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## Legally Speaking/ Intellectual Property

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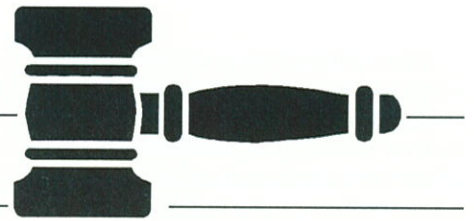
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# Legally Speaking

by Glen Secor (Yankee Book Peddler, Inc.  
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## Intellectual Property

In the mail from our intrepid editor comes a copy of an article from *The Economist*, dealing with intellectual property and international trade. A note attached to the article suggests that I write something about intellectual property, such as "What is it?" My first reaction is somewhat skeptical. After all, everyone knows what intellectual property is, right? Upon further reflection, I concluded that Katina had asked an excellent question. Not only is the nature of intellectual property not universally understood, it can be downright elusive.

Ask a lawyer about intellectual property and you will likely hear about the mechanics of copyright, patent and trademark law. Ask someone in the publishing or information field, and (s)he will probably tell you about books, journals, movies, etc.. But the essence of intellectual property is more intangible than the laws which protect it or the media which convey it; intellectual property consists of our creations and expressions, regardless of legal protection or physical form.

A painting is both tangible and intangible. The owner of the physical painting, the paint on canvas, can do with that physical property as he pleases. He cannot, however, do whatever he wants with the images or ideas expressed in the painting. He cannot, for example, produce posters or prints from the painting without the permission of the painter.

Similarly, a book represents both tangible and intangible property. The owner of the physical book can sell it, shelve it, burn it, etc.. He cannot, without permission of the copyright holder (author or publisher), expropriate the contents of the book, namely the words of the author. We place limitations on the amount and kind of copying, both physical copying of the book and "non-physical" taking of the book's content, that can be done without the copyright holder's permission.

Due to its intangible nature, intellectual property is difficult to define independently. Thus, by necessity, we

define intellectual property in terms of the laws which deal with it and the media which convey it. In practical terms, intellectual property is that which is protected by the laws of copyright, patent, trademark, et al. These laws provide us at least with some discernible boundaries around the intangible "fruits of the mind." It is the legal rights which attach that give value to our intangible creations and expressions.

These legal rights were first developed in England, but for us are founded in the United States Constitution, art. 1, sec. 8, cl. 8, which gives Congress the power 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 . . . "

Even in this context, though, definition is not simple. For copyright, debate persists as to what constitutes a "Writing." The term has been expanded and adapted over two centuries of technological advancement and now includes sound recordings, motion pictures and audiovisual works, computer programs, et al.

Moreover, and this goes to the intangible nature of intellectual property, we must decide what parts of a "Writing" can be protected by copyright. The standard here is one of originality, although Justice O'Connor used the term "creativity" in the recent Feist telephone directory case. Also, the first axiom of copyright states that ideas are not copyrightable, only expressions are.

Thus, the idea of a story in which a ghoulish and quasi-supernatural figure stalks adolescents, killing them one by one in horrific and gory fashion, is not copyrightable. The various expressions of this idea found in the *Nightmare on Elm Street*, *Friday the 13th* and *Halloween* movies can be copyrighted. One can come up with a new ghoul and new story elements as yet another variation on the theme, but one cannot expropriate the character of Freddy Krueger or otherwise

copy identically the key elements of *Nightmare on Elm Street*. How much similarity is allowed between a new work and a copyrighted work is of course the essence of a copyright infringement claim.

The "idea-expression dichotomy" is even less easily reconciled in such works as computer programs, databases, print compilations, etc.. What is at stake in this determination, as with all copyright decisions, is the extent of the monopoly to be granted a copyright holder. Copyright and patent law, as stated in the Constitution, attempt to promote artistic and scientific progress. To do this, we must provide adequate incentive and reward to individuals for their creations and discoveries, while also making sure that others have adequate access and usage of what has come before, so as to be able to build upon it. Intellectual property law attempts to balance these competing interests in the most equitable fashion, not so much for the individuals involved in a particular dispute, but rather for the greater good of society.

If intellectual property has seemed a vague and distant concept, or if your exposure to copyright law has been primarily through the mechanical provisions of the library photocopying exception, I dare say that intellectual property and the laws which protect it are about to become much more prominent in your professional life. This eventuality is reflected in the inclusion of two copyright-related sessions in the program for this year's Charleston Conference. I will summarize those sessions in the next issue of this journal.

Copyright is one of the major issues to be addressed in the electronic information revolution. Also, as library budgets continue to tighten and as journal prices continue to escalate, interlibrary loan and the fair use/library photocopying exceptions to current copyright law are on a collision course. This issue presents numerous competing interests and worthwhile social policies. The debate has already begun, and regardless of the outcome it is certain to affect us all. ☛