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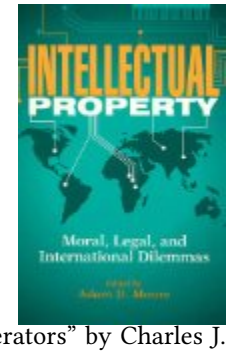
Adam D. Moore, ed. *Intellectual Property: Moral, Legal, and International Dilemmas.* Lanham, Md.: Rowman & Littlefield Publishers, 1997. xi + 387 pp. $28.95 (paper), ISBN 978-0-8476-8427-4; $114.00 (cloth), ISBN 978-0-8476-8426-7.



Reviewed by Tamsen Valoir (Baker & Botts, L.L.P)
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The title of this anthology is somewhat misleading, for it has little to do with legal or international issues important in patent law. It does not, for example, consider the implications of life plus 50 versus life plus 75 years of copyright protection, the ramifications of "le droite moral," or the effects of publication at 18 months on the small American inventor. Instead, the anthology is largely about the theoretical justifications for intellectual property and avoids contemplating the detailed issues that must be debated as we proceed toward an increasingly global economy and harmonization of intellectual property laws.

However, aside from the somewhat misleading title, it is a useful contribution to the literature of the jurisprudential foundations of intellectual property regimes. The selected essays are notable in their diversity, both of viewpoint and of writing styles. Contributions range from the heavy, pedantic style of legal philosophers, such as James W. Child (what do "compossible, pareto-superior, conative, conflate and hypostatized" mean anyway?) to the pragmatic, amusing style of Grateful Dead lyricist and co-founder of the Electronic Frontier Foundation, John Perry Barlow. Fortunately, the philosophies of the contributors also diverge and a multiplicity of viewpoints are presented. For the legal philosopher, the book is a valuable, interesting compendium of traditional, contemporary and occasionally radical thought.

Although the book largely deals with the rational basis for protecting ephemeral property, there are a couple of essays that consider other issues. One essay is titled "Are Computer Hacker Break-ins Ethical? " by Eugene H. Spafford and seems out of place in this anthology. The other is "National and International Copyright Liability for Electronic System Operators" by Charles J. Meyers. This essay is also an unusual selection for the anthology, but is most notable for confusing contributory infringement with vicarious infringement. Id. at 328 (misreading the Supreme Court case *Universal City Studios v. Sony Corp.*). It's amazing that an essay could be published *twice* with these two types of infringement reversed, particularly where the author gets it right in subsequent paragraphs.

The introduction by Adam D. Moore is typical fare, with the obligatory introduction to intellectual property stating the usual inaccuracies about intellectual property law. For example, the author, like many, erroneously states that a patent provides a "twenty-year exclusive monopoly" over the protected work allowing the holder to protect the "the totality of the idea." Id. at 5. Of course what the patentee really holds is a right to prevent others from making, using or selling her invention. The inventor may not necessarily be able to practice her own invention, which depends on the lack of any broader patents in the field. The brief summation of intellectual property follows with introductory paragraphs about each essay which were too perfunctory to be of value, although one could say the same of this review.

The essays themselves are presented in a logical sequence. One of the most attractive features of the book is the point/counterpoint presentation of essays. One author presents an essay and the next author responds directly to the first author's arguments. This is a particularly effective tool that helps to clarify the issues for the reader and makes the debate more interesting. This technique could be applied more often with good effect.

The initial essay by Edwin C. Hettinger considers

all of the usual justifications of intellectual property and concludes that justifying intellectual property is a formidable task because "ideas" can be used by many without restricting their use by the originator. Therefore, there really is little need to protect ideas. The author settles on the usual argument for intellectual property protection, that it stimulates the dissemination and use of information. Of the various types of protection, the author concludes that copyright is the least harmful, followed by patents, then trade secrets. Patents prevent the use of an idea, unlike copyright which prevents only direct copying or plagiarism. Trade secrets are even more suspect, because at least patents provide for the disclosure of ideas, unlike trade secrets which by definition do not.

The subsequent essay by Lynn Sharp Paine takes issue with Hettinger's assumptions about trade secrets. Trade secrets, she asserts, are not founded on the utilitarian justification proposed by Hettinger, a justification under which trade secrets suffer criticism since no disclosure of ideas occurs as compensation for their legal protection. Rather, trade secrets are founded on privacy concerns. She believes that everyone has the right to determine when and to whom an idea will be disclosed. Further, involuntary disclosures based on deceit, coercion and theft of documents should not be condoned nor result in a forfeiture of one's ideas. Paine's essay is well written and as a counterpoint to Hettinger's essay provides much useful insight into various rationales for the protection of intellectual property.

The next essay, by James W. Child, is written in a portentous style that assumes significant familiarity with philosophy, including the prominent philosopher Locke. I find it unlikely that the essay will be of significant interest or comprehension to the average reader, although the jurisprudentialist or law review editor will no doubt enjoy wading through it. To be fair, the initial essay by Child prepares the reader for the subsequent essays by Adam D. Moore, Justin Hughes and Tom G. Palmer, all of which raise interesting questions about intellectual property.

For example, Palmer notes that being the first to market may be more valuable than patent protection, particularly in industries where technical innovation is both incremental and fast. He notes that patents may be most effective in the drug industry where the Food and Drug Administration, which requires early publication of information on new drugs prior to their approval, prevents producers from surprising the market with new products. This idea is supported by a study that sampled 100 firms and 12 industries. Id. at 210.

Both Palmer and John Perry Barlow consider the possibility that copyright protection is rapidly becoming outdated in the emerging information age and instantaneous access of the Internet. Palmer, for example, asks "If laws are dependent for their emergence and validation upon technological innovations, might not succeeding innovations require that those very laws pass back out of existence? " Id. at 188. The authors consider alternate methods of ensuring that sufficient incentive exists to ensure that new creative works are created and disseminated. With respect to software, for example, the work, although easily copied, is marketed with other desirable goods such as manuals, services, regular up-dates, etc. The consumer, although easily able to obtain a pirated copy of the work, is motivated to obtain a legitimate copy and the support services which accompany it.

Marci A. Hamilton brazenly asserts that TRIPS, the Trade Related Aspects of Intellectual Property Rights of the WTO/GATT agreement, is one of the "most effective vehicles of Western Imperialism in history." Id. at 243. What follows is an interesting article about the ever-reaching tentacles of copyright law. Technology, Hamilton asserts, enables the copyright owner to reach into the "free use zone," charging users for traditionally free activities such as browsing, borrowing, fair use and personal use or personal lending. A properly crafted free use zone would retain these rights for users and maintain the balance of rights between the users and the publishers.

Richard Stallman and John Perry Barlow, as programmers, provide a refreshing viewpoint on the issue of copyright, particularly as applied to software and other works on electronic media. Neither believe that copyright has continued value in the electronic age. Although perhaps not as rigorously logical as some academic authors, these writers have a unique viewpoint and write from their personal feelings and experience. The writing is clear, concise and enjoyable and, although lacking in supporting footnotes, well worth reading.

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