Law, Knowledge, Culture

The Production of Indigenous Knowledge in Intellectual Property Law

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2. The making of intellectual property law

The appearance of intellectual property has been largely tackled in terms of an exploration of the emergence of its particular, distinctive categories and subject matter. As a subject of history, the most studied category has been copyright. Though not necessarily claiming the story of copyright as somehow representative of the history of all intellectual property laws, copyright historians have suggested a model of truth about intellectual property laws and a method of historical inquiry in general, directing historians towards discovering the origins of the relevant laws.

What the origins of copyright have been taken to be has differed, reflecting diverse disciplinary approaches and interests. Publishers and booksellers put forward a version,[1] legal historians have presented an account,[2] literary theorists have offered another version,[3] different from the Marxist perspective[4] that, in turn, differs from the 'postmodern' perspective.[5]

In an overview of such histories, Kathy Bowrey notes how many of these histories fail to engage meaningfully with each other.[6] Bowrey's point is to highlight the striking reluctance in generating inter-disciplinary conversations.

> History shows that our understanding of copyright develops out of the interaction of a number of perspectives, even though few writers seem prepared to acknowledge this. At first each discipline wanted to pursue their own definition of the subject. Later on definitions were built in reaction to those earlier territorial claims. The argument was over deciding *what the legitimate interests and concerns of copyright are* and *who is authorised to speak for them*. There was an unwillingness to make space for the diversity of experiences and interests involved with copyright.[7]

What Bowrey advocates is a cross disciplinary approach to understanding copyright and its significance within legal relations of power.[8] Her point about the difficulty of achieving such a perspective is indicative of how the borders of copyright and more generally intellectual property law are patrolled. Under such circumstances knowledge about how copyright is constituted is limited. This helps guarantee the authority of the legal voice to speak about copyright through the language of law, leaving the

other narratives as partial and contingent to accessing the domain of legal discourse.[9] In this sense, there is also a tendency to ignore political and social contexts and the effects of these in shaping the law. The histories tend to remain abstract rather than situated in historical epochs. What is at stake here is the fluidity of disciplinary exchange and the recognition of diverging historical accounts according to different sources, agendas and points of view. Further, the legal narrative of intellectual property's history assumes access and legal competence to understand and reproduce this discourse.[10] This secures the legitimacy of the discourse to distribute an 'authentic' meaning and thus perpetuate the ways in which debates about intellectual property are able to engage with new (and differing) subject matter.

HISTORICAL INFLUENCE

Few histories speak to the space that now constitutes intellectual property by extending analyses through a particular history of copyright to intellectual property law as a whole. One notable exception is Brad Sherman and Lionel Bently's work *The Making of Modern Intellectual Property.*[11] This book addresses the imbalance in histories of copyright, patents, designs and trademarks in order to explain how the whole legal field of intellectual property has been constructed.

What is different in this appreciation of the history of intellectual property is that the writers locate the production of the category of 'intellectual property' with jurisprudential concerns about the making of 'modern' laws. By modern law Sherman and Bently refer specifically to the *form* of the law, namely its abstract and *a*historical representation in legislation, spoken through the language and logic of political economy and utilitarianism.[12] They reject the view that an understanding of intellectual property can be derived from a concern for the origins of particular laws that are now recognised and encompassed by the rubric 'intellectual property law'. In suggesting that the domestic and specialist considerations of intellectual property, such as a history of copyright, do not explain its genesis, their analysis leads to an argument that it is the struggles of making 'modern law' that has significantly contributed to the evolution of the category in law that came to be termed 'intellectual property'.[13]

Sherman and Bently begin their history by noting the distinction between pre-modern intellectual property law and modern intellectual property law. The distinction, which they are the first to admit is 'somewhat artificial',[14] is nevertheless a useful way for considering the differences in identifying what we now understand as intellectual property law. For example, they note that the period around the 1850s marks the historical moment when

intellectual property law, with its relatively bounded figure and specific categories including internal logic and language, emerged. Prior to this period, intellectual property law was haphazard and incomplete. Far from being readily determined and uniform, the development of intellectual property law as a distinct category of law has been slowly developed over a period of time, namely as law came to grapple with a series of issues that threatened its coherence. For until the 1850s there was no discernable law of copyright, patents or designs: the subcategories now recognised under the general axiom of intellectual property. Instead, prior to this period, there was an agreement that 'law granted property rights in mental labour, although the nature of this legal category was itself uncertain.'[15] Thus prior to the 1850s there was no clear or discernable way of managing intellectual property law. The pre-modern was subject specific and reactive as it tended to respond to particular problems when they were presented. The literary property debates in the eighteenth and nineteenth centuries are an example on point. In comparison what characterises modern intellectual property law from the 1850s is that it is more abstract and forward looking. Importantly the focus of the law was shifted *away* from measuring the *labour embodied in the subject matter* to concentrate more on the *object produced by the subject matter*.

Sherman and Bently's approach is to cut through the social and cultural histories of copyright, patents and designs to locate the struggles with which law was intrinsically engaged. For example, they suggest that what the eighteenth century contest over literary property really demonstrated was laws inability to determine effectively the metaphysical dimensions of intangible property (for instance how to designate the boundaries for the property).[16] Whilst relatively unsurprising, as this specific problem was not to be solved easily, it became a constant point of legal consideration and contestation throughout the eighteenth and nineteenth centuries. The crisis this created, in understanding the order and function of copyright law, was handled by shifting the sphere of legal concern away from its internal disorder, to the more general meaning and concerns of intellectual property law.[17] Thus in the late nineteenth century intellectual property law started to take on a new and recognisable shape closer to that which we currently understand, where the main concern settled on defining the object of legal protection. In this sense law was able to shift its gaze from the problem of determining the metaphysical dimensions of intangible property (for example, what was an original work), and focus instead on the object or commodity. For example discussing the original in terms of what is worth copying is worth protecting.[18]

Through moderating the perspective, the problem of determining the metaphysical dimensions of intangible property appeared resolved. The

shift of the gaze also meant that the internal logic of copyright law was withdrawn from view. This left within the body of the law incremental disputes about the object of legal protection. Whilst the question of determining the foundational basis of the law was sidestepped, the issue of defining the protected intangible property in copyright still persisted. Moreover, struggles to identify and measure knowledge through a prism of mental labour still troubles intellectual property law today. However such problems, if noticed at all, are attributed to unusually challenging facts and circumstance, rather than generated through the legal processes of definition inherent to the law.[19]

It is significant that the framing of intellectual property law often excludes consideration of its own historical contingency.[20] Of specific importance to this process are the narratives that intellectual property law has produced of its own history. For instance, the preoccupation with narratives that locate the emergence of copyright with the 1710 *Statute of Anne* or patents with the 1624 *Statute of Monopolies* present intellectual property law as an increasingly coherent and stable body of law derived from Statutes.[21] The cost of such narratives is the marginalisation of discussion about the complexity in the emergence of the concept of intellectual property law. Intellectual property laws are (only) presented as unsettled and complex in the historical past. Those problems are 'resolved' through time via various key reforms. Thus current laws are largely *a*historical in the sense that they only contextualise the past in order to show problems having been overcome. The face with which such laws front the future is comparatively featureless and capable.

The difficulties in granting property rights in mental labour were central to the development of a body of law named intellectual property. It is significant that as the eighteenth century became marked with new concerns, economic and industrial, these were also integral to the changing form of law; from subject specific law to a general 'body' of law replete with coherent and universal categories of assessment. What such a change achieved was to shift the attention away from the problems that threatened the coherence and universality of the law. This is not to say that with a shift in the focus such a problem disappeared, for indeed on closer examination intellectual property law is still characterised by how it reconciles and rearticulates proprietary rights in creative endeavour. In this way intellectual property still maintains the primary difficulties that marked its 'premodern' form. Thus the most profound and certainly lingering issues for intellectual property law revolve around the problem of understanding the metaphysical dimensions that constitute intangible property.

THE LITERARY PROPERTY DEBATES

The English literary property debates of the eighteenth century are important because they provide contextualisation for the initial struggles with which the law was externally and internally engaged.[22] Not only do they illustrate difficulties that are still paramount to intellectual property law, but also reveal how, in a variety of ways, law sought to resolve these complexities. Inevitably individuals (jurists and advocates) also played significant roles in directing the path that the law could take in response to such difficulties. The literary property debates provide a space for considering not only how the law responded to the challenge of metaphysical property, but also that the arguments by proponents, opponents, jurists and others influenced the shape the law took. In these early debates it is possible to discern arguments that attempt to grapple with, and understand, intangible property. These arguments inevitably expose the struggles as being within the law itself. Sherman and Bently's point is that far from only happening within literary property and copyright, the struggle that law was intrinsically engaged also extended into other areas that would later be grouped under the axiom, intellectual property.

Thus the literary property debates provide a focal point where the concept of intangible property was thrashed out and as such predominately included devising a method for appreciating the *nature* of intangible property. Within these arguments for literary property the notion of property rights in mental labour was at the forefront of the debate. As discussed in reference to Locke earlier, the arguments also exposed how notions of 'property' were translated into the debates and how the natural right through an individual's labour was adapted, developed and justified.[23] What the literary debates also signal is how a corresponding key process for the law was in identifying what the limits and boundaries of the intangible subject matter could be.

At first instance, the struggle for the law began as one of identification.

In terms of identifying intangible property, there were three key points, raised by opponents and supporters alike, that highlighted the difficulty for the law in recognising intangible property. The first involved the circumstances in which such property could be legitimately 'acquired'; the second involved the problem of identifying mental labour in literary property; and the third concerned the 'economic and cultural consequences of recognizing a perpetual textual monopoly.'[24]

Inevitably, arguments for perpetual common law rights in intangible property raised the question of how title in property arises. At this period in time, and as I discussed in the previous chapter, property was commonly conceived in political theory as being acquired through first occupancy.[25]

However, as intellectual ideas could not be 'occupied' in the same sense as land, it therefore followed that intellectual ideas could not be seen as property. One jurist, Justice Yates, who constantly argued against the common law right, highlighted the difficulty with equating property rights with ideas. As he noted '[t]he occupancy of a thought would be a new kind of occupancy indeed' for an object of property 'must be capable of distinct and separate possession.'[26] For an example of the difficulty in grasping a property right in an intangible form, consider the following argument made by Justice Yates in the case *Millar v Taylor* (1769).

> But the property here claimed is all ideal; a set of ideas which have *no bounds* or *marks* whatever, nothing that is capable of a *visible possession*, nothing that can sustain any one of the *qualities* or *incidents of property*. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the Author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.[27]

In response to this kind of reasoning and fearing that it would undermine the common law right, the Stationers[28] and their supporters, all keen to see perpetual common law rights in intangible property as it guaranteed their monopoly, argued that a different concept of property was required; one that was 'appropriate for the case at hand.'[29]

As an alternative position, the Stationers, who had Blackstone as their counsel, presented the case that there was property in *mental labour* based on Locke's *Two Treatises of Government* in which the natural rights thesis functioned as the (familiar) marker of property. As already discussed, this was a strategic and selective reading of Locke.[30] While Locke was a supporter of an author's literary property, he was not concerned with defining what it is that an author 'owns' and justifying that as a 'right'. Nevertheless, those who favoured perpetual common law literary property focused on labour as the source of the property right.[31] To enhance the legitimacy of this position they argued that it was the *style* and *sentiment* of the author which 'occupied' the text.

At this stage it is worth noting that the difficulty in conceiving the nature of the property right was not unique to the literary debates and to the formation of copyright.[32] It would however be dangerous to generalise this problem as occurring throughout all regimes currently grouped under the axiom of intellectual property. What makes the problem worth commenting upon is that while other areas of intellectual property did not have the same crisis in defining the property right as copyright did, the shift to

understanding the property as a right in labour subsequently influenced the other regimes that were to come to be grouped as laws of intellectual property. For copyright, at least, the dilemma in defining the property right for literary property was (partially) resolved with the increasing reliance upon possessive individualism.[33]

Certainly a primary element that emerged from the literary property debates was this reliance upon an individual's labour as denoting a property right. There were those who argued for and against such positions. Indeed Yates J saw that the right was more of a personal right than a property right. As Mark Rose recounts, Yates 'insisted on maintaining the distinction between a personal right and an object of property. He did not deny that a personal right might be incorporeal but he did deny that anything incorporeal could be treated as property, in the same sense as a house or land.'[34] To countenance such opposition, proponents for the common law right, advocated that the property was neither in the physical books nor the ideas expressed, but actually 'something else entirely, that consisted of style and sentiment.'[35] Thus the argument circled back to identifying the intangible dimensions of the subject matter. This moved the law in a direction where identification of the intangible became central to ascertaining the right.

That the intangible domain was not marked by boundaries in the same manner as physical objects, led the early jurists to compare the right in literary property to that of patents. In this sense measuring the obvious tangibility of property in one area of law to the perceived intangibility of that which makes a literary work. In *Tonson v Collins* (1760) Blackstone J, argued that 'one essential requisite of every subject of property was that it must be a thing of value'[36] and that for literary property the thing of value was 'sentiment'. Influenced by Yates' J dissenting position that there was no distinction between copyright and patents, Blackstone moved his discussion to the subject of property where, evoking the earlier differentiation between literary and mechanical invention by another jurist, he stated that 'where two engines might resemble each other, they could never be identical because materials and workmanship must differ. But every duplicate of a literary text was the same text because its essence was immaterial.'[37] Herein lay the development that was to affect significantly the shape the law took – pushing the law to focus on the object produced by the intangible subject matter and defining copyright in terms of its points of differentiation to patents.

These questions about the nature of property were philosophical in the sense that they were about justifying the origin of the right. However, in practice only a partial explanation of the nature of the property was provided. This was because it was difficult in practice to identify the boundary to such a right. This problem was played out in questions over

the derivative works such as translations and abridgements. If the text was not identical – was it an infringement of the owner's right? As well as this, and because of disagreements over the appropriate justification argument to apply, the legal questions focused relationally on the problems that law was likely to have in identifying the existence of such property rights, rather than establishing the boundary. Traditionally, property was seen to demarcate definitively a zone of exclusion, at which point it became necessary to show that with a concept of intangible property there was something that was 'capable of being visibly and distinctly enjoyed.'[38] Thus, the challenge was to provide certain markers that would enable literary property to be identified and distinguished thereby making the zone of exclusion clear. It is hard to say how and when precisely this issue was resolved, however it was consistently argued in terms of literary property, that the words in print provided the marker necessary to identify property.[39] As Rose notes '[d]ressed in language, the writer's ideas became a property that could be conveyed from owner to owner.'[40]

Whilst the initial decision by the King's Bench in *Donaldson v Becket* (1774) found for an author's common law right in property, the reversal of the decision by the House of Lords, declaring that copyright was a limited term right, highlighted that the answer to the question of literary property was far from clear.[41] As the case presented a failure to endorse *any* particular foundation for the literary property right it also highlights the indeterminacy of the law in this area. In the following decades, owing to the lack of clarity in determining property in mental labour, the law was developed and interpreted by competing demands. This indeterminacy was what made law subject specific. Interestingly, the objections to a perpetual literary property right raised in *Donaldson v Becket* (1774) laid the foundations for a shift to a different kind of analysis of intangible property rights.

THE MAKING OF MODERN LAW

As well as foundational issues about the origin and boundaries of the 'right', it was also argued, from analysis following *Donaldson v Becket* (1774), that literary property could not be considered as 'property' proper because no harm could be made against the owner in the taking of the property. That is, the nature of the intangible property meant that the harm to the owner through taking the property was difficult to measure and identify. This point was persuasively argued against by highlighting the future financial benefits that the owner would not be able to share. Economic concerns thus became an adequate means for measuring and identifying the loss of this unique form of property. Hence translation,

abridgements and other derivative markets slowly came within the purview of protection to justify this extension of the private right. The following line of reasoning was established: that inadequate legal protection of the economic value of the work would provide little incentive to produce. That this argument relied upon the importance of economics is significant; for the argument is only possible in a period where the liberal democratic form of an economy was beginning to have its own status and regimes of logic.[42] In a parallel development the law became an integral vehicle for upholding that logic.[43] Being deprived of the potential rewards from an economic realm was how the harm against the owner was to be understood in regards to this new form of property relationship. The development in intellectual property law of an integral relationship between property and economics has been dynamic and, as will be considered in more depth at a later stage of this work, significant: specifically in the way in which modern intellectual property law approaches and evaluates an object for protection.[44]

A further problem, after these considerations about identifying the property relation in intangibles, was how to *describe* the subject matter in law itself. Such a problem existed for literary property, patents and design and arose because it was the intangible dimension – not the product (for instance the book) that was supposedly protected in the law. Specifically, when describing intangible property, law spoke of the intangible in dynamic terms, as something that required action through the function of mental labour.[45] However when it came to dealing with the product, the law was unable to represent it in a way that reflected the process of intellectual and metaphysical origin. The 'law lacked the language with which to reproduce the nature of the intangible.'[46] This was a difficulty in phrasing the difference between the 'creation' or intellectual labour and the shaping of that labour into a tangible product.[47]

To this end, the identity of the abstract object became known to the law through the physical object that was produced. Peter Drahos explains the necessity of the transition, where '[a]t some point before property rights attach to the abstract object, the various regimes require(d) some kind of corporealisation of the abstract object.'[48] Inevitably, the *product* which could be named and identified, became the *object* of intellectual property law. For copyright this meant the artistic work or book; for patents, the invention; and, for design, the tangible reproduction (through documentation) of the design. This logic, coupled with economic discourse, further justified an expansion of literary property-like subject matter to include a very diverse array of cultural/industrial objects.[49]

If exclusive possession was to be granted to a product of intellectual labour, it thus became necessary to establish a means of identifying a reproduction of that product. In this sense, for a property right to be granted, *the*

intangible had to be reproducible: for the copy would generate an infringed right in the original property. In addition, the property had to be identifiable, insofar as it was possible to identify to what extent it had been reproduced. Thus the law took on a further change when it recognised that the object of intellectual property law could be infringed beyond the immediate form expressed. To this end, legal protection was extended to non-identical copies of the expression. In order to highlight this point, it is useful to consider the case of translation, which provides an example of how important it was to identify a work in order to further identify a copy or an infringement.

In *An Unhurried View of Copyright*, Benjamin Kaplan explains that the first substantial question to arise under the *Statute of Anne* (1710) was that of alleged infringement by translation.[50] In 1720, Dr Thomas Burnett brought an action against the translator of his Latin work, *Archaeologaie Philosophicae*. The defendant argued that the translation was in fact a 'different book'[51] and therefore the translator was the author of the 'new' book. In this sense, because the translator had put the book into another form, the defendant argued that it was not the same as reprinting because it required the 'translator to bestow his care and pains upon it'.[52] The judge appeared to accept this reasoning from the defendant, that, if the translation was a work of authorship (and importantly mental labour), at the same time it could therefore not be a copy. The issue of identifying a copy and identifying authorship recurred throughout this period as the law sought to establish means of identifying infringement. Other key cases that sought to clarify this issue involved maps, abridgements and histories.[53] However, the issue of copying was resolved by not looking at what had been *taken*, but what he/she had *added* to make it a work distinct from the copy.[54]

As Kaplan highlights through these early cases, the eighteenth century law was caught in judgments of identity. The subject specific nature of these meant that identification of the subject matter became necessarily linked with a concern for aesthetics. In this sense, aesthetic judgments in the form of identifying whether or not a work was infringed relied upon judicial interpretation, as there was no singular underlying principle of the law that could determine an infringement. What this shows is that the direction that the law took was in fact in response to all the underlying issues whose genesis resided in the identification of metaphysical dimensions of intangible property.

FROM COPYRIGHT TO DESIGN

Despite these considerable challenges, and the multiple efforts within copyright law aimed at their resolution, it is actually design law, codified

as a particular category within an intellectual property framework, that produced the first significant transition for intellectual property law.[55] Of importance are the reforms in design legislation that occurred between 1839–1843.[56] Developed in conjunction with design legislation, there were two elements that had a significant effect upon the production of intellectual property law generally. The first concerns the introduction of a system of registration, known as the Designs Register. The second involves a shift in the way in which law concerned itself with the 'aesthetics of law' whereby law itself became interested in the future shape that it was was to take.[57] This attention to the aesthetics of law was specifically demonstrated in the organisational mechanism employed by law to move from subject specific analysis to more abstract formation. Thus the abstraction of legal categories influenced the way in which problems were to be resolved, categories organised and boundaries patrolled.[58]

With the challenge to British design from other trading nations, a variety of initiatives were developed specifically to improve the state of British design. Of these, the *Designs Registration Act* (1839), one of two acts[59] aimed to extend the scope of current design protection through the process of registration. Through the Act, the length of time offered for protection for designs was extended. This was premised on the prerequisite that the design was registered.

The introduction of a process of registration is an important moment in the history of intellectual property law. For registration effectively enabled the centralisation of particular forms of knowledge by recording the characteristics of the (protectable) product. This meant that the law was increasingly able to rely on institutionalised characteristics and avoid subject specific judgments. Culturally specific modes of identification were normalised as the key characteristics required for registration – and obviously anything that fell outside these markers did not qualify for registration and consequent protection.

A primary feature of the registration system, as was developed for designs, was that it regulated and managed specific information. The Register became the institution for accumulating, monitoring and distributing information about the various forms that mental labour could take. Moreover, the process of registration intrinsically established a means of producing proof about the nature of a design. For example, if an image was registered as a design, it could not later be claimed that it was instead a patent.[60] In addition the burden of proof fell to the creator rather than the law to establish what protection it deserved. Essentially, the system of registration facilitated a way of categorising and cataloguing the product of intellectual labour, the work itself.

The role of registration in controlling certain kinds of information was central to the development of the categories of intellectual property law. Further, through the development of this system of recording and documenting knowledge, bureaucratic power took on a new dimension. Importantly this was because the system of registration became 'publicly' controlled (through government) rather than privately regulated as had been the case through specific entities such as guilds.

Publicly controlled knowledge (through registries and archives for example) is an intrinsic mechanism of government.[61] The changes in categorising and regulating specific knowledges also occurred at a time when bureaucratic power in the form of modern European governance was consolidating itself.[62] It is not a coincidence that in the same period that this form of governance begins to take on its contemporary shape that intellectual property law also begins to take its current form. Both develop parallel systems of understanding and conceptualising the power of knowledge and the importance of developing programmes that monitor its progress. For intellectual property law this was achieved through registration. For governance this was increasingly achieved through law. Both facilitated a means for the future direction of the other: a bureaucracy seemingly acting in response to individual initiative. Such controls were also self-regulatory, in the sense that the onus was on the creator to conform to the conditions of registration in order to secure protection. In this way then it is possible to see a specific mode of governance occurring wherein the creator elects to participate in their own governance in return for legal protection. Further, the legal actor becomes simultaneously an object of the law and a self-actualising subject where the blurring between the two categories, rather than destabilising the unity of the opposition, enhances the inter-relations.

The registration process effectively contributed to the closure of debates concerning the nature of intangible property over the second half of the nineteenth century. As Sherman and Bently note, 'creations were not only radically detached from their creators, they also acquired a degree of juridical autonomy they had not previously experienced.'[63] Registration provided a means of decontextualising the product, effectively affirming the product as a 'legal object'. Further, registration effectively centralised specific kinds of knowledge that were deemed appropriate for intellectual property protection through establishing offices in centres of production such as London and Paris. With the increase in processes of centralising government occurring in Europe in the mid-nineteenth century, registration became a necessary vehicle of governance. The spread of modern registration systems was itself instrumental in providing possibilities for managing the identification of specific categories of knowledge.

A further feature that influenced the shape of intellectual property law was the way that the registration process codified protection through its representation of the intangible on paper. As the process for registration became more refined and rationalised, it led to patterns of standardisation that could be applied across a variety of locales. For if the process of standardisation could be applied in varying countries, intellectual property law could take on an almost universal status where the same protection could be guaranteed as if there was a standard normative mode of measurement. Consequently registration could become an end in itself.

Registration thus proved to be one of the most profound techniques in the organisation of certain kinds of legal categories and the production of modern intellectual property law. Without such systematised processes of documenting, archiving and managing specific categories of knowledge, it is unlikely that intellectual property law would have gained the reified status and power that it currently sustains. For intellectual property, registration allowed the codification of 'types' of knowledge to became one of the necessary mechanisms for producing an effective 'body' of intellectual property law (potentially global in scope) that could identify specific 'types' of knowledge through universal categorical indices whilst also promoting the benefits of an extensive intellectual property regime.

CONCLUSION

The key point to this overview of the emergence of intellectual property law is that the law was not pre-existing, nor was it a coherent entity with an underlying logic. Rather, intellectual property law functioned disparately, responding to specific issues as and when they arose. There was no obvious line connecting an author to property in the work (indeed, the very concept of authorship was also emerging at this time) and the legal principles that identify intangible property were slowly and partially assembled in response to specific concerns. In this sense law was deeply involved in its ongoing creation and thus instrumental in creating its own categories and developing processes of recognition and identification.

Consequently, these factors averted attention away from the destabilising potential of the laws inability to fully describe or justify the 'right'. As there was no pre-existing conception of a work, only the law itself could establish the means and process for understanding intangible property. The resulting dynamism of the law is often overshadowed but it is useful to keep in mind that in present day intellectual property law, the difficulties about 'the essence of intangible property continue to appear when law is confronted with new subject matter.'[64] Moreover, rather than highlighting

the cohesion, it brings to the fore the complexity and messiness of the law both within its construction and its modern function.

In recognising the importance of the past in shaping present law, the next chapter considers the individuation of copyright as a subset of intellectual property law. Concepts of authorship and originality become the key tools for identifying the intangible property within copyright. The point is to consider how these categories function to influence the shape of the law and the judgments that are subsequently made in relation to identifying new 'types' of knowledge – for instance indigenous knowledge. Through such an analysis the structure of the law as messy and incomplete is exposed, where the struggles of modern law to determine the metaphysical dimensions of intangible property are revealed as still actively functioning and directing the way in which the law responds to the introduction of new kinds of cultural knowledge.

NOTES

1. J. Feather, *The Provincial Book Trade in Eighteenth Century England*, Cambridge University Press: Cambridge, 1985; and, V. Bonham-Carter, *Authors by Profession Volume One and Two*, The Society of Authors: London, 1978.
2. B. Kaplan, *An Unhurried View of Copyright*, Columbia University Press: New York, 1967; and, R. Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press: Nashville, 1968.
3. E. Eisenstein, *The Printing Revolution in Early Modern Europe*, Cambridge University Press: Cambridge, 1983.
4. B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (transl. by Kingdom, E.), Routledge and Keegan Paul: London, 1979. Edelman was strongly influenced by the early Soviet Jurist Evgeny Pashukanis writing in the 1920's. See: E. Pashukanis, *Law and Marxism* Arthur, C. (ed), Ink Links: London, 1978.
5. The postmodern perspective is strongly influenced by Foucault. See: M. Rose, 'The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship' in Sherman, B. and Strowel, A (eds), *Of Authors and Origins: Essays on Copyright Law*, Clarendon Press: Oxford, 1994; M. Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press: Cambridge MA, 1993; M. Woodmansee and P. Jaszi (eds), The *Construction of Authorship: Textual Appropriation in Law and Literature*, Duke University: Durham and London, 1994; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press: Durham and London, 1998. For a cultural studies perspective see: J. Gaines, *Contested Culture: The Image, The Voice and The Law*, University of South Carolina Press: Chapel Hill, 1991.
6. K. Bowrey. 'Who's Writing Copyright's History?', (1996) 18 (6) *European Intellectual Property Review* 322. See also: C. May 'Why IPRs are a Global Political Issue', (2003) 1 *European Intellectual Property Review* 1.
7. K. Bowrey, 'Who's Writing Copyright's History?', ibid. at 329 [emphasis in the original].
8. This advocacy has been taken up recently in C. May and S. Sell, *Intellectual Property Rights: A Critical History* Lynne Reiner: UK, 2005.
9. See also: R. Deazley, 'Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters', (2003) 25 (6) *European Intellectual Property Review* 270; and R.

Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)*, Hart Publishing: Oxford and Portland, 2004.

10. S. Almog, 'From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law', (2002) 13 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1.
11. B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760–1911*, Cambridge University Press: Cambridge, 1999.
12. Ibid., at 3–4.
13. Ibid., at 1–10.
14. Ibid., at 3.
15. Ibid.
16. Ibid., at 5.
17. Ibid., at 4.
18. The examples given here are mine.
19. See for example *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112, concerning the subsistence of copyright in a telephone directory. A discussion of the case will be made later in the chapter.
20. B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.11 at 6.
21. Ibid., at 206–212.
22. The literary property debates argued for and against common law literary property. The litigation was between the London and Scottish booksellers. The key cases were: *Millar v Kinkaid* (1750) 4 Burr. 2319, Eng. Rep. 210; *Tonson v Collins* (1760) 1 Black. W 301, 96 Eng. Rep. 169; *Osborne v Donaldson* (1765) 2 Eden. 328, 28 Eng. Rep. 924; *Millar v Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201; *Donaldson v Becket* (1774) 4 Burr. 2408, 98 Eng. Rep. 257.
23. See: R. Deazley, *On the Origin of the Right to Copy*, supra n.9.
24. B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.11 at 21. See also: K. Bowrey *Don't Fence Me In: The Many Histories of Copyright*, Doctor of Juridical Studies, University of Sydney, 1994 (unpublished).
25. Locke discussed this concept, it was one he developed from Roman law, but it did not justify property in itself, except so far as occupation equalled cultivation. As I discussed in the previous chapter it was re-popularised by Blackstone in the late eighteenth century.
26. *Millar v Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201, at 230.
27. *Millar v Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201, at 233. I have added the italics to point to the ways in which property was to be known and the future elements that were used to help understand intangible property: this involved making the intangible into a visible possession that had its own marks of identification which could therefore become property.
28. The Stationers Guild was established in 1405 in London. Printmakers began to join the guild after printing was introduced.
29. B. Sherman and L. Bently *The Making of Modern Intellectual Property*, supra n.11 at 22.
30. See Chapter 1.
31. B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.11 at 23.
32. The difficulty of conceiving the nature of the property rights was also debated in 'real' property too, for example in regards to custom, squatting and aristocratic inheritance claims. While the 'real' property debates were similarly philosophical they were grounded in corporeality.
33. It is worth remembering that the notion of possessive individualism was not a stable theory either, as it changed through its application in a variety of cases, depending on any number of individuals who utilised and manipulated it to justify the point or argument at hand.
34. M. Rose, 'The Author as Proprietor', supra n.5 at 39.

35. Ibid., at 39.
36. *Tonson v Collins* (1760) 96 ER 180.
37. M. Rose, *Authors and Owners*, supra n.5 at 89.
38. B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.11 at 25.
39. This was reaffirmed by Blackstone where he states: 'Now the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or to the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed.' See M. Rose, *Authors and Owners*, supra n.5 at 89–90.
40. Ibid., 91.
41. M. Rose, 'The Author as Proprietor', supra n.5. See also: R. Deazley, 'Re-reading Donaldson (1774) in the Twenty First Century and Why It Matters', supra n.9.
42. P. Miller and N. Rose, 'Governing economic life', (1990) 19 (1) *Economy and Society* 1.
43. Brevity of space does not allow for an in-depth exploration of this parallel development for law and economics.
44. I will be examining the importance of value in measuring objects for protection with respect to Aboriginal art in Part Two.
45. Remembering Locke's discussion and how rights to property are bestowed primarily through action.
46. B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.11 at 49.
47. Interestingly at the same period in which the difficulty of describing the difference between the idea and its expression was contested, the same problem arose in relation to paper money. 'Currency had traditionally been solid and material: gold and silver refined to an established standard of purity and parceled into specified weights stamped into coins . . . but coinage of this sort was inadequate to meet the demands of a developing commercial nation and during the course of the century . . . forms of commercial paper were absorbed into the economic system as a legitimate form of currency. Thus money also became phantasmic, a matter of circulation of signs abstracted from their material base.' M. Rose, *Authors and Owners*, supra n.5 at 129.
48. P. Drahos, *A Philosophy of Intellectual Property*, Dartmouth Press: Sydney, 1991 at 151. See also comments on the model of 'real' property being used for intellectual property in J. Litman, 'The Public Domain', (1990) 39 (4) *Emory Law Journal* 965 at 970–972.
49. 'Another social development that must be mentioned is that copyright has on one hand become more and more the concern of enterprises and institutions, and has on the other hand developed into a legal instrument for the regulation of the transfer of cultural information. Cultural information has, speaking in economic terms, made the step from product to raw material.' F.W. Grosheide, 'When Ideas Take the Stage' (1994) 6 *European Intellectual Property Review* 219 at 219.
50. B. Kaplan, *An Unhurried View of Copyright*, supra n.2 at 9.
51. Ibid., at 9.
52. Ibid., at 10.
53. For the key case involving whether maps or charts were copyright subject matter see *Sayre v Moore* (1785) 1 East 361, 102 Eng. Rep. 139; and for abridgement, *Dodsley v Kinersley* (1761) Amb. 403, 27 Eng. Rep. 270.
54. B. Kaplan, *An Unhurried View of Copyright*, supra n.2 at 17. Of course, non-protection of translations as well as underdeveloped international protection gave a boost to the British publishing industry at the expense of the French, Flemish and German publishers. National laws did not generally recognise the copyright of foreign nationals nor the rights of colonial subjects.
55. Sherman and Bently, *The Making of Modern Intellectual Property*, supra n.11 at 63–76.
56. Ibid., at 64–65.

57. Ibid., at 73–74.
58. Ibid., at 62.
59. The other was the *Copyright of Design Act* (1839) which offered shorter periods of protection (3 months) and registration was not necessary.
60. B. Sherman and L. Bently *The Making of Modern Intellectual Property*, supra n.11 at 79–82.
61. There is a burgeoning literature on archives as key mechanisms for facilitating the making of new kinds of categories and therefore new forms of governance. See N. Dirks, *Castes of Mind: Colonialism and the Making of Modern India*, Princeton University Press: New Jersey 2001; L. Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 (1–2) *Archival Science*, 87–109; T. Osborne, 'The Ordinariness of the Archive', (1999) 12 (2) *History of Human Sciences* 51.
62. See: M. Foucault, 'Governmentality' in Burchell, G., C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality*, The University of Chicago Press: Chicago, 1991.
63. B. Sherman and L. Bently, *The Making of Modern Intellectual Property*, supra n.11 at 177.
64. Ibid., at 58.