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## From Edison to iPod: Protect Your Ideas and Make Money

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## BOOK REVIEW

### *FROM EDISON TO IPOD: PROTECT YOUR IDEAS AND MAKE MONEY*

BY FREDERICK W. MOSTERT AND LAWRENCE E. APOLZON  
NEW YORK: DORLING KINDERSLEY LIMITED, 2007  
PP. 288, \$30.00

*Reviewed by Yvonne Cripps<sup>†</sup>*

This is no dry, dusty tome tolling the endless knells and changes of intellectual property law. We enter a world of sounds, smells and moving images, distinctive words and designs, into which your reviewer humbly follows Nelson Mandela, who has aptly stated: “This book democratizes intellectual property and makes it accessible for all to use and understand.”<sup>1</sup> Mandela has been advised by the authors, as have the Shaolin monks, Catherine Zeta-Jones, Michael Douglas, Boris Becker, Jackie Chan, Stella McCartney, Sylvester Stallone and Ernie Els, to name but a few.<sup>2</sup>

It is not in every book on intellectual property law that one would see the Supplemental Register rightly described as “a sort of purgatory for trademarks” awaiting entry into the “nirvana” of the Principal Register.<sup>3</sup> Thus the authors succinctly convey the long wait<sup>4</sup> with limited rights which may be endured before full trademark protection can be gained by those possessed of merely descriptive

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<sup>†</sup> Harry T. Ice Professor of Law, Indiana University School of Law, Bloomington. I am delighted to record my thanks to Professor Gary Simson, Dean of the Case Western Reserve University School of Law and Joseph C. Hostetler-Baker Hostetler Professor for his brilliantly helpful comments on this review.

<sup>1</sup> Praise for the Book, <http://www.fromedisonitoipod.com/praise> (last visited Oct. 21, 2008) (quoting Nelson Mandela).

<sup>2</sup> FREDERICK W. MOSTERT & LAWRENCE E. APOLZON, *FROM EDISON TO IPOD: PROTECT YOUR IDEAS AND MAKE MONEY* 9 (2007).

<sup>3</sup> *Id.* at 80.

<sup>4</sup> Approximately five years.

marks. But this book is aimed at creative spirits and those who sponsor and invest in them: musicians, artists, scientists, designers, marketers and entrepreneurs. The authors themselves lay claim to that audience,<sup>5</sup> but this reviewer would add to that list: lawyers, law students and law professors. Lawyers not normally focused on intellectual property law and students considering whether to take intellectual property courses or whether to practice in that area will benefit greatly from this book.

Intellectual property has become such an integral part of our everyday life that every lawyer and, arguably, every citizen should know something of its contours. The authors illustrate the ubiquity of intellectual property with an evocative passage reminding readers of the many trademarks, patents and design rights they are likely to encounter within the first few minutes of waking. As the authors invite us to imagine, a Radio Shack alarm is playing NPR's Morning Edition. Starbucks coffee from the GE refrigerator brews in the Braun coffeemaker, with its Melitta filter. The Sony television is switched on for a check of The Weather Channel. Entenmann's cake, bought from Kroger's supermarket, proves irresistible before the IKEA chair is drawn up for work at the HP laptop.<sup>6</sup>

Yet such ubiquity and the logjams in intellectual property registries<sup>7</sup> do not, for the most part, lead Mostert and Apolzon to rail against what this reviewer regards as a veritable pandemic of intellectual property. As I have argued elsewhere,<sup>8</sup> there has been a lamentable tendency to grant intellectual property protection, in some instances of expanded duration,<sup>9</sup> to subject-matters that would not previously have been regarded as inventive, not least because they are purely abstract ideas or discoveries or part of the common heritage of mankind. As is so often the case, more is less here, because the appropriation of such ideas and discoveries will exclude true inventors who cannot afford to purchase the access required to build upon these newly-seized territories. Let us, therefore, end unjustified annexation in the world of intellectual property.

The authors touch upon this issue only when they question the so-called "business method patents," which protect subject matter such as Amazon's "One-click" checkout.<sup>10</sup> It is a fundamental principle of

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<sup>5</sup> MOSTERT & APOLZON, *supra* note 2, at 8.

<sup>6</sup> *Id.* at 50–51.

<sup>7</sup> *Id.* at 254.

<sup>8</sup> Yvonne Cripps, *The Art and Science of Genetic Modification: Re-Engineering Patent Law and Constitutional Orthodoxies*, IND. J. GLOBAL LEGAL STUD., 11.1, Winter 2004, at 1.

<sup>9</sup> In the case, for example, of extended copyright terms.

<sup>10</sup> MOSTERT & APOLZON, *supra* note 2, at 173–74.

patent law that ideas alone, as opposed to inventions, are not patentable. This principle, the authors note, “separates the dreamers from the inventors!”<sup>11</sup> They point out that “[i]n some cases, the range of protection has become so extreme that critics refer to this change [the expansion of patentable subject-matter] as the ‘silliness standard.’”<sup>12</sup> Mostert and Apolzon attribute the questionable business method patents to the evolution of the Internet from its origins in the academic and scientific communities to its domination today by consumers and entrepreneurs, ushering in the DOTCOM era.<sup>13</sup> This was a cultural evolution which led Patent and Trademark Offices around the world to lose sight of the tried-and-tested principles of intellectual property law—principles that would have suggested that business methods were un-patentable ideas, as opposed to inventions deserving protection.

If the development of the Internet, with its accompanying DOTCOMs, was a transforming technological force in the twentieth century, the biotechnological revolution may come to dominate the twenty-first. Yet apart from the briefest of references to plant variety rights<sup>14</sup>—a subject to which Apolzon may devote what would be a most welcome future work<sup>15</sup>—the authors do not discuss intellectual property rights in the increasingly important sphere of biotechnological inventions.

The sequencing of the human genome raised tantalizing questions about the appropriate scope of intellectual property. Human genes have become patentable subject matter, as have stem cells and clones. Is intellectual property protection, if too widely cast, ultimately likely to limit creativity? Do certain subject matters constitute part of the natural heritage of mankind rather than inventions? Much is at stake, for innovation and inventiveness may be inhibited if natural basic building blocks are patented.

Appropriately and unsurprisingly, the authors do not attempt to pursue such questions in an introductory text. Nor, despite the exoticism of the authors’ client list, is their book aimed at readers interested in non-American intellectual property law. It does, however, refer to the international scene, as when the authors note that whether a work is in the public domain will vary from country to

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<sup>11</sup> *Id.* at 192.

<sup>12</sup> *Id.* at 174.

<sup>13</sup> *Id.* at 173.

<sup>14</sup> *Id.* at 169.

<sup>15</sup> *Id.* at 287.

country.<sup>16</sup> They also devote some attention to international filing<sup>17</sup> and the database administered by the European Patent Office.<sup>18</sup>

This beautifully written and illustrated<sup>19</sup> book begins with an introduction to the basic intellectual property rights—a tour of the various properties, showing how they fit together, and sometimes overlap, to create multi-layered protection.<sup>20</sup> The authors repeatedly emphasize the importance of considering whether more than one intellectual property right will need to be invoked to protect a particular creative work or product, once the “prior art”<sup>21</sup> has been checked. Thus, for example, elements of computer programs may be protected by trade secrecy, copyright and patents.<sup>22</sup> The authors note the desirability of registering even when, under U.S. law, rights are automatically acquired on creation.<sup>23</sup> This is linked with the need to alert as wide an audience as possible to your intellectual property rights. If you have a famous name and also trademark rights, you can allege that a third party’s use of your name dilutes your trademark, even if the questionable mark is not directly related to the goods and services you provide.<sup>24</sup>

As in all things, timing is crucial. The authors counsel creative types not to procrastinate and to keep detailed records of dates. The latter will be especially valuable in the event of disputes about the “prior art.”<sup>25</sup> Beware also the duration of protection. For example, trademark rights last for as long as the trademark is used:<sup>26</sup> it is a question of “use it or lose it!”<sup>27</sup>

But none of this advice matters if you cannot afford to pay what it takes to protect your intellectual property, and this makes Mostert and Apolzon’s guidance on costs extremely beneficial to readers. They suggest obtaining a full upfront estimate of costs for the short and long term,<sup>28</sup> and they helpfully include broad estimates of the cost of filing for the different types of intellectual property rights. They also

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<sup>16</sup> *Id.* at 136.

<sup>17</sup> *Id.* at 194–95, 224–25, 250–51.

<sup>18</sup> *Id.* at 186.

<sup>19</sup> Photos of many famous inventions, brands and designs are used throughout the book and, of course, properly attributed and acknowledged. *See, e.g., id.* at 284, 288.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.* at 174–76, 181, 191, 203, 223.

<sup>22</sup> *Id.* at 159.

<sup>23</sup> *Id.* at 44.

<sup>24</sup> *Id.* at 112–13.

<sup>25</sup> *Id.* at 181–82.

<sup>26</sup> *Id.* at 18.

<sup>27</sup> *Id.* at 85.

<sup>28</sup> *Id.* at 241.

underline the importance of policing, renewing and maintaining intellectual property rights.<sup>29</sup>

To assist novices in this field to gain best advantage from the gems stored in this book, the authors provide very useful checklists and summaries.<sup>30</sup> These help readers to appreciate whether, for example, their creations qualify for more than one type of intellectual property protection. Mostert and Apolzon also supply a thorough index as well as appendices with examples of various intellectual property documents, such as a non-disclosure, or confidentiality, agreement.<sup>31</sup> Epitomizing today's DOTCOM era, the authors even have their own website to accompany the book and to make further examples accessible.<sup>32</sup> They also cite relevant websites for organizations such as the Copyright Office,<sup>33</sup> in addition to other sites that will assist greatly with all-important intellectual property searches.<sup>34</sup> As they observe, however, even providing a link to another website can amount to unfair competition or an infringement of trademark law. Accordingly, they advise website designers to seek permission from the web masters of the sites to which they would like to establish links.<sup>35</sup> Website designers will also be able to claim copyright in their website design.<sup>36</sup>

After the general introduction to the various rights, the authors dedicate individual chapters to each of the major rights in turn: trademarks, rights of publicity, copyright (including the moral rights that artists have in their artistic creations<sup>37</sup>), trade secrets, utility patents and design patents. The trademark chapter<sup>38</sup> extends to trade names, domain names, color marks, moving image marks, sound marks and smell marks. This reinforces the multi-dimensional nature of intellectual property's relation to the various senses, though "taste" and "touch" marks remain thankfully elusive. The chapter also contains a very illuminating section on the rewards of choosing an effective trademark and the factors, such as distinctiveness and descriptiveness, to take into account when making that choice. Here, too, the value of the authors' extensive experience is evident in their

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<sup>29</sup> *Id.* at 85, 90–97.

<sup>30</sup> *Id.* at 38–39, 46.

<sup>31</sup> *Id.* at 270–71.

<sup>32</sup> *Id.* at 131; see From Edison to iPod, <http://www.fromedisonitoipod.com> (last visited Oct. 14, 2008).

<sup>33</sup> See MOSTERT & APOLZON, *supra* note 2, at 131–32 (describing U.S. Copyright Office, [www.copyright.gov](http://www.copyright.gov), and the forms available there).

<sup>34</sup> MOSTERT & APOLZON, *supra* note 2, at 71–73.

<sup>35</sup> *Id.* at 142–43.

<sup>36</sup> *Id.* at 143.

<sup>37</sup> *Id.* at 127.

<sup>38</sup> *Id.* at ch. 1.

observation that suggestive marks are, in general, easier and less expensive to enforce than descriptive ones.<sup>39</sup> They also recognize that marks can be a victim of their own success, as, for example, were Cellophane and Trampoline.<sup>40</sup> In such instances, marks that were hugely successful come to be generically associated with a broad class of object rather than a particular brand name. At that point, they are so associated with a generic category of object that their associative value for the trademark holder is seriously diminished, if not extinguished. The authors note that this is particularly likely to happen when a trademark is coined for a completely new product which is patented and has at the time no competition in the marketplace.<sup>41</sup>

The chapter on utility patents<sup>42</sup> contains further warnings about cost, as well as guidance on how to assess the likely viability of a patent in the first instance.<sup>43</sup> These discussions dovetail with reminders of the need for sufficient disclosure of the “best mode” for implementing an invention.<sup>44</sup> And in language exemplifying their translucently clear and enjoyably readable prose, the authors describe the “prosecution” of a patent application as a “sort of stodgy term” for the “back and forth” process with the United States Patent and Trademark Office.<sup>45</sup> They also include very worthwhile advice on cross-licensing<sup>46</sup> and when to settle.<sup>47</sup>

Design patents receive useful scrutiny in Chapter 6.<sup>48</sup> There, the authors give extremely interesting practical tips on filing design patent applications, and they also caution against the use of color photos, or indeed photos in general, to support an application.<sup>49</sup> The passages addressing the difficulty of protecting an invention as broadly as possible, while drafting the claims sufficiently narrowly to avoid the prior art, reveal the importance of being represented by practiced professionals and of having “errors and omissions insurance.”<sup>50</sup> Such matters are pursued in a final chapter, entitled “Intellectual Property Portfolio,”<sup>51</sup> in terms, for example, of advice on

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<sup>39</sup> *Id.* at 58–59, 61.

<sup>40</sup> *Id.* at 57.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at ch. 5.

<sup>43</sup> *Id.* at 187–88.

<sup>44</sup> *Id.* at 190–91.

<sup>45</sup> *Id.* at 196.

<sup>46</sup> *Id.* at 204–05, 238.

<sup>47</sup> *Id.* at 203, 254–55.

<sup>48</sup> *Id.* at 206–31.

<sup>49</sup> *Id.* at 219–24 (especially at p. 221).

<sup>50</sup> *Id.* at 241–43.

<sup>51</sup> Ch. 7, *id.* at 232–55.

how to choose competent intellectual property professionals and other ancillaries such as tax, estate planning and search experts.<sup>52</sup> Here, the authors also consider the value of settlement, mediation and arbitration, and the disadvantages of litigation.<sup>53</sup>

Mostert and Apolzon's marvelously accessible and practical guide for newcomers to intellectual property law is sprinkled with occasional references to the efficacy of issuing "cease-and-desist" letters in appropriate circumstances.<sup>54</sup> This reviewer borrows that injunction by concluding with a "cease and desist" notice to other authors who would attempt to publish an introduction to intellectual property as artistic, creative, useful and bankable as this one. Any such copy will be merely a pale imitation.

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<sup>52</sup> *Id.* at 241–47.

<sup>53</sup> *Id.* at 254–55. See also *id.* at 241 for the possible need for product liability insurance.

<sup>54</sup> *Id.* at 91–94, 146, 202–04, 228, 230.



