PROPERTY RIGHTS IN INVENTIONS, WRITINGS, AND MARKS

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We have heard from the earlier panels about traditional property in land and in chattels, a form of legal arrangement that appears to be very ancient in human society. In the panel on "Property and Regulation: Allies or Enemies?"[1] we began to learn about modern forms of property dealing with problems of the modern industrial state. We now are going to discuss well-established forms of property that are fairly recent in the law, emerging after 1700, but that have also been around long enough so that we have had substantial experience with them. These recent but well-established forms of property have many of the attributes of the newly emerging property of tradeable rights in pollution and tradeable landing rights.

I will begin this discussion by pointing to distinctive features of the three basic systems of intellectual property—patents, copyrights, and trademarks. The rights to intellectual property have been the subject of a good deal of puzzlement and skepticism.

First, the limited period of protection for these rights is a feature that we do not see in rights in chattels and land. The inherent structure of these rights incorporates a basic ambivalence. A patent, in our system, is good for a term of seventeen years.[2] Copyright protection is now life of the author plus fifty years.[3] One's trademark right continues only so long as the individual uses it.[4] This limited period of protection is in sharp distinction to the essentially perpetual nature of rights in real estate and chattels, and it reveals our intuition about intellectual property: We ought to have some of these rights, but my goodness, let's not go too far in creating them.

A second distinctive characteristic of these three systems is that they are each accompanied in the literature by pop historical stories about how they came into being. I say pop historical

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1. *See Panel III: Regulation and Property—Allies or Enemies?*, 13 HARV. J.L. & PUB. POL'Y 67-96 (1990).

2. *See* 35 U.S.C. § 143 (1982).

3. *See* 17 U.S.C. § 302(a) (1976).

4. *See* 15 U.S.C. §§ 1058, 1065 (1958).

because these histories are incomplete and because it is a feature of all the stories that these rights are born in sin.

Patent. The basic pop historical story about patents begins with the Stuart Kings in England and their desire to grant monopolies to enrich their favorite subjects and strengthen the crown.[5] Some antitrust case books start with the playing card monopoly case in England.[6] The abuses of the system eventually led to its demise, but there was a surviving exception: a state monopoly for a limited term for new inventions. So in this story the patent system comes crawling out from under the remains of Stuart monarchical abuse. The overtone in this story is that we ought to complete the job and get rid of the whole thing.

Copyright. Copyright emerges in English law with the Statute of Anne of 1710.[7] That Statute is viewed as the successor to a system of regulation operated by the Stationers' Company, a London Printer's Guild, which assigned exclusive printing rights to member companies and operated under the jurisdiction of the Star Chamber. One of the purposes of the Stationers' system of regulation was to implement a system of censorship.[8] This system was abolished with the fall of the second Stuart monarchy at the end of the Seventeenth Century, leaving no exclusive printer's rights. The Statute of Anne was eventually worked out as a compromise to create rights in the names of authors, but it effectively benefitted printers. So again, we have an origin in abuse.

Trademarks. Trademarks are traced back to the trade guilds, which often held trade monopolies. The guilds had the right to mark their products with the mark of the guild. Trademark is seen as a descendent of that notice,[9] and the stories about how trademark rights came into being are not terribly attractive.

Third, it is a feature of all these systems that they contain some restriction on transfer. The inventor and no one else must apply for a patent,[10] although the right to apply can be

5. *See* K. BOEHM, THE BRITISH PATENT SYSTEM 14-17 (1967).

6. *See* Darcy v. Allin (The Case of Monopolies), 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602).

7. 8 Anne ch. 19 (1710).

8. *See* A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE NINETIES 1 (1989).

9. *See* F. SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS (1925).

10. *See* 35 U.S.C. § 111 (1982).

assigned. Our copyright law has long had a system of dual terms, with the author's ownership of the second term contingent on his survival to its beginning, and the statute now creates an express right to terminate transfers.[11] In other countries more strongly influenced by the doctrine of moral rights, some other elements of the author's protection have been non-transferable. Historically it has been thought that trademarks were not transferable except when accompanied by the business itself, so that trademarks alone could not be assigned.[12] Thus, these property systems have lacked the feature of free assignability that we associate with a fully developed system of property rights.

A fourth distinctive feature is that these rights are statutory in nature and are viewed as positive creations of the states that control the conditions under which these rights come into being. They are not viewed as having emerged through a process of natural, customary, or common-law development. There are two exceptions: common-law copyright,[13] and common-law protection against unfair competition.[14] Patent rights are viewed as entirely creatures of the statute. The right to obtain a patent could be abolished by Congress tomorrow if it so desired.

Another distinctive feature of these rights is that you go to a government office to get some or all of the protection. You go to the Patent Office to file an application, and only after it has been reviewed do you receive a patent. In copyright, there is a procedure for registering your claim to copyright with the Registrar of Copyrights. We have a national system of trademark registration, also administered by the Patent and Trademark Office.

Finally, these rights are of a nature that lend themselves to

11. The dual term structure of the 1909 Act, Copyright Act of 1909, 17 U.S.C. § 24, has been replaced for works created after January 1, 1978 by a right of termination, *see* 17 U.S.C. § 203, which cannot be alienated except under specified conditions. *See* 17 U.S.C. §§ 203 et. seq.

12. *See* 15 U.S.C. § 1060 (1958).

13. Common-law copyright was the right of an author of an unpublished work to prevent copying or publication of the work by others. For instance, the author of an unpublished book manuscript could prevent others from making and circulating unauthorized copies of the manuscript. Until 1976, the right was based solely on judicial decisions. In 1976, the protection of unpublished work was incorporated into the federal statute. *See* 17 U.S.C. §§ 101 et seq.

14. For instance, the use of confusing trade names or symbols was actionable at common law even before the trademark registration statute.

the modern bundle of rights analysis because there is no tangible thing that is the subject matter of these rights. They are completely abstract. You can grab chattel, you can feel land, but the subject of the copyright or the patent does not exist. This abstractness affects the symbolic strengths of these rights and makes the fact that they are creatures of positive law particularly vivid.

One unusual feature of the system of rights to intellectual property can be viewed as a strength: All of the rights are tied into an unusual system of international treaties. The patent and trademark systems are within the regime of the Convention of Paris,[15] and copyright is within the Berne Convention.[16] Combined, these two treaties, in a quite extraordinary display of worldwide cooperation among nations, have committed almost all countries to maintaining systems of protection under their national law. Because of the inherent weaknesses of rights in intellectual property, we have compensated by creating an international system that locks nation states into these systems of property rights. Similar international conventions for rights in real estate or rights in chattels do not exist.

The literature has basically been either ambivalent or hostile to all of these rights, and I shall identify and comment on some of the leading criticisms. One criticism of this system of rights has been that it creates "monopolies." Case law and legal scholarship are filled with the use of this term, and it is never meant as a compliment. Critics acknowledge that the monopolies are necessary, but even this concession is not a sympathetic or fair starting point. By rhetorically using the term "monopoly" in the sense of an exclusive right, critics circularly suggest their proposition by definition.[17] In fact, none of these rights in themselves confer economic monopolies.

The patent is the most widely criticized system of rights, but it is constrained by the fact that the scope of the patent right is limited by the claim. The claims of most issued patents are so narrow that competitors can devise many ways of achieving the same thing as the subject matter of the claim. Moreover, most

15. Paris Convention for the Protection of Industrial Property of March 20, 1883.

16. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (implemented adherence to the Berne Convention of the Protection of Literary and Artistic Works as of March 1, 1989). The United States is also a signatory to the Universal Copyright Convention.

17. *See* Kitch, *Patents: Monopolies or Property Rights?*, 8 RES. IN L. & ECON. 31 (1986).

issued patents are worthless, or very nearly worthless. They have no market value, much less market power.

A variant of the monopoly criticism of patents has been the concern about "barriers to entry"[18] created by trademarks. There has also been concern that the incentives created by these rights are not appropriately designed for their proper positive purposes.

Economists, who have been the principal writers on patent policy, have concluded that if we did not have the patent system, we would be fools to create it; but because one exists, it is not clear that it is worth the trouble to get rid of it.[19] This commentary is far from a ringing endorsement of the patent system. Similar skepticism exists with regard to copyrights. Steve Breyer, for instance, has an article on the subject that advanced this very skeptical position.[20] Professor Breyer took the position that people who write books get such a charge out of writing books that they would write them without the copyright. Why should we tie up the dissemination of their works by giving them copyrights as well? I should note that most legal literature is more sympathetic to copyrights than to patents or trademarks. Indeed, I have always wondered whether that was because people who write books about the subject could bring themselves to do away with patents and trademarks but never could quite bring themselves to argue against their own copyrights.

How should we view these rights? The way you have to see these systems of rights is that they are a subtle and complex system of private empowerment. These systems of rights exist to enable private parties to engage in the activity of investment in innovation, authorship, and development of positive relationships with customers.

In evaluating these systems, one must compare them to alternative arrangements for achieving the same ends. Some of the critical literature does not hesitate to compare and offer answers. It asks how we would we create incentives for innovation if we did not have patents. The answer is that we would have

18. *See* J. BAIN, BARRIERS TO NEW COMPETITION (1956).

19. *See* SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, STUDY NO. 15, AN ECONOMIC REVIEW OF THE PATENT SYSTEM, 85th Cong., 2d Sess. (1958) (individual author Fritz Machlup).

20. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

government support of research. How would we create incentives for quality if we did not have trademarks? We would have government grading systems such as we have in the case of meats—USDA grade, choice, or prime—simply expanding this to a wider range of products. I have never found in the critical literature, however, anyone who has said: "When we do away with copyrights how will we get our books produced? We'll have government production of books." The absence of this response reflects well-founded concerns, based on traditional First Amendment values that book publishing in general is an activity that the government should not perform.

Apart from theoretical concerns, the government cannot plan and do research well because it is an extremely difficult activity to manage. Similarly, the government cannot grade products for the benefit of consumers well because the government systems of quality grading would suppress product distinctions important to customers, deter innovation, and be overly responsive to the interests of producer groups. Indeed, most modern and non-communist states share this judgment and have adopted systems of patents, copyrights, and trademarks.