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BOOK REVIEW

The Making of Modern Intellectual Property

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Historical and contextual analysis of intellectual property law is rather uneven. Many writers focus on copyright. A few look at patents. Design law features mainly as the creator of problems for the others. Trade marks and the other odds and sods are placed a long way from "core" intellectual property concerns.

This book attempts to redress that balance with a historical and scholarly focus that is mainly on "industrial property", but there is not simply a mapping of the development of the categories of patent, design and trade mark. The primary concern of the book is to explain how the whole intellectual property field has come to be drawn - the relative status of the categories, their aesthetics and the intellectual exchanges between them. This is elaborated with close consideration of the history of reform of the various laws and their administration. The book is a rich resource in these terms.

The most provocative proposition in the book is the suggestion that contrary to conventional wisdom, pragmatic, domestic and specialist considerations do not explain the distinctive categories of intellectual property. It is attention to the attributes of modern law that explains the structure and priorities of our intellectual property laws.

The central organising tool utilised to develop this thesis is a distinction between premodern and modern intellectual property law. Premodern laws are characterised as subject specific and geographically localised. Modern laws are abstract, forward looking and are perceived as autonomous.

The book is in four parts. Part One primarily focuses on the eighteenth century literary property debates which is the foundation of the analysis of premodern law. The debates are cast as a struggle over the nature and legitimacy of intangible property rights. It is argued that the law was unable to effectively determine the metaphysical dimensions of intangible property. The expression in the book that is the subject of the literary property right is too "dynamic" in character to be legally contained. In recognition of this there is a jurisprudential shift away from a concern that the law reflect the "natural" property in mental labour, to a "consequential" analysis of the merits of granting a right. In the process it is left up to law to "create" the intangible property, which can now only be partially defined.

Part Two begins the journey toward modern law. The legitimacy of protecting creative works of many kinds is now accepted and the main interest of law reformers is with legal

aesthetics - drawing simple, uniform and precise laws. In confrontation with the common perception of its "step-child" status, design law is presented as the first area of intellectual property law to undergo modernisation. It is this modernisation, and in particular the reliance upon abstract language to define the category of design, that initiates problems with managing the boundaries between copyright and design, and particularly in the mid-nineteenth century, patent and design. It is a recurring theme of the book that the objects of intellectual property law resist effective definition in terms of essences or principles. A consequence of this is that intellectual property laws rely upon a high level of legal abstraction in definitions. These serve to include but never clearly exclude various objects from protection. This definitional defeat has been overlooked by reliance on description of the administration of the various rights, in order to differentiate them. The process by which we came to see intellectual property law as settled and the categories distinct is explored in both Part 3 and 4.

Part Three focuses on the latter half of the nineteenth century. The impact of bilateral treaty negotiation, the development of specialist treatises, professional organisations, and changes in political and bureaucratic will are seen to combine to facilitate a settling of intellectual property law. The law reform that took place at this time has traditionally been presented as conservative in character- reform that drew upon a national destiny. The authors argue however that the reality was far more radical. The communication required to negotiate treaties and intellectualise them in texts changed the purview of the law - the former internationalised the language of intellectual property law, the latter framed the way the categories came to be explained and understood. What was lost during this period was interest in exploring or understanding the nature of intellectual property categories. To the extent that it was necessary to do so in political discourse, copyright was distinguished from patents by reference to the essential creative activity at issue. Patents were cast as involving "discoveries" rather than creation. Accordingly the unique expression at issue in patents could be confined to the specification and the conditions of its registration, in a way that the copyright expression could not.

What became "settled" were laws rewritten so as to be "forward looking" - anticipating new subject matter, but paradoxically presented as timeless. The categories were assumed to be distinct and separate. Their subject matter was presented as essentially legal and technical in character. What became settled were not just the laws, but a way of framing intellectual property that excluded consideration of its own historical contingency and theoretical inadequacies.

In Part Four the full modernisation of the law is taken to occur with a complete break from the premodern metaphysical preoccupation with "the innate, autonomous will of the creator" and legal recognition of their "mental labour". This is replaced by an assumption that the object is "a closed and secure entity" - "That is, the law moved its focus away from the labour used to create, for example, a book . . . to focus instead on the book . . . itself" (p174). Rather than try to value the labour embodied in the book, modern law assesses value with reference to the (potential) macro-economic value of the book as a commodity, and in the main, tries not to value the work at all. The subject matter of intellectual property is decontextualised- seen as a "legal object", that is as represented as

property in law by indicia such as legally significant drawings and writings, and as circumscribed by policy. The ongoing importance of "speculation, intuition and insight" in interpreting the objects of protection is downplayed.

The culmination of this story about intellectual property law is an attack on the historical inaccuracy of the traditional recounting of origins - the convention of tracing the law back to a statutory point of origin; the forgetting of the entirely different objects of that earlier legislation and the lack of any relation between them; the neglect of the nineteenth century when creation of modern intellectual property law took place; the emphasis on the national significance of laws, ignoring international cross-fertilisation. The conventional story is identified as a product of the intellectual preoccupations of modern law. In order to hide its real origins we ignore that the current forms are a product of their own history, and that that history embraced a serious intellectual questioning of the form of law, rather than unfolding from more pragmatic and particular considerations.

In an age where we continue to remake modern intellectual property laws with continuing reliance upon abstract and forward looking definitions and categories, the telling of *The Making of Modern Intellectual Property Law* is timely. Our twentieth century experience has led us to question whether this strategy is sufficient to serve our current and future needs. This book helps us to further understand and question this path.

The authors conclude with an expression of desire to generate new narratives about the law, but offer few hints as to what they think these should be. Perhaps one line of inquiry worth considering is to re-evaluate what was left behind in the shift from "premodern" to "modern law", which in this author's view encompassed far more than simply the literary property debates and subject-specific forms of regulation. For if we conclude that premodern metaphysics demonstrate that the dynamic subject matter of intellectual property is incapable of clear definitional capture, and we reject reliance on principles and essences, it is hard to see an alternative to laws based upon (inadequate) abstractions. Reopening an investigation into the nature of the intangible property claimed as a product of mental (and other) labour (as well as the contribution of tools), which must necessarily be subject (or craft) specific, might prove the only way out of the current malaise.