The Multiple Levels of Property in IP, and why it matters

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Overview

- Polarization of IP commentators: “max” v. “min”
- Minimalists adopt utilitarian regulatory view of IP
- Some maximalists adopt natural law/rights view
- Results in talking past each other because of monolithic approach to IP “property”
- Reconcile by realizing multiple levels of property in IP
- Shift to true service-based economy may moot the efforts of those seeking to minimize IP rights; even as requiring a return to first

A little history . . .

- Before formal IP systems, central distinction between private and public spheres for individual speech, action, and production since antiquity
- That which was private could generally be maintained and enforced as private, including things shared with servants
- However, that which was made public through intentional act of *publicatio* was available for sharing/use AND was a commitment to the ideas etc. by the individual
- Liability and punishment could follow for published things deemed harmful or treasonous
- Primary way out was recanting—disavowing ideas publicly (but could still hold privately)

A little history . . .

- Thus, long before printing press there was a distinction between public and private manuscripts
- Similarly for methods, machines, manufactures, and compositions of matter
- Private things often maintained through elaborate secrecy rituals, e.g., neo-platonist knowledge societies
- Not just individuals, but also guilds, cities, and nations/empires
- Critical in Western history: e.g., secret “Greek Fire” protected Byzantine Empire for centuries until became a lost art

A little history . . .

- By Italian Renaissance a realization that too much secrecy and control of the "means of innovation" could be detrimental to state (e.g., Venice-Milan war and perceived failure of Venetian Arsenal to match innovation of Milan)
- Brunelleschi makes first known successful pitch for state exclusivity rights/privilege in exchange for "publication" of new boat though public use (early 1400s)
- Argument based on: value to public; unjust enrichment by others if made public without state's protections; deserves because of genius and labor
- This becomes the model for early versions of patent and copyright (or printers privileges)

A little history . . .

- Printing press enables mechanical reproduction
- Even though earlier privileges focus on printers, they have to obtain manuscripts from authors or reprint already “published” works
- Authors can obtain patronage and even fame—within intellectual and royal circles—by circulating private manuscripts so often no burning need to print or publish
- Further, “publication” still could led to serious problems
- Profit-making potential of print publishing a lure, but authors need to participate in profits
- By end of 1500s, MS sale contracts are well-established: lump sum or royalties

A little history . . .

- Scientific Revolution and then Enlightenment put a premium on “Republic of Letters” and open dissemination of knowledge/skills
- But “open” does not entail “free” or “public domain” (similar to free speech/free beer distinction in open source software)
- E.g. leading proponents of open knowledge in sciences and fine and mechanical arts, Diderot and d’Alembert, undertake the landmark *Encyclopedie* open knowledge project as very much a pioneering profit-making venture as well
- Statute of Anne creates a “super” right to one’s creative works in exchange for publication and deposit (so as to ensure continued availability even if work goes out of

A little history . . .

- Patent systems were also based around some kind of disclosure: e.g. Venetian Patent Act of 1474 required *experientia* which was a demonstration of finished version of patented invention to govt comm.
- This disclosure became stronger over time leading to specification requirement for written disclosure and enablement
- Patents also became expressly statutory “super rights” based on disclosure, etc.
- BUT, the fundamental right of authors and inventors to hold their writings/inventions as private property has remained, especially when disclosed to no one else

What does this all mean?

- Whether one accepts natural law/rights framework or not, no civilized person should advocate the forced disclosure of an individual's private thoughts
- This is as much a foundational privacy law matter as an IP one -- and through 1800s, IP type rights have been effectively enforced through privacy, e.g., *Albert v. Strange* (U.K.))
- This is as true for commercial trade secrets as it is for writings
- Therefore, utilitarian regulatory IP proponents should recognize this foundational privacy-based right to one's writings and inventions as property even in the absence of statutory IP systems

What does this all mean?

- Likewise, natural law/rights IP proponents would do well to understand the utilitarian/regulatory IP side's focus on contingent positive law IP statutes
- Whether based on utilitarian notions or not by the legislature, such statutory rights generally ARE changeable by the legislature in the nature of regulatory rights
- Even in the U.S., the IP Clause does not mandate that Congress in fact pass any general public or specific private statutes creating regulatory IP rights (although privacy-based rights or remedies would presumably still be available under common law)

Restating the multiple levels of property in IP

1. Foundational privacy and autonomy based rights to one's private thoughts, actions, and productions
2. Statutory regulatory rights to encourage transfer of private things to public sphere by exclusive and perhaps moral rights; these are often "deeded" rights/title
3. Personal property in embodiments (copies) of IP-protected things
4. Contracts that convey title, licenses, or other rights to deeded IP and/or physical copies

Complications and current policy issues

- If we take this seriously, then regulatory utilitarians and natural law/rights proponents could find common ground to begin a productive dialog
- But, the accelerating transition to a true service-based economy may make much of existing IP battles—e.g., exhaustion/first sale—moot; SaaS/cloud, bike & car shares, etc. mean that we won't own or even acquire bailment or lease of physical or digital objects
- Yet, this will return us to foundational first principles, especially around "publication" as disclosure, sharing, and making a public commitment to knowledge/ideas/positions

Complications and current policy issues

- Do we want a world in which there are no such commitments? Where everything is like a tweet that can be deleted or claimed to be a joke?
- What about a world in which we do not have enough possessory claim to physical or digital things to be able to figure out how they work? Where there will be no need or incentive for technical disclosure?
- Finally, the push to minimize IP protections/incentives as purely a regulatory matter will likely itself accelerate the move to delivering everything innovative thing as a closed/private service