A Primer in Modern Intellectual Property Law

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Abstract

This is a very broad primer in intellectual property law from the perspective of its original justification, and the basic legal and institutional distinctions that accompany it in the modern period (roughly 1700-2000).

1 The Role of Law in Modern Society

The importance of law in modern societies is hard to overestimate. The systems are complex, the institutions are diverse and range from small to mammoth, and the number of people involved, from para-legal to federal judge, can only be proof of its central role in society. And yet, for the most part, law and legal issues are left to lawyers, legal theorists and the occasional sociologist. For most people, the law is only reluctantly confronted during those signature events in life: marriage, paying taxes, immigrating, or suing the buttwipe in the SUV who smashed up your right-hand rear-view mirror. And so it should be.

Intellectual Property (IP) Law, however, seems to have broken this mold. For about twenty years, IP law has slowly become something more and more people confront. It is not only becoming easier to violate the law, due to changing technology, but it is also becoming much easier and more common for people to use the law to police their own intellectual property. In order to understand what this body of law consists of, where it came from, and what it's original justification and current uses were and are, it's necessary to look more carefully at both the law, and the reasons for its existence.

2 The origin of American Intellectual Property Law

Intellectual Property law stretches back at least to the 17th century, and depending on the definition, further. However, as with many modern government institutions, it was given a special place in the American constitution. It is interesting to note that the US constitution does not specify anywhere that humans have a right to tangible property such as land (though the 5th amendment guarantees that there shall be no government taking of property without just compensation), but it does insist that the Congress of the United States be given a special right concerning "Authors and Inventors":

> *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;*

*http://creativecommons.org/licenses/by/1.0

This statement, in Section 8 of the US constitution, is the sole legal justification for the creation of the immense body of law and diverse institutions that we now live with. Implied by this phrase are both economic and social justifications.

The inclusion of this phrase in the constitution is by no means arbitrary. It was, like the rest of the constitution, extensivvely debated by the framers. Perhaps one of the most famous statements about intellectual property comes from Thomas Jefferson. Jefferson's 1813 letter to Isaac McPherson has been very widely quoted in the context of debates about the role of intellectual property. In it, he explains why he considers it unreasonable to consider ideas to be property.

> *It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors. It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it; but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.*

The passage does not end there (indeed, the whole of the letter, as with most of Jefferson's writings, is incredibly erudite, and goes on at length about the particular invention–a grain elevator–which McPherson had sought his advice for. See the supplementary links for more information.). Jefferson recognized the subtle balance that must exist between the need to reimburse inventors for their hard work, and the "embarrassment" of giving them sole monopoly rights to an idea, something Jefferson clearly considered unnatural, he continues:

> *Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body. Accordingly, it is a fact, as far as I am informed, that England was, until wecopied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.*
>
> *Considering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.*

Jefferson's explanation references both issues of economics, the so-called utilitarian justification for granting monopolies, as well as a social one: that the granting monopolies for ideas is an inherently difficult and dangerous thing to do.

By creating a system of IP law, the US government not only headed down a new, somewhat hairy, bureaucratic path, but it gave voice to a sense that there is a balance to be struck between the impossibility of restricting the circulation of ideas, and the need to find some way to reward individuals who spend their lives inventing, authoring, or otherwise creating and improvig ideas.

3 Institutions of US IP Law.

From this constitutional mandate, Congress has passed a number of federal laws, which both govern the legal and illegal aspects of IP and actually create institutions to manage and oversee the resulting issues. These three federal areas are copyright, patent and trademark (trademark actually derives from the constitution in Section 8, clause 3, the power to regulate interstate commerce). In addition to these three main areas, there is also law relating to "trade secrets" which is not federal, but state (in the US) and generally functions only to protect commercial enterprises from the unfair appropriation of information it has taken steps to protect. (Compare this with the notion of *personal* privacy; is there a version of a "trade secret" for individuals?)

In the case of copyright, the Library of Congress was designated as the body which would house copyrighted works, maintain a registry, and publish circulars concerning the rules and regulations (Title 17). In the case of patents the congress created a new office, the Patent and Trademark Office. The USPTO oversees patent law (title 35) and trademark law (Section 22 of Title 15). In addition, this institution also publishes its own elaborate Code of Federal Regulations that govern how the office will grant and review patents and trademarks–that is, how it will carry out the federal law.

3.1 Copyright

US Federal Copyright Law. Points for discussion

- what's explicitly protected?
  - literary, musical works (+lyrics), dramatic works (+music), pantomime, dance, choreographic works, pictirial, graphic and sculptural works, motionpictures, audiovisual recordings, sound recordings, architectural works software, "mask works" of semiconductors, music videos, designs
- What's explicitly not covered?
  - US Government works.
- How long are works covered for?
  - Currently, an author gets life + 70 years. A "work for hire" (where the author is different from the owner) gets 95 years from publication (or 120 years from creation). The original duration was 14 years, renewable for another 14.
  - **Exercise 1: Math Problem.** ***(Solution on p. 5.)***
    I write this module today, and I live to the year 2066 (hallelujah!). When can you make use of it?
- What's the test for copyrightability?
  - It must be original (a modicum of originality) and it must exist in a "tangible medium of expression."
- What about registration and notice?
  - Works prior to 1989 needed to be marked with a little c in a circle or "Copyright 1988". Works after this date do not need to be marked to be considered copyrighted. No registration is necessary, until you want to sue someone, then you need to deposit a copy somewhere (such as the Library of Congress) in order to formally assert your ownership.

- Note that much of the law, as it has been extended incorporates the specifics of existing technologies– rules about phonorecords, broadcasting, cable, and now digital transmission. Even Jukeboxes (17.1.116) have been covered at some point.

Other questions:

- Copyright is a "strict liability" statute. What does this mean?
- What constitutes infringement?
- What constitutes damages?
- What kinds of remedies can you pursue (injunction, impounding, damages, criminal penalities)?

Some specific aspects of copyright law

The idea/expression dichotomy:

- From 17.1 concerning the subject matter:

> *tangible expression 102(b): 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.*

Explicit exclusive rights: see section 106.

Fair Use and explicit limitations on rights: see section 107 on fair use (see also section 110, what kind of limitations does this create on the notion of creativity/originality in the classroom)?

Rights in intangible vs. tangible objects, implications of ownership.

- 17.2 Ownership in copyright is not ownership in the object.

The 1998 Digital Millenium Copyright Act.

17.12. DMCA, Anti-circumvention, criminal penalties, extensive rules and exceptions.

3.2 Patent

US Federal Patent Law, points for discussion.

- Patents vs trade secrets? What kind of justification? general availablity of patents.
- What's patentable?
- What duration?
- 20 years + 5 years renewal for drugs, devices. 14 years on designs.
- What are the standards for patentability?
- What if a patent isn't original?
- are plants are patentable? organisms and genes? What does this mean?

3.3 Trademark

Trademark, points for discussion

- What can be a trademark?
  - symbols, logos, sounds, designs, or even distinctive nonfunctional product configurations.
- Trademark's ostensible justification is not to reward inventors, but, believe it or not, to protect consumers from snake-oil salesmen and other unscrupulous dealers.
- The function of trademark is to: indicate the source of goods avoiding confusion, encouraging competition.
- Trademarks must be granted, and they do not expire, but they can become unprotectable (Xerox, kleenex, etc.)
- Since 1996, trademarks have been susceptible to "dilution."

Solutions to Exercises in this Module

Solution to Exercise 1 (p. 3)

It's a trick question, this text is available under a license that allows you to use it now. Nonethless, the copyright on this text will last until Jan 20. 2136. That's 132 years from now.