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Acknowledgements

Dissertation Acknowledgments often tend to have an unreal quality. Unless you are the one who happened to write the dissertation. During the long journey involved with such a project, one accumulates many debts and becomes aware of the immeasurable value of the contributions and support offered by others. This dissertation is no exception to this rule. The two to whom I owe the most are Morton Horwitz and Terry Fisher. Morton Horwitz played a crucial role in setting me on the path that led to this project. His unrelenting guidance, support and advice were invaluable to the project and went well beyond it. Terry Fisher was everything that one could wish for in a dissertation supervisor. Among many other things, his store of knowledge and intellectual sharpness were a constant inspiration. Duncan Kennedy, one five minutes conversation with whom could save (or cause) many sleepless nights, deserves much credit for his influential role in the formative stages of this project and of my academic training.

Many other friends and colleagues provided invaluable comments, advice and critique regarding various parts of this work. I am particularly grateful to Jane Cohen, Anuj Desai, Karen Engle, Catherine Fisk, William Forbath, Ronald Mann, Tony Reese, Mark Rose, Larry Sager, Bruce Smith and Talha Syed,

Finally, the greatest debt of all I owe to my wife Tammy who endured much and contributed even more during this six year journey. This work is devoted to her.

Preface

This work is about an exotic and strange set of concepts that gradually developed in Western legal culture during the last three hundred years. These concepts structure and create our notion of ownership of ideas, also known as "intellectual property." It is always a sobering experience for a practitioner who is deeply immersed in the details of his field to discuss that field with the uninitiated. Although it is becoming hard these days to find the uninitiated when the relevant field is intellectual property, it is not yet impossible. The reaction that one is most likely to find in such an encounter is puzzlement. Despite its growing normalization, intellectual property is still a very unintuitive concept. More than two hundred years ago, when the concept was an unintuitive one even to lawyers, one of them suggested that "in a law-tract upon this species of property, the division of its subjects would be perfectly curious; by far the most comprehensive denomination of it would be, a property in nonsense."[1] Modern lawyers have managed long ago to drown this sense of bewilderment in a flood of technical legal details. Others, of more theoretical inclinations, would explain that once one understands that property is merely a "bundle of rights" in any imaginable resource, there is nothing special about the notion of owning ideas.

My starting point in this work is the sense of bewilderment, rather than the forces of normalization that increase daily as intellectual property becomes part of the everyday life of all of us. My purpose is to better understand the historically contingent concept of intellectual property by taking it apart and by looking at its history. In this sense this is an "archeology of knowledge" project.[2] It seeks to reconstruct the process in which this modern set of concepts was invented and shaped within a specific legal culture. My focus will be on the Anglo-American legal culture.

The subject matter I explore does not encompass the entire daily-lengthening list of legal fields that come under the title of intellectual property. It is limited to the two areas of patent and copyright law. Historically, these two fields were the first to develop. They appeared much earlier than the others. Moreover, these fields began to develop even before

[1] James Boswell, *The Decision of the Court of Session upon the Question of Literary Property in the cause of Hinton against Donaldson* 25 (1774), reprinted in THE LITERARY PROPERTY DEBATE SIX TRACTS 1764-1774 (Stephen Parks ed. 1975).

[2] MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (1972).

either the term or the concept of intellectual property first emerged. Patents and copyright are also an obvious choice because they were and they still are considered the core of intellectual property. There are, of course, vast differences between the various doctrines that are gathered together under the overarching category of intellectual property. To the extent, however, that this loose family has anything resembling a core it can be found in these two fields.

Intellectual property has always been a combustible mixture of highly technical doctrine and extremely abstract speculation. My inquiry follows this spirit. I am ultimately interested in uncovering the development of the complex conceptual structures that define the notion of ownership of ideas. Sometimes these can be found in direct theoretical discussions by contemporaries. More often, however, the metaphysics is buried deep in a pile of technical legal doctrine. The basic concepts are often "latent" in mundane doctrinal details and discussions. Thus much of my analysis is devoted to extracting the assumptions latent in the legal doctrine and the semantic structures they implicitly construct. Nevertheless, this is not a straightforward doctrinal history. I am interested in the doctrine only inasmuch as it can inform us about the abstract concept of intellectual property. This overlaps with a more lawyerly interest in doctrine for the sake of doctrine only most of the time. Registration procedures in copyright or the details of statutory bar in patent law were highly important to the nineteenth century practicing lawyer, but, as far as I can say, they can tell us relatively little about the developing concept of ownership of ideas. On the other hand, sometimes an obscure and unimportant piece of doctrine happened to highlight an important feature of that conceptual scheme. Accordingly the organizing principle of this work is to focus on those features of the legal doctrines that can best highlight the development of the general conceptual structure of ownership of ideas.

It is probably obvious by now that the main perspective of this work is internal to legal doctrine. The bulk of my analysis is focused on examining legal doctrine and discourse. The reason for this outlook is not any assumption about the independence of law from other social fields. The reason for this choice is, rather, twofold. First, my basic methodological assumption is that of relative autonomy. My assumption is that while the legal field is far from being independent, it is also not completely reducible to other social fields. It, rather, contains its own modes of thinking and of argumentation that are only partly reducible to "external" influences. Second, I think that the legal field was one of the main social sites where our basic concepts about ownership of ideas were produced and reproduced. It is always dangerous to derive conclusions pertaining to the general culture from

the highly technical discourse of a small cult of initiated lawyers. Nevertheless, it so happened that in the case of intellectual property the law and closely related social spheres were the main area where social ideology was produced. To the extent that anybody knew anything about the subject, it is probable that this knowledge was organized in structures and concepts similar to those produced in legal discourse. Thus if one is interested in the development of the basic concepts of owning ideas one of the first places to look is to the law.

The period covered in this work is extensive. I survey patents and copyright from their very early origins in late sixteenth century England. The English and the early American part of this work follows the development of these fields until the end of the eighteenth century. The second part of the work that deals with the United States federal regimes starts at 1790, the year when those regimes were created. It ends at the dawn of the twentieth century, when many of the components of the modern conceptual scheme of intellectual property were already in place. The long period covered involves tradeoffs, of course. I believe, however, that covering this long time-span is necessary in order to grasp the far-reaching changes experienced within the relevant legal fields and the concepts latent in them. When one surveys this entire period there emerges a picture of a radical transformation. Yet this transformation involved no "ruptures." The change was always a gradual one. At each stage, much of the structures of the past were incorporated into the new framework and imbued with new meanings.

The subject of the first two chapters is the early developments of patents and copyright in England. Each of those chapters also includes a brief survey of the early American origins of these fields, during the colonial era and in the short period in which state regimes played a major role. I suggest that these American origins are best understood as local dialects of the concepts and practices that developed in the English metropolis. At the end of the eighteenth century two hundred years of English and colonial history was the legacy of Americans who began to construct their own patent and copyright regimes. This legacy did not "determine" the future development of these new regimes, but it certainly heavily influenced their initial from. Moreover, in keeping with the outlook just explained, even during the later stages much of the content of these preexisting structures was incorporated into new forms and was only gradually reworked.

Chapters three and four deal with these later stages. They describe the development of patent and copyright law in the United States during the nineteenth century. They also outline the emerging conceptual framework of owning ideas that was implicit in the developing doctrinal structures. This

framework as it consolidated by the end of the century was very different than the one that existed one hundred years earlier. In many respects it was very similar to the framework we still assume today.

The fifth and last chapter changes the methodological perspective. It attempts to present a few contextual stories that can illuminate the conceptual and doctrinal changes internal to law that are described in the two preceding chapters. This attempt is far from exhaustive. It develops three main clusters of social developments that seem pertinent to the conceptual story and describes some of these connections. Much work still needs to be done on this front. I hope that the bulk of this work lays detailed foundations for understanding the conceptual framework of owning ideas that is to be explained in context. I also hope that the last chapter provides several interesting directions for placing this framework in broader social context. This skeleton still requires to be fitted with flesh. But it is a start.