

INTELLECTUAL PROPERTY RIGHTS

Critical Concepts in Law

Edited by
David Vaver

Volume I

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Chronological table of reprinted articles and chapters

<i>Date</i>	<i>Author</i>	<i>Title</i>	<i>Source</i>	<i>Vol.</i>	<i>Chap.</i>
1850	Charles Dickens	A poor man's tale of a patent	<i>Household Words</i> 1: II(70).	III	33
1859	Abraham Lincoln	Second lecture on discoveries and inventions	In Roy P. Basler (ed.), <i>The Collected Works of Abraham Lincoln</i> (1953), 356-63.	III	32
1880	Thomas Macaulay	A speech delivered in the House of Commons on the 5th of February, 1841	<i>The Miscellaneous Writings, Speeches and Poems of Lord Macaulay</i> (Longmans, Green, & Co., vol. 3): 149-67.	II	13
1905	Augustine Birrell	A few words about copyright in books	<i>In the Name of the Bodleian and Other Essays</i> (London: Elliot Stock): 110-16.	II	14
1927	Frank I. Schechter	The rational basis of trademark protection	<i>Harvard Law Review</i> 40: 813-33.	IV	46
1934	Arnold Plant	The economic theory concerning patents for inventions	<i>Economica</i> (N.S.) 1(1): 30-51.	III	34
1934	Arnold Plant	The economic aspects of copyright in books	<i>Economica</i> (N.S.) 1(2): 167-95.	II	15
1936	Walter Benjamin	The work of art in the age of mechanical reproduction	<i>Illuminations</i> (1955, Eng. translation by Harry Zohn 1968): 219-53.	II	16
1981	David Lange	Recognizing the public domain	<i>Law and Contemporary Problems</i> 44: 147-78.	IV	58
1982	Peter Shaw	Plagiary	<i>American Scholar</i> 51: 325-33.	II	20
1984	Martha Woodmansee	The genius and the copyright: economic and legal conditions of the emergence of the "author"	<i>Eighteenth-Century Studies</i> 17(4): 425-48.	II	17
1989	Rebecca S. Eisenberg	Patents and the progress of science: exclusive rights and experimental use	<i>University of Chicago Law Review</i> 56: 1017-86.	III	36

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1989	Edwin C. Hettinger	Justifying intellectual property	<i>Philosophy & Public Affairs</i> 18: 31–52.	I	4
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1993	Dreyfuss	Indigenous knowledge of biological resources and intellectual property rights: the role of anthropology	<i>American Anthropologist</i> 95(3): 653–86.	I	11
1993	Jeremy Waldron	From authors to copiers: individual rights and social values in intellectual property	<i>Chicago-Kent Law Review</i> 68: 841–87.	I	5
1994	Mark F. Grady	A positive economic theory of the right of publicity	<i>UCLA Entertainment Law Review</i> 1: 97–126.	IV	57
1995	Andrew Christie	Reconceptualising copyright in the digital era	<i>European Intellectual Property Review</i> 11: 522–30.	V	84
1996	Hugh Laddie	Copyright: over-strength, over-regulated, over-rated?	<i>European Intellectual Property Review</i> 5: 253–60.	II	18
1996	Michael Spence	Passing off and the misappropriation of valuable intangibles	<i>Law Quarterly Review</i> 112: 472–98.	IV	55
1996	David Vaver	Copyright and the state in Canada and the United States	<i>Intellectual Property Journal</i> 10: 187–218.	II	23
1997	James Boyle	A politics of intellectual property: environmentalism for the Net?	<i>Duke Law Journal</i> 47(1): 87–116.	V	87
1997	Henry Hansmann & Marina Santilli	Authors' and artists' moral rights: a comparative legal and economic analysis	<i>Journal of Legal Studies</i> 26(1): 95–143.	II	28
1997	P. Bernt Hugenholtz	Fierce creatures – copyright exemptions: towards extinction?	A paper delivered at the IFLA/ IMPRIMA-TUR Conference on <i>Rights, Limitations and Exceptions: Striking a Proper Balance</i> , Amsterdam (30–31 October), located at www.ivir.nl/publications/hughenholtz/PBH-FierceCreatures.doc .	II	24

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1997	Julius C.S. Pinckaers	The right of persona: a new intellectual property right for the US and EU	<i>Copyright World</i> 68: 26–32.	IV	56
1997	Lester C. Thurow	Needed: a new system of intellectual property rights	<i>Harvard Business Review</i> (September–October): 95–103.	V	81
1998	William R. Cornish	Experimental use of patented inventions in European Community states	<i>International Review of Intellectual Property and Competition Law</i> 29(7): 735–53.	III	41
1998	Catherine L. Fisk	Rights in employee inventions and ideas: an overview of United States law	<i>New Zealand Journal of Industrial Relations</i> 23(2): 47–62.	V	69
1998	Paul Edward Geller	<i>Hiroshige</i> vs. <i>Van Gogh</i> : resolving the dilemma of copyright scope in remedying infringement	<i>Journal of the Copyright Society of the USA</i> 46: 39–72.	II	19
1998	Wendy J. Gordon	Intellectual property as price discrimination: implications for contract	<i>Chicago-Kent Law Review</i> 73: 1367–90.	V	75
1998	Kamal Puri	Preservation and conservation of expressions of folklore	<i>Copyright Bulletin</i> (UNESCO) 32(4): 5–36.	IV	67
1998	Michael Spence	Intellectual property and the problem of parody	<i>Law Quarterly Review</i> 114: 594–620.	V	73
1998	Alan Story	Owning Diana: from People's Princess to private property	<i>Web Journal of Current Legal Issues</i> 5; http://webjcli.ncl.ac.uk/1998/issue5/story5.html .	IV	59
1998	Diane Leenheer Zimmerman	Who put the right in the right of publicity?	<i>DePaul Journal of Art and Entertainment Law</i> 9(1): 35–82.	IV	60
1999	Peter Drahos	Intellectual property and human rights	<i>Intellectual Property Quarterly</i> 3: 349–71.	I	10

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1999	Jane C. Ginsburg	The Cyberian captivity of copyright: territoriality and authors' rights in a networked world	<i>Santa Clara Computer & High Technology Law Journal</i> 15(2): 347–61.	V	78
1999	Herman Cohen Jehoram	Prohibition of parallel imports through intellectual property rights	<i>International Review of Intellectual Property and Competition Law</i> 30(5): 495–511.	V	74
1999	Mark A. Lemley	The modern Lanham Act and the death of common sense	<i>Yale Law Journal</i> 108: 1687–715.	IV	47
1999	Jessica Litman	Breakfast with Batman: the public interest in the advertising age	<i>Yale Law Journal</i> 108: 1717–34.	IV	51
1999	Ruth Towse	Copyright and economic incentives: an application to performers' rights in the music industry	<i>Kyklos</i> 52(3): 369–90.	II	29
1999	David Vaver	Moral rights yesterday, today and tomorrow	<i>International Journal of Law and Information Technology</i> 7(3): 270–8.	II	27

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2000	Graeme B. Dinwoodie	(National) trademark laws and the (non-national) domain name system	<i>University of Pennsylvania Journal of International Economic Law</i> 21: 499–527.	IV	52
2000	Peter Drahos	Indigenous knowledge, intellectual property and biopiracy: is a global bio-collecting society the answer?	<i>European Intellectual Property Review</i> 6: 245–50.	IV	68
2000	Rochelle Cooper Dreyfuss	Are business method patents bad for business?	<i>Santa Clara Computer & High Technology Law Journal</i> 16: 263–80.	III	37
2000	Paul Edward Geller	International intellectual property, conflicts of laws, and internet remedies	<i>European Intellectual Property Review</i> 3: 125–30 (updated 2004).	V	77
2000	J.H. Reichman	Of green tulips and legal kudzu: repackaging rights in subpatentable innovation	<i>Vanderbilt Law Review</i> 53(6): 1743–98.	V	83
2000	David Vaver	Intellectual property: the state of the art	<i>Law Quarterly Review</i> 116: 621–37.	I	1
2001	John H. Barton	The economics of TRIPs: international trade in information-intensive products	<i>George Washington International Law Review</i> 33: 473–501.	IV	61
2001	Michael Blakeney	Intellectual property rights and global food security	<i>Bio-Science Law Review</i> 4: 127–40.	III	44
2001	Michael Blakeney	Proposals for the international regulation of geographical indications	<i>Journal of World Intellectual Property</i> 4(5): 629–52.	IV	53
2001	Carlos M. Correa	Pro-competitive measures under the TRIPs Agreement to promote technology diffusion in developing countries	<i>Journal of World Intellectual Property</i> 4: 481–96.	IV	62
2001	Graham Dutfield	TRIPs-related aspects of traditional knowledge	<i>Case Western Reserve Journal of International Law</i> 33(2): 239–81.	IV	66
2001	Christine Greenhalgh & Mark Longland	Intellectual property in UK firms: creating intangible assets and distributing the benefits via wages and jobs	<i>Oxford Bulletin of Economics and Statistics</i> 63: 671–96.	I	8

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2001	Robert Pitofsky	Antitrust and intellectual property: unresolved issues at the heart of the New Economy	<i>Berkeley Technology Law Journal</i> 19: 535–59.	I	7
2001	Nicholas Pumfrey	Patent protection of broad claims	<i>10th European Patent Judges' Symposium Luxembourg</i> (September) in <i>Special Edition (2) of the Official Journal 2001</i> of the European Patent Office, 82–92.	III	38
2001	Rüdiger Rogge	Equivalents and the importance of prior limiting statements	<i>10th European Patent Judges' Symposium Luxembourg</i> (September), in <i>Special Edition (2) of the Official Journal 2001</i> of the European Patent Office, 14–33.	III	40
2001	Pamela Samuelson	Anticircumvention rules: threat to science	<i>Science</i> 293(5537): 2028–31.	II	25
2002	Lori B. Andrews	Genes and patent policy: rethinking intellectual property rights	<i>Nature Reviews Genetics</i> 3(10): 803–8.	III	42
2002	John H. Barton	Research-tool patents: issues for health in the developing world	<i>Bulletin of the World Health Organization</i> 80: 121–5.	IV	64
2002	James Boyle	Fencing off ideas: enclosure and the disappearance of the public domain	<i>Daedalus</i> (Spring): 13–25.	V	85
2002	Andrew Christie	The ICANN domain-name dispute resolution system as a model for resolving other intellectual property disputes on the internet	<i>Journal of World Intellectual Property</i> 5(1): 105–17.	V	79
2002	William Cornish	The author as risk-sharer	<i>Columbia Journal of Law and the Arts</i> 26(1): 1–16.	V	70

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2002	Jane C. Ginsburg	"The exclusive right to their writings": copyright and control in the digital age	<i>University of Maine Law Review</i> 54: 196–215.	II	26
2002	Carla Hesse	The rise of intellectual property, 700 BC to AD 2000: an idea in the balance	<i>Daedalus</i> (Spring): 26–45.	I	2
2002	Mark D. Janis and Jay P. Kesan	U.S. plant variety protection: sound and fury ... ?	<i>Houston Law Review</i> 39: 727–78.	III	43
2002	Martin Kretschmer	The failure of property rules in collective administration: rethinking copyright societies as regulatory instruments	<i>European Intellectual Property Review</i> 3: 126–37.	II	30
2002	Fiona Macmillan	The cruel ©: copyright and film			
2002	Christopher May	The Venetian moment: new technologies, legal innovation and the institutional origins of intellectual property	<i>European Intellectual Property Review</i> 10: 483–92.	II	22
2002	Richard A. Posner	The law and economics of intellectual property	<i>Prometheus</i> 20(2): 159–79.	III	31
2002	David Vaver	Need intellectual property be everywhere? against ubiquity and uniformity	<i>Daedalus</i> (Spring): 5–12.	I	6
2003	Paul Edward Geller	An international patent Utopia?	<i>Dalhousie Law Journal</i> 25(1): 1–26.	V	80
2003	Robin Jacob	One size fits all?	<i>European Intellectual Property Review</i> 11: 515–21.	V	82
2003	Christopher May	Why IPRs are a global political issue	In F. Scott Kieff (ed.) <i>Perspectives on Properties of the Human Genome Project</i> (Elsevier) 449–58.	V	72
2003	David Vaver	Invention in patent law: a review and a modest proposal	<i>European Intellectual Property Review</i> 1: 1–5.	I	12
2003	R. Polk Wagner	Information wants to be free: intellectual property and the mythologies of control	<i>International Journal of Law and Information Technology</i> 11(3): 286–307. <i>Columbia Law Review</i> 103: 995–1034.	III	35
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2004	William Cornish	Branding	<i>Intellectual Property: Omnipresent, Distracting, Irrelevant?</i> (OUP): 73–114.	IV	48
2004	Gerald Dworkin	Unfair competition: is it time for European harmonization?	In David Vaver & Lionel Bently (eds.), <i>Intellectual Property in the New Millennium</i> (CUP): 175–88.	IV	54
2004	L. T. C. Harms	The role of the judiciary in the enforcement of intellectual property rights	<i>European Intellectual Property Review</i> 11: 483–92.	V	71
2004	Paul J. Heald	A skeptical look at Mansfield's famous 1994 survey	<i>Information Economics and Policy</i> 16: 57–65.	IV	63
2004	Jeremy Phillips and Ianah Simon	No marks for Hitler: a radical reappraisal of trade mark use and political sensitivity	<i>European Intellectual Property Review</i> 8: 327–30.	IV	50
2004	C. Ford Runge	Enclosure, intellectual property and life-sciences research	<i>Journal of World Intellectual Property</i> 7(6): 807–27.	III	45
2005	Michele Boldrin & David K. Levine	The economics of ideas and intellectual property	<i>Proceedings of the National Academy of Sciences</i> 102(4): 1252–6.	I	9
2005	Hector L. MacQueen	“My tongue is mine ain”: copyright, the spoken word and privacy	<i>The Modern Law Review</i> 68(3): 349–77.	II	21
2005	Michael J. Meurer and Craig Allen Nard	Invention, refinement and patent claim scope: a new perspective on the doctrine of equivalents	<i>Georgetown Law Journal</i> 93.	III	39

PREFACE

Putting together a set of the most interesting writings about the law of intellectual property rights has been rather more of challenge than I originally expected when I first took on the task. Twenty years ago my job would have been much easier – there was not that much great writing around. This is, fortunately, no longer true. The last couple of decades have seen an enormous outpouring of excellent commentary about intellectual property as the subject has moved from its place as a recondite field of study to taking a centre role in the current technological revolution.

Any selection of the “best” work in the field is bound to be very personal. One major constraint has been space. I have tried to present a broad selection of writing from an equally broad range of authors and perspectives – mostly law, but also other disciplines: economics, history, politics, anthropology, cultural studies. Some arbitrary choices nonetheless had to be made. Since the brief was to include whole unabridged articles, the shorter piece usually won out over the longer. Thus some excellent writers and writing are represented here only as footnote references. Had everything I wanted gone in, this compilation would have ballooned to twice or three times its current size.

It is impossible to thank all those who helped shape the work. The many academics and lawyers I contacted for suggestions of what writing to include provided leads I might otherwise have overlooked. At the Oxford Intellectual Property Research Centre at St Peter’s College, Shamnad Basheer provided much additional helpful research, and my assistant Karen Clayton worked tirelessly on the collection and assembly of the physical material and on clearing out what was ultimately rejected. Jessica Spencer at Routledge offered constant encouragement and, fortunately, a flexible viewpoint on that scourge of all publishing – deadlines.

The result will, I hope, prove stimulating reading.

David Vaver
Oxford
October 2005

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GENERAL INTRODUCTION

David Vaver

What is intellectual property law? It starts from the premise that ideas are free as the air – a common resource for all to use as they can and wish. It then proceeds systematically to undermine that premise.

Some try to trace the origins of intellectual property – copyright, patents, trademarks and design rights – to time immemorial. The attempt is implausible, at least for patents, copyright and design rights: the common law recognized no such things and legislatures had to be pressured to create them.

The first recognizable patent law was a 1474 decree of Renaissance Venice,¹ but its idea was slow to catch on. When British courts were asked to rule in the late 18th century on whether copyright was part of the unwritten law of the land, a solid majority firmly replied in the negative.² So did a solid majority of the United States Supreme Court when faced with the same question half a century later.³ The judges thought that writings and inventions were alike in theory. The law let anybody imitate and market another's method or product unless the state had granted a patent over it or the copier had betrayed some secret process confided to him. But issuing patents and rectifying breaches of confidence were the exception, not the rule. In Britain patent grants flowed from the Crown's prerogative power, often exercised since early times as much to reward the monarch's favourites as to encourage new industry. Since 1623, however, the Statute of Monopolies (mainly a statute *against* monopolies) had severely circumscribed the Crown's patent-granting power to defined situations, a key one of which was the granting of time-limited (14-year) protection for newly invented or imported technologies. The case of books was similar: copying was forbidden only in respect of works that the author had kept private to himself and his intimates. Otherwise, according to the judges, anyone could copy a published work at leisure, and the author or publisher had no legal right to object. Legislatures could change that position. They did, but gradually and with circumspection.

So, as Carla Hesse puts it, “[t]he concept of intellectual property – the idea that an idea can be owned – is a child of the European Enlightenment.”⁴ Copyright started as a response to the protectionist bent of the early 18th century London book trade, then reeling from the demise of its role as the Crown's censor of books. France repackaged this protectionist urge more attractively as a basic human right