it ceases to denote source and instead starts to denote the product itself.81 Famous examples of marks that have become generic include “lite” for beer82 and “shredded wheat” for cereal.83 Generic marks are not registrable.84 The registrations for marks that become generic may be canceled at any time.85 The test for determining trademark genericism is whether the primary significance of the mark identifies the producer86 or the product.87 To the extent the primary significance of the mark is to identify the product, the mark has become generic.

The rationale for preventing trademark protection of generic marks is simple. Allowing a monopoly on the use of a commonly used term would be ludicrous. No individual should be able to appropriate existing terms in the language for their own commercial advantage when to do so would prevent competitors from using that term to describe their competing products.88 When a trademark stops denoting the source of a product but rather the product itself, it becomes the victim of genericide

81. Miller Brewing Co., 561 F.2d at 79-81.
82. Id.
84. For example, the Trademark Trial and Appeal Board held the mark ICE-PAK to be generic and therefore unregistrable. In re Stanbel, Inc., 16 U.S.P.Q. 2d 1469, 1472 (T.T.A.B. 1990), aff’d, 925 F.2d 1480 (Fed. Cir. 1991). See also Clipper Cruise Line, Inc., 952 F.2d at 1048 (finding the term “CLIPPER” generic as applied to cruise ships).
85. Lanham Act, 15 U.S.C. § 1064(3) (1988); Park ’N Fly, 469 U.S. at 194. Although it is fairly common for marks to evolve from distinctive to generic through improper usage by the owner or genericide by competitors, some trademarks have moved from generic to distinctive. In 1896, the Supreme Court held that the trademark SINGER had become the generic name for a sewing machine. Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896). Singer continued to use their mark and a half century later re-established it as a distinctive mark by establishing new secondary meaning. Singer Mfg. Co. v. Briley, 207 F.2d 519 (5th Cir. 1953).
86. The customer need not know the actual producer just that the product came from a single source. Roulo v. Russ Berrie & Co., 886 F.2d 931, 936 (7th Cir. 1989), cert. denied, 493 U.S. 1075 (1990); Processed Plastic Co. v. Warner Communications, Inc., 675 F.2d 852, 856 (7th Cir. 1982).
88. See Bernard v. Commerce Drug Co., 964 F.2d 1338, 1342 (2d Cir. 1992). While finding the plaintiff’s mark ARTHRICARE merely descriptive, the court stated “[o]ur conclusion is bolstered by the concern that ‘exclusive use of the term might unfairly “monopolize” common speech’ . . . . According trademark protection to Arthriticare could forever preclude manufacturers of products marketed to arthritis sufferers from using the root of the word ‘arthritic’ for their products.” See also United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97-98 (1918) (“The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly.”); Dranoff-Perlstein Assoc. v. Sklar, 967 F.2d 852, 857 (3d Cir. 1992) (“Generic terms are denied trademark protection because granting one firm their exclusive use would place competitors at a serious competitive disadvantage.”) (quoting Gilson, supra note 59, § 2.02); Hutchinson v. Essence Communications, Inc., 769 F. Supp. 541, 569 (S.D.N.Y. 1991) (remarking that “a trademark owner is not entitled to . . . pursue a course of action which, if successful, ‘would be tantamount to awarding it exclusive dominion over a word in common usage,’ with the consequent ‘right to impair other parties’ possible entrance into areas of endeavor far removed from its own”).
and ceases to function as an indication of source or origin.\textsuperscript{89}

A descriptive mark only describes the good or service on which it is used\textsuperscript{90} or an attribute of that good or service.\textsuperscript{91} In order to be registrable and enforceable, the owner of a descriptive trademark must show that the mark possesses "secondary meaning."\textsuperscript{92} If a descriptive mark lacks secondary meaning, it is "merely descriptive" and therefore not registrable and not enforceable.\textsuperscript{93}

Secondary meaning is the notion that if a word is used long enough and enough money is spent promoting the mark, the consuming public will eventually associate the word with the product.\textsuperscript{94} Thereby the word will attain trademark status. The "secondary" meaning attained by a word is that it functions not only as a word but also as a trademark—that is, a source-indicating significance.\textsuperscript{95}

Suggestive trademarks are those marks which, although not arbitrary or fanciful, require some amount of imagination to determine what

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\item\textsuperscript{89} Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316, 1321-26 (9th Cir. 1992); Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 80-81 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).
\item\textsuperscript{90} G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 873 F.2d 985, 992 (7th Cir. 1989); Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1190 (6th Cir. 1988).
\item\textsuperscript{91} Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985); Bernard, 964 F.2d at 1341 ("a mark can be classified as descriptive if it conveys 'an immediate idea of some characteristic or attribute of the product'"); (quoting Papercutter, Inc. v. Fay's Drug Co., 900 F.2d 558, 562 (2d Cir. 1990)); Union Nat'l Bank of Texas, Laredo v. Union Nat'l Bank of Texas, Austin, 909 F.2d 839, 845 (5th Cir. 1990). ("A descriptive term is one that 'identifies a characteristic or quality of the article or service.'") (citing Vision Center v. Optiks, Inc., 596 F.2d 111, 115 (5th Cir. 1979)).
\item\textsuperscript{93} Papercutter, 900 F.2d at 562; G. Heileman Brewing Co., 873 F.2d at 992; Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 698 (2d Cir. 1961) ("[W]ords which are merely descriptive of the qualities, ingredients or composition of an article cannot be appropriated as a trademark and are not entitled to protection unless they have acquired secondary meaning.").
\item\textsuperscript{94} Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1354 (9th Cir. 1985) ("The basic element of secondary meaning is, thus, the mental association by a substantial segment of consumers and potential consumers 'between the alleged mark and a single source of the product'. . . .") (quoting I J. THOMAS McCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 15:2, at 659 (2d ed. 1984); id. § 15:11(B), at 686; Volkswagenwerk Aktiengesellschaft v. Rickard, 492 F.2d 474, 477 (5th Cir. 1974).
\item\textsuperscript{95} Dranoff-Perlestein Assoc. v. Sklar, 967 F.2d 852, 858 (3d Cir. 1992) ("In order for secondary meaning to exist, 'it is not necessary for the public to be aware of the name of the [source] . . . . It is sufficient if the public is aware that the product [or service] comes from a single, though anonymous, source.").") (quoting Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 380 (7th Cir.), cert. denied, 429 U.S. 830 (1976); Bristol-Myers Squibb Co., 786 F. Supp. at 194 ("A mark has acquired secondary meaning when it 'has been used so long and so exclusively by one producer with reference to its article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article was the first producer's trademark.").") (quoting G. Heileman Brewing Co., 676 F. Supp. at 1467).
\end{enumerate}
\end{footnotesize}
the association is between the trademark and the goods or services. Suggestive marks therefore do not require a showing of secondary meaning to be validly registered and enforceable. Examples of suggestive marks include COPPERTONE for suntan lotion and HEARTWISE for vegetable protein meat substitute foods.

Arbitrary or fanciful marks are those that have no mark/product association whatsoever at conception. These marks are often referred to as "inherently distinctive" at least partially because they do not require secondary meaning in order to be registered or enforced.

Trademarks that are inherently distinctive are protected without regard to secondary meaning. Trademarks that fall within the suggestive or arbitrary or fanciful categories are inherently distinctive and therefore need not possess secondary meaning. However, the owner of a descriptive mark must establish secondary meaning or courts will deny any recovery. The requirement that an otherwise descriptive mark have secondary meaning to be enforceable or registrable is justified as a facilitation of competition among producers. Granting protection from the moment of creation with no use established to even descriptive or arbitrary or fanciful categories are inherently distinctive and therefore not require secondary meaning.

96. MCCARTHY, supra note 94, § 11:21. See also Forum Corp. of N. Am. v. Forum, Ltd., 903 F.2d 434, 443 (7th Cir. 1990); Union Nat'l Bank, 909 F.2d at 845.


100. A mark is said to be arbitrary when it consists of a common word applied in an unfamiliar way. Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 11 n.12 (2d Cir. 1976).

101. Fanciful marks are those "invented solely for their use as trademarks." Id. at 11.


103. Coach House Restaurant, 934 F.2d at 1559; Investacorp, Inc. v. Arabian Inv. Banking Corp., 331 F.2d 1519, 1523 (11th Cir.), cert. denied, 112 S. Ct. 639 (1991); Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 700 (2d Cir. 1961) ("The presumption that a fanciful word or mark becomes distinctive and identifies the source of goods on which it is used immediately after adoption and bona fide first use is basic in trademark law.") (citing 2 HARRY D. NIMS, UNFAIR COMPETITION & TRADEMARKS § 346, at 1078 (4th ed. 1947)).

104. See Port, supra note 59, at 532-34.

105. See generally, CHISUM & JACOBS, supra note 46, at § 5C[3][a].


tive—the weakest—trademarks would amount to an obstacle to competition among producers of that product. The holder of one descriptive mark could block the entrance into a specific market by other competitors by merely claiming trademark rights to the name or a descriptive feature of the product. 108

That is, the owner of a weak mark should not be able to protect or enforce that mark against others until that owner's rights have become clarified. Trademark rights in weak or descriptive marks become clarified when the consumers of goods associate a trademark with a producer of those goods. Unless the mark has secondary meaning, the mark is merely a word that other market participants would presumably need to adequately describe their products. Allowing trademark rights in a descriptive mark without secondary meaning essentially would be granting a monopoly on a word or words that competitors need to describe their goods. 109

Finally, trademarks have a wide range of restrictions to which neither patents nor copyrights are subjected. For example, trademarks are not assignable without the pertinent goodwill associated with the mark. An assignment in gross (transferring nothing but the mark itself) is invalid. 110 Also, the test for infringement—likelihood of confusion of relevant purchasers—means that identical trademarks can be used on similar products as long as the relevant consumers would not be likely to be confused. Because of this restriction, many states have adopted antidilution laws prohibiting identical marks from being used on unrelated products (by definition a non-infringing act) in a manner that would be likely to dilute the distinctiveness of the original mark. However, many

108. Twentieth Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81 (2d Cir. 1984) (terms should not be monopolized by a single use). See also Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1430 (7th Cir. 1985) (there are a limited number of terms available to competitors to describe their products and a single party should not be allowed to "snatch for themselves the riches of the language and make it more difficult for new entrants to identify their own products"), cert. denied, 475 U.S. 1147 (1986); In re DC Comics, Inc., 689 F.2d 1042, 1044 (C.C.P.A. 1982) (descriptive terms should remain unencumbered for use by all to associate such symbols with their goods).


110. See American Steel Foundries v. Robertson, 269 U.S. 372, 380 (1925). By contrast, Japan, for example, recognizes private property rights in the trademark itself. Therefore, assignments in gross are valid totally divorced from any goodwill and trademark rights are severable and may be assigned by class providing the goods of the remaining classification would not cause confusion with the goods of the class assigned. See generally Kazuko Matsu, Trademarks, in 4 DOING BUSINESS IN JAPAN (Zentaro Kitagawa ed., 1991).

courts now interpret the anti-dilution acts as applying only to "famous" marks even though no legislative history exists that indicates that dilution should be applied so restrictively. 113

V. THE CONTRIBUTORS

Because most of the contributors to this Symposium come from fields other than standard, doctrinal legal areas, we thought it would be helpful for the reader if we took the unusual step of giving some personal background of each individual before conventionally introducing each contribution.

Lawrence Becker is a Professor of Philosophy at the College of William and Mary. Professor Becker is the author of the seminal work Property Rights: Philosphic Foundations. 114 In that book, Professor Becker argues in favor of granting private property rights for social utilitarian reasons: granting property rights to individuals serves the communal needs.

Becker's contribution to this Symposium in a way is an extension of the foundations laid in Property Rights: Philosphic Foundations. Here Becker applies this analysis to intellectual property. Even though no one else deserves property in someone's intellectual works, what is the basis for the desert which results in a property right for the creator?

Becker raises three versions of the desert-for-labor theory as a justification for the private property model of intellectual property: excellence, reciprocal benefits, 116 and need. Becker is not satisfied with any of these explanations. To Becker, none of these justifications adequately support the award of property rights.

Even if they did, it is not entirely clear what sort of jurisprudence would logically result. Becker recommends that because "what property law ought to be follows from the desert arguments," other policy considerations such as aggregate welfare have to be taken into consideration. This should include the desert justification out of a simple "fundamental

113. See Port, supra note 59, at 519, 556-60.
114. Other selected works of Becker include the following: RECIPROCITY (1986) (positive reciprocity is a virtue); ON JUSTIFYING MORAL ARGUMENTS (1973); Hard Choices Are Enough, 67 VA. L. REV. 97 (1981); Rent Control Is Not A Taking, 54 BROOK. L. REV. 1215 (1989); Impartiality and Ethical Theory, 101 ETHICS 698 (1991); Elements of Liberal Equality: Introduction to Kirp, Hochschild, and Strauss, 34 WM. & MARY L. REV. 89 (1992); Places for Pluralism, 102 ETHICS 707 (1992).
116. This concept is derived from Becker's book RECIPROCITY, supra note 114.
fairness' approach. This would also require that we abandon the preclusion of non-intellectual property owners and make the current owners share their property rights in their intellectual creations.

Patrick Croskery is an Assistant Professor of Philosophy at Virginia Polytechnic Institute and State University (Virginia Tech.). Croskery's academic interest is to apply utilitarian political theory to diverse institutions including government, the marketplace, and community. Utilitarian political theory instructs that individual conduct will be guided by principles of universal utility maximization.117

In his contribution,118 Croskery applies an institutional utilitarian perspective to intellectual property. Institutional utilitarianism is a study of the impact institutions have on total utility.119 Croskery is concerned primarily about the role government and the marketplace should play in the production of intellectual property, the facilitation of access to intellectual property, and the distribution of intellectual property.

Croskery's contribution creates a new framework by which intellectual property can be analyzed. He breaks the provision of information goods into four components as seen from the institutional utilitarian perspective. These four components consist of production, reward, fencing, and fine-tuning.

Production is merely the question of who will produce information goods. Reward is the question of assigning value to the information goods produced. Fencing raises the issue of exclusion. Fine-tuning modifies whatever fencing has provided to achieve other goals.

Croskery concludes that both the government and the marketplace (the institutions) can and should be the providers of the four functions mentioned above. According to Croskery, the debate must be framed in a manner which points out and highlights the advantages of the role of the government and the marketplace in the definition of intellectual property as private property and not a debate over which will prevail in total victory over the other.

Timothy Brennan is Associate Professor of Policy Sciences and Economics at the University of Maryland, Baltimore County and was previously an economist with the Antitrust Division of the U.S. Department of Justice. Brennan’s prior work has focused on the philosophical bases of economics. For example, Brennan expanded the economic analysis of

antitrust law to the decision making actions of local governmental bodies.\textsuperscript{120} He has facilitated understanding of the economic impact and purpose of antitrust laws through analysis of a concept known as "raising rivals' costs."\textsuperscript{121} Brennan has also contributed significantly to the understanding of determinants of market power through an economic perspective.\textsuperscript{122}

In his contribution,\textsuperscript{123} after a thorough analysis of the legal, economic, and social objections to recognizing copyrights as property, Brennan argues that so long as calling copyrights "property" does not imply that use and exclusion restrictions are never permissible, Brennan would not object to the private property model of copyrights. After all, to Brennan, the real goal here should be a mutually agreeable and efficient exchange—provide whatever incentive is necessary for the production of copyrightable works of value. What a copyright is called is less important than how the protected works are treated. Brennan believes that the private property model of copyright law may be appropriate although he is "uneasy" about it. His unease stems from his concerns over restricting access to information and limiting uses of that information.

Robert Rotstein is a partner with the law firm of Rosenfeld, Meyer & Susman in Beverly Hills, California. Rotstein focuses on litigation and appellate copyright practice. Rotstein's contribution is grounded on his perception of copyright law as viewed from a practitioner with over 17 years of experience. As literary criticism extends from and is a comment on how literature is actually read and perceived, Rotstein's theory as developed in his contribution also extends from the reality of his copyright practice.\textsuperscript{124}

In his contribution,\textsuperscript{125} Rotstein argues that courts should look to literary criticism in interpreting written, copyrighted works when mak—


\textsuperscript{121} Timothy J. Brennan, \textit{Understanding "raising rivals' costs"}, 33 \textit{Antitrust Bull.} 95 (1988).


\textsuperscript{124} Rotstein, for example, has written \textit{amicus curie} briefs in the following Supreme Court cases: United States v. Wells Fargo, 485 U.S. 351 (1988); San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (better known as "the Gay Olympics Case").

ing determinations of infringement. Rotstein argues that courts have not hesitated to look to the most recent advances in science—and in some instances feel an obligation to do so—in determining questions of patentability. However, in copyright law, courts focus on copyrighted literary works as autonomous objects as if they were possible of comparison one against another in an objective manner. That is, Rotstein argues that modern literary theory should also be taken into consideration when courts analyze literary works just as they take modern theories of science into consideration when analyzing patents.

Rather, Rotstein argues that courts should apply more literary theory when examining copyrightable works. Contemporary literary theory argues that no single interpretation of a work is valid and that the interaction with the audience of the work is as much a part of the creation of the work as putting pen to paper. Rotstein argues for an expansion of protection of copyrighted literary works to include protection of these various interpretations. In dealing with the obvious idea/expression dichotomy problem raised by this argument—that is, in an effort to balance the public's access to information with the need to reward and encourage authorship, copyright law protects the tangible expression of ideas and not the ideas themselves—Rotstein argues that texts should be approached as speech whose meanings take shape only in light of the code (ideas) and convention (expression) in which they are formulated. Eventually, some conventions evoke only rote, stock reactions from audiences. At that point, the code and the convention should be perceived as merged; until then, however, the convention of the work should be protected.

Jeremy Waldron is Professor of Law, Jurisprudence and Social Policy Program in the Department of Philosophy at the University of California at Berkeley. In *The Right to Private Property*,126 Waldron argues that there are no right-based arguments that justify the huge disparities in the distribution of wealth in our society.127 While attempting to breath new life into the concept of private rights, Waldron conducts a systematic critique of theories of property from Locke's *Second Treatise* and Hegel's *Philosophy of Right*. Waldron finds that the mutually exclusive split in the analysis of private rights between Locke's perspective of rights (I own the right because of what I have done or what has happened to me) and Hegel's perspective of rights (private rights are things

127. WALDRON, supra note 126, at 5.
all men have such as free speech) runs contrary to his goal of distribution of wealth based on rights. Rather, Waldron argues, these two perspectives need to be worked into a single case to better inform the debate and justifications for private property.128

Waldron's contribution129 to this Symposium applies oppositional analysis rather than sympathetic analysis to intellectual property. Rather than approaching the matter from the viewpoint of those owning and asserting intellectual property rights, Waldron approaches it from the perspective of those feeling the impact of intellectual property rights. Waldron believes that intellectual property is not self-justifying. Intellectual property must be justified not to the owners of the rights but rather to those constrained by intellectual property. Intellectual property acts to restrict the liberty of countless ordinary people on an individual basis. If this is to be legitimized, some conceptual justification must be put forth.

One of the accepted purposes of the copyright system is to ensure an equitable return on investment. Waldron argues, however, that nowhere else does the American system of jurisprudence guarantee that investors make a profit. Waldron's contribution, then, is a discussion of potential, but to him not completely satisfying, justifications for putting intellectual property on this conceptual podium as seen from the point of view of the copier. He concludes that neither social utility nor individual rewards justifies granting intellectual property rights to authors; that intellectual property is a direct impingement on a copier's liberty; and that simple post-modern deconstruction of the author also does not justify intellectual property rights. Rather, Waldron argues for a more fully developed explanation and justification for rewarding an author at the expense of a copier if the intellectual property system is to have any internal conceptual integrity.

In his contribution, Waldron walks through a variety of philosophical justifications for restricting the copier. First he recognizes that intellectual property, more than material property, is generally expressed directly in terms of social utility. However, on closer analysis, social policy arguments tend to be converted into individualist arguments and fur-

other confused by assimilation into rhetoric regarding material property rights.

Waldron does not pose a specific way out of this problem. Rather, he argues that if intellectual property is to be justified as private property restricting the liberty of copiers, a better justification needs to be formulated than merely: "I made it, so it's mine."

J.S.G. Boggs' contribution\(^{130}\) is probably the most unusual and at the same time valuable piece because of Boggs' unique position as an artist somewhat at odds with the law. Boggs is not a scholar or teacher in the traditional sense of the words. Depending upon one's perspective, Boggs is either an artistic genius pressing hard the outer edges of creativity\(^ {131}\) or, for example, in the minds of the United States Department of Treasury, perhaps a counterfeiter.\(^ {132}\)

Boggs' art is to draw "money." Boggs draws paper money in various denominations in various countries. He then barter this money in exchange for goods and services. He does this with the full knowledge of those providing the goods and services that the "money" is "art" and not money at all.

Boggs has been arrested in Britain and Australia for counterfeiting. He was acquitted in both instances.\(^ {133}\) Unrelated to copyright law, observing how governments react to Boggs' art is a fascinating study of the role of law itself. Governments seem to not want to encourage Boggs' art. On the other hand, they are hard pressed to convince themselves that Boggs should be punished or incarcerated for doing his art.

Boggs' contribution is a journey through the notion that copyright law does not reflect an understanding or appreciation of the creative process. If the purpose of copyright law is to promote creativity, it is especially ironic that copyright law does not show an understanding of creativity.

Boggs pursues a theme questioning ownership of images. Although some aspects of his comments may make it clear that he does not have


\(^ {131}\) See Lawrence Weschler, "Onward and Upward with the Arts: Value (Part I: A Fool's Questions) (J.S.G. Boggs Draws Pictures of Legal Tender)," THE NEW YORKER, Jan. 18, 1988, at 33.


formal training in copyright law, his perspective is an important one and sheds much light on the underlying need of copyright discourse.

Boggs argues that the underlying style of an artist's work is what is most important to that artist and it is that and perhaps only that which is worth protecting. Someone should be able to copy a work providing they do not take the personal style of the artist. After all, the style of the artist is really what artists value most. The copyright laws should recognize and protect that which is most important to authors if the law's intention is to provide an incentive so that authors will create more and all of society will thereby benefit.

In conclusion, the editors of this Symposium would like to express their gratitude to the contributors for their thoughtful excursions on a fascinating journey. We would like to also thank the Commentators in this issue, Russell Hardin, Keith Aoki, and Stephen Carter for their significant contributions. We would also like to thank Jim Lindgren for the original idea to do this Symposium in this format. Finally, we would like to thank Mark K. Johnson and the editors and staff of Chicago-Kent Law Review for their hard work and determination to see this project through to completion.