

What is Intellectual Property?

Part 2: Copyright

By Judith Silver, Esq.¹

Intellectual Property is the group of legal rights in things people create or invent. Intellectual property rights typically include patent, copyright, trademark and trade secret rights.

Most people are surprised to discover that Intellectual Property rights originate with our Founding Fathers in the Constitution (Article 1, Section 8, Clause 8) which states that Congress shall have 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.” The right to exclusive ownership and use of one’s inventions and the monetary rewards from giving others permission to use them complement the other beliefs of our Founders.

In the middle to late nineteenth century, these beliefs grew into capitalism which embodies the benefits and rewards of hard work (as remained from Puritanism); the exchange of business ideas through products and services; and competition in the marketplace and financial reward for the most popular or beneficial ideas. It was not accidental that capitalism had many of the same theoretical bases as Charles Darwin’s notions of survival of the fittest from the same time; author and Harvard biology professor Stephen Jay Gould states that Darwin read Adam Smith prior to writing his “survival of the fittest” theory². Indeed, intellectual property law, with exception of patents which preceded the rest in codification by several centuries, reached major legal codifications in this same period, during the late eighteenth to late nineteenth century. These laws sought to ensure that the best and most popular inventions and creations earned monetary compensation for their creators. This, in turn, inspired others to create through discussion and understanding.

The heart of intellectual property law is the balancing of (a) financially rewarding creation through granting of exclusive rights to the author and (b) promoting the free flow of ideas to facilitate more creation. This balance is two-fold. First, it can be seen as the a tension between rewarding ideas and spurring new ones. Secondly, it can be seen as a balance between the “Promotion of Science and Useful Arts” Constitutional clause above and the First Amendment – this is an equally compelling tension between ownership of arts, words and

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² Stephen Jay Gould, *The Panda's Thumb: More Reflections in Natural History* (New York: Norton, 1982), p.64 according to www.crosscurrents.org/darwin

invention and the freedom of Americans to speak and express themselves without restriction. This balance is visible through all the laws and all the cases about intellectual property in the United States. If you keep this tension in mind, everything else becomes much easier to understand.

With this in mind, let's consider briefly what rights are granted under copyright law³.