This is a section of doi:10.7551/mitpress/14648.001.0001

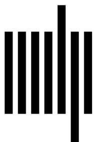
Ownership of Knowledge

Beyond Intellectual Property

Edited by: Dagmar Schäfer, Annapurna Mamidipudi, Marius Buning

Citation:

Ownership of Knowledge: Beyond Intellectual Property
Edited by: Dagmar Schäfer, Annapurna Mamidipudi, Marius Buning
DOI: 10.7551/mitpress/14648.001.0001
ISBN (electronic): 9780262374644
Publisher: The MIT Press
Published: 2023



The MIT Press

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

3

TEACHING INTELLECTUAL PROPERTY: CONSTRUCTING THE HISTORICAL NARRATIVE OF INTELLECTUAL PROPERTY IN UNIVERSITY TEXTBOOKS

Marius Buning

> Since it is man, and man alone, who has required that his inventions be protected from unauthorized emulation by others, it is worth pausing to enquire as to why this is so.
>
> —Jeremy Phillips and Alison Firth, *Introduction to Intellectual Property Law*, 24

Ideas about the present are based, in part, on our conception of the past. In that way, the past directly relates to history—that is, to the stories we tell about our predecessors and the kinds of things they did. The many books that have appeared on this topic each emphasize a different aspect, from Paul Ricoeur's ideas on historical time to Benedict Anderson's *Imagined Communities*, from Hayden White's *Metahistory* to Stephen Bann's *Clothing of Clio*.[1] In a nutshell, the literature argues that history consists of stories that we commonly hold to be true. Alternative histories are kept in check by professional scholars who relentlessly conduct a tense debate on how history should be told and which aspects from the infinitely rich past are worthy of mention. From this perspective, without denying that specific historical events actually took place, historical knowledge production is thus by definition a social construct.

Over the last 150 years or so, a lot of attention has been given to the social dimensions of the law as well. Exact definitions of "the law" remain in that context a matter of contestation. From Bruno Latour's actor-network-theory (ANT) to Eugen Ehrlich's "living law," from Niklas Luhmann's systematic approach to Marilyn Strathern's notion of "social control"—the literature is endless and filled with subtle differences of opinion on how the law operates.[2] To put it bluntly, and perhaps stating the blindingly obvious, one could say that the common denominator in the literature is a recognition that the law is whatever people recognize as being law. It follows that telling stories about the law forms an important part of what law is. This idea has received a particular boost over the last decennia in the form of the so-called law and literature movement, advocated by representatives such as Ronald Dworkin and James Boyd White.[3] Authors

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

in this field focus on the linguistic aspects of the law, such as lawyers' pleas and court decisions, all the way to how law is linguistically experienced in society. The important insight coming from this literature is that narrative is crucial to successfully creating consistency within the law.

In this chapter I will try to reconstruct the historical narrative of what is commonly known as *intellectual property* (hereafter IP)—a collective term that runs to different forms of property that include intangible creations of the human intellect, such as patent law, copyrights, and trademark law. What I attempt to show is how the choice of historical categories and the specific use of rhetorical language in university textbooks on IP affects the way in which we think of IP. The framework of intellectual property law is a strong example of a system in which naming defines owning—that is to say, a system in which words function as a way to own knowledge. This chapter not only explores how this silences, excludes, or ignores other possible systems of knowledge and ownership; it also reconstructs how these words operate within the presentation of this system in textbooks to justify the system's own historical assumptions and theoretical preconditions.

The idea of studying the rhetoric of intellectual property is not entirely new. Jessica Reyman, for instance, has written on the topic and highlighted the implications of the rhetorical positioning of technology as being destructive to creative production.[4] Jessica Silbey has analyzed the mythical aspects of American IP law and concluded that "the origin stories of intellectual property are the mechanisms by which one area of law works to both embrace its founding and overcome its limitations to move forward."[5] Yet, neither Reyman nor Silbey have dealt with the question of how language and discourse is used in the specific context of legal textbooks. For that matter, remarkably little has been written about those legal textbooks.[6] With particular regard to IP law, Ronan Deazley has published on the making of Copinger's *Law of Copyright* (1870), Christopher Wadlow has written about *Terrell on the Law of Patents*, and Jose Bellido has contributed, with a number of excellent essays, to our understanding of how concepts and laws emerge within an educational setting.[7] None of these authors, however, have paid much attention to any rhetorical issues within the text. Such issues have instead been addressed in research on historical textbooks, where narratives and analogies play a central role.[8] Yet, these studies focus exclusively on historical works and primers, not on the question of how historical accounts are (being made) part of another discipline, such as the law.

Finally, however, there is an entirely different kind of literature in which the relationship between history and IP comes to the fore—namely, in works that focus on the justification and morality of the law. In this framework, attention has been given to the question of who has written the history of copyright and with what objective—it

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

turns out that writing histories of IP is mainly a phenomenon of the last two centuries, which came about in parallel with the internationalization of legal concepts.[9] Less historical, yet more concretely related to semiotics, is the highly original work by Kelly Gates, Majid Yar, and Tarleton Gillespie on copyright outreach campaigns.[10] These outreach campaigns are particular in the sense that they are oriented toward the general public and often funded by specific organizations, with a clear idea of what they want to achieve. So far, no attention has been given to the question of how future legal professionals (such as lawyers, judges, and so on) are schooled in thinking about IP in a particular way. This chapter attempts to fill that gap by analyzing a concrete body of university textbooks, further defined in the next section.

THEORY AND SOURCES: THE SEMIOTICS OF IP

It would be impossible to deal exhaustively with the theme of "IP teaching" in the course of just one chapter. In addition to monographic textbooks, there are handbooks like encyclopedias, dictionaries, anthologies, and readers (as well as compendia of reading materials for particular courses) that such a study would have to consider. Moreover, it would be important to keep a geographical balance and to delve deep into various educational settings. I have chosen instead to single out a limited number of textbooks in the area of IP law, following a reading list used at the London School of Economics (LSE; see box 3.1) in 2018/2019.[11] While I will allude to all the books on the list, to achieve a more thorough analysis I have chosen to focus on one text in particular: Bainbridge's *Intellectual Property* (which celebrated its tenth edition in 2018). The reason for this is because the book by Bainbridge has been widely read for many decades (see also box 3.2), but also because narrative study is best served by the close reading of a text as a coherent entity; an integral analysis of all the materials on the LSE reading list would demand a separate monograph.

The use of Bainbridge's *Intellectual Property* differs from case to case. Thus, the course offered at the LSE is "available on the BA in Anthropology and Law and LLB in Laws . . . [and] . . . as an outside option to students on other programmes where regulations permit and to General Course students."[12] The aim of the optional course at the LSE for year 2 and year 3 students on a BA/LLB program is to provide students with an overview of the basic principles of IP, which they can then apply in their own specialization.[13] In the other courses listed in box 3.2, the use of Bainbridge's text might be different; the listed courses are not equal or do not teach the same content. Furthermore, the course at the LSE provides a *general* overview of IP, which is again different from other courses. For instance, the course at the City University of Hong Kong, IP Law:

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

Box 3.1
Sources of the Analysis

The following literature is prescribed as essential reading in the LSE course Intellectual Property Law LL251:

Bainbridge, David I. *Intellectual Property*. 9th ed. Harlow, UK: Pearson, 2012.

Cornish, William, and David Llewelyn. *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*. 6th ed. London: Sweet & Maxwell, 2007. For this chapter, I have used the fourth edition (1999), written by William Cornish.

Background/further reading:

Aplin, Tanya, and Jennifer Davis. *Intellectual Property Law: Text, Cases, and Materials*. Oxford: Oxford University Press, 2009. For this chapter, I have used the third edition (2017).

Bently, Lionel, and Brad Sherman. *Intellectual Property Law*. 4th ed. Oxford: Oxford University Press, 2014.

MacQueen, Hector, Charlotte Waelde, Graeme Laurie, and Abbe Brown. *Contemporary Intellectual Property: Law and Policy*. 2nd ed. Oxford: Oxford University Press, 2010. For this chapter, I have used the third edition (2013), written by Charlotte Waelde, Graeme Laurie, Abbe Brown, Smita Kheria, and Jane Cornwell.

Theory, Patents and Trademarks LW 4642, does not deal with copyright, whereas in other courses—for example, Intellectual Property and Media Law LT5007, London Metropolitan University—the emphasis is on IP within the broader framework of media law, which creates a different focus. The consequence of this disciplinary fluidity is that the textbooks have to appeal to the greatest common denominator when it comes to areas of interest within IP. One could make the argument that the IP handbooks that shape the reading public are equally well shaped by this, with the result that important (but less accessible) topics within the field of IP law, such as plant and seed varieties, perhaps do not get the attention they deserve.

The specifically English context of the textbooks merits our further attention as well. Within law, both on doctrinal grounds and in practical terms (admission to the bar), the question of jurisdiction is central. So, it is logical that the practical textbooks zoom in on a law landscape with national lines of demarcation, unless the topic is treaties, supranational organizations, and international law. The textbooks aim to come to terms with a constantly changing legal system that is valid today. As the legal historian Frederic William Maitland (1850–1906) had already remarked toward the end of the nineteenth century, the logic of law is, as such, different from that of history. Whereas the discipline of history is guided by a “logic of evidence,” and historians want to study

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

Box 3.2

Use of the Textbooks in University Courses

The selected textbooks are used, in various order and combinations, in—among many others—the following course syllabi:

Intellectual Property LA3026—University of London

https://london.ac.uk/courses/intellectual-property-la3026

Intellectual Property Law: Theory, Patents and Trademarks LW4642—City University of Hong Kong

https://www.cityu.edu.hk/catalogue/ug/201516/course/LW4642.pdf

Intellectual Property and Media Law LT5007 (2016/17)—London Metropolitan University

https://intranet.londonmet.ac.uk/module-catalogue/record.cfm?mc=LT5007

Intellectual Property Law LA4036 (2019/2020)—University of Limerick School of Law

https://ulsites.ul.ie/law/sites/default/files/Law_Book%20of%20Modules%202019.2020%20B.pdf

Media and Entertainment Law UJUTNG-30-3—University of the West of England

https://info.uwe.ac.uk/modules/specification.asp?urn=2055146&file=Media_and_Entertainment_Law_UJUTNG-30-3.pdf

Nature, Emergence and Development of IPR L4 RTDA2 C5—Guru Gobind Singh Indraprastha University

http://www.ipu.ac.in/uslls/LawSyllabus/ipr070116.pdf

history in its own terms, the discipline of law is governed by a "logic of authority," whereby the past is seen only as a preamble to contemporary interpretation. According to this view, the most recent interpretation of the past with legal validity is considered as being the most "correct," whereas "from the historian's point of view it is almost of necessity a process of perversion and misunderstanding."[14] As we shall see, this distinction also plays out in the books on the LSE reading list.

Aside from the textbooks on that list, I have looked into some short IP law guidebooks for comparison. However, I did not examine how the material is taught in class or the role of the reader. A more exhaustive analysis of IP teaching material would certainly consider these elements, if only because IP courses are often upper-level courses where basic legal principles (such as the concept of justice) are no longer deliberated, on the assumption that they have been dealt with in general introductory courses. Moreover, it is, of course, very possible that lecturers each tell the history of IP differently in class. Still, the selected sources are some of the most important textbooks used today to explain IP to future generations of legal professionals. Thus, a better understanding

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

of the ideological positioning in these textbooks by means of history will provide a better understanding of how specific narratives are framed alongside or against distinct ownership claims.

Based on the selected sources, I discuss the rhetorical framing of the genesis of IP. As classical theory on the topic tells us, this type of "history of origins" is a narrative with a plot that moves between two states, or more specifically, between "the transformation of equilibrium into disequilibrium and into a subsequent equilibrium."[15] In the course of the employment, our attention is focalized on certain aspects at the expense of others.[16] Telling and showing, naming and inscribing, routes our attention and thus leads us to "see" specific things whilst neglecting others. The positioning that takes place can be brought out by dismantling dichotomies, examining silences and disruptions, and identifying metaphors as well as the most alien elements in the narrative.

On the following pages, I shall follow a Greimasian approach centered on the "discursive," the "narrative," and the "thematic" levels.[17] The issues associated with these levels include the identification of places, objects, actors, opposites, and states of being ("discursive"), as well as the identification of the protagonists (subject/object, helper/opponent, sender/receiver) and the change that is being effectuated after a series of tests ("narrative"). On a deeper level, I shall question what the most abstract poles are in the story and what fundamental transformation of value is at stake ("thematic"). This will lead toward the construction of a semiotic square discussing unsaid elements in the history of IP. In conclusion, I shall discuss the importance of narrative analysis and the relevance of history of the making of IP's future.

Before we start, however, it is important to note that I have not considered the content in my analysis, but rather the form. The point is not to find the truth, the "real" history, but to show how the story is used to legitimize just one possible version of history. In this sense, my work unmistakably differs from that of, for instance, Kathy Bowrey, who argued that, whereas several people have written the history of copyright from a specific perspective, what "seems to be missing is a history of copyright that goes beyond a particular discipline's point of view."[18] I take the view that it is impossible to write a history that is value-free.

THE SCENERY

The first level of analysis must begin with what Gérard Genette has called the paratext.[19] Let us take the book by Bainbridge as our point of departure. On the back cover, the book is praised as one that "offers you unrivalled coverage of all aspects of the intellectual property syllabus, making it your essential guide through the intricacies of this

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

dynamic subject."[20] The performative undertone is that the book is a key to success. This promise cashes in on the reader's hope of a successful professional career. The blurb points out that the textbook has been "trusted by generations of students and lecturers alike." As one endorsement (written by an anonymous author in the *Law Student Journal*) clarifies, it is clear that "those looking for an accessible and stimulating account of the nuts and bolts of intellectual property law need not, however, look any further."[21] The sense of confidence that is created serves not only to convince the potential buyer to purchase the book, but also to persuade the audience of the reliability of the information found inside the book. Positioning the credentials of the author in a clearly visible location contributes to the status of this book as well (in this case, "Emeritus Professor of IPL of Aston University and an honorary member of Hardwicke Building, Lincoln's Inn"). A statement on the back cover helps to distinguish the book from others on the market, declaring that it is "one of the best."[22] Similar claims are made in the other source material. For example, the cover of Waelde et al.'s *Contemporary Intellectual Property* announces that it "offers a unique perspective on intellectual property law, unrivalled amongst IP textbooks available today."[23] Bently and Sherman's *Intellectual Property Law* is presented as "the definitive textbook on the subject,"[24] and in this case, too, the authors' university positions are clearly mentioned to add institutional allure to the publication (Herchel Smith Professor of Intellectual Property at the University of Cambridge, and Professor of Law at the T.C. Beirne School of Law at the University of Queensland, respectively). Another text that was previously extolled, on its own back cover, as being the "definitive textbook on the subject," was written by the *former* Herchel Smith Professor of Intellectual Property at the University of Cambridge, W. R. Cornish, Q.C., LL.B., F.B.A. (*Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights*, 4th ed., published by Sweet & Maxwell). Thus, the claim to authority is made even before the reader has opened the book. It helps that each of the selected books is published by renowned English publishers.

Moving on to the content, one is struck by the strong emphasis on the role England has played in the genesis of IP law. This one-sided focus can perhaps be explained by the need to limit the scope of the subject matter, with a view to the readership but also considering the jurisdictional reality of the present. The distinction between the logic of the law and the logic of history, as highlighted by Maitland, comes clearly to the fore here. Nonetheless, the closed or "circular" system of references remains remarkable. In a section on the "justification for patent rights," for instance, Bainbridge argues: "An inventor owns a property right in his invention. This is a natural right and accords with the views on property rights of philosophers such as Locke."[25] The text is punctuated by continuous references to English authorities, from Locke to the "great English

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

philosopher" Jeremy Bentham (I will return to this example below). The neglect of non-English events and the contributions of non-English legal theory is sustained by the omission of existing literature on the topic written in a different context or in a different language. The references are to books written in English only, mainly on English topics.[26]

It seems that the role attributed to history in the coming about of the present almost inevitably leads to an idea of English uniqueness. As Bainbridge argues in his "brief historical perspective" on the patent system:

> As with the origins and development of other intellectual property rights, England has a prime place in world history and has set the mould for patent rights internationally. It is no coincidence that England was the country where the first major steps towards an industrial society were taken. Whether this was a direct result of the patent system is arguable, but it is without doubt that patents had an important role to play in the Industrial Revolution. Before this, the origins of patent law can be seen emerging in late medieval times.[27]

The sources of Bainbridge's information are Davenport's *The United Kingdom Patent System*, and Thorley et al.'s *Terrell on the Law of Patents*.[28] References to historical events throughout the book are to other scholarship in the field of law, not history. Later in the text, referencing the Statute of Monopolies, Bainbridge adds: "It seems that the world's first patents statute was passed in Venice in 1474: see Reid, B.C. (1998) *A Practical Guide to Patent Law* (3rd edn) Sweet & Maxwell, p 1."[29] This contribution from the non-English world is moved to a footnote and stated in terms much more uncertain ("It seems") than the decisive tone used in the rest of the text. Again, reference is made only to other legal scholarship. What emerges is the image of a closed system of references for scholars who are looking for the (ahistorical) antecedents of their own discipline instead of understanding the past in a broader social and intellectual context.

It should be stated here that the degree of historical sensitivity in the selected literature clearly varies from author to author. In Colston's *Principles of Intellectual Property Law* (1999) there is only one sentence, on the first page, acknowledging that "intellectual property law has a long history."[30] The idea is nowhere elaborated in the remainder of the book. Aplin and Davis deal with history more extensively, and rather prudently.[31] In a section on the history of patent law, for example, the authors include a reference to Bently and Sherman's *Making of Modern Intellectual Property Law* (208–209), warning against the tendency to trace patent law back to the 1624 Statute of Monopolies, as "it encourages us to gloss over the history of the patent system between 1624 to the present day and to treat patent law as predestined and timeless, as opposed to open and historically contingent."[32] Indeed, particularly in the case of Bently and Sherman, one cannot say that they are unaware of the way in which current IP is embedded in history. Bently has written extensively on the history of IP, and on the history of

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

trademarks in particular.[33] Sherman has written elsewhere about how the writing of IP history originated in the second half of the nineteenth century, when a particular form of IP was confirmed in its existence on the international stage.[34] In a groundbreaking essay, Sherman has also pointed to the challenges of any essentialist approach to patent law based on a "consequentialist mode of thinking" about its history.[35] Indeed, the narratological analysis of several writings discussed in this chapter should not be seen as criticism of the authors concerned; it merely serves to gain a better understanding of *how* current legal practice is anchored in the past.

Let us briefly return to the "prime place in world history" that Bainbridge attributed to England in the example cited earlier. In the first instance, Bainbridge admits that the relationship between patents and the Industrial Revolution is "arguable," only to remove any reservation that such a connection does indeed exist in the same sentence ("without doubt"). After building consensus on the issue, the modern situation is set against the previous situation, in "medieval times." Speaking about the early history of patents, the text later goes on to argue:

> In this early form, there was no need for anything inventive; it had more to do with the practice of a trade and the granting of favors by the Crown. . . . Eventually, there was a strong need for an effective system that prevented unfair competition where, for example, one person had made some novel invention and wanted to stop others from simply copying it. A monopoly system developed in the reign of Elizabeth I and many letters patent were granted.[36]

The connotations and use of adjectives in this excerpt provide a clear sense of the direction in which the author wants to bring the reader. This can be highlighted by filling in the gaps and outlining tacit binary oppositions: "There was a strong [not weak] need [felt by whom?] for an effective system [which the patent system provided] that prevented [or imposed a ban on?] unfair [regular] competition." The specific wording reinforces the sentiment that the current patent system is the necessary outcome of history.

For Bainbridge, history is nothing but a stepping-stone to modern times. As such, this type of eschatological thinking fits well with the substantive structure found in most of the textbooks. Usually, any text on IP is divided into at least three sections: patents, copyright, and trademarks (supplemented by related or less-developed fields such as liability and design law). Each of these sections on IP's main components typically starts with "a brief historical introduction" before moving on to issues that play a more substantial role in the reality of the modern-day lawyer. Despite the sometimes limited attention to history, the justification for the very existence of IP is at all times clearly anchored in the past—as the next section of this chapter explores more fully.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

FRAMING THE NARRATIVE: INTELLECTUAL GENEALOGIES

> Consequently, most IP law is statutory and the result of political and economic history.
> —Colston, *Principles of Intellectual Property Law*, 4

I have discussed some aspects of the claim to expertise and the varying degrees of attention that the different sources give to the history of IP. This variation is in part a matter of genre. In collections of jurisprudence and contemporary IP laws, for example, one rarely finds any reference to the distant past, since these works pay attention only to laws currently in use.[37] History is not mentioned in many of the dictionaries of law either. In this case, the neglect of the past can be explained by the size as well as the intended use of such books; in a dictionary that aims to cover all legal concepts in no more than around three hundred pages, a short definition of, for instance, *patent*, meets the requirements. Textbooks have a different function. They not only include the promise of a successful career but also give a sense of unity to a discipline. The attentiveness to history in that context is a tool to regulate the community; it suggests the existence of a temporal unity between the present and the past.

What is striking in the way this history is framed is the silent assumption that there is an inescapable route from past to present that coincides with the transition to modernity. The way the story is told very much resembles a Proppian fairy tale. Let us look, for illustration, at the way the history of patent law has been told so far. The subject (the patent notion) is depicted as going on a quest to become modern (the object). The necessity to act (*devoir faire*) is fueled by "a strong need for an effective system that prevented unfair competition" (the mandatory sender).[38] The patent notion establishes a contract, which is followed by three tests: the qualifying test, the decisive test, and the glorifying test. In the qualifying test, the subject "must acquire the necessary competence to perform the planned action or mission."[39] Patent law is hindered in its quest by the "odious monopolies" (the villain/opponent) issued by James I, and aided by parliamentary intervention in the form of the 1624 Statute of Monopolies (the helper) that provided exclusive rights to commercially exploit an invention for a duration of fourteen years.[40] The qualifying test thus enables the patent notion to progress, symbolizing "a first step towards the modern form of a right open to the world based upon legal principles and enduring for a specified period."[41] Later in the story, our hero encounters a decisive test ("the principal event or action for which the subject has been preparing, where the object of the quest is at stake")[42] in the form of the nineteenth-century reformulation of legal principles. There is a confrontation between the subject and the antisubject in the form of the conflict between the proponents of patents and the so-called patent abolitionist movement. As Bainbridge formulates it,

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

> The Industrial Revolution brought a great many pressures upon the patent system, eventually leading to major reforms starting with the Patent Law Amendment Act 1852. During the preceding period there had been much debate about whether inventions should be afforded legal protection by the grant of patents, and indeed in Switzerland and the Netherlands patent law was dismantled, to be reintroduced later in the nineteenth century. The fact that this could happen and that the whole rationale for the granting of patents could be challenged in England now seems incredible.[43]

Withstanding the many pressures, the patent notion finally moves on to the "glorifying" test, which is "the stage in the story at which the outcome of the event is revealed."[44] Depending on the author's perspective, the final test was passed either in 1883 (the Patents, Designs, and Trade Marks Acts 1883 to 1888), or with the 1977 Patents Act. The performance of the subject is now recognized in accordance with the mandate instituted by the initial sender (the "strong need for an effective system that prevented unfair competition"). The sender-adjudicator (the author) can confidently conclude that "it is now unthinkable that the patent system would be abolished."[45] Patents slayed the dragon, and lived happily ever after.[46]

The narrative of the plot moves from chaos to a stable situation that coincides with the present. Historical events are singled out for their importance as markers of a legal discipline with its own right to existence, distinguishing IP from, for example, tort and property. The idea that this "long history" is significant for the present plays a role in all standard textbooks, and it reappears in every section on a different subdivision within IP law (I shall focus here on copyrights, patents, and trademarks). Only in the case of trademarks—something of a cuckoo in the nest in terms of theoretical reflection in IP law—is there any confusion over its true origins. On the one hand, it is claimed that "the use of trademarks has a long history, from the marks used by potters in Roman times, to the internationally known marks in use today, such as McDonald's 'golden arches,' the Nike 'swoosh' or the name Coca-Cola."[47] On the other hand, Lionel Bently in particular has advocated letting the history of modern trademark law begin in the nineteenth century, with

> a legal understanding of a trade mark as a sign which indicates trade origin; the establishment of a central registry in 1876; the conceptualization of the trade mark as an object of property; the recognition of a dual system of protection: one based on registration, the other based on use in the marketplace; and the development of international arrangements for the protection of marks in foreign territories.[48]

Of course, the debates in the nineteenth century had their roots in the past (the actors in those debates were certainly aware of a longer history). Nevertheless, one can speak of a radical break (or a "decisive test").

In the case of copyright and patents, Bently and his coauthor Sherman identify a similar break at a similar time. In another monograph on the topic, they argue their

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

point extensively and emphasize that they are concerned with "the doctrine of intellectual property law, rather than in what, for example, economists or political philosophers may be able to tell us about intellectual property law."[49] They thus come to the "belief that during the middle period of the nineteenth century an important transformation took place in the law which granted property rights in mental labour."[50] Other proposals have been made, too. Mario Biagioli and Oren Bracha, for instance, have argued that a great shift in thinking about patents took place around the time of the French and American Revolutions, when former privileges became redefined as rights.[51] Once again, the point is not to evaluate the correctness of these various claims but to recognize that they emphasize a longer history that does not coincide with the time at which current laws became effective.

To explain this hankering for the past, ideas and theories about "situatedness" and "historical anchoring" might be worth exploring.[52] IP is socially legitimized *because* it is part of a longer tradition—and with that, the battle to claim the "true origins" of IP has begun. In the case of patent law, the Statute of Monopolies was hailed as the starting point of patent law when the British Empire was at its height, whereas in the interwar period, other scholars tried to put Italy and Germany on the map as important actors in the development of a patenting concept. In the case of copyright, the 1710 British Statute of Anne is usually considered to be the first copyright statute, even if Wikipedia tells us that "the earliest recorded historical case-law on the right to copy comes from ancient Ireland."[53] With the emergence of new economic powers on the global stage, attempts are being made to shift the focus elsewhere. Along these lines, one can read the expressions of disappointment on Wikipedia's Talk Page about the "History of Patent Law" article, with its "Eurocentric POV" and its failure to mention the importance of Muslim societies.[54] Reader Terry0051 replies that

> if there's evidence relevant to patent-relevant laws from Muslim sources from 600 AD to 1500 AD, then let's hear about it. But to assume (or even demand) that there be such a history, if (so far) there is no sign of any such facts, shows a POV of its own.[55]

What is all too easily forgotten in these debates is that the fundamental bone of contention is the question of definition: What exactly is IP, that it allows us to speak about it? Even if the term *intellectual property* does not appear to have existed before the end of the nineteenth century (and for most legal scholars, that settles the case), there is more going on than a simple conflict between disciplines, in which the lawyers look at the problem internally whereas a philosopher or a historian takes a broader view. By emphasizing mental labor and the reformulation of property as a right, alternative histories are silently suppressed.

This may not be an unknown phenomenon for those who occupy themselves with what is known as "traditional knowledge"—a field where conflicts between alternative

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

definitions perhaps come most clearly to the fore. The views that have been formulated within this rich field of research are mostly aimed at solving the question of how to balance different understandings with one another. Vandana Shiva, for instance, criticized the IP "myth of stimulating creativity" by arguing that "science cannot be used to refer only to modern Western science. It should include the knowledge systems of diverse cultures in different periods of history."[56] Her work adds to a sizable body of literature that questions the need to take IP as a standard to which others should relate or conform, or even to revolt against. And this brings us to an important question: What exists outside of IP?

IN SEARCH OF THE PUBLIC DOMAIN

> Copyright and author's right are the two great legal traditions for protecting literary and artistic works. The copyright tradition is associated with the common law world—England, where the tradition began, the former British colonies, and the countries of the British Commonwealth. The tradition of author's right is rooted in the civil law system and prevails in the countries of the European continent and their former colonies in Latin America, Africa, and Asia.
>
> —Paul Goldstein, *International Copyright Principles, Law, and Practice*, 3

What is highlighted in the textbooks is that historically, there have been economic and legal reasons why "society" has implemented an ever-stronger program of intellectual property rights. The underlying dynamic is strongly focused on problem-solving, meaning that those who make the law find solutions for the problems they face. Attention is given in this context to issues (such as censorship and justice) or to particular actors (such as the Stationers, the Crown, John Locke, and so on), as well as to the various criticisms of the IP system (although this to a lesser degree). What is hardly ever mentioned, however, are the underlying processes of state formation that played a role in the reformulation of legal principles. The 1706 Acts of Union are never mentioned in relation to the 1710 Statute of Anne, for example. The impact of colonialism on the diffusion of IP principles is never problematized.

Another aspect that is silently passed over is the historic transformation of the public domain. Often confused with related notions such as the commons or the public sphere, the public domain refers to a distinct concept best identified as the space in which IP does not apply.[57] The public domain consists, in brief, of resources freely accessible to all to use without the need for special permission. Examples include works for which the copyright has expired and inventions made public without prior patent protection, as well as creations and discoveries that cannot be patented or copyrighted, such as products of nature, facts, government publications, and so on. The abundance

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

of reflection on legal notions and the making of modern IP law in the textbooks is matched only by the paucity of attention given to the public domain. This is remarkable, to say the least, since the ultimate purpose of the IP system is to enlarge that public domain, thereby "promoting the progress of science and useful arts."[58]

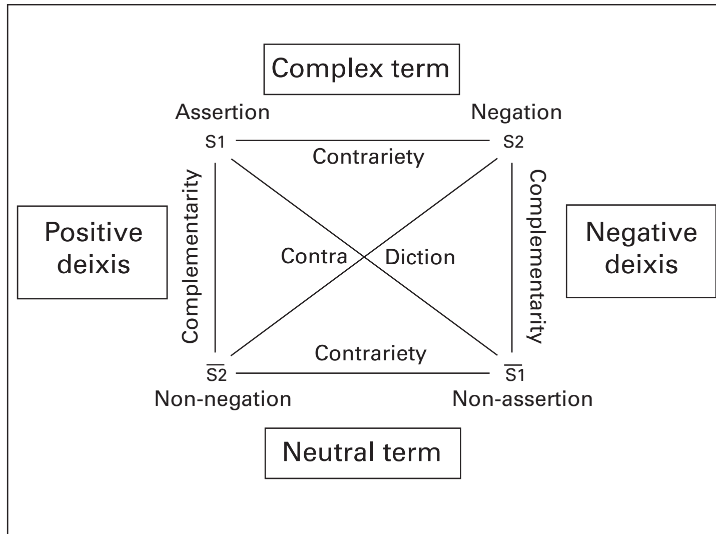
It appears that the focalization on rights diverts attention away from the ultimate goal of those rights. In the different sections on justification in the university textbooks, we read about Locke, rewards, and a perpetual mantra that IP stimulates inventive labor. But we are rarely provided with any insight into what IP does in terms of expanding the public domain. In Bainbridge, for example, one finds two entries in the index, one short definition, and a number of passing references to the existence of the public domain, but with no further elaboration. There is no entry for "public domain" in the index of Bently and Sherman's *Intellectual Property Law*, except in relation to breach of confidence, where the notion has a different meaning than in other areas of IP (1147–1156). In the fourth editions of both Cornish's *Intellectual Property* and Phillips and Firth's *Introduction to Intellectual Property Law*, the public domain is not specifically defined or referenced in the index.[59] The major exception to this is Aplin and Davis's *Intellectual Property Law*, where the various ways to constitute a public domain are reviewed on pages 20 to 26 (out of 912). One would expect the public domain to be a more central subject in accounts aimed at understanding IP principles and justifications.

Whereas a full reflection on the public domain is missing, the various textbooks do pay attention to various (political and technological) challenges to IP law, ranging from alternative systems of IP protection all the way to complaints about market monopolization. Countering the panegyric on IP, over recent years, a growing number of authors have questioned the righteousness of the IP system, mostly by looking at the social benefits and effectiveness of the current system.[60] Proposed alternatives are plentiful; however, they usually lack a longer history, with the exception of traditional knowledge systems and the commons. These systems are not quite the opposite of IP, but they remain within the boundaries of exclusive use and ownership. If one really wanted to tell a different story, one would have to start paying attention to histories of the public domain or whatever is complementary to that.

It is useful at this point to invoke a semiotic square (see figure 3.1). A semiotic square is a map of logical possibilities; it can be made in many different ways.[61] I assume, however, that the complex contrary of IP is the public domain (hereafter PD).

At the top of the lower square, in between IP and PD, stand proposals such as Copyleft and Share-alike, where the author makes use of existing IP structures to enlarge the PD. At the bottom are alternative regimes of ownership that fall outside of the categories of IP and PD, such as sharing knowledge with an exclusive group of people (the commons

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024



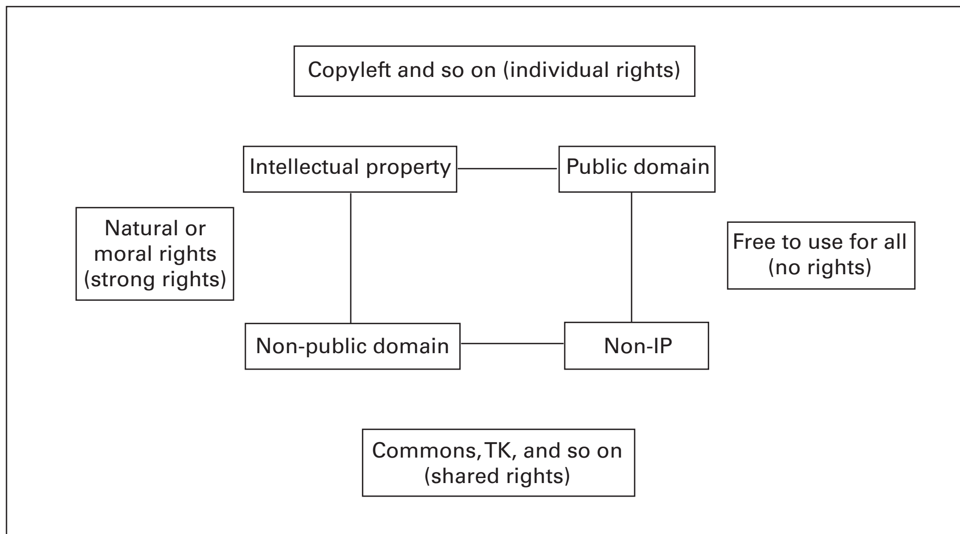


Figure 3.1
Semiotic square outlining the various relationships between IP and the PD. (Upper square adapted from Daniel Chandler, *Semiotics: The Basics*, 2nd ed. (London: Routledge, 2007), 107; lower square courtesy of the author).

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

and so on). Rules to ensure exclusive ownership apply in this case; however, they are not based on current IP regimes. On the left side of the square, we find programs that encourage strong rights, such as moral rights (not implemented everywhere in the same way) or proposals that are aimed at making IP indefinite (a logical step if one considers IP to be a natural right). These "strong rights" programs combine the notion of IP with other (non-PD) justifications for exclusive use. Finally, on the right side, we find a section that falls completely beyond the notion of "exclusive use": a combination of the PD and non-IP that is not based on exclusive use and that exists beyond the law. Whereas the first three alternatives to the current IP system are given some attention in the selected textbooks, the complete silence on the fourth possibility (the most abstract pole in the story) reveals the strategic boundaries around the narrative. Framing the historical narrative of intellectual property in terms of "legal solutions to problems" defines IP from the outset as a legal discourse, limiting the possibilities to consider IP beyond this framing. At the root of the historical narrative presented by these textbooks, however, we find a justification—the public domain—which the narrative systematically excludes in order to maintain this restriction.

THE BALANCE AND THE AFTERLIFE

In the final section of this chapter, I want to briefly focus on a metaphor that underpins the entire IP system, and patent law in particular.[62] At the basis of the patent system is the idea that inventors should obtain a reasonable temporary monopoly to commercially exploit their ideas in exchange for the proper disclosure of an invention; this is represented by the imagery of a balance between the interests of the inventor and society at large, an exchange in which both sides win.[63] In Bainbridge, for example, the view is formulated as follows:

> The conventional justification for a patent system is that inventors and investors are *rewarded* for their time, work and risk of capital by the grant of a limited, though *strong*, monopoly. This *benefits society* by *stimulating* investment and employment and because details of the invention are added to the store of available knowledge. Eventually, after a period of time, depending on how long the patent is renewed (subject to a maximum of 20 years), anyone will be free to put the invention to use. This *utilitarian* approach found favour with *great* English philosophers such as Jeremy Bentham, who argued that, because an invention involved a great deal of time, money and effort and also included a large element of risk, the exclusive use of the invention must be reserved for a period of time so that it could be exploited and thereafter used for the general increase of knowledge and wealth. He said that such exclusive use cannot ". . . otherwise be put upon any body but by the head of law: and hence the necessity and the use of the interposition of law to secure to an inventor the benefit of his invention."[64]

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

The idea of a contract that benefits both sides is presented as a self-evident fact that has even been confirmed by a "great" authority who functions as the focalizer in the story. Several assumptions are at work here, such as the notion that a "risk taker" should be "rewarded," that "strong" monopolies are good, and that all this is benefiting "society." One might wonder who "society" really is in this context, or who "gains" on the side opposite to the inventor—other inventor-entrepreneurs who can make use of the information provided, or the public at large, who will eventually benefit from its free use?

The idea that IP is based on a mutually beneficial contract, and that it has a long and successful history, is extremely powerful and has found its way from the textbooks into daily reality around the world, where it is highly influential in shaping future legislation. There are numerous examples of this, but I have selected one from the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, a subcommittee of the US House Judiciary Committee established in 2011. In its assessment of the effectiveness of current laws, the committee collects opinions from various actors in the field of IP law. One of those actors is the Honorable Sheila Jackson Lee, a representative in Congress from the state of Texas and a member of the committee, who declared in a prepared statement that

> the system [IP law] stands on principles of balance and fairness which allow for continued innovation while not infringing on the property rights of others. The roots of these laws go back many centuries, from the ancient Egyptians and people of the African Gold Coast, whose leader, Mansa Musa of ancient Ghana, traded books for gold, to the likes of political philosopher John Locke of Great Britain, who further wrote and expounded on the ideas and theory of property rights.[65]

The authority of the past is complemented in this example with the belief that Egyptians and other Africans had some notion of IP as well, and that the reach of the idea is therewith truly universal. Who would even begin to doubt such a system that "stands on principles of balance and fairness which allow for continued innovation"?

CONCLUSION: TRAJECTORIES OF OWNERSHIP

> The importance of intellectual property in the modern world goes far beyond the protection of the creations of the mind. It affects virtually all aspects of economic and cultural life. As a result, intellectual property education at the university level is of increasing relevance in educational programs.
>
> —WIPO, *WIPO Intellectual Property Handbook*, 422

This chapter has shown that historical introductions in legal textbooks on IP are marked by an ideology that is sustained by means of rhetorical techniques as well as

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

strategic narratives. Scholarship itself is thus a powerful tool in producing social order, making explicit the politics of knowledge and ownership ideals. What stands out in the narratological analysis of the selected materials is a preference for ending embedded plots as well as the inclination to situate the beginning of IP in parallel to the beginning of modernity. Depending on the author's perspective, the "real" history of patents thus began either in the late Renaissance, with the scientific revolution and the discovery of the New World, or in the nineteenth century, with the making of empire and the internationalization of European patent laws. Earlier systems "provided no more than a germ of a functioning patent system."[66] Yet, they are invoked time and time again to create the impression that society was looking for a solution until an effective system finally came along. The emphasis on historical continuity is balanced by the omission of any alternative historical options and a silence with regard to alternative regimes of ownership over knowledge products in history.

As the German sociologist George Simmel has noted in his reflections on "historical time," authors are bound to make choices in the construction of a historical narrative.[67] I have tried to reveal some of these choices, whilst being fully aware that I, too, cannot escape from rhetoric. This contribution has no pretension to be complete, and one could quite rightly complain that it runs somewhat randomly through the enormously rich material, offering only limited insight into the distinctive rhetorical facets of how IP is taught in various contexts. Nevertheless, I hope that this short intervention may serve as a "germ" that inspires readers to think differently about IP, in terms of its genesis, its current implementation, as well as its future. If we want to create a change in the way IP is employed today, it is of little use to regard existing law as being ontologically different—as something that exists "out there" that has to be changed. What is needed is a new history, and a new plot.

ACKNOWLEDGMENTS

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Research Council. Neither the European Union nor the granting authority can be held responsible for them.

Notes

1. For an excellent overview of the history and narrative debate, see Geoffrey Roberts, *The History and Narrative Reader* (London: Routledge, 2010).

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

2. It is impossible to do justice to the vast body of literature that has been published on the topic of "law and society." The few contributions mentioned here are Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New Brunswick, NJ: Transaction, 2001); Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Cambridge: Polity, 2010); Niklas Luhmann and Fatima Kastner, *Law as a Social System* (Oxford: Oxford University Press, 2004); and Marilyn Strathern, "Discovering 'Social Control,'" *Journal of Law and Society* 12, no. 2 (1985): 111–134.

3. For a valuable introduction to some of the issues at stake, see Kieran Dolin, *Law and Literature* (Cambridge: Cambridge University Press, 2018); Timothy Endicott, "Law and Language," *Stanford Encyclopedia of Philosophy* Archive, ed. Edward N. Zalta, Metaphysics Research Lab, Stanford University, last updated April 15, 2016, https://plato.stanford.edu/archives/sum2016/entries/law-language/; and Bernard Jackson, "A Journey into Legal Semiotics," *Actes Sémiotiques* 120 (2017): 1–43.

4. Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (London: Routledge, 2012); Dan Burk and Jessica Reyman, "Patents as Genre: A Prospectus," *Law & Literature* 26, no. 2 (2014): 163–190.

5. Jessica Silbey, "The Mythical Beginnings of Intellectual Property," *George Mason Law Review* 15, no. 2 (2008): 379.

6. For an overview, see Richard Danner, "Foreword: Oh, the Treatise!," *Michigan Law Review* 111, no. 6 (2013): 821–834.

7. Ronan Deazley, "Commentary on Copinger's *Law of Copyright* (1870)," in *Primary Sources on Copyright (1450–1900)*, ed. Lionel Bently and Martin Kretschmer, http://www.copyrighthistory.org; Christopher Wadlow, "New Life and Vigour at Terrell?," *Journal of Intellectual Property Law & Practice* 6, no. 11 (2011): 833–836; Jose Bellido, "The Editorial Quest for International Copyright (1886–1896)," *Book History* 17, no. 1 (2014): 380–405; Jose Bellido, "The Constitution of Intellectual Property as an Academic Subject," *Legal Studies* 37, no. 3 (2017): 369–90.

8. See Maria Repoussi and Nicole Tutiaux-Guillon, "New Trends in History Textbook Research: Issues and Methodologies toward a School Historiography," *Journal of Educational Media, Memory, and Society* 2, no. 1 (2010): 154–170.

9. Kathy Bowrey, "Who's Writing Copyright's History?," *European Intellectual Property Review*, 18, no. 6 (1996): 322–329; Brad Sherman, "Remembering and Forgetting: The Birth of Modern Copyright Law," in *Comparing Legal Cultures*, ed. David Nelken (Aldershot, UK: Dartmouth, 1997), 237–266. Traces of the latter work can also be found in Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (Cambridge: Cambridge University Press, 1999), 205–220.

10. Kelly Gates, "Will Work for Copyrights: The Cultural Policy of Anti-piracy Campaigns," *Social Semiotics* 16, no. 1 (2006): 57–73; Majid Yar, "The Rhetorics and Myths of Anti-piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom," *New Media & Society* 10, no. 4 (2008): 605–623; Tarleton Gillespie, "Characterizing Copyright in

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

the Classroom: The Cultural Work of Antipiracy Campaigns," *Communication, Culture & Critique* 2, no. 3 (2009): 274–318. See also the relevant chapters in Reyman, *Rhetoric of Intellectual Property*.

11. This course at the LSE was chosen at random and merely provides a guideline around which to shape this chapter. Nonetheless, it is worth noting that the LSE was the first university in Britain to offer a course on IP. After initial attempts to do so in the 1960s, in 1967 Bill Cornish drafted a syllabus for a postgraduate course titled "Industrial and Intellectual Property." It was only during the 1970s that IP was introduced as an undergraduate course (the first example dates from 1975, offered at the University of Southampton). For further details on the constitution of intellectual property as an academic subject in Britain, see Bellido, "Intellectual Property as an Academic Subject."

12. LSE, *Course Guides and Programme Regulations 2018/2019*, 240.

13. The course content specifies the learning goals as follows: "The curriculum of LL251 reflects the fact that it will be examined by means of an 8000-word essay. Instead of expecting students to acquire a more detailed knowledge of the mechanics of each of the principal branches of intellectual property law (copyright, patents, and trade marks) the course is structured around a strong theme that runs persistently through all parts of IP law, which will also be the basis of the dissertation topic that will be assigned at the start of the year. The objective will be to develop the skills required to engage critically with the mechanics of each branch." LSE, *Course Guides*, 240.

14. Frederic William Maitland, *Why the History of English Law Is Not Written* (London: C. J. Clay & Sons, 1888), 14.

15. Barbara Czarniawska-Joerges, *Narratives in Social Science Research* (London: Sage, 2004), 109. The classic theory I am referring to here is that of Todorov, who argued that "an 'ideal' narrative begins with a stable situation which is disturbed by some power of force. There results a state of disequilibrium; by the action of a force directed in the opposite direction, the equilibrium is re-established; the second equilibrium is similar to the first, but the two are never identical." Tzvetan Todorov, *The Poetics of Prose* (Ithaca, NY: Cornell University Press, 1977), 111.

16. For a succinct overview of the debate on focalization, see Burkhard Niederhoff, "Focalization," in *The Living Handbook of Narratology*, ed. Peter Hühn et al. (Hamburg: Hamburg University Press, 2009–2013), last modified September 24, 2013, https://www.lhn.uni-hamburg.de/node/18.html.

17. A. J. Greimas, "Narrative Grammar: Units and Levels," *MLN* 86, no. 6 (1971): 793–806.

18. Bowrey, "Who's Writing Copyright's History?," 322.

19. Gérard Genette, *Paratexts: Thresholds of Interpretation*, trans. Jane E. Lewin (Cambridge: Cambridge University Press, 1997).

20. David Bainbridge, *Intellectual Property*, 9th ed. (Harlow, UK: Pearson, 2012), back cover.

21. Bainbridge, back cover.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

22. Bainbridge, back cover.

23. Charlotte Waelde et al., *Contemporary Intellectual Property: Law and Policy*, 3rd ed. (Oxford: Oxford University Press, 2013), back cover.

24. Lionel Bently and Brad Sherman, *Intellectual Property Law*, 4th ed. (Oxford: Oxford University Press, 2014), back cover.

25. Bainbridge, *Intellectual Property*, 393.

26. On the insularity of English legal studies, see also Peter Goodrich, "Critical Legal Studies in England: Prospective Histories," *Oxford Journal of Legal Studies* 12, no. 2 (1992): 195–236.

27. Bainbridge, *Intellectual Property*, 392.

28. Neil Davenport, *The United Kingdom Patent System: A Brief History* (Hampshire, UK: Kenneth Mason, 1979); Simon Thorley et al., *Terrell on the Law of Patents*, 16th ed. (London: Sweet & Maxwell, 2005), both quoted in Bainbridge, *Intellectual Property*, 392n11.

29. Bainbridge, *Intellectual Property*, 392n14.

30. Catherine Colston, *Principles of Intellectual Property Law* (London: Cavendish, 1999), 1.

31. Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials*, 3rd ed. (Oxford: Oxford University Press, 2017).

32. Aplin and Davis, 535. I return later on to the meaning of the Statute of Monopolies, which provided a clause that gave inventors a fourteen-year term to exploit their invention.

33. Among the numerous publications, I single out: Lionel Bently, "The Making of Modern Trade Mark Law: The Construction of the Legal Concept of the Trade Mark (1860–1880)," in *Trade Marks and Brands: An Interdisciplinary Critique*, ed. Lionel Bently, Jane C. Ginsburg, and Jennifer Davis (Cambridge: Cambridge University Press, 2011), 3–41; Lionel Bently, Ronan Deazley, and Martin Kretschmer, eds., *Privilege and Property: Essays on the History of Copyright* (Cambridge: Open Book, 2010). Lionel Bently is one of the main editors of the project copyrighthistory.org, which provides a digital archive of primary sources on copyright from the invention of the printing press (c. 1450) to the Berne Convention (1886) and beyond.

34. Sherman, "Remembering and Forgetting."

35. Sherman, "Towards a History of Patent Law," 15.

36. Bainbridge, *Intellectual Property*, 392.

37. E.g., Roger Schechter, *Selected Intellectual Property and Unfair Competition Statutes, Regulations, and Treaties* (St. Paul, MN: West Academic, 2017); and Andrew Christie and Stephen Gare, *Blackstone's Statutes on Intellectual Property*, 13th ed. (Oxford: Oxford University Press, 2016).

38. Bainbridge, *Intellectual Property*, 392.

39. Bronwen Martin and Felizitas Ringham, *Dictionary of Semiotics* (London: Cassell, 2000), 11.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

40. There are variations of this story, yet in principle they all distinguish between "monopolies in inventions, which were favourably viewed by Parliament and the public, and monopolies over things which were already invented, including a number of costumer staple products, which were viewed with great resentment by frustrated traders and distressed citizens." Phillips and Firth, *Introduction to Intellectual Property Law*, 34.

41. William Cornish, "Copyright I," in *The Oxford History of the Laws of England*, ed. William Cornish et al. (Oxford: Oxford University Press, 2010), 13:879.

42. Martin and Ringham, *Dictionary of Semiotics*, 11.

43. Bainbridge, *Intellectual Property*, 395.

44. Martin and Ringham, *Dictionary of Semiotics*, 12.

45. Bainbridge, *Intellectual Property*, 396.

46. One could think of different variations of the plot for the different sections of IP. In the case of copyright, for example, the different tests include the 1556 charter to the Stationers Company (the qualifying test), the 1710 Statute of Anne (the decisive test), and what Phillips and Firth call the "great consolidation of copyright in 1911" (the glorifying test). Phillips and Firth, *Introduction to Intellectual Property Law*, 128.

47. Colston, *Principles of Intellectual Property Law*, 343.

48. Bently, "Modern Trade Mark Law," 3–4 (notes omitted). This idea finds its way into the textbooks. For instance, Bainbridge argues that "although the application of distinguishing marks to goods has a long history, the law relating to trade marks is relatively young, going back to the early part of the nineteenth century." Bainbridge, *Intellectual Property*, 690.

49. Bently and Sherman, *Modern Intellectual Property Law*, 2.

50. Bently and Sherman, 2. Additional arguments concern the system of registration and the organization of the law. This idea is rehearsed in Bently and Sherman, *Intellectual Property Law*, 377.

51. Mario Biagioli, "Patent Specification and Political Representation: How Patents Became Rights," in *Making and Unmaking Intellectual Property*, ed. Mario Biagioli, Peter Jaszi, and Martha Woodmansee (Chicago: University of Chicago Press, 2011), 25–40; Oren Bracha, "Geniuses and Owners: The Construction of Inventors and the Emergence of American Intellectual Property," in *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz*, ed. Daniel W. Hamilton (Cambridge, MA: Harvard Law School, 2010), 1:369–390.

52. Cf. Ineke Sluiter, "Anchoring Innovation: A Classical Research Agenda," *European Review* 25, no. 1 (2017): 20–38; David Simpson, *Situatedness, or, Why We Keep Saying Where We're Coming From* (Durham, NC: Duke University Press, 2002).

53. Wikipedia, s.v. "History of Copyright," last modified June 12, 2020, https://en.wikipedia.org/wiki/History_of_copyright_law. The reference is to the Royal Irish Academy: "The Cathach/The Psalter of St. Columba," Library Cathach, archived from the original on July 2, 2014, https://web

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

.archive.org/web/20140702153948/http://www.ria.ie/Library/Special-Collections/Manuscripts/Cathach.aspx.

54. See Wikipedia, s.v. "Talk: History of Patent Law," last modified November 5, 2017, https://en.wikipedia.org/wiki/Talk:History_of_patent_law. The argument is that "whenever an article or a book claims to give a broad coverage on some topic and then talks about ancient Greece, just before jumping to Renaissance Europe (or vice versa) is Eurocentric POV.—The preceding unsigned comment was added by 74.103.17.98 (talk) 21:29, 8 May 2007 (UTC)."

55. Wikipedia, s.v. "Talk: History of Patent Law."

56. Vandana Shiva, *Protect or Plunder: Understanding Intellectual Property Rights* (London: Zed Books, 2001), 21.

57. On the complicated definition(s) of a public domain, see also Robert Merges and Amy Landers, *Intellectual Property and the Public Domain* (Cheltenham, UK: Edward Elgar, 2017).

58. This expression comes from Article I, Section 8, Clause 8 of the United States Constitution. The terminology changes from jurisdiction to jurisdiction; however, the underlying principle that IP should enlarge the public domain remains the same. As Walterscheid expresses it: "Indeed, it is precisely the unregulated and uncontrolled nature of knowledge in the public domain that renders it valuable for society. Patents and copyrights are deemed to be for the public good precisely because they are intended to enlarge the intellectual commons of knowledge available to all." Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* (Buffalo, NY: W. S. Hein, 2002), 268.

59. See William Cornish, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights*, 4th ed. (London: Sweet & Maxwell, 1999); Jeremy Phillips and Alison Firth, *Introduction to Intellectual Property Law*, 4th ed. (London: Butterworths, 2001).

60. Among the most vocal have been Michele Boldrin and David Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2010).

61. See Algirdas Julien Greimas, *On Meaning: Selected Writings in Semiotic Theory* (Minneapolis: University of Minnesota Press, 1987). One could also think of a square where IP is contrasted to secrecy, for example.

62. This section has been shortened for reasons of space. I decided to single out the most central metaphor and not to look at other types of analogy, such as metonyms and allegories. One could add other metaphors as well: in copyright, for instance, the analogy is more about "the birth and caring of a baby," whereas in trademarks it is more about "personal identity and development." Still, one can find the idea of "a balance" in those domains of the law as well.

63. For a more elaborate reflection on the metaphorical use of "the balance" in IP law, see Mario Biagioli, "Weighing Intellectual Property: Can We Balance the Social Costs and Benefits of Patenting?," *History of Science* 57, no. 1 (2018): 140–163. For the philosophical underpinnings of this essay, which deals with the importance of the balance in the iconography of justice, see also Mario Biagioli, "Justice Out of Balance," *Critical Inquiry* 45, no. 2 (2019): 280–306.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

64. Bainbridge, *Intellectual Property*, 384. Notes omitted; author's emphasis.

65. *Innovation in America, Hearings Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, One Hundred Thirteenth Congress, First Session, July 25 and August 1, 2013. Part I and II* (Washington, DC: U.S. Government Printing Office, 2014), 203.

66. Cornish, *Intellectual Property*, 123.

67. Georg Simmel, "Das Problem der historischen Zeit (1916)," in *Brücke und Tür: Essays des Philosophen zur Geschichte, Religion, Kunst, und Gesellschaft*, ed. Michael Landmann and Margarete Susman, 43–58 (Stuttgart: K. F. Koehler, 1957).

Bibliography

Aplin, Tanya, and Jennifer Davis. *Intellectual Property Law: Text, Cases, and Materials*. 3rd ed. Oxford: Oxford University Press, 2017.

Bainbridge, David I. *Intellectual Property*. 9th ed. Harlow, UK: Pearson, 2012.

Bellido, Jose. "The Constitution of Intellectual Property as an Academic Subject." *Legal Studies* 37, no. 3 (2017): 369–390.

Bellido, Jose. "The Editorial Quest for International Copyright (1886–1896)." *Book History* 17, no. 1 (2014): 380–405.

Bently, Lionel. "The Making of Modern Trade Mark Law: The Construction of the Legal Concept of the Trade Mark (1860–1880)." In *Trade Marks and Brands: An Interdisciplinary Critique*, edited by Lionel Bently, Jane C. Ginsburg, and Jennifer Davis, 3–41. Cambridge: Cambridge University Press, 2011.

Bently, Lionel, Ronan Deazley, and Martin Kretschmer, eds. *Privilege and Property: Essays on the History of Copyright*. Cambridge: Open Book, 2010.

Bently, Lionel, and Brad Sherman. *Intellectual Property Law*. 4th ed. Oxford: Oxford University Press, 2014.

Bently, Lionel, and Brad Sherman. *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911*. Cambridge: Cambridge University Press, 1999.

Biagioli, Mario. "Justice Out of Balance." *Critical Inquiry* 45, no. 2 (2019): 280–306.

Biagioli, Mario. "Patent Specification and Political Representation: How Patents Became Rights." In *Making and Unmaking Intellectual Property*, edited by Mario Biagioli, Peter Jaszi, and Martha Woodmansee, 25–40. Chicago: University of Chicago Press, 2011.

Biagioli, Mario. "Weighing Intellectual Property: Can We Balance the Social Costs and Benefits of Patenting?" *History of Science* 57, no. 1 (2018): 140–163.

Boldrin, Michele, and David K. Levine. *Against Intellectual Monopoly*. Cambridge: Cambridge University Press, 2010.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

Bowrey, Kathy. "Who's Writing Copyright's History?" *European Intellectual Property Review* 18, no. 6 (1996): 322–329.

Bracha, Oren. "Geniuses and Owners: The Construction of Inventors and the Emergence of American Intellectual Property." In *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz*. Vol. 1, edited by Daniel W Hamilton, 369–390. Cambridge, MA: Harvard Law School, 2010.

Burk, Dan L., and Jessica Reyman. "Patents as Genre: A Prospectus." *Law & Literature* 26, no. 2 (2014): 163–190.

Chandler, Daniel. *Semiotics: The Basics*. 2nd ed. London: Routledge, 2007.

Christie, Andrew, and Stephen Gare. *Blackstone's Statutes on Intellectual Property*. 13th ed. Oxford: Oxford University Press, 2016.

Colston, Catherine. *Principles of Intellectual Property Law*. London: Cavendish, 1999.

Cornish, William. "Copyright I." In *1820–1914, Fields of Development*, edited by William Cornish, J. Stuart Anderson, Ray Cocks, Michael Lobban, Patrick Polden, and Keith Smith, 879–930. Vol. 13 of *The Oxford History of the Laws of England*. Oxford: Oxford University Press, 2010.

Cornish, William. *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights*. 4th ed. London: Sweet & Maxwell, 1999.

Czarniawska-Joerges, Barbara. *Narratives in Social Science Research*. London: Sage, 2004.

Danner, Richard. "Foreword: Oh, the Treatise!" *Michigan Law Review* 111, no. 6 (2013): 821–834.

Deazley, Ronan. "Commentary on Copinger's *Law of Copyright* (1870)." In *Primary Sources on Copyright (1450–1900)*, edited by Lionel Bently and Martin Kretschmer. http://www.copyrighthistory.org.

Dolin, Kieran. *Law and Literature*. Cambridge: Cambridge University Press, 2018.

Ehrlich, Eugen. *Fundamental Principles of the Sociology of Law*. New Brunswick, NJ: Transaction, 2001.

Endicott, Timothy. "Law and Language." *Stanford Encyclopedia of Philosophy* Archive, edited by Edward N. Zalta. Metaphysics Research Lab, Stanford University, last updated April 15, 2016. https://plato.stanford.edu/archives/sum2016/entries/law-language/.

Gates, Kelly. "Will Work for Copyrights: The Cultural Policy of Anti-piracy Campaigns." *Social Semiotics* 16, no. 1 (2006): 57–73.

Genette, Gérard. *Paratexts: Thresholds of Interpretation*. Translated by Jane E. Lewin. Cambridge: Cambridge University Press, 1997.

Gillespie, Tarleton. "Characterizing Copyright in the Classroom: The Cultural Work of Antipiracy Campaigns." *Communication, Culture & Critique* 2, no. 3 (2009): 274–318.

Goldstein, Paul. *International Copyright Principles, Law, and Practice*. Oxford: Oxford University Press, 2001.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

Goodrich, Peter. “Critical Legal Studies in England: Prospective Histories.” *Oxford Journal of Legal Studies* 12, no. 2 (1992): 195–236.

Greimas, Algirdas Julien. “Narrative Grammar: Units and Levels.” *MLN* 86, no. 6 (1971): 793–806.

Greimas, Algirdas Julien. *On Meaning: Selected Writings in Semiotic Theory*. Minneapolis: University of Minnesota Press, 1987.

Innovation in America. Hearings Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, One Hundred Thirteenth Congress, First Session, July 25 and August 1, 2013. Part I and II. Washington, DC: U.S. Government Printing Office, 2014. http://purl.fdlp.gov/GPO/gpo45855.

Jackson, Bernard S. “A Journey into Legal Semiotics.” *Actes Sémiotiques* 120 (2017): 1–43.

Latour, Bruno. *The Making of Law: An Ethnography of the Conseil d’Etat*. Cambridge: Polity, 2010.

London School of Economics and Political Science (LSE). *Course Guides and Programme Regulations 2018/2019*. Accessed November 4, 2020. https://info.lse.ac.uk/staff/divisions/academic-registrars-division/Teaching-Quality-Assurance-and-Review-Office/Assets/Documents/Calendar/CourseGuidesProgrammeRegs18-19.pdf.

Luhmann, Niklas, and Fatima Kastner. *Law as a Social System*. Oxford: Oxford University Press, 2004.

Maitland, Frederic William. *Why the History of English Law Is Not Written*. London: C. J. Clay & Sons, 1888. https://en.wikisource.org/wiki/Why_the_History_of_English_Law_is_Not_Written.

Martin, Bronwen, and Felizitas Ringham. *Dictionary of Semiotics*. London: Cassell, 2000.

Merges, Robert P., and Amy L. Landers. *Intellectual Property and the Public Domain*. Cheltenham: Edward Elgar, 2017.

Niederhoff, Burkhard. “Focalization.” In *The Living Handbook of Narratology*, edited by Peter Hühn, Jan Christoph Meister, John Pier, and Wolf Schmid (Hamburg: Hamburg University Press, 2009–2013). Last modified September 24, 2013. https://www.lhn.uni-hamburg.de/node/18.html.

Phillips, Jeremy, and Alison Firth. *Introduction to Intellectual Property Law*. 4th ed. London: Butterworths, 2001.

Repoussi, Maria, and Nicole Tutiaux-Guillon. “New Trends in History Textbook Research: Issues and Methodologies toward a School Historiography.” *Journal of Educational Media, Memory, and Society* 2, no. 1 (2010): 154–170.

Reyman, Jessica. *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture*. London: Routledge, 2012.

Roberts, Geoffrey. *The History and Narrative Reader*. London: Routledge, 2010.

Schechter, Roger. *Selected Intellectual Property and Unfair Competition Statutes, Regulations, and Treaties*. St. Paul, MN: West Academic, 2017.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

Sherman, Brad. "Remembering and Forgetting: The Birth of Modern Copyright Law." In *Comparing Legal Cultures*, edited by David Nelken, 237–266. Aldershot, UK: Dartmouth, 1997.

Sherman, Brad. "Towards a History of Patent Law." In *Intellectual Property in Common Law and Civil Law*, edited by Toshiko Takenaka, 3–16. Cheltenham, UK: Edward Elgar, 2013.

Shiva, Vandana. *Protect or Plunder: Understanding Intellectual Property Rights*. London: Zed Books, 2001.

Silbey, Jessica M. "The Mythical Beginnings of Intellectual Property." *George Mason Law Review* 15, no. 2 (2008): 319–379.

Simmel, Georg. "Das Problem der historischen Zeit (1916)." In *Brücke und Tür: Essays des Philosophen zur Geschichte, Religion, Kunst, und Gesellschaft*, edited by Michael Landmann and Margarete Susman, 43–58. Stuttgart: K. F. Koehler, 1957.

Simpson, David. *Situatedness, or, Why We Keep Saying Where We're Coming From*. Durham, NC: Duke University Press, 2002.

Sluiter, Ineke. "Anchoring Innovation: A Classical Research Agenda." *European Review* 25, no. 1 (2017): 20–38.

Strathern, Marilyn. "Discovering 'Social Control.'" *Journal of Law and Society* 12, no. 2 (1985): 111–134.

Todorov, Tzvetan. *The Poetics of Prose*. Ithaca, NY: Cornell University Press, 1977.

Wadlow, Christopher. "New Life and Vigour at Terrell?" *Journal of Intellectual Property Law & Practice* 6, no. 11 (2011): 833–836.

Waelde, Charlotte, Graeme Laurie, Abbe Brown, Smita Kheria, and Jane Cornwell. *Contemporary Intellectual Property: Law and Policy*. 3rd ed. Oxford: Oxford University Press, 2013.

Walterscheid, Edward C. *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*. Buffalo, NY: W. S. Hein, 2002.

World Intellectual Property Organization (WIPO). *WIPO Intellectual Property Handbook*. 2nd ed. Geneva: World Intellectual Property Organization, 2008.

Yar, Majid. "The Rhetorics and Myths of Anti-piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom." *New Media & Society* 10, no. 4 (2008): 605–623.

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024

MIT Press Direct

© 2023 Massachusetts Institute of Technology

This work is subject to a Creative Commons CC-BY-ND-NC license.

Subject to such license, all rights are reserved.

Subject to such license, all rights are reserved.

Co-funded by the ERC project “Before Copyright: Printing privileges and the politics of knowledge in early modern Europe,” funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Research Council. Neither the European Union nor the granting authority can be held responsible for them.

This book was set in Stone Serif and Futura by Westchester Publishing Services.

Library of Congress Cataloging-in-Publication Data

Names: Schäfer, Dagmar, editor. | Mamidipudi, Annapurna, editor. | Buning, Marius, 1979– editor.
Title: Ownership of knowledge : beyond intellectual property / edited by Dagmar Schäfer, Annapurna Mamidipudi, and Marius Buning.
Description: Cambridge, Massachusetts : The MIT Press, [2023] | Series: Inside technology | Includes bibliographical references and index.
Identifiers: LCCN 2022038290 (print) | LCCN 2022038291 (ebook) | ISBN 9780262545594 (paperback) | ISBN 9780262374637 (epub) | ISBN 9780262374644 (pdf)
Subjects: LCSH: Knowledge management. | Intellectual property.
Classification: LCC HD30.2 .O926 2023 (print) | LCC HD30.2 (ebook) | DDC 658.4/038—dc23/20220811
LC record available at https://lccn.loc.gov/2022038290
LC ebook record available at https://lccn.loc.gov/2022038291

Downloaded from http://direct.mit.edu/books/oa-edited-volume/chapter-pdf/2146074/c002800_9780262374644.pdf by guest on 05 October 2024