Journal of Civil & Legal Sciences
ISSN: 2169-0170

Mini Review Open Access

Conjectures of Patent Trade Secrets, Copyrights and Trademark

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Abstract

The primary economic benefits of trademarks, they contend, are the reduction of consumers' search costs and the creation of an incentive for businesses to produce consistently high-quality goods and services. Trademarks, Lands and Posner claim, also have unusual ancillary social benefits; they improve the quality of our language.

Keywords: Judges; Rights; Legal; Social Welfare; Proponents; Civil Society

Introduction

By increasing our stock of nouns and by creating words or phrases that people value for their intrinsic pleasantness as well as their information value, they simultaneously economize on communication costs and make conversation more pleasurable. To be sure, trademarks can sometimes be socially harmful for example by enabling the first entrant into a market to discourage competition by appropriating for itself an especially attractive or informative brand name [1]. Awareness of these benefits and harms should, Lands and Posner claim, guide legislators and judges when tuning trademark law; marks should be protected when they are socially beneficial and not when they are, on balance, deleterious. The second of the four approaches that currently dominate the theoretical literature springs from the propositions that a person who labours upon resources that are either un-owned or held in common has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right. The last of the four approaches is rooted in the proposition that property rights in general and intellectual-property rights in particular can and should be shaped so as to help foster the achievement of a just and attractive culture. Theorists who work this vein typically draw inspiration from an eclectic cluster of political and legal theorists, including Jefferson, the early Marx, the Legal Realists, and the various proponents of classical republicanism. This approach is similar to utilitarianism in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of social welfare deployed by utilitarian [2]. A provocative example may be found in recent essay, Copyright and a Democratic Civil Society. Sketching a picture of a robust, participatory, and pluralist civil society, teeming with unions, churches, political and social movements, civic and neighbourhood associations, schools of thought, and educational institutions. In this world, all persons would enjoy both some degree of financial independence and considerable responsibility in shaping their local social and economic environments.

Discussion

A civil society of this sort is vital, to the perpetuation of democratic political institutions. It will not, however, emerge spontaneously. It must be nourished by government. In two ways, copyright law can help foster it. The first is a production function. Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association. The second function is structural. Copyright supports a sector of creative and communicative activity that is relatively free from reliance on-state subsidy, elite patronage, and cultural hierarchy [3]. Those, then, are (in order of prominence and influence) the four perspectives that currently dominate theoretical writing about intellectual property: Utilitarianism, Labour Theory, Personality Theory; and Social Planning Theory. In large part, their prominence derives from the fact that they grow out of and draw support from lines of argument that have long figured in the raw materials of intellectual property law -- constitutional provisions, case reports, preambles to legislation, and so forth. The dependence of theorists on ideas formulated and popularized by judges, legislators, and lawyers is especially obvious in the case of utilitarianism. References to the role of intellectual-property rights in stimulating the production of socially valuable works riddle American law. Thus, for example, the constitutional provision upon which the copyright and patent statutes rest indicates that the purpose of those laws is to provide incentives for creative intellectual efforts that will benefit the society at large. Until recently, the personality theory had much less currency in American law. By contrast, it has long figured very prominently in Europe. The French and German copyright regimes, for example, have been strongly shaped by the writings of Kant and Hegel. This influence is especially evident in the generous protection those countries provide for moral right authors and artists' rights to control the public disclosure of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, and above all to protect their works against mutilation or destruction. This cluster of entitlements has traditionally been justified on the ground that a work of art embodies and helps to realize its creator's personality or will. In the past two decades, moral-rights doctrine and the philosophic perspective on which it rests have found increasing favour with American lawmakers, as evidenced most clearly by the proliferation of state art-preservation statutes and the recent adoption of the federal Visual Artists Rights Act [4]. Finally, deliberate efforts to craft or construe rules in order to advance a vision of a just and attractive culture the orientation that underlies Social Planning Theory can be found in almost all of the provinces of intellectual property law. Such impulses underlie, for example, both the harsh response of most courts when applying copyright or trademark law to scatological humour and the generally favorable treatment they have accorded criticism, Commentary, and education. Social-planning arguments also figure prominently in current debates concerning the appropriate scope of intellectual-property rights on the Internet. To summarize, one source

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Received: 24-Sep-2022, Manuscript No.JCLS-22-78251; **Editor assigned:** 27-Sep-2022, PreQC No. JCLS-22-78251 (PQ); **Reviewed:** 10-Oct-2022, QC No. JCLS-22-78251; **Revised:** 15-Oct-2022, Manuscript NoJCLS-22-78251(R); **Published:** 22-Oct-2022, DOI: 10.4172/2169-0170.1000355

Citation: Heleba S (2022) Conjectures of Patent Trade Secrets, Copyrights and Trademark. J Civil Legal Sci 11: 355.

of the prominence of utilitarian, labour, personality, and social-planning theories in recent theoretical literature is the strength of similar themes in judicial opinions, statutes, and appellate briefs [5]. But two circumstances suggest that such parallelism and resonance cannot fully explain the configuration of contemporary theories. First, there exist in the materials of intellectual-property law several important themes that have not been echoed and amplified by a significant number of theorists. Many American courts, for example, strive when construing copyright or trademark law to reflect and reinforce custom either customary business practices or customary standards of good faith and fair dealing [6]. That orientation has deep roots both in the common law in general and in the early-twentieth-century writings of the American Legal Realists. Yet few contemporary intellectual-property theorists pay significant attention to custom. Much the same can be said of concerned for privacy interests. Long a major concern of legislators and courts, protection of privacy has been given short shrift by contemporary American theorists. The second circumstance is that, in legislative and judicial materials, arguments of the various sorts we have been considering typically are blended. We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labours. Fairness, incentives, culture-shaping in these and countless other passages, they swirl together. In contemporary theoretical writing, by contrast, such themes are typically disentangled and juxtaposed. The answer seems to be that the theorists are seeing the law through glasses supplied by political philosophy [7]. In contemporary philosophic debates, natural law, utilitarianism, and theories of the good are generally seen as incompatible perspectives. It is not surprising that legal theorists, familiar with those debates, should separate ideas about intellectual property into similar piles. One additional circumstance also likely plays a part: Many contemporary intellectual property theorists also participate in similar arguments about the appropriate shape of property law in general. In that arena, there is now a well-established canon of rival perspectives, again drawn in large part from Anglo-American political philosophy [8]. Labour theory, utilitarianism, and personality theory are the primary contenders. We should not be surprised to see them replicated in the context of intellectual property. Lawmakers are confronted these days with many difficult questions involving rights to control information. Many other, similar problems demand attention. The proponents of all four of the leading theories of intellectual property purport to provide lawmakers with answers to questions of these sorts. In other words, they understand their arguments to be, not merely systematic accounts of the impulses that have shaped extant legal doctrines, but guides that legislators and judges can use in modifying or extending those doctrines in response to new technologies and circumstances. Unfortunately, all four theories prove in practice to be less helpful in this regard than their proponents claim. Ambiguities, internal inconsistencies, and the lack of crucial empirical information severely limit their prescriptive power. The first task in developing a utilitarian theory of intellectual property is translating the Benthamite ideal of the greatest good of the greatest number into a more precise and administrable standard. Most contemporary writers select for this purpose either the wealth-maximization criterion, which counsels lawmakers to select the system of rules that maximizes aggregate welfare measured by consumers ability and willingness to pay for goods, services, and conditions, or the Kaldor-Hicks criterion, under which one state of affairs is preferred to a second state of affairs if, by moving from the second to the first, the gainer from the move can, by a lump-sum transfer, compensate the loser for his loss of utility and still be better off. This preliminary analytical maneuver is vulnerable to various objections. First, the wealth- maximization and Kaldor-Hicks criteria, though similar, are not identical, and much may turn on the choice between them [9]. Next, skeptics commonly object to both criteria on the grounds that they ignore the incommensurability of utility functions and bias analysis in favour of the desires of the rich, who, on average, value each dollar less than the poor. Finally, some economists and political theorists who draw inspiration from the rich tradition of utilitarianism contend that both criteria define social welfare too narrowly and would prefer a more encompassing analytical net [10]. But because these objections are by no means limited to the field of intellectual property and because they have been well aired elsewhere, I will not pause to explore them here. Assume that we are comfortable with at least one of these criteria as our beacon. It turns out that there are at least three general ways in which we might try to answer that question: The first and most common of the three approaches is well illustrated by William Nordhaus classic treatment of patent law.

Conclusion

Norhaus was primarily concerned with determining the optimal duration of a patent, but his analysis can be applied more generally. Each increase in the duration or strength of patents, he observed, stimulates an increase in inventive activity.

Acknowledgement

None

Conflict of Interest

None

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