Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights

Carolyn W. Davenport
JUDICIAL CREATION OF THE PRIMA FACIE TORT OF PLAGIARISM IN FURTHERANCE OF AMERICAN PROTECTION OF MORAL RIGHTS

Although the European doctrine of moral right acknowledges a creator's prima facie right to be recognized for his work product, courts in this country have traditionally struggled within the confines of existing property, contract, tort, and copyright law to afford redress to an individual whose work has been appropriated by another. In Bajpayee v. Rothermich, however, an Ohio appellate court articulated an individual's right, distinct from common law remedies, to protect his intellectual property. This Note examines, in the context of Bajpayee, the existence of remedies potentially available to a plaintiff who alleges improper use of his intellectual property. It contrasts these remedies with the European doctrine of moral right and concludes that by acknowledging a creator's right to be recognized for his work, Bajpayee may be the first step toward American adoption of the moral right doctrine.

INTRODUCTION

Our judicial system has never recognized a creator's prima facie right to be recognized for his work. It has struggled, in a rather inconsistent fashion, to redress injury resulting from the appropriation of an individual's work product through traditional channels of recovery—tort, property, contract, and copyright law. In 1977, however, an Ohio court recognized the right of an inventor to be acknowledged for his scientific discovery. In doing so, it may have created a new cause of action in American courts.

In Bajpayee v. Rothermich,¹ the plaintiff was employed by the Columbus Medical Center Foundation as a biochemist in charge of the research laboratory. During the course of his employment, the plaintiff made discoveries in the treatment of arthritis through the use of radioactive indomethacin suppositories, which were the subject of his unpublished article intended for future publication.² The defendant, the president and medical director as well as a member of the board of trustees of the foundation, without the plaintiff's knowledge or consent, condensed and presented the discovery as his own before the American Society of Clinical Pharmacology and Therapeutics.³ The plaintiff conceded that he was

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2. Id. at 118, 372 N.E.2d at 818.
3. Id.
not entitled to common law copyright protection for the publication by virtue of the shop work doctrine, which assigned an irrevo-
cable license to use the work product to his employer, the
Columbus Medical Center Foundation. Rather, he sued the de-
fendant as a co-employee, alleging that the defendant's acts were
intentional and malicious; that the defendant had converted the
plaintiff's intangible property to his own use; and that the defend-
ant had intentionally interfered with the plaintiff's contract rights
with his employer, resulting in his discharge.

The trial court granted summary judgment for the defendant. This
decision was reversed when the appellate court found that
sufficient material issues of fact existed regarding the plaintiff's re-
tention of the right to be recognized for his work. The court
stated that the plaintiff's cause of action was distinct from com-
mon law copyright and rested upon his right to be recognized for
his own creation and ideas. Although the court did not decide
whether the plagiarism constituted an independent cause of ac-
tion, an invasion of privacy, or a prima facie tort, it concluded
that the plaintiff's right to be recognized for his work product ex-
isted and was actionable. Thus, the court reversed the finding of
summary judgment and remanded for further proceedings consis-
tent with its decision. The parties subsequently disposed of the
action in an out-of-court settlement.

4. Id. For a discussion of the shop work doctrine, see notes 60-67 infra and accom-
panying text.
5. Id. These allegations were based on three distinct causes of action: (1) violation
of the plaintiff's right of publicity so as to constitute a prima facie tort, (2) conversion of
intangible property rights, and (3) intentional interference with the plaintiff's contract
rights. Id. For a discussion of the elements of the first action, see notes 146-63 infra and
accompanying text. The defendant's admission by affidavit of his omission of the plaintiff's
name from the abstract report of the discovery led the court to summarily conclude that the
defendant had attributed to himself authorship of the work. 53 Ohio App. 2d at 118, 372
N.E.2d at 818.
6. Id. at 123-24, 372 N.E.2d at 821.
7. Id. at 120, 372 N.E.2d at 819.
8. Id. at 122, 372 N.E.2d at 820. The court stated that "[i]t makes no difference
whether we label this claim for relief plagiarism, invasion of privacy, or prima facie tort,
which plaintiff contends the claim to be." Id. at 122, 372 N.E.2d at 820. It proceeded to
define a prima facie tort as "the intentional infliction of injury upon another without excuse
or justification by an act which in and of itself may not be unlawful." Id. For the elements
and an analysis of an action for invasion of privacy, see notes 133-45 infra and accompan-
ying text.
9. 53 Ohio App. 2d at 123, 372 N.E.2d at 821.
10. Telephone interview with Phil Baesman, Esq. counsel for the defendant (October,
1978).
By labelling the case as one of first impression, the Bajpayee court avoided any examination of existing causes of action to determine their availability as methods of redress. This Note is intended to accomplish that which the Bajpayee court did not—to examine the legal and equitable remedies potentially available to those plaintiffs who have claimed improper or unauthorized use of their intellectual property. Intellectual property traditionally included artistic, literary, and musical creations, scientific discoveries, inventions, secret processes, and a creator's symbols or ideas. It has been extended, however, to encompass character creations such as comic personalities, a creator's style of mannerisms or voice inflection, and original expressions. This Note shows that courts have permitted redress for injuries resulting from the piracy of such property through copyright, property, contract, and tort causes of action, although the scope of these remedies has proven to be somewhat limited.

The Note first traces the development of state and federal copyright law. Historically, the Copyright and Supremacy Clauses of the Constitution were applicable only to published works by virtue of the Copyright Act of 1909 (1909 Act). Unpublished creations were excluded from the Act and instead were subject to federal and state common law copyright actions. With the passage of the Copyright Act of 1976 (1976 Act), however, the common law of copyright for unpublished works was abolished for those works which were specifically covered by the new statutory provisions. Although the 1976 Act was not in effect at the time that the cause of action in Bajpayee arose, this Note analyzes the Act to determine the statute's applicability to future actions in which plagiarism of unpublished works may be

11. 53 Ohio App. 2d at 122, 372 N.E.2d at 820.
12. See Note, Intellectual Property—Performer's Style—A Quest for Ascertainment, Recognition, and Protection, 52 Den. L.J. 561 (1975). One court defined an intellectual production as an "intangible, incorporeal right [which] exists separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied." Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 466, 114 P.2d 370, 372 (1941). In that case, although the misappropriation of a motion picture scenario was grounds for a tort cause of action for plagiarism, it was barred by the statute of limitations.
14. See notes 39–50 infra and accompanying text.
17. See note 56 infra.
alleged. Further, in view of Bajpayee's concession of common
law copyright ownership of his discovery to his employer, a
discussion of the shop work doctrine, both in its traditional setting and as it has survived under the 1909 and 1976 Acts is included.

The Note then focuses on the scope of the common law protec-
tion of intellectual property. The development of trade secret pro-
tection is traced, as well as the protection afforded unpublished works. The first amendment privilege allowing appropriation of intellectual property is also analyzed. The Note next examines different actions available at common law in order to ascertain their applicability to Bajpayee. In light of the employment relationship between the parties in Bajpayee, actions for unfair com-
petition, misappropriation, and breach of contract are precluded for the plaintiff. Likewise, actions for invasion of privacy or publicity are improper due to the absence of commercial exploitation. Actions for breach of trust, breach of an implied contract, and implied defamation, although hampered by severe limitations, are suggested as possible grounds for recovery.

The Note also examines the European doctrine of "moral right." This doctrine affords foreign claimants a safeguard against infringements of their rights of personality, which are regarded under Continental systems as inherent, inalienable, and distinct from rights protected under copyright law. Although hesitant to adopt the moral right doctrine per se, our courts have achieved substantially the same result. Since Bajpayee is one such example, it is re-examined in the context of the moral right doctrine. Though Bajpayee did not expressly adopt the moral right doctrine, the plaintiff's interests that the court sought to protect

18. See notes 51–59 infra and accompanying text.
19. See notes 60–62 infra and accompanying text.
20. See notes 63–67 infra and accompanying text.
21. See notes 68–81 infra and accompanying text.
22. See notes 82–84 infra and accompanying text.
23. See notes 91–97 infra and accompanying text.
24. See notes 98–105 infra and accompanying text.
25. See notes 129–132 infra and accompanying text.
26. See notes 133–45 infra and accompanying text.
27. See notes 146–63 infra and accompanying text.
28. See notes 129–32 infra and accompanying text.
29. See text accompanying note 132.
30. See notes 106–128 infra and accompanying text.
31. See notes 164–86 infra and accompanying text.
32. See note 182 infra and accompanying text.
fell squarely within its ambit. \(^{33}\) Thus, the Note concludes that, by the court's recognition of plagiarism as a prima facie tort, \(Bajpayee\) may be the first step toward American adoption of the Continental moral right doctrine.

I. INTERESTS PROTECTED UNDER COPYRIGHT LAW

A. Federal Statutory and State Common Law Copyright Protection

The first copyright statute to be enacted in the United States was the Copyright Act of 1790. \(^{34}\) It defined the protectible interests of American citizens following publication, while the common law protection for unpublished works was left to judicial interpretation. Courts, however, refused to give common law protection to published works. For example, in \(Wheaton v. Peters\), \(^{35}\) the defendant during his employment as the official court reporter, published a number of Supreme Court cases. He was challenged by his predecessor for violating his common law and statutory rights of copyright, despite the latter's failure to comply with all of the Copyright Act provisions. The Court acknowledged the existence of common law rights, \(^{36}\) but held them inapplicable to works which were published, due to the protection for such works af-

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\(^{33}\) See notes 164–86 infra and accompanying text.

\(^{34}\) Ch. 15, 1 Stat. 124 (1790) ( superseded 1831). The first Anglo-American copyright legislation was the Statute of Anne, enacted in 1710. 8 Anne, c. 19 (1710). For a fascinating account of the genesis of the law of copyright, beginning in ancient Egypt, see Streibich, The Moral Right of Ownership to Intellectual Property: Part I — From the Beginning to the Age of Printing, 6 Mem. St. U.L. Rev. 1 (1975).

The English courts recognized the natural law of common law copyright, embodying the Continental doctrine of moral right, for unpublished works and for rights and privileges existing independently of copyright. In contrast to protected American rights, this natural right was inherent in each creator, inalienable, indestructible, and remained unaltered by the Statute of Anne. Streibich, The Moral Right of Ownership to Intellectual Property: Part II — From the Age of Printing to the Future, 7 Mem. St. U.L. Rev. 45, 68 (1976) [hereinafter cited as Streibich, Part II].

In 1783, the Continental Congress of the United States passed a resolution recommending "the several States to secure to the Authors or Publishers of New Books the Copyright of such Books." U.S. Copyright Office, Copyright Laws of the United States of America 1783–1862, at 1 (1962), cited in Streibich, Part II, supra, at 68 n.165. Accordingly, all of the states except Delaware adopted copyright statutes, which proved inadequate due to their limitations and lack of interstate effect. Id. at 69. To remedy these defects, the Constitution authorized Congress 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." U.S. Const. art. I, § 8, cl.8.

\(^{35}\) 33 U.S. (8 Pet.) 223 (1834).

\(^{36}\) Id. at 228.
forded by the statute.  

At the time of the cause of action in Bajpayee, the Copyright Act of 1909 was in effect. Under this statute, failure by the published author to comply with the statutory requirements rendered the work unprotected and within the public domain. Compliance offered protection for over twenty-eight years of an exclusive monopoly for commercial exploitation, renewable for an equivalent duration, after which the work entered the public domain. The Act conferred exclusive jurisdiction on the states to protect unpublished works, not otherwise copyrightable, at "common law or in equity."  

Hence, the states undertook to protect unpublished works with common law copyright actions when the work satisfied three conditions: (1) the expression of the work must have been developed beyond the point of abstraction; (2) the work must have been original; and (3) it must have been unpublished. A substantial amount of case law developed in both the federal and state courts regarding protection of unpublished works. Indeed, in an action before the Eighth Circuit Court of Appeals in 1946 alleging common law copyright infringement, the court reviewed more than 200 federal court decisions. The court accepted those decisions without even entertaining the possibility of a conflict and federal preemption under the Copyright Act of 1909, illustrating the states' autonomous reign over the protection of unpublished works.  

In 1964, two Supreme Court cases invalidated state statutory interference with the objects of federal copyright legislation. In both Sears, Roebuck & Co. v. Stiffel Co. and Compco Corp. v. Day-Brite Lighting, Inc., the Court disallowed state statutory protection against unfair competition for works which were excluded from federal patent or copyright laws. The Court reasoned

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37. Id. at 231-32.  
41. Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946).  
42. Id. at 898.  
that the federal laws by implication permitted free access to and use of material left in the public domain.\textsuperscript{45} These decisions were subsequently interpreted to permit redress for commercial exploitation of another's property interest only when that interest fell outside the scope of the copyright clause.\textsuperscript{46}

This presumption of state interference with the objects of federal copyright legislation was later rejected by the Court in Goldstein \textit{v.} California,\textsuperscript{47} when the Court upheld a California penal statute prohibiting record piracy. The Court expanded the potential protection of unpublished works by stating that the Copyright Clause neither impliedly nor expressly grants exclusive power to the federal government to protect works, and that the Copyright Act of 1909\textsuperscript{48} did not preempt state protection over all works which might be considered "writings" within the statute.\textsuperscript{49} Hence, state statutory and common law protection was once again available to redress invasions to intellectual property. The Supreme Court further held that the twenty-eight year limitation permissible under the Copyright Act was inapplicable to the states, thus impliedly sanctioning unlimited duration for such state protection.\textsuperscript{50}

\subsection*{B. The 1976 Act—Its Impact on Common Law Protection}

The 1976 Act\textsuperscript{51} abolishes the common law of copyright for unpublished works that are specifically covered by the new statutory provisions.\textsuperscript{52} The House Judiciary Committee Report indicates

\textsuperscript{45} 376 U.S. at 231–32; 376 U.S. at 237. In \textit{Compco Corp. v. Day-Brite Lighting, Inc.}, the Court stated that "when an article is unprotected by a patent or copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." \textit{Id}.

\textsuperscript{46} \textit{Sinatra v. Goodyear Tire \& Rubber Co.}, 435 F.2d 711 (9th Cir. 1970); \textit{Columbia Broadcasting Sys., Inc. v. DeCosta}, 377 F.2d 315 (1st Cir. 1967).

\textsuperscript{47} 412 U.S. 546 (1973).

\textsuperscript{48} Ch. 320, §§ 4, 5, 35 Stat. 1075 (1909) (superseded 1978). Section 4 provides that "[t]he works for which copyright may be secured under this title shall include all writings of an author." Section 5 lists specific categories of protected works, followed by a statement that "[t]he above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title . . . ." \textit{See} Goldstein \textit{v. California}, 412 U.S. at 568–69.


\textsuperscript{50} 412 U.S. at 560. \textit{See generally} Comment, \textit{supra} note 40, at 323.


\textsuperscript{52} 17 U.S.C. app. § 301(a) (1976). The scope of rights embodied in the 1976 Act is specified in § 106. That section provides:

\[\text{[T]he owner of copyright under this title has exclusive rights to do and to authorize any of the following:}\]
that state remedies which are not preempted by the 1976 Act in-
clude causes of action for "breaches of contract, breaches of trust,
trespass, conversion, invasion of privacy, defamation, and decep-
tive trade practices such as passing off and false representation."53
State statutes and common law actions for misappropriation of
commercial property interests are also preserved if they are "not
equivalent to any such exclusive rights within the general scope of
copyright . . . ."54 The House Report states that "consistent with

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public
by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works,
pantomimes, and motion pictures and other audiovisual works, to perform the
copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works,
pantomimes, and pictorial, graphic, or sculptural works, including the individual
images of a motion picture or other audiovisual work, to display the copyrighted
work publicly.

Id. § 106.

53. H. R. REP. No. 1476, 94th Cong., 2d Sess. 24 (1976). Although the final version of
the new Act deleted the aforementioned enumeration of exempted state actions, the House
debates indicate the nature of continued permissible state actions which do not conflict
with the New Act.

The House Judiciary Committee Report is enlightening regarding the legislative intent
to preserve various state actions which provide redress for injuries to personal rights:

The examples in clause (3), while not exhaustive, are intended to illustrate
rights and remedies that are different in nature from the rights comprised in a
copyright and that may continue to be protected under State common law or
statute. The evolving common law rights of "privacy," "publicity," and trade
secrets, and the general laws of defamation and fraud, would remain unaffected
as long as the causes of action contain elements, such as an invasion of personal
rights or a breach of trust or confidentiality, that are different in kind from copy-
right infringement. Nothing in the bill derogates from the rights of parties to
contract with each other and to sue for breaches of contract; however, to the ex-
tent that the unfair competition concept known as "interference with contract re-
lations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—"deceptive trade practices such as pass-
ing off and false representation"—represents an effort to distinguish between
those causes of action known as "unfair competition" that the copyright statute is
not intended to preempt and those that it is. Section 301 is not intended to pre-
empt common law protection in cases involving activities such as false labeling,
fradulent representation, and passing off even where the subject matter involved
comes within the scope of copyright statute.

Id. at 132, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5748. "Passing off"
may require some clarification. It is one genre of the tort of unfair competition, also known
as false representation, whereby the tortfeasor claims another's goods or services as his
own. See note 92 infra and accompanying text.

priation doctrine:

"Misappropriation" is not necessarily synonymous with copyright infringe-
ment, and thus a cause of action labeled as "misappropriation" is not preempted
if it is in fact based neither on a right within the general scope of copyright as
specified by section 106 nor on a right equivalent thereto. For example, state law
the 1964 Supreme Court decisions in Sears, Roebuck & Co. v. Stiffel Co., . . . and Compco Corp. v. Day-Brite Lighting, Inc., . . . preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute."

Although the cause of action in Bajpayee is not subject to the application of the 1976 Act, since the cause of action arose prior to its effective date, the right in one's work product must be evaluated in the context of the 1976 Act to determine its future availability. The interests alleged by the plaintiff in Bajpayee are similar or identical to some of those interests that the House Judiciary Committee Report exempts from federal preemption. Moreover, the scope of the 1976 Act does not extend to a "discovery." Thus, it appears that the cause of action newly recognized in Bajpayee would not fall within the protection of the 1976 Act should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of International News Service v. Associated Press, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business, or financial data bases.


56. Actions brought before January 1, 1978 are expressly exempted from the 1976 Act.


57. See note 53 supra and accompanying text.

58. Section 102(b) of the 1976 Act provides:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.


59. Works of authorship under the 1976 Act's protection include but are not limited to: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings." Id. § 102(a). Further, the 1976 Act covers compilations and derivative works:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.
and would thereby avoid preemption.

C. Ownership of Literary Works Created During the Course of Employment — The Shop Work Doctrine

The plaintiff in *Bajpayee* conceded that the shop work doctrine precluded any common law copyright interest he may otherwise have enjoyed in his scientific discovery. A consideration of the development of the doctrine supports this conclusion. Prior to the 1909 Act, an employer possessed the common law right to copyright the products, creations, and inventions of his salaried employees, and to assign those rights by contract. Thus, property interests in works produced during the course of employment by an employee were presumed to vest in the employer, although this presumption was rebuttable by proof of a contrary agreement between the parties.

The 1909 Act authorized either the author or proprietor of a work to secure a copyright. The employer of a creator or author was defined by the 1909 Act as within the scope of the term “proprietor,” and as such was eligible to secure a copyright over any works made for hire.

Judicial decisions since the Copyright Act of 1909 have consistently upheld the right of an employer to secure copyrights over works made during the course of employment, and have construed the employer classification to include both natural persons and corporations. Thus, at the time that the cause of action...
arose in Bajpayee, any claimed property interest in the discovery by the plaintiff would have been presumptively precluded.

A similar result would be reached under the 1976 Act, which codified the rebuttable presumption in the common law that works made for hire vest in the employer.66 The 1976 Act permits alteration of this presumptive right only by written contractual agreement.67

II. AMERICAN PROPERTY, TORT, AND CONTRACT REMEDIES FOR APPROPRIATION OF INTELLECTUAL PROPERTY

A. Scope of Protection of the Common Law

Intellectual property has been subject to two types of protection: (1) recognition of a contractual or fiduciary obligation between parties which is breached when access to the property is exploited, and (2) recognition of property interests under the common law and statutory copyright and patent laws.68 The type of protection afforded by the first approach can be illustrated by an examination of the law of trade secrets. Though a precise definition of trade secrets is impossible, in general they "may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use

66. 17 U.S.C. app. § 201(b) (1976). "Works made for hire" and presumptively assigned to the employer must be prepared by the employee within the scope of his employment. Id. § 101. Evidence used to determine this scope includes: (1) an express contract for hire, especially an exclusive one; (2) an oral agreement of employment, constituting more than a mere assignment of individual works; (3) a regularly paid salary; (4) the right of the employer to direct and supervise the manner of performance; and (5) the creation of the work at the insistence, time, expense, and with the facilities of the employer. See Angel & Tannenbaum, Works Made for Hire Under S. 22, 22 N.Y.L.S. L. Rev. 209, 223 (1976). The right to direct and supervise performance has been considered to be one of the more determinative factors. See 1 M. Nimmer, supra note 40, § 5.03[B], at 5–12 & n.18.

The Act also modifies the provisions of the 1909 Act by permitting the assignee of works created on commission to exercise the privilege of copyright protection. 17 U.S.C. app. § 101 (1976).

67. 17 U.S.C. app. § 101 (1976). Several commentators have interpreted this provision of the 1976 Act as prohibiting the enforcement of any contract clause which enables the employer to use or copyright the work on the condition that the employee is designated as the author or inventor. See, e.g., Angel & Tannenbaum, supra note 66, at 217. This interpretation would require that the employee relinquish the right to have his name attributed to the work once the right to copyright is conceded to the employer.

68. See C. Gregory & H. Kalven, Jr., supra note 38, at 1166. Other intangible properties such as mineral rights are protected in a third way. When one exclusively possesses real property, another's access to the intangible rights connected with that property give rise to an action in trespass. Id.; Shell Oil Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934).
Trade secrets, like patents and copyrights, are subject to protection during the period of the inventor's secrecy against those who discover them by improper means.70

Although never protected by statute, trade secrets were protected at common law. This was particularly so when access to them was gained through a contractual or employment relationship. Such a relationship raises the inference of access. In *Tabor v. Hoffman*,71 for example, the plaintiff's patterns for the production of pumps were copied and reproduced by the defendant, a bailee repairing the pumps. Although the patent on the pumps had expired, the court held that the plaintiff retained exclusive rights in the patterns as trade secrets since they had not been published.72 Similarly, in *Sun Dial Corp. v. Rideout*,73 the court enjoined a former employee of the plaintiff from disclosing a trade secret for the manufacture of sun dials to his subsequent employer.74

The interests protected in these trade secret cases are somewhat similar to those for which the plaintiff in *Bajpayee* sought redress. *Tabor* and *Rideout* upheld the creator's right to control the use of intellectual property prior to publication, while *Bajpayee* identified a more limited right to be recognized for one's own work product. The approaches taken, however, are different. The unauthorized taking and conversion of an inventor's trade secrets is characterized by *Tabor* and *Rideout* as a breach of a fiduciary relationship between employer and employee. In contrast, the parties in *Bajpayee* did not stand in a contractual or employment relationship but were co-employees. Further, the trade secret cases granted redress for commercial exploitation of the plaintiff's creations,75 while the interest recognized by the *Bajpayee* court appears to be of a scientific or noncommercial nature.76

The second approach to protection of intellectual property—recognition of property interests under common law and statutory copyright—has been discussed earlier in this Note.77
The bounds of its protection, however, are further delineated below in order to illustrate the scope of the common law copyright actions.

In general, common law copyright protection extended not only to the actual work but also to a paraphrased or abridged version. In *Prince Albert v. Strange*,78 in which the plaintiff's and Queen Victoria's sketches were exploited, the court stated that the "right to prevent 'innocent' writings from being published without the consent of the proprietor, the author . . . is not lost by partial and limited communications not made with a view to general publication . . . . [T]his protection, by the common law . . . cannot . . . be evaded by a translation . . . by an abridgment, a summary, or even a review."79

State-created causes of action for conversion of intangible property have allowed recovery primarily for actual injury to a plaintiff's past earnings. Many courts have extended the protection to prospective commercial profits where they have been reasonably ascertainable. For example, in an action against Cole Porter alleging misappropriation of the plaintiff's songs,80 the court characterized the right to be protected not as the plaintiff's ingenuity in music, but as his right to anticipated commercial profits from its sale.81 Thus, in order for the plaintiff in *Bapayee* to successfully prove conversion of his intellectual property, he would have to show either loss of past earnings—an impossible task since his discovery was as yet unpublished—or loss of prospective profits.

Finally, the role of the media in the common law of copyright must be noted. In the traditional common law copyright action,

78. 2 De. G. & Sm. 652, 79 Rev. R. 307 (1848).
79. Id. at 692-93, 79 Rev. R. at 325.
80. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). The court in *Arnstein* imposed upon the plaintiff the burden of proving that the defendant copied the plaintiff's copyrighted work and, assuming the burden was met, that such copying constituted misappropriation. The court found both issues to be factual matters. Under the standard set by this court, the evidence required to prove copying could have consisted of the defendant's admission, or may have been circumstantial (when evidence of the defendant's access to the work could permit the jury to infer that copying had occurred). The claim of misappropriation had to have been substantiated by similarities between the creations, (with expert testimony admissible for this purpose), although the court required the similarities to be evaluated by the standard of the reasonable lay person. Striking or obvious similarities gave rise to an inference that the work had been copied or improperly appropriated. Id. at 468-69.
the media could not reproduce, without consent, any portion of a creation. The first amendment and the doctrine of "fair use" later enabled the media to use provocative and noteworthy intellectual property without the creator's authorization. This notion has been recently limited by the "entire act" doctrine which permits recovery if the entire performance or work, however newsworthy, has been reproduced by the defendant.

B. Causes of Action Available to Protect Intellectual Property Rights

Within the broad scope of common law protection of intangible property interests, several distinct causes of action have emerged as means by which a plaintiff can seek redress for injury to his intellectual property. These are (1) unfair competition, misappropriation, defamations, breach of contract or breach of trust, (5) right of privacy, and (6) right of publicity. In the sections which follow, each of these causes of action is examined as it has developed at common law to determine its availability to a plaintiff seeking to protect his work product.

1. Unfair Competition

A civil action for unfair competition arises when the defendant, in competition with the plaintiff, fraudulently attributes his own work product to the plaintiff to take advantage of the latter's reputation or skills. There are three ways in which this may occur. First, the defendant may make false representations in order to "pass off" his goods or services as those of another. Second, when the defendant's product is similar to the plaintiff's, the plaintiff may seek to distinguish his work by virtue of its renowned characteristics. Third, the defendant may make unauthorized use

82. C. Gregory & H. Kalven, Jr., supra note 38, at 1191.
85. See notes 91-97 infra and accompanying text.
86. See notes 98-105 infra and accompanying text.
87. See notes 106-128 infra and accompanying text.
88. See notes 129-32 infra and accompanying text.
89. See notes 133-45 infra and accompanying text.
90. See notes 146-63 infra and accompanying text.
91. Comment, supra note 40, at 318 n.12.
of the plaintiff's symbol of identification. 92

Most courts have required the author or owner of an intellectual property to demonstrate that his name or goodwill has been injured and that the public has been deceived. 93 For example, in Prouty v. National Broadcasting Co., 94 a case in which the defendant was charged with broadcasting degrading sketches based upon the life of a fictional character taken from the plaintiff's novel, the court denied the defendant's motion to dismiss the complaint. It did so to enable the plaintiff to present proof of the appropriation of her characters, the injury resulting to her reputation as an author, and the deception inflicted upon the public. If the plaintiff met this burden of proof, the court felt that equitable relief could be available by virtue of the doctrine of unfair competition. 95

The doctrine of unfair competition would not appear to apply to a plaintiff in a situation analogous to that of the plaintiff in Bajpayee. Although such a plaintiff could prove that the defendant had deceived the public, the plaintiff would likely fail in his attempt to show the requisite injury to his name or good will since the plaintiff's work was not presented by the defendant in a manner degrading to the plaintiff. In addition, an action for unfair competition assumes that the plaintiff and defendant are in commercially competitive roles. Bajpayee and Rothermich were co-employees of the foundation, presumably working toward common goals.

In addition to judicially-created remedies, some states have passed unfair competition laws modeled after the Uniform Deceptive Trade Practices Act. 96 The Act was designed to prevent commercial advertising deception in transactions involving goods or services. It protects against the unauthorized appropriation of goods or services by including practices such as "passing off" within its definition of unfair trade practices. 97 The Act's protection, however, would probably not extend to the plaintiff in

92. Note, supra note 12, at 581–82.
93. Id.
95. Id. at 266.
96. For the text of the Act, See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1964).
97. Section 2(a) of the Act provides that a "person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation he . . . passes off goods or services as those of another . . . ." UNIFORM DECEPTIVE TRADE PRACTICES ACT § 2(a)(1), reprinted in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 306–13 (1966).
Bajpayee, since his discovery was scientific and not yet commercially available.

2. Misappropriation

Misappropriation provides redress for commercial exploitation of another's property interest but does not require proof that the public has been defrauded, as does an action for unfair competition. Where it is recognized, a cause of action for misappropriation is established upon a showing that the defendant used the plaintiff's product in competition with the plaintiff.

In the wake of the Supreme Court's holding in Goldstein v. California—that the Constitution does not vest exclusive power in the federal government to protect works—courts have applied the doctrine in a wide variety of cases. For example, in Mercury Record Productions, Inc. v. Economic Consultants, Inc., the court found that the defendant had misappropriated the plaintiff's taped recordings. The court characterized the wrong to be re-dressed as

the defendant's use of the plaintiff's product, into which the plaintiff has put time, skill, and money; and the defendant's use of the plaintiff's product or a copy of it in competition with the plaintiff. . . . The wrong is not in the copying, but in the appropriation, of the plaintiff's time, effort and money.

It appears, however, that application of the doctrine has been lim-
itored to parties in direct commercial competition with one another, when one party enjoys an undue profit by depriving the plaintiff of his right to market the creation. 105

Absence expansion of the doctrine to include noncommercial relationships, it would be unavailable to claimants such as the plaintiff in Bajpayee. The defendant in that case did not commercially exploit the plaintiff's work product but instead presented it to the scientific community to inflate his personal academic reputation. Further, in Bajpayee, as contrasted with actual financial loss, the plaintiff's injury was limited to putative lost profits and employment potential. Such speculative damages would have likely been denied by the court had Bajpayee alleged misappropriation as his basis for relief. It would thus seem that although the elements of an action for misappropriation are more readily satisfied than those of an action for unfair competition, both actions would be unavailable to those plaintiffs similarly situated to Bajpayee.

3. Defamation

A successful action in defamation requires that the plaintiff demonstrate (1) that the defendant has made a false and defamatory statement concerning the plaintiff; (2) that the statement was made to a third party; (3) that the defendant was at least negligent in making the statement, and (4) that the plaintiff has suffered special harm. 106 Thus, there is a general overlap between the rights


106. RESTATEMENT (SECOND) OF TORTS § 558 (1976). At common law, the tort of defamation consisted of two subdivisions: libel, for published falsities, and slander for verbal assaults. Courts have traditionally balanced the competing interests in the plaintiff's honor and reputation, the defendant's freedom of speech, and the public's interest in the free flow of information as well as its social interest in protecting dignity. Wade, The Communicative Torts and the First Amendment, 48 Miss. L.J. 671, 672 (1977).

Under the common law of defamation, courts have historically imposed liability for negligent and intentional conduct. Id. They have occasionally imposed strict liability upon a showing of the publication of a defamatory and false statement about the plaintiff to a third party. Id. at 673.

Truth was an early common law defense to an action in defamation. Statements made between spouses and by public officials, trial witnesses, and governmental and legislative officials were absolutely privileged. Qualified privileges became available when, for example, a defendant had endeavored to perfect a third party's or his own interests. Finally, the
protected in actions for misappropriation and those protected in
defamation actions. Both involve the deception of the public ei-
ther as to the source of the creation, in the case of the former, or as
to its content or nature in the latter.\textsuperscript{107}

Indeed, an action in defamation occasionally serves as an al-
ternative ground for recovery in an action for misappropriation. In \textit{Lahr v. Adell Chemical Co.},\textsuperscript{108} the defendant had deliberately
appropriated actor Bert Lahr's unique vocal characterization of a
duck. Lahr, seeking protection of his original style, alleged both
appropriation and defamation.\textsuperscript{109} The court granted relief on the
ground that an imitation of an entertainer in a performance “be-
low his class may be found to damage his reputation . . . .”\textsuperscript{110} In
striving to find this noncommercial injury, the \textit{Lahr} court inferred
defamatory damage to the plaintiff's professional reputation from
the defendant's derogatory imitation of the plaintiff's style.

Because implied defamation requires proof of established no-
toriety prior to a finding of sufficient injury to reputation to sus-
tain the action, the \textit{Bajpayee} court could not have availed itself of
the \textit{Lahr} rationale. A closer look at the law of defamation is nec-
essary, however, to ascertain the extent to which it protects a crea-
tor's work product.

Beginning in 1964 with \textit{New York Times Co. v. Sullivan}\textsuperscript{111} and
culminating in 1976 with \textit{Time, Inc. v. Firestone},\textsuperscript{112} the Supreme
Court forged the constitutional evidentiary standards required in
actions instituted by public officials,\textsuperscript{113} public figures,\textsuperscript{114} and pri-
vate parties\textsuperscript{115} against publishers of defamatory falsehoods.\textsuperscript{116} In
Gertz v. Robert Welch, Inc., the Court held that the states could define for themselves the standard of care that publishers and broadcasters must satisfy when making statements concerning nonpublic individuals, as long as the "liability without fault" standard was not applied. The case also reaffirmed the Court's holding in New York Times that suits instituted by public figures or officials require proof that the defendant had knowledge of the falsity of the statement or made it with reckless disregard as to its validity.

Like Bajpayee, the Gertz case involved a private plaintiff. The Gertz plaintiff was an attorney who was injured by false and defamatory statements published in American Opinion, a John Birch Society publication owned by the defendant. The Supreme Court had previously implied that the availability of a special privilege for reporting was dependent not upon whether the plaintiff was a private or public figure, but upon whether the publicized event was a matter of general or public interest. The Court repudiated this position in Gertz, however, and established separate liability standards for private plaintiffs. Thus, by implication, the qualified privilege for publicizing matters of public interest was no longer available to defendants in cases such as Bajpayee. Instead, such cases now require a state-determined liability standard of at least negligence.

The Gertz court also eliminated the distinction between slander and slander per se for private plaintiffs by permitting recovery only for actual and proven harm, the ultimate compelling state interest being compensation. Accordingly, the plaintiff must demonstrate actual damage to his reputation, although he need not necessarily assign to it a precise monetary value. This stan-

118. Id. at 347.
119. Id. at 334.
121. See note 118 supra and accompanying text.
122. In Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979) the Supreme Court declined to elevate the plaintiff, a behavioral scientist, to public figure status for defamation purposes despite previous media exposure of the fact that his work was federally funded. Such a holding suggests that Bajpayee, a biochemist, also would not be a public figure in a defamation action.
123. It should be noted that Bajpayee alleged actual malice. 53 Ohio App. 2d at 118, 372 N.E.2d at 818.
124. 418 U.S. at 348–50.
125. Id. at 350.
standard of proof may establish a large obstacle for private plaintiffs, such as Bajpayee.

The Court in *Gertz* refrained from expressing an opinion regarding the applicability of its holding to defendants beyond the communications media, the press, or the publishing industry. In practice, the Court has used the same standards where the defendant was arguably not within the "communications media" classification. Indeed, the defendant's publication in *Gertz* might be considered semi-private with a circulation limited to the John Birch Society's membership. Further application of similar standards to non-media defendants can be found in *New York Times*, where the co-defendants were private individuals who had submitted the allegedly false advertisement to the newspaper.

Consequently, the privileges and standards prescribed in *Gertz* may be imposed on non-media defendants and in other tort actions, thus covering cases similar to *Bajpayee*. Their application in *Lahr*, an action by a public figure against a non-media advertising manufacturer, would render an identical result. The defendant's conduct with knowledge or reckless disregard for the consequences of his action would justify the court's award of presumed or general damages to a public figure plaintiff. Conversely, a private plaintiff would be required to prove actual damages to his reputation, precluding such a finding of implied defamatory conduct. This rationale could prove fatal to a court's *sua sponte* creation of a right of recognition for one's work product for the private plaintiff who could not prove actual and present damages to his reputation, absent a finding of actual malice.

4. Breach of Contract or Breach of Trust

Traditionally, a plaintiff must stand in a special relationship with the defendant to recover for a breach of contract or trust. In an action for breach of contract, the plaintiff and the defendant must be parties to the contract, while an action for breach of trust is based on the breach of a confidential relationship such as that created between employer and employee. The underlying basis
of each relationship is the mutual expectation of the parties as to
performance and loyalty. When intellectual property is at issue, a
breach occurs when an idea shared in either express or implied
confidence is later used without the creator's consent. For ex-
ample, in cases involving trade secrets, courts have protected ori-
ignal inventions and ideas by finding that a confidential
relationship existed between the parties.

Because the plaintiff in *Bajpayee* conceded that he had no
common law copyright interest in his discovery by virtue of the
shop work doctrine, he was precluded from alleging either a
breach of contract or of trust. Under such circumstances, both of
these would have been viable actions if brought by his employer,
the Columbus Medical Center Foundation. Alternatively,
Bajpayee might have instituted suit against the Foundation for
breach of an implied contract to publish the discovery under its
own name, as the proprietor. Although such an action would be
directed at the wrong tortfeasor, the defendant could possibly
have been impleaded. Nevertheless, Bajpayee would have been
precluded from an independent action for breach of trust against
the defendant absent a showing of a confidential relationship be-
tween them.

Courts have typically employed breach of contract or trust
doctrines when the defendant has, or would have been, unjustly
enriched financially. From this standpoint, it is unlikely that a
court would grant recovery to a plaintiff such as Bajpayee, since
the defendant has not benefitted financially from his appropria-
tion of the discovery. Although the defendant in *Bajpayee*
may

...
have benefitted professionally and hence commercially from Bajpayee's discovery, measurement of his unjust enrichment is merely speculative and would be inadequate in ascertaining Bajpayee's recoverable damages.

5. Right of Privacy

In 1890, Warren and Brandeis promoted a new cause of action called the right to privacy. In their article of the same name, they quoted extensively from *Prince Albert v. Strange* and analogized to the common law of copyright. They observed: "The principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality." The right to privacy is now recognized by statute or common law in nearly every state. It protects the commercial interest in an individual's popularity by forbidding the unauthorized use of his name, portrait, or picture for advertising or trade purposes. Where the right is statutory, the courts have examined the user's motives to determine whether the use was for trade or advertising purposes. Common law jurisdictions, on the other hand, have stressed the context of the use, granting relief for commercial exploitation of a name or picture.

In *Time, Inc. v. Hill*, a right of privacy action arose from *Life* magazine's article about a play whose script was derived from the experiences of the plaintiff's family. Although the plaintiff was a private individual, the Supreme Court held that the defendant's misstatements were privileged unless they were made with knowledge or reckless disregard of the truth. The Court concluded that the subject of the *Life* article was newsworthy, and thus warranted the protection of the first amendment. By applying the *New York Times* standard, the Court raised the private plaintiff's burden of proof in privacy actions to actual malice.

134. 2 De. G. & Sm. 652, 79 Rev. R. 307 (1848). See text accompanying notes 78–79 supra.
135. Warren & Brandeis, supra note 133, at 205.
137. C. GREGORY & H. KALVEN, JR., supra note 38, at 1130 n.32.
139. Id. at 378.
140. Id. at 387–88.
141. Id. at 388.
when the object of the defendant's appropriation is of public interest. In the context of Bajpayee, if a court found that a scientific discovery was newsworthy, a plaintiff would have to meet a similar burden of proof.\(^{142}\)

*Gertz* indicates, however, that the states are free to impose lesser standards of liability for private plaintiffs in privacy actions, provided that at least a standard of negligence is imposed.\(^{143}\) Thus, the extent of protection afforded a plaintiff in Bajpayee's situation depends on whether a court applies *Hill* or *Gertz*.\(^ {144}\) As for the burden of proof regarding damages, *Gertz* states that actual injury, though not necessarily limited to monetary loss, must be demonstrated.\(^ {145}\) The *Gertz* Court seemed to establish the defense of truth for both public figures and private plaintiffs. Later in *Cox Broadcasting Corp. v. Cohn*,\(^ {146}\) the Supreme Court denied its treatment of the issue in *Gertz* and expressly declined to determine whether the defense was available to private plaintiffs.\(^ {147}\) Hence, the issue has seemingly been reserved to the states.

6. **The Right of Publicity**

Dean Prosser subdivided the right of privacy into four distinct

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\(^{142}\) Although *Bajpayee* involved a non-media defendant, the only court that has held that such a defendant was not entitled to first amendment protection did so because the facts before it did not concern a matter of public interest. Caleso v. Del Chem. Corp., 68 Wis. 2d 487, 506, 228 N.W.2d 737, 748 (1975) discussed in Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W. RES. L. REV. 306, 332 (1978). *See note 122 supra.* Moreover, others have argued more persuasively that it would be anomalous if courts held non-media defendants to a higher standard of care than media defendants, since (1) the first amendment does not distinguish between "speech" and "press," (2) a private person's misstatement is less likely to harm an individual than a defamatory media publication, (3) the media are the better risk spreaders, and (4) the media are more likely to be knowledgeable of the law. *See, e.g.* Jacron Sales Co. v. Sindorf, 276 Md. 580, 592–93, 350 A.2d 688, 695 (1976) (quoting *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 148 n.52 (1974)); Collins & Drushal, *supra* at 333, 334.

\(^{143}\) 418 U.S. at 347.

\(^{144}\) *Gertz* was decided subsequent to *Hill* and established a new mode of analysis—which centers upon the status of the plaintiff rather than the subject matter of the misstatement. For a discussion of how plaintiff's status as a public or private figure determines the standard of liability, see note 142 *supra*. Yet, *Hill* has not been explicitly overruled. In fact, in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), the Court may impliedly have approved of the continued use of *Hill* for privacy actions. While the Court criticized the Ohio Supreme Court's reliance on *Hill* in a right of publicity action, it did not state that *Hill*'s approach to privacy cases had been outmoded. *Id.* at 570–72. *See text accompanying notes 149–51 infra.*

\(^{145}\) 418 U.S. at 350.

\(^{146}\) 420 U.S. 469 (1975).

\(^{147}\) *Id.* at 491.
The right of publicity is the offspring of his fourth classification and is directed at the appropriation of the plaintiff's name or likeness as used in his professional capacity. It permits an individual to exploit his name and reputation to his best advantage and precludes their commercial usage by others. The right of publicity contemplates that the plaintiff's notoriety has been previously established and that his name or likeness has inherent commercial value.

This right was first articulated in Haelan Laboratories v. Topps Chewing Gum Co. In Topps, the court found that unlike the right to privacy, which is nonassignable, the right to use a name, and by inference a picture or photograph, could be granted to an exclusive licensee. The court thus extended common law protection to an individual's right to assign his name if it had commercial or pecuniary value. It did not decide whether the new right protected only commercially valuable products, or whether a product could also be protected for its educational or intellectual value. One commentator speculated that the court intended to protect not only the actual value of a product but also the putative commercial value of an unknown creator's work.

It has been suggested that this action provides redress when a work is falsely attributed to an author, deceiving the public and thereby damaging him. Similarly, it has been suggested that recovery is possible when an uncompleted work is published without the author's approval under circumstances which suggest that it is his final work product. In either of these situations, however, the defendant must have benefitted from the publication and is liable to the plaintiff for his unjust enrichment in the event that the plaintiff is not a public figure.

In Bajpayee, the defendant appropriated the prospective academic and commercial value of the plaintiff's name by claiming the work product as his own. In so doing, the defendant's action infringed upon the plaintiff's right of publicity. However, the fact that the defendant used the plaintiff's property for noncommercial

149. 202 F.2d 866 (2d Cir. 1953).
150. Id. at 868.
152. Comment, supra note 129, at n.235.
purposes may preclude the plaintiff from recovering under this cause of action.

In Zacchini v. Scripps-Howard Broadcasting Co., 154 a performer brought action to recover damages for the unauthorized broadcast of his entire act, which consisted of his being shot from a cannon. The Supreme Court of Ohio reframed the plaintiff's cause of action as one based not on his right of privacy, as alleged, but on his right of publicity. Nevertheless, the court denied recovery on the ground that the defendant's report was privileged because it concerned a matter of public interest. 155

The United States Supreme Court reversed on the ground that the media could not appropriate the "entire act" of the plaintiff because it conflicted with the state's interest in protecting the proprietary interest of a performer. 156 It held that the media was not protected by the first amendment when it broadcasted an entire act without the performer's consent. 157 The Court reasoned that such an unauthorized appropriation of the plaintiff's performance would threaten its economic value 158 and characterized the state's interest in protecting that performance as "analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . ." 159 The Court also noted several rationales underlying the "entire act" doctrine: the unjust enrichment of the defendant, the destruction of a performer's ability to earn a living, and the interest of the community in entertainment. 160 It suggested that damages be measured by the plaintiff's measurable losses. 161

In Price v. Hal Roach Studios, Inc., 162 the widows of Laurel and Hardy successfully brought action against a former assignee of the actors' names and likenesses. The court found that the right of publicity, which protected from appropriation or commercial exploitation some element of the actors' personalities, could be assigned for a limited duration, after which it was inheritable, especially when the actors had created their own characters. 163

154. 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976).
155. Id. at 235-36, 351 N.E.2d at 461.
156. 433 U.S. at 579.
157. Id.
158. Id. at 575.
159. Id. at 573.
160. Id. at 576.
161. Id.
163. Id.
court noted that the right "usually becomes important only when the plaintiff . . . has achieved in some degree a celebrated status." The failure of the actors or their heirs to carry statutory copyright notices, the court said, was not an implied grant to the public of the right to commercial exploitation of the actors' names and likenesses.

It would seem from the foregoing analysis and cases that the right of publicity would not protect the plaintiff whose creative genius is not yet publicly acknowledged. While this right does guard against the defendant's appropriation of the plaintiff's idea for his own benefit, it is limited to plaintiffs who have established reputations and to situations in which the defendant has been unjustly enriched commercially. As such, this cause of action would appear to be unavailable to claimants such as Bajpayee.

III. THE MORAL RIGHT DOCTRINE

This section of the Note contrasts the breadth and limitations of the American causes of action presented above with the European moral right doctrine. The Note then analyzes the moral right doctrine and examines efforts by our courts to implement protections similar to those afforded by the doctrine.

A. Europe

Although the doctrine of droit moral tends to be associated with the French, it has also been adopted in the Pan American Literary and Artistic Property Convention as well as the Brussels Protocol of the Berne Union. The United States is not eligible to become a member of the Berne Convention until it complies with the Convention's minimum standards for copyright law. One objection to admitting the United States has been our short term for renewal of copyright protection. This objection may have been remedied by the longer term of renewal permitted by the 1976 Act.

164. Id. at 847.
165. Id.
167. For example, the copyright renewal term for a proprietor was increased by the 1976 Act from 28 to 47 years for works enjoying an initial term of copyright on the effective date of the new Act. 17 U.S.C. App. § 304(a) (1976). For a discussion of the proprietor's right to its employee's work product, see note 54 supra and accompanying text.
Article 6 bis of the Berne Convention provides an author with the following rights:

Indepedently of the patrimonial rights of the author, and even after the assignment of the said rights, the author retains the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to his reputation.168

These rights are governed by the legislatures of the member nations.169 They include four distinct area of protectible interests: the right of creation and publication of one's work; the right of paternity, which provides one with the right to be recognized for one's work; the right of integrity, which protects one against distortions of one's work product; and the right to withdraw or disavow a creation.170

B. The American Response

The American courts have recognized the need to protect the interests sanctioned by the moral right doctrine but have limited their ability to do so by restricting recovery to actions in contract, property, and tort.171 For example, in Chaplin v. Amador,172 the court used the doctrine of unfair competition to protect the entertainer's right of paternity, and in Lahr v. Adell Chemical Co.,173 the court implied defamation to protect the performer's right of integrity. As a result, the plaintiff may be confused as to the appropriate cause of action to allege. In Italiani v. Metro-Goldwyn-Mayer Corp.,174 for example, although the plaintiff asserted that the defendant had violated his property rights by appropriating his motion picture scenerio, the court stated that the cause of action sounded in tort for plagiarism.

Early American cases tended to deny recovery to a plaintiff for his right to be recognized for his work. In Vargas v. Esquire,175

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168. Berne Convention, art. 6 bis (Rome, 1928).
170. Streibich, Part II, supra note 34, at 74.
171. Id.
172. 93 Cal. App. 358, 269 P. 544 (1928). The entertainer's right of paternity sometimes is effectively protected on the ground that the defendant was "passing off" his character as that of the performer. In Chaplin, for example, injunctive relief was held appropriate against the defendant's use of the name "Charlie Aplin" in his performance.
173. 300 F.2d 256 (1st Cir. 1962). See text accompanying notes 108-110 supra.
175. 164 F.2d 522 (7th Cir. 1947).
the court held that the plaintiff, who had contracted with a publisher to allow the latter the use of his portraits, had forever relinquished the right to be recognized for his work. The court also struck down the plaintiff's claim that his rights were protectible under the doctrine of moral right, or alternatively, under misappropriation or misrepresentation theories.\textsuperscript{176} \textit{Vargas} is perhaps typical of the early American reluctance to expand the scope of protection to rights included in the moral right doctrine, although here the plaintiff's claim may not have merited such an extension.

In a later case, \textit{Granz v. Harris},\textsuperscript{177} the court sought to protect the plaintiff's "rights of integrity and paternity" through existing American causes of action. The plaintiff was a jazz musician who had produced recordings of two of his songs on twelve-inch 78 r.p.m. masters, which he sold to the defendant under a contract requiring the defendant's use of the plaintiff's credit line. In manufacturing ten-inch 78 r.p.m. records, the defendant deleted eight minutes of the original recording.

The plaintiff failed to prove actual damages; however, the court found injunctive relief appropriate to prevent further irreparable harm to the "plaintiff's reputation as an expert in the presentation of jazz concerts,"\textsuperscript{178} provided that the plaintiff had not waived his right by requiring the defendant to use his credit line. The case was remanded for a determination of this issue.

The court declined to reject the doctrine of moral right, and the concurring opinion of Judge Frank stated: "I agree . . . that whether by way of contract or tort, plaintiff . . . is entitled to prevention of the publication, as his, of a garbled version of his uncopyrighted product."\textsuperscript{179} He stated that American courts have enjoined the use of a reputable author's characteristics to prevent buyers from erroneously believing they were purchasing a work by the author. He continued:

\begin{quote}
Whether . . . copyrighted or not, the established rule is that, even if the contract . . . expressly authorizes reasonable modifications . . . it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original . . . . The irreparable harm [here] . . . becomes apparent when one thinks what would be the result if the selected speeches of Stalin were published under the name of Senator Robert Taft, or the poems of Ella Wheeler Wilcox as those of
\end{quote}

\textsuperscript{176} \textit{Id.} at 526.
\textsuperscript{177} 198 F.2d 585 (2d Cir. 1952).
\textsuperscript{178} \textit{Id.} at 588.
\textsuperscript{179} \textit{Id.} at 589 (Frank, J., concurring).
T.S. Eliot.\textsuperscript{180} Although the court in \textit{Granz} did not reject the moral right doctrine, neither did the court adopt it—it essentially circumvented the issue by employing alternative grounds for redress.

The right of integrity which protects a creator against the mutilation of his work product has yet to be protected by contract in the United States. One commentator has stated:

In the United States, the publisher or producer who purchases a copyright has no duty to preserve the integrity of the work. Only if the author successfully [\textit{sic}] bargained for the right to be acknowledged as the creator of his work or for the right to give final approval to the finished script can he protect his work by recourse to actions for defamation, privacy, or breach of contract.\textsuperscript{181}

Under the moral right doctrine, however, the publisher of a work impliedly promises to reproduce the work faithfully.\textsuperscript{182}

The right to be recognized for one's work or characterization has finally been distinguished in the American courts from the property right in the work itself. Such rights are considered personal rights which survive the creator. They can be contractually assigned but only for the term of the contract and are even then revocable.\textsuperscript{183} The ability to assert the right has been traditionally foreclosed to a plaintiff who has assigned the use of the property to another.

This is the point at which the \textit{Bajpayee} court departed from the current common law.\textsuperscript{184} It permitted the plaintiff to be recognized as the author of the discovery, despite the fact that all rights to ownership in the property had vested in the employer. The court's holding is unique among American decisions in its acknowledgment that the plaintiff's right of recognition was actionable independently from his common law copyright interest in the unpublished work.

Section 43(a) of the Trade-Mark Act of 1946 (Lanham Act)\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.} at 79 (citing Prince v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975)). \textit{See} notes 162-65 supra and accompanying text.
\item \textsuperscript{184} This is further indicated by the court's inability to substantiate its holding with precedents.
\end{itemize}
has sometimes been used to protect the public's right to the truth regarding goods or services. This section provides:

Any person who shall . . . use in connection with any goods or services . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to . . . any person who believes that he is or is likely to be damaged by the use of any such false description or representation.\textsuperscript{186}

In order to avoid the application of the moral right doctrine, the Second Circuit Court of Appeals has used contract law, copyright law, and the Lanham Act to protect an author against excessive editing of his work. In \textit{Gilliam v. American Broadcasting Co.},\textsuperscript{187} (The \textit{Monty Python} case), the plaintiff's contract with the defendant for the production of three television programs contained a clause requiring that editorial changes would be subject to plaintiff's approval. Excessive editorial changes without his approval were held by the court to infringe his common law copyright in the original script, and the mutilation of the script constituted a misrepresentation in violation of section 43(a) of the Lanham Act.\textsuperscript{188} In so holding, the court combined the statutory right against unfair competition in the Lanham Act, which is limited to goods and services in interstate commerce, with the common law tort rights against the mutilation of one's artistic integrity to protect the author's moral right in his literary creation.

As contrasted with the American use of traditional contract, tort, property, and statutory rights for recovery, the French infer from the moral right doctrine the duty of the assignee to reproduce the creation in an accurate manner. Granz followed this rationale, in different terms, by imposing upon the assignee a duty not to falsely represent the plaintiff's work product, based upon the contract's stipulation that the assignee would use the plaintiff's work with his credit line in the manufacture of recordings. However, both \textit{Granz} and \textit{Monty Python} are unusual in the history of American judicial protection for these natural rights, and require the courts to strain with currently available alternatives in order to circumvent the invocation of the Continental doctrine of moral right. Moreover, the protection afforded in the

\begin{itemize}
  \item \textsuperscript{186} \textit{Id.}
  \item \textsuperscript{187} 538 F.2d 14 (2d Cir. 1976).
  \item \textsuperscript{188} The court partially relied on \textit{Granz} in reaching its result. \textit{Id.} at 17.
\end{itemize}
United States is often inadequate for the coverage of all of the rights encompassed by the European doctrine.

A portion of the moral right doctrine was clearly designed to preserve rights of a creator equivalent to those abridged by the defendant in Bajpayee. The natural rights of Bajpayee to disclose his work to the public through his employer and to retain the right of recognition for his discovery would be grounds for recovery under the doctrine of moral right. These rights prevail regardless of the author's assignment or relinquishment of the copyright in his work and foreclose a third party from crediting the work to anyone other than the true author. Bajpayee's cause of action fits well within the scope of the established European law of moral rights. Being of paramount importance to writers, inventors, scientists, scholars, and other creators, and long recognized under the moral right doctrine, these rights should be equally protected within the United States.

IV. CONCLUSION

The Ohio appellate court found that the plaintiff in Bajpayee was entitled to recognition for the authorship of his discovery, and that the right of recognition existed separately from any rights to ownership under common law or statutory copyright law. In its attempt to reach an equitable result, the court issued a somewhat confused and unsubstantiated decision, leaving unclear whether the right of recognition should be labelled a prima facie tort, plagiarism per se, or the right to privacy. Although the court failed to take notice of the moral right doctrine, the plaintiff's interests for which the court mandated protection clearly rested within the scope of the doctrine.

The courts in the United States have devised new actions, and subdivisions thereof, to ensure redress for the commercial exploitation of a creator's work product. Most of these have compensated the plaintiff for actual injuries, consisting of lost profits, occasionally for the defendant's unjust enrichment. Actions protecting interests similar to those alleged by Bajpayee include unfair competition, misappropriation, conversion, breach of contract, and the rights of privacy and publicity, conversion of intangible property rights, and intentional interference with his con-

189. 53 Ohio App. 2d at 120, 372 N.E.2d at 820.
190. Id. at 122, 372 N.E.2d at 822.
tract rights. The causes of action for unfair competition and misappropriation were precluded since the plaintiff and defendant were not in competition with one another. An action for breach of contract was unavailable due to the lack of a contractual relationship between the parties. The right of privacy was disallowed because the defendant did not use the plaintiff's name, portrait, or picture for trade or advertising purposes and because a matter of probable public interest was disclosed. The right of publicity would probably have been an incorrect characterization of the plaintiff's action since the plaintiff was not well known and the defendant had not been unjustly enriched. The latter two causes of action also assume the defendant's commercial exploitation of the creation, thereby barring their use in *Bajpayee*.

An action for breach of trust, arising from the employment relationship, would be the most likely basis for Bajpayee's recovery, although it is limited by the shop work doctrine and by the parties' status as co-employees. Recovery based on the defendant's breach of an implied contract to reproduce or present the plaintiff's work only as that of his employer, the Columbus Medical Center Foundation, might have been possible had the foundation been sued as a co-defendant, with Rothermich involved in his official capacity as president and medical director. Alternatively, had the court analogized the cause of action to defamation, the plaintiff would have been required to prove actual injury to his reputation or that his work was presented in an inferior context. Yet, all of these causes of action contain sufficient limitations to thwart their invocation by the *Bajpayee* court.

The tort of plagiarism per se or the right of recognition, as acknowledged by the *Bajpayee* court, seeks to remedy the gaps in the previously developed American doctrines by allowing recovery for the direct injury to Bajpayee from the deprivation of his right to be recognized. The court offered further compensation for the indirect injuries to the plaintiff resulting from the defamatory implications of and inherent employment value lost by the defendant's conduct. Because none of the actions justifying punitive damages were directly applicable to *Bajpayee*, the court recognized plagiarism as a prima facie tort.

Regardless of the action's designation, the court in *Bajpayee*

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191. *Id.* at 118, 372 N.E.2d at 818. The last two of these grounds were alleged by Bajpayee.

192. See notes 133–63 *supra* and accompanying text.
clearly envisioned that the district court, on remand, would compensate the plaintiff for the loss of his moral right to be recognized for his creation, despite the eventual assignment of his copyright interest to his employer. At present, one can only speculate whether plagiarism per se will be accepted by the courts; nevertheless, the *Bajpayee* decision represents a first step in furtherance of American protection of moral rights.

**Carolyn W. Davenport**