The Lessons of History

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The Making of Modern Intellectual Property Law

By Brad Sherman and Lionel Bently
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THE *Making of Modern Intellectual Property Law* is a detailed and scholarly account of the historical development of our current intellectual property regimes. The authors argue against the view that the law reflects some natural ordering: in their opinion the law of intellectual property has largely been shaped by 'a complex and changing set of circumstances, practices and habits' (p 6).

The authors limit themselves to two themes: (i) the problems faced by the law in granting property status to intangibles; and (ii) how it is that intellectual property law came to assume its now familiar form. In exploring these themes, Sherman and Bently confine themselves largely to British law from 1760–1911. They argue that by 1850, modern intellectual property law had emerged as a distinct area with its own grammar and logic. Accordingly, they divide intellectual property law into the pre-modern (ie, pre-1850) and the modern (post-1850) periods as a 'useful basis from which to explore and understand [the subject]' (p 3). They trace the development of the law from the pre-modern to the modern through the four parts of the book: 'Towards a Property in Intangibles' (chs 1-2); 'The Emergence of Modern Intellectual Property Law' (chs 3-4); 'Towards an Intellectual Property Law' (chs 5-7); and 'Transformations in Intellectual Property Law' (chs 8-9).

The authors make the point that the pre-modern intellectual property law was not divided into the now familiar categories (copyright, patent, designs and trade marks), but was subject-specific and reactive. Its particular concern was with the mental or creative effort embodied in the protected subject matter. The pre-modern law employed the language, concepts and questions of classical jurisprudence. Modern intellectual property law, on the other hand, tends to be more abstract and forward-looking. Its focus is not on the labour involved in the creation of the object, but on the object in its own right. Rather than employing the ideas of classical jurisprudence, it uses the resources of political economy and utilitarianism.

The authors suggest that their book is written, at least in part, as a response to those who have argued that the current intellectual property law cannot cope with the onslaught of new technologies:

> No matter how attractive the emancipatory appeal of a digitised, organic future may be, because the concepts which are under dispute and the language within which these arguments are posed are mediated by the past, even the most radical of accounts remain indebted to the tradition from which they are trying to escape. Paradoxically, the more the past is neglected, the more control it is able to wield over the future (p 2).

The argument that our existing intellectual property regimes cannot cope with new technologies has been alleged, in particular, against the copyright regime and its capacity (or rather, its lack of capacity) to accommodate informational goods such as computer software and electronic databases. The authors make three important points of relevance to this argument.

The first concerns the role that registration played in the development of modern intellectual property law. Sherman and Bently trace the ways in which the registration of designs and patents served to close the categories of intellectual property and to cut off debate about the essential elements of the different forms of intellectual property. However, this did not happen in the case of copyright: in part this was because, in those cases where copyright was required to be registered, the object itself, rather than a representation of the object, was presented to the registering authority. As a result debate as to the essence of copyright, and the scope of the protection afforded to it, was played out in the courts rather than by the bureaucrats. Thus, the debate as to informational goods is simply part of an ongoing attempt to delineate the essence and scope of copyright protection.

The second point is that our current scheme of intellectual property law is contingent rather than inevitable — the result of 'a complex and changing set of circumstances' (p 6), rather than conscious design. Much of the argument surrounding intellectual property law's inability to handle new technologies stresses the problems caused by the copyright/patent division in intellectual property regimes. Much of our modern, information-based products do not fall comfortably into either camp. The authors illustrate the ways in which, historically, intellectual property protection has been concerned with the development of closed and stable entities and legal categories, leaving no room for judicial 'speculation, intuition or insight' (p 204). For this reason, the authors argue, the courts' response to the problems of intellectual property law has been less successful in the modern than in the pre-modern age. In modern intellectual property law, the judges are often reduced to circular reasoning or to silence, unable to justify particular decisions by coherent argument.

The third point is that the notion that creativity has played an ambivalent or, at least, a very limited role in the development of intellectual property law is

largely a myth. The authors argue against this view, revealing that the creativity or mental effort embodied in an object, rather than the object itself, was the original basis for all intellectual property protection (p 16). Mental effort originally encompassed so-called 'sweat of the brow' as well as creativity. However, this dual nature of copyright protection (ie, the protection of labour and investment as well as creative effort) tended to be obscured over time so that eventually the law looked to the object itself, rather than the labour or effort involved in its creation, as the focus of protection.

The thesis of *The Making of Modern Intellectual Property Law* is very relevant to Australia as, together with other countries, it struggles to resolve the issues posed for intellectual property regimes which have been raised by information technology. In a more general sense, the book provides a comprehensive overview of the development of patent, copyright, design and trademarks law and is a welcome addition to the available texts on intellectual property, many of which tend to present its categories as fixed and inevitable. The book is well researched, articulate and interesting. Given its nature, the book is likely to be of more interest to academics and postgraduate students rather than to legal practitioners and undergraduates. The focus upon the development of the designs law as a means of illustrating the development of intellectual property law more generally may pose something of a barrier for some readers: in many ways, the designs regime is the least explored and least understood of all the intellectual property regimes. In one sense, however, that focus is most welcome because it rectifies the relative neglect of designs as an area of inquiry.

All in all, *The Making of Modern Intellectual Property Law* is highly recommended for anyone seeking a better understanding of the origins and development of intellectual property law as a discrete area of legal analysis. If the thesis of Sherman and Bently is to be believed, then we should have a more optimistic view of the ability of intellectual property regimes to adapt to the challenges of the digital age.

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