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INTRODUCTION

1 INTRODUCTION

Intellectual property law creates exclusive rights in a wide and diverse range of things, from novels, computer programs, paintings, films, television broadcasts, and performances, through to dress designs, pharmaceuticals, and genetically modified animals and plants. Intellectual property law also creates rights in the various insignia that are applied to goods and services, from FUJITSU for computers, to 'I CAN'T BELIEVE IT'S SO GOOD FOR EVERYTHING' (formerly 'I CAN'T BELIEVE IT'S NOT BUTTER') for margarine. We are surrounded by and constantly interact with the subject matter of intellectual property law. For example, you are reading a copyright work bearing the Oxford University Press trade mark. You are probably sitting on a chair which might be (or have once been) protected by design right (of some sort) and marking the book with a pen the mechanism for which has, at some stage, been patented. Alternatively, you may be typing notes into a computer, which no doubt has parts (such as the mouse) that are protected by patents and design right (in the shape of the product, as well as the semiconductor chip topographies inside).

Perhaps not surprisingly, given the wide range of subject matter with which it is concerned, intellectual property law is not a single homogenous body of law; rather, the term is usually used to describe a number of areas of law, typically including copyright law, patent law, and trade mark law, each of which has its own characteristics. The adjective 'intellectual' is regarded as descriptive of the character of some of the material that this area of law regulates—namely, the products of the human mind or 'intellect'. The designation 'property' is said to describe the form of regulation—that is, primarily the grant of individual exclusive rights that operate in a manner similar to private property rights over tangibles. Neither component is uncontroversial. Certainly, not everything that this field of the law protects can be described as 'intellectual'. Moreover, there are those who question whether, whatever the legislators may say, these rights can really be called 'property rights' as opposed to 'monopolies' or 'rights to exclude'. Others worry that, by referring to these rights as 'property', particular attitudes are engendered that lead to their expansion.[1]

[1] Y. Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *NYU L Rev* 354; R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (2005), 180–7, 200, 225–6, 239; M. Lemley, 'The Modern Lanham Act and the Death of Common Sense' (1999) 108 *Yale LJ* 1687, 1697; N. Netanel, 'Why Has Copyright Expanded? Analysis and Critique', in F. MacMillan (ed.), *New Directions in Copyright Law* (2008), 1, 11–15.

Although it is possible to trace usage of the term 'intellectual property' back for almost 150 years to refer to the general area of law that encompasses copyright, patents, designs, and trade marks,[2] it has been commonly used in this way for only the last 30 or 40 years.[3] Nevertheless, in that relatively brief period, it has become part of the basic legal vocabulary. Legal commentators write books about 'intellectual property';[4] students study courses on 'intellectual property'; publishers publish journals on 'intellectual property';[5] agencies (such as the United Kingdom's 'Intellectual Property Office', or UK IPO) and organizations gather under the banner of 'intellectual property'.[6] Perhaps more significantly, intergovernmental meetings agree treaties relating to 'intellectual property',[7] the European Parliament and Council adopts directives concerning intellectual property,[8] and national legislators utilize the term in drafting legislation.[9] This move has led to the transformation of 'intellectual property' from a category *of* laws to a category *in* law. Article 17 of the European Charter of Rights and Freedoms even declares that 'intellectual property shall be protected'.[10]

Although widely deployed, there is little agreement on the precise coverage of the term 'intellectual property'. Most definitions have the character of lists—sometimes exhaustive,[11] sometimes open-ended.[12] Nearly all definitions include 'copyright' and 'patents', and most include 'trade marks'. But matters become more difficult when the question becomes, for example, whether the protection granted over confidential information (including personal information) counts as 'intellectual property'.[13] Indeed, when asked to decide whether confidential information fell within the term 'intellectual property' as used in the Senior Courts Act 1981,[14] the Supreme Court in *Phillips v. Mulcaire* indicated that the term lacked 'potency'—that is, it intrinsically does not possess (for the moment at

[2] See Sherman and Bently, 95–100.

[3] A key factor in the widespread adoption of the term 'intellectual property' to refer to a broader range of rights has been the establishment of the World Intellectual Property Organization by the WIPO Convention (1967).

[4] In the United Kingdom, Bill Cornish wrote the first contemporary textbook, published in 1981.

[5] The *European Intellectual Property Review* was first published in October 1978.

[6] The Patent Office adopted the name 'Intellectual Property Office' in 2006 following the Gowers Review.

[7] Most significantly, the Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS), an annex to the World Trade Organization Agreement (1994).

[8] See Enforcement Dir., discussed in Chapter 49.

[9] See Intellectual Property Act 2014.

[10] Charter of Fundamental Rights of the European Union [2000] *OJ* C 364. C. Geiger, 'Intellectual Property Shall Be Protected: Art. 17(2) of the Charter of Fundamental Rights of the EU—A Mysterious Provision with an Unclear Scope' [2009] *EIPR* 113. See further, C. Geiger, 'Intellectual 'property' after the Treaty of Lisbon: Towards a Different Approach in the New European Legal Order?,' [2010] *EIPR* 255; S. Peers, T. Hervey, J. Kenner, and A. Ward (eds.), The EU Charter of Fundamental Rights: A Commentary (2014).

[11] BMR, Art. 2.

[12] WIPO Convention (1967), Art. 2(viii); EC Statement 2005/295/EC on the Enforcement Directive 2004/48/EC.

[13] Other difficult cases include the non-assignable 'moral' rights given to authors to be named as such on their works (see Chapter 10, section 1, pp. xxx–xx) or the protection given to devices or technologies that provide access to data only on prescribed conditions (see Chapter 13, section 4, pp. xxx–xx), or those rights granted to certain producers to use geographically descriptive names of products associated with particular locations (e.g. 'Parma ham', 'parmesan cheese', and so on) (see Chapter 43).

[14] Senior Courts Act 1981, s. 72. The provision creates an exception to the rule against self-incrimination, such that a person is not excused from answering questions put in proceedings or complying with an order on the basis that doing so would tend to expose that person to proceedings for a related offence if proceedings are civil proceedings 'for infringement of rights pertaining to any intellectual property or passing off'. Under s. 72(5), 'intellectual property' is defined as 'any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property'.

least) the power to define the boundaries of the field.[15] Instead, whenever the term 'intellectual property' appears as a legal concept, its meaning must be determined by reference to the specific legislative context.[16]

While there are a number of important differences between the various forms of intellectual property,[17] one factor that they share in common is that they establish property protection over intangible entities such as ideas, inventions, signs, and information. While there is a close relationship between intangible property and the tangible objects in which they are embodied, intellectual property rights are distinct and separate from property rights in tangible goods. For example, when a person posts a letter to someone, the personal property in the ink and parchment is transferred to the recipient. If the recipient is pleased with the letter, they can frame it and hang it on the wall; if they are unhappy with the letter, they can burn it; if it is a love letter, they might store it away, in which case it will pass under the recipient's will when they die. Despite the recipient having personal property rights in the letter as a physical object, the sender (as author) retains intellectual property rights in the letter. The author will be the first owner of copyright in the letter, which will enable them to stop the recipient (or anyone else) from copying the letter or from posting it on the Internet.

For many, the fact that intellectual property rights are separate from the physical objects in which they are embodied may be counterintuitive. For example, if someone owns a recipe book, why should they not be able to photograph a couple of recipes to email to a relative? Similarly, if someone owns an animal or plant, should they not be able to buy and sell seeds from the plant, or offspring of the animals? Or if someone purchases bottles of perfume in Singapore, should they not be able to sell them in the United Kingdom? One of the consequences of intellectual property rights being separate from property rights is that the legal answer to these questions might well be 'no'. As rights over intangibles, intellectual property rights limit what the owners of personal property are able to do with the things that they own.

While the law has long granted property rights in intangibles, the law did not accept 'intellectual property' as a distinct and form of property until late in the eighteenth century. In granting property status to intangibles, the question arose as to how and where the boundary lines of the intangible property were to be determined. That is, once it was accepted that the law should grant property rights over intangibles, the question arose: how was the object of the property to be identified and its limits defined? While in real and personal property law, questions of this nature are answered by reference to the boundary posts and physical markers of the objects in question, one of the defining features of intangible property is that these reference points do not exist. As a result, each area of intellectual property law has developed its own techniques to define the parameters of the intangible property. These include schemes of deposit and registration, techniques of representation (such as the patent specification and claims), statutory rules and legal concepts such as the requirement of sufficiency of disclosure (in patent law),[18] and the originality requirement (in copyright law).[19]

[15] *Phillips v. Mulcaire* [2012] *UKSC* 28. But cf. *Vestergaard Frandsens A/s v. Bestnet Europe Ltd* [2013] *UKSC* 31, [44] (Lord Neuberger) (referring to 'the protection of intellectual property, including trade secrets').

[16] L. Bently, 'What Is Intellectual Property?' (2012) 71 *CLJ* 501; L. Bently, 'Trade Secrets: Intellectual Property but not Property?', in R. Howe and J. Griffiths (eds), *Concepts of Property in Intellectual Property Law* (2013), ch. 3.

[17] See W. R. Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2004), 2–5.

[18] Which effectively means that the property claimed must correspond to the invented subject matter: see Chapter 20.

[19] See Sherman and Bently, 25, 153–5, 185–93; O. Bracha, *Owning Ideas: The intellectual origins of American Intellectual Property, 1790-1909* (2016).

One fact that will become apparent as we look at the various forms of intellectual property law is that they share a similar image of what it means to 'create' (or produce), for example, a book, a design for a car, or a new type of pharmaceutical. More specifically, it is commonly assumed that it is an individual, rather than a god, a machine, a force of nature, or a muse, who creates ideas, information, and technical principles. It is also assumed that the act of creation occurs when an individual exercises their mental labour to manipulate the underlying raw material.

Another fact that will become clear as we progress through the book is that intellectual property law is highly politicized. On the one hand, there are groups who represent existing (or putative) right holders, which have tended to argue that the existing laws provide inadequate protection—that, for example, that copyright protection should be extended to give publishers' their own rights to control reuse of press publications, that the term of patent protection be increased, or that the rights of trade mark owners be extended to encompass the use of trade marks to generate advertising on the Internet, and so on. At the other extreme, there are a range of groups who oppose stronger intellectual property protection—whether they be representatives of the developing world, consumers and users of intellectual property (such digital samplers, appropriation artists, users of peer-to-peer sharing systems, and librarians), defenders of free speech, classical liberal economic theorists, competition lawyers, post-modern theorists, ecologists, or religious groups.[20] While there is a tendency to caricature such debates about intellectual property as battles between 'good' and 'evil', there are many shades of opinion between these extremes that deploy a diversity of more nuanced arguments.

The remainder of this chapter provides an introduction to some topics that impinge upon all areas of intellectual property law. After looking at some of the justifications that have been given for the grant of intellectual property rights, we explain the key international and regional structures that are central to an understanding of British intellectual property law.

2 JUSTIFICATIONS FOR INTELLECTUAL PROPERTY

Legal and political philosophers have often debated the status and legitimacy of intellectual property.[21] In so doing, philosophers have typically asked 'why should we grant intellectual property rights?' For philosophers, it is important that (and how) this question is answered, since we have a choice as to whether we should grant such rights.[22] It is also important because the decision to grant property rights in intangibles impinges on traders, the press and media, and the public.[23] (Indeed, as the work by Danish art group

[20] M. Boldrin and D. Levine, *Against Intellectual Monopoly* (2005), available online at http://www.dklevine.com/general/intellectual/against.htm (describing 'intellectual property' as a 'cancer').

[21] For useful collections, see A. Moore (ed.), *Intellectual Property: Moral, Legal and International Dilemmas* (1997); A. Gosseries, A Marciano, and A. Strowel (eds), *Intellectual Property and Theories of Justice* (2008); A. Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2012).

[22] For the, perhaps surprising, view that these 'high level' arguments are less important than mid-level principles (such as proportionality, efficiency, dignity, and non-removal from the public domain), see R. P. Merges, *Justifying Intellectual Property* (2011).

[23] For emphasis on free speech, see P. Drahos, 'Decentring Communication: The Dark Side of Intellectual Property', in T. Campbell and W. Sidurski (eds), *Freedom of Communication* (1994); J. Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 *Chi-Kent L Rev* 841. For emphasis on the relationship between intellectual properties, identity, and alterity, see R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (1998).

Superflex on the cover to this textbook suggests, 'copying' can be regarded as much a part of contemporary conceptions of being human as shopping.[24]) Moreover, because the conventional arguments that justify the grant of private property rights in land and tangible resources are often premised on the scarcity or limited availability of such resources, and the impossibility of sharing, it seems especially important to justify the grant of exclusive rights over resources—ideas and information—that are not scarce and can be replicated without any direct detriment to the original possessor of the intangible (who continues to be able to use the idea or information). As we will see, philosophers have not always found intellectual property rights to be justified,[25] and there are now many commentators who doubt that all intellectual property rights are justified in the form they currently take.[26]

The justifications that have been given for intellectual property tend to fall into one of two general categories. First, commentators often call upon ethical and moral arguments to justify intellectual property rights. For example, it is often said that copyright is justified because the law recognizes authors' natural or human rights over the products of their labour.[27] Similarly, trade mark protection is justified insofar as it prevents third parties from becoming unjustly enriched by 'reaping where they have not sown'.

Alternatively, commentators often rely upon instrumental justifications that focus on the fact that intellectual property induces or encourages desirable activities.[28] For example, the patent system is sometimes justified on the basis that it provides inventors with an incentive to invest in research and development of new products,[29] or an incentive to disclose valuable technical information to the public, which would otherwise have remained secret. Similarly, the trade mark system is justified because it encourages traders to

[24] The Superflex image is a riff on an earlier work by the feminist artist, Barbara Kruger, that featured the same photographic representation of a hand holding a card stating 'I shop, therefore I am'. On the latter, see online at https://www.moma.org/collection/works/64897 for Kruger's image.

[25] A. Plant, 'The Economics of Copyright' (1934) *Economica* 167; S. Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 *Harv L Rev* 281; R. Brown, 'Advertising and the Public Interest: The Legal Protection of Trade Symbols' (1948) 57 *Yale LJ* 1165 (on trade marks); N. Kinsella, 'Against Intellectual Property' (2002) 15 *J Liber Sts* 1; D. Boldrin and M. Levine, *Against Intellectual Monopoly* (2005). Different theories may work better for different intellectual property rights: L. Paine, 'Trade Secrets and the Justifications of Intellectual Property: A Comment on Hettinger' (1990) 19 *Philos Public Aff* 247.

[26] J. Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (2015) (an important empirical exploration that 'begins to dismantle the stunningly persistent and monolithic explanation of intellectual property protection in the United States: that IP is necessary to facilitate robust production and dissemination of art and science': p. 7).

[27] Universal Declaration of Human Rights, Art. 27(2); Charter of Fundamental Rights of the European Union (7 December 2000), Art. 17. For a critical assessment of such claims, see P. Drahos, 'Intellectual Property and Human Rights' [1999] *IPQ* 349. On the theoretical basis of these claims, see H. Breakey, *Intellectual Liberty: Natural Rights and Intellectual Liberty* (2012) (highlighting the natural rights constraints on intellectual property rights); J. Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown LJ* 287 (exploring application of Locke and Hegel); A. Moore, *Intellectual Property and Information Control: Philosophical Foundations and Contemporary Issues* (2001) (rejecting utilitarian argument and favouring a version of Lockean theory); W. Gordon, 'Property Right in Self Expression' (1993) 102 *Yale LJ* 1533. On desert, see L. Becker, 'Deserving to Own Intellectual Property' (1993) 68 *Chi-Kent L Rev* 609.

[28] For an overview, see E. Hettinger, 'Justifying Intellectual Property Rights' (1989) 18 *Philos Public Aff* 31; F. Machlup and E. Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) *J Ec Hist* 1, 10*ff*; T. Palmer, 'Are Patents and Copyrights Morally Justified?' (1990) 13 *Harv JL & Pub Pol'y* 817.

[29] See, e.g., W. Landes and R. Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *JLS* 325. See N. Elkin-Koren and E. M. Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (2013), ch. 3. For the view that incentive theories are no longer supportable, see E. E. Johnson, 'Intellectual Property and the Incentive Fallacy' (2011) 39 *FLA St U L Rev* 623.

manufacture and sell high-quality products. It also encourages them to provide information to the public about the attributes of those products.[30] Instrumental arguments are typically premised on the position that, without intellectual property protection, there would be under-production of intellectual products. This is because while such products might be costly to create, once made available to the public, they can often be readily copied. This means that (in the absence of rights giving exclusivity) a creator is likely to be undercut by competitors who have not incurred the costs of creation. The inability of the market to guarantee that an investor in research could recoup its investment is sometimes called 'market failure'.

A related, but distinct, economic theory argues that by transforming potentially valuable intangible artefacts into property rights, those artefacts are more likely to be exploited to their optimal extent.[31] Such a theory (in contrast with theories of intellectual property rights as incentives to create or disclose) is not concerned with how the intangibles came into existence and tends towards the protection of a broader range of subject matter, potentially in perpetuity. This 'neoliberal' economic theory would draw the limit of intellectual property protection at the point at which it begins to inhibit efficient uses (that is, the point at which the costs of transacting with a property holder start to prevent uses to which parties would agree were there no such costs).[32]

These justifications are examined in more detail in the introductory sections dealing with copyright, patents, and trade marks.[33]

3 INTERNATIONAL INFLUENCES

One of the primary characteristics of intellectual property rights is that they are national or territorial in nature—that is, they do not ordinarily operate outside the national territory in which they are granted.[34] The territorial nature of intellectual property rights has long been a problem to rights holders whose works, inventions, and brands are the subject of transnational trade. Throughout the nineteenth century, a number of countries that saw themselves as net exporters of intellectual property began to explore ways of protecting their authors, designers, inventors, and trade mark owners in other jurisdictions. Initially, this was done by way of bilateral treaties, whereby two nations agreed to allow nationals of the other country to claim the protection of their respective laws. Towards the end of the nineteenth century, a number of (largely European) countries entered into two multilateral arrangements: the Paris Convention for the Protection of Industrial Property of 1883; and the Berne Convention for the Protection of Literary and Artistic Works of 1886. While the detail of these treaties

[30] See, e.g., W. Landes and R. Posner, 'The Economics of Trademark Law' (1988) 78 *TM Rep* 267.

[31] N. Elkin-Koren and E. M. Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (2013), ch. 4.

[32] Classic texts include: W. Landes and R. Posner, *The Economic Structure of Intellectual Property* (2003); E. Kitch, 'The Nature and Function of the Patent System' (1977) 20 *J L & Econ* 265; W. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (1982) 82 *Colum L Rev* 1600. For a general discussion, see W. Gordon and R. Watt (eds), *The Economics of Copyright: Developments in Research and Analysis* (2003).

[33] See Chapter 2, Chapter 14, and Part IV, respectively.

[34] On the ability of UK courts to decide issues of infringement of foreign intellectual property rights, see Chapter 48.