

2

Justifying Intellectual Property: Back to the Beginning

Why History?

History matters to philosophy. It would be nice if it did not, since this would simplify the task of philosophical analysis. There are at least three reasons why some history needs to be introduced to an analysis of intellectual property. Some philosophical frameworks, which might be chosen to do the job of analysis, necessarily draw on history. Applying Marx's theory of historical materialism (with some mechanical simplicity) one might claim that intellectual property is a superstructural phenomenon corresponding to the industrial (or perhaps post-industrial) phase of development of capitalist societies.¹ Such an explanation could only be made plausible by historical evidence.

History also matters to an economic or consequentialist analysis of intellectual property. These kinds of approaches would justify the creation of intellectual property rights on the basis that such rights

¹ This is not to say that Marxists would necessarily approach intellectual property in this way. There are, within the traditions that Marx inspired, complex and subtle treatments of law. See, for instance, K. Renner, *The Institutions of Private Law* (O. Kahn-Freund ed., A. Schwarzschild trs., London, 1949); E.B. Pashukanis, *Law and Marxism: A General Theory* (C. Arthur ed., B. Einhorn trs., London, 1978). For a Marxist treatment which uses copyright law to build some of the elements of its theory of law, see B. Edelman, *Ownership of the Image* (E. Kingdom trs., London, Boston, Henley, 1979).

helped to fulfil, for example, some stipulated goal, such as welfare, economic growth, cultural protection, reward for creativity and so on. For such approaches the real data of history would be a preferred source for understanding the effects of intellectual property rather than *a priori* theory. Finally, a historical perspective can, for the kinds of reasons which Quentin Skinner gives in relation to political philosophy, deepen our understanding of the philosophical dimensions of intellectual property.² Skinner's methodological argument is that the present meaning of the central concepts of political philosophy can only be understood through a linguistic analysis that tracks these concepts through their respective historical time lines and uncovers both the social context of their users and the matrix of assumptions surrounding their use. The kind of combined philosophical, historical and linguistic game analysis that Skinner has in mind has yet to be undertaken in the context of intellectual property. It is not undertaken here. This is clearly a task for specialists. But Skinner's general methodological claim provides another reason why a philosophy of intellectual property cannot turn its back on history.

Having built a case for a philosophy of intellectual property needing at least some history, we must now circumscribe our use of the historical materials for present purposes. Clearly, the national history of any one intellectual property regime such as copyright or the patent system could be the subject of a separate work. Even if one confines the historical investigation to enacted law and judge-made law in Europe, there is a sheer bulk of historical material going back centuries. 'Intellectual property' is a 20th-century generic term used to refer to a group of legal regimes which began their existence independently of each other and at different times in different places.³ England, for example, is often given the credit for having the first copyright statute, the *Act of Anne* of 1709. The Venetians are thought to have had the first patent statute.⁴ And in any case the history of intellectual property law does not begin with statute. Copyright and patents in

2 For a flavour of this debate which seems to take place mainly in intellectual history, see J. Tully (ed.), *Meaning and Context: Quentin Skinner and his Critics* (Cambridge, 1988). See also D. LaCapra and S. Kaplan (eds), *Modern European Intellectual History: Reappraisals and New Perspectives* (Ithaca, N.Y., 1982).

3 The use of the term 'intellectual property' to refer to both industrial property and copyright seems to have first occurred in the 1950s. See A. Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (Geneva, 1992), 8.

4 S. Ricketson, *The Law of Intellectual Property* (Sydney, 1984), 860–861.

England evolved out of a complex system of prerogative, privilege and monopoly. Similarly, in many European countries, including Russia, there was a complex system of royal decrees and privileges that regulated the industrial arts.⁵

Two tasks govern the selection of historical materials in this chapter. The first relates to the legal categorisation of intellectual property. One possibility is that we may gain some philosophical insight into intellectual property from the way in which English property law classified intellectual property. The law's own internal taxonomic structures may help us to understand the character of intellectual property rights, especially if this legal character is itself based on some pre-existing philosophical idea or influence. This possibility should not be discounted. The legal classification of intellectual property as incorporeal rights, we shall see, leads straight into the philosophical notion of abstract objects. The fusion of this notion with the property concept becomes important to the argument, given in Chapter 7, that the basis of power in modern economic systems lies in the control of abstract objects.

The second use we make of the legal historical materials is to examine the justifications to be found within early English law for copyright and patents. Naturally, the philosopher is not confined to these justifications. This material is used to support the proposition that early justificatory approaches to intellectual property were distinctly instrumental. The final chapter of the present volume sees more use being made of this historical material to mount a normative argument to the effect that an instrumental attitude should inform theory development within intellectual property.

Before commencing there are some more general observations to be made about the role which history can play in a critical evaluation of intellectual property systems. History is one distinctive kind of storytelling and intellectual property is an area in need of many more critical historical stories. One purpose of such stories would be to help evaluate the orthodox forms of justification for intellectual property. The history which is being contemplated here is actually

5 See F. Machlup and E. Penrose, 'The Patent Controversy', X, *The Journal of Economic History*, 1, 2 (1950). On Russia, see J. Vojacek, *A Survey of the Principal National Patent Systems* (London, 1936).

a series of histories about the way in which different societies have, in terms of their institutional organisation and norms, encouraged and harnessed human creativity, both scientific and non-scientific. To illustrate: a fundamental form of argument used to justify the creation of intellectual property rights is that such rights provide incentives for persons to engage in the activity covered by the particular right. Patent rights, according to this argument, encourage invention. History may tell us whether property rights are the only route to take for a society that wants to encourage invention and innovation. Imperial China is an example of a society that achieved spectacular outcomes in science and innovation,⁶ yet it did not rely on intellectual property rights or a customary equivalent.⁷ History may teach us that the connection between intellectual property, science and economic development is contingent and local rather than necessary and universal.

There are other purposes that such critical historical investigations could serve. It would make our examination of intellectual property less Eurocentric. What evidence there is suggests that intellectual property is a protean concept which has been configured in different ways by different societies. Lowie's anthropological work reveals that the concept of incorporeal property, and in particular patents and copyright, was highly developed amongst the Andaman Islanders, the Kai, the Koryak and the Plains Indians.⁸ These societies were, in contrast to western approaches, more concerned to restrict the transferability of such rights.

Histories of intellectual property rights would also guard against an overreliance on economic storytellers for an understanding of intellectual property. The signs which conventional economic analysts leave for others to follow in relation to property generally do not explicitly deal with the linkages between values and property, or with themes of power, domination, exploitation and control, themes so

6 See J. Needham, *The Grand Titration* (London, 1969). See also the volumes in the series J. Needham, *Science and Civilization in China* (Cambridge at the University Press, 1954 v.1–).

7 This raises the question of how Imperial China was able to achieve such an impressive track record in innovation in the absence of intellectual property rights. This is a matter for historians of science and technology. But there is little doubt that intellectual property did not play a role. There was no legal or customary equivalent to intellectual property in Imperial China. See W.P. Alford, 'Don't Stop Thinking About ... Yesterday: Why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China', 7 *Journal of Chinese Law*, 3 (1993).

8 R.H. Lowie, *Primitive Society* (New York, 1920), 235–243.

familiar to the historian. Property rules, more than most rules, are rooted in the fundamental morality of a given society. Western copyright laws, for instance, reflect a view of art that promotes the importance of individual creativity and individual rights, a view which has no real oriental parallels.⁹ At a time when western forms of intellectual property are being transplanted to non-western countries, the signs of economic storytellers need to be read critically by those who are adopting these forms.¹⁰ Decisions about the adoption of foreign legal models have to be made with, as it were, informed consent. Critical historical storytelling can help those receiving intellectual property legal traditions gain a better understanding of their full consequences.

Classifying Intellectual Property: Rome Speaks

Most students of intellectual property are told of the distinction between corporeal (roughly, tangible) and incorporeal (roughly, intangible) property and that intellectual property rights are an example of incorporeal rights. One immediate analytical puzzle that this gives rise to is the very possibility of corporeal rights, since all rights would seem to be best thought of as incorporeal. (It is difficult to plough a right.) A judicial answer to the puzzle is to say that this is a loose but common way of talking and that the distinction is not between the nature of the rights but between the nature of the objects to which the right refers.¹¹ All rights are incorporeal, while some property is not.

The distinction between corporeal and incorporeal things is to be found in the classical period of Roman private law.¹² Classical Roman law, we know from the *Institutes of Gaius*, divided all law into the

9 See A. Hauser, *The Social History of Art* (S. Godman trs., London, 1951) volume 1, 65–66.

10 The most obvious example of this globalisation is the Agreement on Trade-Related Aspects of Intellectual Property Rights contained in Annex 1C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994.

11 This is how Windeyer J deals with the problem in *Pacific Film Laboratories Pty. Ltd. v. Federal Commissioner of Taxation* (1970) 121 C.L.R. 154 at 168.

12 The expression ‘classical period’ is used by writers to refer to the period of the Principate – from Augustus (27 BC) to the beginning of the reign of Diocletian (284 AD). See F. Schulz, *Classical Roman Law* (Oxford at the Clarendon Press, 1951), 1.

law relating to persons, things or actions. The distinction between corporeal and incorporeal occurs in the law of things (*res*). It is stated by Gaius in the following way:¹³

12. Further, things are divided into corporeal and incorporeal.
13. Corporeal things are tangible things, such as land, a slave, a garment, gold, silver, and countless other things.
14. Incorporeal are things that are intangible, such as exist merely in law, for example an inheritance, a usufruct, obligations however contracted.

The distinction, then, is one between tangible and intangible objects.¹⁴ The distinction is not an old one since the words *corporalis* and *incorporalis* are not to be found till the time of the Empire.¹⁵

From where did the Roman jurists obtain the distinction?¹⁶ This question is one for the classicists. One possibility is Stoicism.¹⁷ Stoicism had a wide influence on Roman culture and philosophy, including legal culture, and the distinction is to be found within Stoic thought.¹⁸ It is possible, therefore, that the Roman law category of incorporeal things derived from the Stoic notion of incorporeals.¹⁹

13 *The Institutes of Gaius* (F. De Zulueta (ed. and trs.), Oxford at the Clarendon Press, 1946), Book II, 12–14. The distinction is similarly put in *Justinian's Institutes* translated with an Introduction by Peter Birks and Grant McLeod, Ithaca, New York, 1987), 2.2:

Some things are corporeal, some incorporeal. 1. Corporeal things can actually be touched – land, a slave, clothes, gold, silver, and of course countless others. 2. Incorporeal things cannot be touched. They consist of legal rights – inheritance, usufruct, obligations however contracted. It is irrelevant that an inheritance may include corporeal things ... The point is that the actual right of inheritance is incorporeal ...

14 The modern distinction between tangible and intangible is between things which can be perceived by the senses and things which are merely creations of the mind. In Roman law tangible seems to have meant things which could be touched and used. See P. Warmelo, 'The Institutes of Justinian as Students' Manual', in P.G. Stein and A.D.E. Lewis (eds), *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* (London, 1983), 164, 169.

15 W.W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge at the University Press, 1931), 91. Buckland observes that the words were rarely used outside juristic work.

16 Modern Roman law texts do not address the question since they are concerned with the law rather than its philosophical origins.

17 John Austin is confident that the distinction is borrowed from the Stoics and Epicureans. See, J. Austin, *Lectures on Jurisprudence* (5th edn, London, 1885), Lecture XIII. Austin is not alone in his belief. See also P. Colquhoun, *A Summary of the Roman Civil Law* (London, author's preface 1851), vol. 2, 13, section 931 for the suggestion that the distinction came from the Stoics.

18 For a general treatment of the influence of Stoicism on Roman thinking and culture, see E.V. Arnold, *Roman Stoicism* (London, 1911, reissued 1958).

19 That the Stoics had the distinction we know from Sextus Empiricus. See Sextus Empiricus, *Adversus Dogmatico*, ii, 11–13, in *Sextus Empiricus* (R.G. Bury trs., London, Cambridge, Mass., 1935), vol. 2, 247–249.

Within Stoicism, four things were said to be incorporeal: time, space, the void and *lekta* (the meaning of words or sentences).²⁰ That the Stoics should have had the category at all is at first sight surprising, given that theirs was a philosophy of uncompromising materialism. God and the soul were for them corporeal entities. Only corporeal entities were real.²¹ Incorporeal things were not existent, but rather subsistent. They subsisted by virtue of human mental life. They were things superimposed by the mind onto the corporeal world.²²

The category of incorporeal things in a materialist philosophy is an intriguing juxtaposition. One of its analytical features is that it would have allowed the Stoics to give an account of universals without, as Plato did, committing themselves to the existence of abstract Ideas or Forms.²³ For Plato, universals like the number one, the property of squareness or moral terms like justice existed as eternal forms. Within Stoic metaphysical theory, only particulars existed. Universals were a convenient fiction which *subsisted* as incorporeal things, these things being essentially mental figments.

We should bear in mind that modern intellectual property rights relate to the grant of property rights in some *thing* as well as constituting a set of relations between individuals. But what is the nature of this thing? It cannot be a physical object for, as every law student is told, the fact that I own a physical copy of a book does not entail that I own the copyright in that book. Furthermore, I may own the copyright without owning a physical copy (for example, the letter I have written and sent is owned by someone else). By recognising intellectual property rights, is the law forced also to recognise 'spooky' entities – universals? Or can Stoic thought offer us a more sensible account of property rights in incorporeal things?

20 The word *lekta* is translated by Rist as 'things meant'. See J.M. Rist, *Stoic Philosophy* (Cambridge, 1969), 152–153. Also translated as 'that which can be expressed' or 'what is meant'. See G. Watson, *The Stoic Theory of Knowledge* (Belfast, 1966), 41.

21 For a general discussion, see D.E. Hahm, *The Origins of Stoic Cosmology* (Columbus, Ohio, 1977).

22 For a discussion of this, see G. Watson, *The Stoic Theory of Knowledge* (Belfast, 1966), chapter 2. See also J.M. Rist, *Stoic Philosophy* (Cambridge, 1969), chapter 9.

23 For an argument that the Stoics had a theory of universals, see D. Sedley, 'The Stoic Theory of Universals', in R.H. Epp (ed.), *Recovering the Stoics*, XXIII, Supplement, *Southern Journal of Philosophy*, 87–92 (1985).

The Stoic incorporeal category of most interest here is that of meaning (*lekta*). Meaning is conceived to be something expressible, although it is not to be confused with the material expression of a sentence in writing or speech, for example the words on a tablet or spoken in a play. *Lekta* are signified meanings which are logically distinct from their physical representation or communication. Since *lekta* are incorporeals they cannot act in the world. They are causally inert. Meanings can become causal factors once they form part of people's beliefs.²⁴ At the point at which the incorporeal expressible enters a person's beliefs it becomes a corporeal force. Here, then, is one view of the metaphysical character of the legal category of incorporeal things. Before one can claim an intellectual property right, whether it be copyright, a patent right, a design and so on, there has to be some concrete specification of the subject matter. This process of specification can involve formalities (for example, the registration of a patent) or it can be informal (simply creating information that can be the subject of trade secret protection). This specification of subject matter does two things. It produces signifiers (the physical representations). It also generates an entity with specific meaning which, in the language of the Stoics, amounts to the creation of an 'expressible'.²⁵ An expressible is an abstract entity. It is also a convenient mental fiction. It subsists as a construct of the mind. An abstract object does not exist in the corporeal world. Once the abstract object attains corporeality by becoming embodied belief, at least in the Stoic scheme of things, it can play a causal role in the social and productive relations of people. At the same time, because it affects human conduct, it becomes a potential candidate for legal regulation.

To summarise, one view is that mental constructs are the stuff of intellectual property relations. Intellectual property rights are rights in our mental projections. An alternative is to adopt some kind of realist explanation of these abstract things. Shortly stated, this would involve arguing that abstract entities are real entities, just like law books and tennis balls. Following a realist line, abstract objects would have to be assigned an independent ontological status and given either an immanent (that is, Aristotelian) or transcendental (that is, Platonic) account of their existence. Either account has philosophical support,

24 F.H. Sandbach, *The Stoics* (London, 1975), 92.

25 See G. Verberke, *The Presence of Stoicism in Medieval Thought* (Washington, D.C., 1983), 22–33.

but this realist way of looking at abstract objects drives intellectual property law ever deeper into metaphysics. The law now has to contemplate the independent existence of unobservable entities.

Roman law, by inventing the category of *res incorporales*, plants its property law squarely in the realm of the metaphysical. English law, as we shall see in a moment, made use of this category in order to add a largely flexible category to its property law. Before moving on, though, we should make clear that the idea of incorporeal things in Gaius and Justinian refers to legal rights. Rights are used by both to include those rights we would think of as property rights as well as contractual rights. The strong implication from Justinian is that incorporeal things have corporeal counterparts. Incorporeal things are thought, in other words, to relate strongly to corporeal objects. The link between incorporeal rights and incorporeal objects, or what we have called abstract objects, only came to the fore in English property law when various intellectual property forms were classified as choses in action and these were carefully distinguished from any property rights in chattels.²⁶ Intellectual property rights are incorporeal things, but this came to mean incorporeal rights which relate to abstract objects.

From the very start the category of incorporeal things creates legal uncertainties. In *The Institutes*, Gaius in some places includes obligations as *res incorporales* and in other places does not.²⁷ On the basis of the distinction one might expect ownership (*dominium*) in a physical object to be a *res incorporales* since ownership is concerned with rights and rights are an intangible. But, as writers of Roman law routinely point out, *dominium* is to be found in the category of *res corporales*.²⁸

26 In English law a patent is a chose in action. See *In re Heath's Patent* [1912] W.N. 137. This right is completely separate from the right of property in the physical thing made under the patent. See *Edwards & Co. v. Picard* [1909] 2 K.B. 903, 905.

27 See W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, revised by Peter Stein, Cambridge, 1963), 186. On the failure of Gaius to follow through the distinction, see R. Zimmermann, *The Law of Obligations* (Cape Town, Wetton, Johannesburg, 1990), 26.

28 W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, revised by Peter Stein, Cambridge, 1963), 186.

What seems to happen is that the object is substituted for ownership, or perhaps object and ownership are thought of as substitutes.²⁹ Modern Roman law writers do not devote a great deal of attention to the distinction except to point out its logical flaws.³⁰ None do so with the impatience of the 19th-century jurist Austin. He dismisses the distinction as completely useless, saying that it is 'either imperfect, or else big with contradiction'.³¹

While the Roman scheme of property law conflates object and ownership, other rights, such as rights of way, are no longer seen concretely in terms of an actual path, but rather are viewed as intangible rights. Some writers use the corporeal/incorporeal distinction to support a claim that classical juristic thought was generally manifesting a tendency towards greater abstraction.³² Whether this claim is true is another matter, but we can say that in the context of property law the recognition of a category of *res incorporales* and the formal classification of some rights as intangible at least leaves open the possibility for the development of a more abstract juristic mode of thought about the property concept.

The distinction lay dormant until the rediscovery and revival of Roman classical law by Irnerius and his followers in 11th-century Bologna. From here Roman law began a new journey of conquest and entered at various different times, and to varying degrees, the legal systems of Europe. *Res incorporales*, with its unexplored potentiality, found a

29 Nicholas suggests that because only corporeal things could be owned there was no need for a clear distinction between ownership and its object. The effect is that object and ownership come to be thought of as interchangeable terms. See B. Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962), 107.

30 The distinction is said not to be logical because it equates ownership with the objects of ownership. See B. Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962), 107. See also H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge, 1972), 412–413; W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, revised by Peter Stein, Cambridge, 1963), 185–186; W.W. Buckland, *The Main Institutions of Roman Private Law* (Cambridge at the University Press, 1931), 91–92.

31 J. Austin, *Lectures on Jurisprudence* (5th edn, London, 1885), Lecture XLVI, 777. Austin's criticism is founded on the fact that within Roman law the meaning of corporeal things is extended to include acts and forbearances in addition to objects of the senses. If forbearances are part of corporeal subject matter then there is a contradiction, for the intangible is ranked with the tangible. If not, says Austin, then an object of the distinction is omitted.

32 See H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge, 1972), 412. But for a contrary view, see F. Schulz, *History of Roman Science* (Oxford at the Clarendon Press, 1946), 130–131.

place in the legal language of both civil systems and the common law.³³ Incorporeal things, or rather the category, found its way into English law only to be fused with an equally opaque legal category, that of the chose in action.³⁴ This latter category of personal property, more than most, was ready to lose the 'thinglikeness' which characterised mediaeval attitudes to the property concept and thus paved the way for the modern juristic discovery that property is not a thing but a set of relations between people.

Calling intellectual property rights choses in action does not bring immediate illumination. The reason, put shortly, is that doctrinal scholars have concluded that a chose in action is a class best understood in terms of the description of its members, rather than a definition capable of a self-selection of members.³⁵ Often a chose in action is explained by saying that it is not a chose in possession, but a thing recoverable by action, like a debt.³⁶ However not all rights of action are choses in action. The chose in action seems to have more than the usual degree of vagueness associated with legal predicates. The classification of apparently simple cases, like the owner of a chattel out of possession, have been the subject of debate.³⁷ The distinction between corporeal and incorporeal makes its presence felt in the category of chose in action, although it does not add much in the way

33 On the influence of Justinian's *Institutes* in England, see A. Watson, 'Justinian's *Institutes* and some English Counterparts', in P.G. Stein and A.D.E. Lewis (eds), *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* (London, 1983), 181–186.

34 Within English property law a distinction is made between real and personal property. Real property is linked to interests in land while personal property is defined negatively to refer to property which is not real property. Personal property is subdivided into chattels personal and chattels real. Chattels real are an anomalous category whereby, for historical reasons, leases were classed as personal property. Chattels personal are further subdivided into choses in possession and choses in action. It is this latter category that houses many statutory forms of intellectual property such as patents and copyright. Typically, statutes classify the relevant right as personal property, relying on the legally established meaning of that term. For Australian examples, see section 13(2) of the *Patents Act 1990*, section 196(1) of the *Copyright Act 1968* and section 20 of the *Plant Breeder's Rights Act 1994*. For a discussion of English personal property law, see A.P. Bell, *Modern Law of Personal Property in England and Ireland* (London and Edinburgh, 1989). For an Australian discussion, see J.W. Carter et al., *Helmore Commercial Law and Personal Property in New South Wales* (10th edn, Sydney, 1992).

35 O.R. Marshall, *The Assignment of Choses in Action* (London, 1950), 33. See also pages 6–8, where 10 different definitions of a chose in action are listed.

36 *Halsbury's Laws of England* (4th edn) vol. 6, 2, para. 1.

37 See O.R. Marshall, *The Assignment of Choses in Action* (London, 1950), 8–16.

of clarity. A chose in possession is said to refer to corporeal or tangible things while a chose in action is linked to intangible property, that is something which cannot be claimed by taking physical possession.³⁸

Why do intellectual property rights come to be called choses in action? The answer has to do with chance, history and the internal dynamics of the English legal system rather than the application of logic. The process of classification has been a prolonged one, for even at the beginning of the 19th century there was going on in England a quiet debate about whether or not, for instance, copyright really was a chose in action.³⁹

Early in its history the common law had a rule against the assignment of choses in action.⁴⁰ The primary reason for this was that choses in action were thought to be highly personal obligations not appropriate for transfer and in any case their transfer might provoke too much litigation.⁴¹ At the time that patents and copyright came into being the rule about the non-assignment of choses in action was being substantially undermined by the courts of Equity. This made it easier to fit copyright and patents into the category. It was commercially necessary for these forms of property to be assignable and the prohibition on assignment was being undermined. The other factor influencing their classification was their incorporeal character.⁴²

Things might have turned out differently. Holdsworth, for example, argues that, had Equity not modified the consequences of the rule against the assignment of choses in action, then intellectual property rights would have been treated as incorporeal hereditaments.⁴³ One view might be that whether intellectual property rights are

38 A.P. Bell, *Modern Law of Personal Property in England and Ireland* (London, Edinburgh, 1989), 21–22.

39 See H.W. Elphinstone, 'What is a Chose in Action?', 9 *Law Quarterly Review*, 311 (1893); C. Sweet, 'Choses in Action', 10 *Law Quarterly Review*, 303 (1894); F. Pollock, 'What is a Thing?', 10 *Law Quarterly Review*, 318 (1894); S. Brodhurst, 'Is Copyright a Chose in Action?', 11 *Law Quarterly Review*, 64 (1895); T.C. Williams, 'Property, Things in Action, and Copyright', 11 *Law Quarterly Review*, 223 (1895); C. Sweet, 'Choses in Action', 11 *Law Quarterly Review*, 238 (1895).

40 See O.R. Marshall, *The Assignment of Choses in Action* (London, 1950), chapter 3.

41 Known as the objection to maintenance. See *Lampet's Case* (1612) 10 Co. Rep. 46b at 48a; 77 ER 994 at 997. It was thought that assignment would encourage maintenance, that is, the promotion by intermeddlers of litigation. This was both a crime and a tort.

42 See E. Jenks, *A Short History of English Law* (6th edn, London, 1949), 281.

43 W.S. Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law', 33 *Harvard Law Review*, 997 (1920).

classified as choses in action or incorporeal hereditaments matters not, for both are categories of property. There is perhaps a difference in the level of abstraction which each category represents. The incorporeal hereditaments which Blackstone lists (easements and profits *à prendre* are two examples) have a strong territorial ambit.⁴⁴ They, for the most part, in one way or another relate to bounded real property. The chose in action is better suited to lose the traces of territoriality and tangibility that exist in relation to other property forms – what Pollock termed the ‘thinglikeness’ of English property. These new forms of personal property were in one sense less personal, for they did not bind communities together in the same strong way that was true of customary and feudal forms of property. Rather these new forms make possible anonymous, impersonal connections between owners and strangers, connections which in the 20th century broke free of the usual territoriality of property relations and became genuinely global.

The magnitude of the psychological and conceptual shift which took place through the rise in importance of the chose in action should not be underestimated. Maitland and Pollock both argue that much of English real property law can best be understood by a mediaeval incapacity to separate the transfer of rights from the transfer of things.⁴⁵ There was, even in the case of incorporeal hereditaments like rights of way and offices, a tendency to ascribe to them a ‘thinglike’ character and to analogise their property nature to land. Maitland, for example, suggests that practices like attornment, which surrounded the transfer of incorporeal hereditaments, reveal that these hereditaments were considered really to be things rather than rights.⁴⁶

Through linking the Roman law category of the incorporeal thing with the category of chose in action, English law produced a highly flexible concept of personal property. It was flexible precisely because its extension was not limited by some set of precisely specified attributes. Its indefiniteness was a source of functional strength for the property

44 Sir William Blackstone, *Commentaries on the Laws of England* (1765; 1783 edn, reprinted by Garland Publishing, New York, London, 1978), Book 2, chapter 3.

45 F. Pollock and F.W. Maitland, *The History of English Law* (2nd edn, Cambridge at the University Press, 1898, reissued 1968), 124–125.

46 F.W. Maitland, ‘The Mystery of Seisin’, in *Select Essays in Anglo-American History* (edited by a committee of the Association of American Law Schools, Cambridge at the University Press, 1909), 591–610.

system. The result was that it was capable of being extended into many different areas of market and social relationships.⁴⁷ It was a concept that had no real equivalent within the Continental civil law system.⁴⁸

There is one final observation to make. On one view our short story of the career of incorporeal things seems to support the idea that property law in its long evolution has been progressively dematerialised, made more abstract or, in Pollock's terms, has lost its 'thinglikeness'. This conclusion would be easy enough to draw, but should we draw it? What happens in our story is that a Roman law category is used by English juristic hands to fashion a practical solution to a practical problem. A person with ideas has in a broad sense assets. In order that the person may make a living in a market society those intangible assets have somehow to be recognised as property rights so that they can be commercially exploited. Some of the crucial conceptual apparatus to this end was provided by Roman law. The English common law, renowned for its pragmatism, ventured deep into metaphysical territory and added the abstract objects of intellectual property to the list of incorporeal things. By doing so it extended its reach over material objects. Artists, authors and inventors have to turn their intangible assets into material ones in order to survive economically in the world. Once the law recognised property in abstract objects, the significance of the materiality which governed property relations in the physical world grew stronger and not weaker. It grew stronger because through abstract objects many more material objects, both in number and in kind, could be reached by individual property owners. The abstract object became a way of gaining control over the material object. One patent could relate to an indefinite number of physical

47 Austin argues that indefiniteness is the essence of property. He writes, though, as if it were true of property in all jurisdictions. See J. Austin, *Lectures on Jurisprudence* (5th edn, London, 1885), Lecture 48.

48 For an excellent discussion of the differences in approach to property between common law and civil law systems, see 'Introduction' by O. Kahn-Freund (ed.) in K. Renner, *The Institutions of Private Law* (A. Schwarzschild trs., London, 1949).

objects. The corporeality of intellectual property is, legally speaking, never very far away and manifests itself in various requirements which impose a condition of materiality on the abstract object.⁴⁹

Justifying Intellectual Property

Abstract objects are the ‘things’ that mediate property relations between individuals in the case of intellectual property. What is the justification for creating property rights in what, after all, is the perfect example of a resource which cannot be exhausted through use? In the case of tangibles a person can deprive another by taking the thing. But the nature of abstract objects permits of their simultaneous use and so deprivation of the object through use cannot take place.

English law had first to confront this question of justification in the context of patents and copyright. In each of these contexts the answer was worked out within a heavily Christianised legal tradition and a discourse that was influenced by natural law theories of property. Within this tradition the justification issue was argued differently for patents and copyright. In order to illustrate these claims we shall restrict ourselves to a discussion of *Millar v. Taylor* and the *Act of Anne* in the case of copyright and, in relation to patents, the *Statute of Monopolies* and the *Case of Monopolies*.⁵⁰ This is admittedly a small number but then some cases and statutes reveal much about the broader legal universe of the times. The two cases, amongst the most famous in English law, are rich in philosophical argument. They show clearly the jurisprudential frame of reference that was used to work through the justification issue.

49 For example, patent applications need to be accompanied by specifications that describe and define the invention. Invention itself is often defined in terms that resonate of the material. The *Statute of Monopolies* refers to ‘any manner of new manufactures’ and this language is carried over into the Australian *Patents Act 1990* by s.18(1)(a) which defines an invention as ‘a manner of manufacture within the meaning of section 6 of the *Statute of Monopolies*’. Copyright statutes generally also impose a requirement of material form in relation to works.

50 *Millar v. Taylor* (1769) 4 Burr. 2303, 98 E.R. 201; *Act of Anne* 8 Anne, c. 19 (1709); *The Case of Monopolies* (1602) 11 Co. Rep. 84b, 77 E.R. 1260; *Statute of Monopolies* 21 Jac 1 c. 3 (1623).

Copyright

We will begin with copyright. There are a number of excellent sources for the history of English copyright and so here we shall only make the briefest observations about this history before going on to the material we have selected for analysis.⁵¹

The printing and production of books in England in the 15th century was carried on by a craft guild known formally as the Stationers. Like all craft guilds it had a serious interest in monopoly profits and a commensurate fear of competition. The combination of these eventually led members of the guild to obtain in 1557 a royal charter of incorporation.⁵² Queen Mary was happy to accommodate the Stationers. Giving the control of printing to the Stationers' Company provided another means by which the spread of seditious and heretical information could be controlled (although it should be said that the Crown did not make much early use of the Stationers, preferring to rely on rougher methods such as torture and killing).⁵³

The use of privilege to control the book trade in 16th-century England occurred because of a complementarity between two sets of self-interest. The Crown saw that the control of printing was vital to its political well-being and the Stationers regarded the privilege system as a way of maintaining their London-based monopoly and extending their influence regionally and across the border to Scotland. At this stage of copyright's history the author had only a cameo role. The central players were the Crown and the printing trade and neither was particularly interested in the rights of the author, or the value

51 An excellent source of primary materials is E. Arber (ed.), *A Transcript of the Registers of the Company of Stationers of London 1554–1640 A.D.* (London, 1875–94, privately printed, 5 volumes). Examples of specialist texts include C. Blagden, *The Stationers' Company: A History, 1403–1959* (Cambridge, 1960); L.R. Patterson, *Copyright in Historical Perspective* (Nashville, 1968); G. Putnam, *Books and Their Makers During the Middle Ages 1476–1600* (New York, 1962); H. Ransom, *The First Copyright Statute* (Austin, 1956).

52 Reproduced in E. Arber (ed.), *A Transcript of the Registers of the Company of Stationers of London 1554–1640 A.D.* (London, 1875–94, privately printed, 5 volumes), vol. 1, xxviii. The Charter begins as follows:

The King and Queen ... Know ye that we, considering and manifestly perceiving that certain seditious and heretical books rhymes and treatises are daily published and printed by divers scandalous malicious schismatical and heretical persons, not only moving our subjects and lieges to sedition and disobedience against us, our crown and dignity, but also to renew and move very great and detestable heresies against the faith and sound catholic doctrine of Holy Mother Church.

53 *Ibid.*, xxvii.

of a right of copy to the economy or to culture. Unless an author was lucky enough to secure a personal privilege, his position was weak, so much so that, if he allowed a manuscript to be publicly circulated, there was nothing to prevent a member of the Stationers' Company from registering the copyright and exploiting it. The right to print books belonged to those members of the Stationers' Company who registered the particular work and not to the author.

This system of privileges eventually became a ruin, in part because privileges were unevenly distributed throughout the industry, producing a conflict between those in the industry who had a large and profitable share of it and those who survived on its edges. The *Act of Anne* in 1709 replaced the privilege system. It was a revolutionary statute because it heralded the arrival of a public interest dimension to copyright. Its preamble linked copyright to the 'Encouragement of Learning'. By limiting the term of copyright protection the Act recognised the existence of the public domain.⁵⁴ The Act gave authors the 'sole Liberty of printing' in relation to books not printed and published. The whole flavour of the Act was instrumental and practical. Copyright's role was to encourage writers to produce, thereby serving the larger purpose of encouraging and adding to learning. The monopoly control of the Stationers over existing books was removed by limiting protection for such books to 21 years. Price control provisions for books were introduced and the interests of universities explicitly protected.

The arrival of the *Act of Anne* was not the cause of great rejoicing amongst the Stationers and, in the decades that followed, the statute was tested in the English courts. These 18th-century cases have a sharp contemporary relevance for, in deciding whether authors had rights that survived the *Act of Anne*, the courts had to confront the basis of copyright protection. Consequently, they were forced to travel into philosophical territory. The Stationers' litigation was part of a wider social debate over property rights in books or 'literary property'. This debate was one of the longest running and most keenly contested

54 L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright* (Athens, London, 1991), 29–31.

in late 17th- and 18th-century British life.⁵⁵ Drawn to it were not only those with economic interests in the book trade but those within intellectual circles generally. There was a lot at stake. For some the real issue lay in the control of the dissemination of ideas.⁵⁶

The debate in the courts took the form of a basic question over the existence of common law copyright after the author had published his or her work. The Stationers, reluctant to let their monopoly slip, argued that, independently of any statute, the common law gave authors a perpetual copyright (a copyright they could acquire from authors) and that this remained unaffected by either publication or the *Act of Anne*. Ultimately they lost this argument but, as they pursued it in the courts, English judges were given the opportunity to comment on the nature of the rights of authors in their works. Finally, in the case of *Donaldson v. Beckett*, a slim majority (six to five) decided that the *Act of Anne* had abolished the common law right.⁵⁷ Although this was not the last case in which an opinion was expressed on the matter, it fixed the line of thinking that saw copyright come to be considered as a creature of statute.

We turn now to an examination of the first case we mentioned at the beginning of this section. It precedes *Donaldson v. Beckett* and in many ways captures the essence of the debates over literary property. The 1769 case of *Millar v. Taylor* raised two questions. Did authors have at common law a right of copy? If so, had this common law right been taken away by the *Act of Anne*? The plaintiff Millar in this case was the registered proprietor of the poem 'The Seasons'. Taylor, without Millar's permission, had copies made of the poem so that he could sell them. The period of protection granted by the *Act of Anne* had expired. Millar's only hope of succeeding was to establish

55 The titles relating to the debate have been reproduced in 42 volumes in S. Parkes (ed.), *The English Book Trade 1660–1853* (New York, London, 1974). Of particular interest are the following titles: 'English Publishing, the Struggle for Copyright and the Freedom of the Press: Thirteen Tracts, 1666–1774'; 'The Literary Property Debate: Seven Tracts 1747–1773'; 'The Literary Property Debate: Six Tracts 1764–1774'; 'The Literary Property Debate: Eight Tracts, 1774–1775'.

56 For a judicial view to this effect, see the dissenting judgement of Yates J in *Millar v. Taylor* 98 E.R. at 229–250.

57 (1774) 4 Burr. 2408, 98 E.R. 257. For the view that the House of Lords in this case did not hold that authors had a common law copyright in the first place, see L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright* (Athens, London, 1991), 36–46.

the existence of a common law copyright which remained unaffected by the statute. He succeeded in doing so. Three out of four judges decided the case in Millar's favour.

There are a number of different lines of justificatory argument offered by those judges who found in favour of a common law copyright. Mansfield CJ, after arguing that the source of this author's right is the same whether before or after publication, claims that the basis of the right lies in justice: 'it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent.'⁵⁸ While other judges also appeal to justice they provide additional arguments. Willes J advances an instrumental argument. He links property to incentive. After conceding that it is 'not agreeable to natural justice' that others should reap the benefits of what they did not sow, he states the following argument: 'It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works.'⁵⁹ A third line of justification is presented by Aston J. He bases the existence of the right upon the fact that the author owns the produce of his mental labours.⁶⁰ This leaves open the question of why labour should have this property-conferring quality. Although Aston is not clear on this, he does later refer to the law of nature to support his claim that the invasion of this property right is against natural reason.⁶¹ Aston's analysis seems to have an obvious Lockean lineage and he does in fact refer to Locke's discussion of property in Book II of the *Two Treatises of Government*, but only to say that Locke's discussion of property has no relevance to literary property.⁶² Despite this, Aston's argument that the mental labours of the author create a property right bears, as we shall see in the next chapter, a remarkable similarity to Locke's analysis of the origins of property.

58 98 E.R., at 252.

59 Id., at 218.

60 Id., at 221.

61 Id., at 222.

62 Id., at 220–221. Aston J thinks this because Locke's theory applies to 'the necessities of life'. Further, theories like Locke's depend on some act of occupancy, a physical act of attachment. Aston seems to be suggesting that occupancy is not relevant to acquiring property in literary works.

There are in short three lines of justification to be found in *Millar v. Taylor* which we can label as the justice justification, the incentive justification and the natural rights justification. They are clearly independent. Somebody might deny that property rights are an incentive to be creative and yet argue that justice requires the creation of property rights to reward creators. The incentive justification is instrumentalist in nature. Property rights are levers for obtaining socially beneficial activities. The natural rights justification depends for its plausibility on the existence of a law of nature and the existence of reason in humans to enable its identification. Although these justifications are worked out by the judges in the context of copyright they can equally apply to other areas of intellectual property. In later chapters each of these justifications will be subject to a more detailed evaluation. For the moment, we shall continue with the analysis of *Millar v. Taylor*, since it reveals much about the connections between copyright and natural law thinking about property.

One of the interesting features of *Millar v. Taylor* is the different way in which each judge makes use of natural law property theory. All the judges have to confront this intellectual tradition, partly because it is clear from the case that counsel in their arguments drew heavily upon it, and partly because it is the dominant tradition of their times. One of the lessons for the modern observer of this case, interested in the question of property and its justification, is that the outcome of the analysis is less dependent on the choice of ethical theory and more dependent on the characterisation or description of community in relation to which the particular justificatory theory stands. This point emerges when the judgements are studied more closely.

Aston J and Yates J (the only judge to dissent) make use of the theories of Grotius, Pufendorf and Locke.⁶³ Yates explicitly links the development of the English law of personal property to natural law.⁶⁴ And yet, working within the same natural law framework, Yates and Aston derive opposite conclusions. Aston concludes that authors have property in abstract objects while Yates argues that, upon publication, this property right vanishes. There are a number of differences between them in the way they use the intellectual corpus of natural law, but the crucial difference is in the way each uses the concept of community. Aston argues that literary property belongs to an author from the moment that the author brings that work into being. He contrasts this with tangible property which he says commences in common ownership and comes to be individually owned through some act of occupancy. The following passage shows the contrast he makes between the two kinds of property:⁶⁵

And there is a material difference in favour of this sort of property, from that gained by occupancy; which before was common, and not yours; but was to be rendered so by some act of your own. For, this is originally the author's: and therefore, unless clearly rendered common by his own act and full consent, it ought still to remain his.

Aston, in this passage, is drawing upon the discussion of an issue of enormous importance for natural law theorists like Grotius, Pufendorf and Locke. These theorists were, in part, trying to provide an explanation for the evolution of private property. Did God grant the earth and its contents to the original community in common, by way of joint ownership? Alternatively, did this grant simply make the earth available for use, the questions of ownership to be determined

63 Aston J at 98 E.R., 220 refers explicitly to Locke's discussion of property in *The Second Treatise of Government* (1690). He also refers to Grotius' discussion of the origins of property in *De Jure Belli Ac Pacis Libri Tres* (1625) and Pufendorf's *De Jure Naturae et Gentium Libri Octo* (1672). See 98 E.R. at 220–221. Yates makes explicit use of Pufendorf at 98 E.R., 231 and 233. Willes J refers to the metaphysical arguments which he says have exercised the 'ingenuity of the bar' and alludes to 'supposed modes of acquiring the property of acorns'. See 98 E.R. at 218. This is perhaps a reference to Locke's discussion of property which does mention acorns. (See, J. Locke, *Two Treatises of Government* (P. Laslett (ed.), Cambridge, 1988), Book II, chapter 5, section 28.) In any case Willes chooses to sidestep an explicit discussion of the natural law tradition by claiming that this discussion related only to physical objects. Mansfield J draws on natural principles and moral justice to justify his conclusion. He makes no explicit reference to Grotius, Pufendorf or Locke.

64 98 E.R., 229.

65 *Id.*, at 221.

by men at some later stage? The former conception of community – positive community – would make the acquisition of property by an individual heavily dependent upon the consent of others, since the individual is trying to acquire something that belongs to all. The latter conception of original community – negative community – provides greater scope for individuals to acquire property through their labour, because the individual is trying to acquire something which, although open to all to acquire, does not belong to any one individual.⁶⁶ The consent of others does not have the same strong role that it has in positive community.

Aston J approvingly cites Pufendorf, a defender of negative community, and argues that the author's mental labours provide the foundation for the right to property in literary works.⁶⁷ The fact that abstract objects can become property does not pose problems for Aston for, drawing on Pufendorf, he argues that the objects of property are settled over time. Natural law principles do not, in other words, inhibit the capacity of a society to adapt its positive rules of property to suit its new circumstances. Discovery, invention and art have added to the range of possible objects of property.

Like Aston J, Yates J draws on the general principles of property to be found in natural law theory, but he concludes the opposite to Aston; authors do not have a common law copyright beyond the *Act of Anne*. Occupancy cannot be the basis of this right, for abstract objects

66 Grotius is somewhat ambiguous on the question of the nature of the original community. In *Mare Liberum* he begins by saying that there are some things 'which every man enjoys in common' without specifying the nature of this common ownership. Later he suggests that in the beginning 'common' simply meant a complete absence of ownership rather than an ownership by all. See H. Grotius, *Mare Liberum* (1608; R. Van Deman Magoffin trs., New York, 1916) at 2, and 22–25. See also H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625; F.W. Kelsey trs., New York, London, 1964), Book II, chapter 2 for a discussion of the origin and development of private property. There Grotius cites Justin saying that all things were the common and undivided possession of all men. Grotius then follows this with the claim that 'each man could at once take whatever he wished for his own needs'. This is consistent with negative community. On the use of negative and positive community by natural law writers, see the commentary by K. Haakonssen on Thomas Reid, *Practical Ethics* (K. Haakonssen ed., Princeton, New Jersey, 1990), 323–326. For an excellent discussion of natural law theories of property, see S. Buckle, *Natural Law and the Theory of Property* (Oxford, 1991).

67 For Pufendorf's claim that the original community is negative, see S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1672; translation of 1688 ed. by C.H. and W.A. Oldfather, New York, London, 1964), IV. 4. 3.

cannot be occupied.⁶⁸ The fact that abstract objects are valuable does not turn them into the property of individuals for 'mere value does not constitute property'.⁶⁹ Yates' rejection of common law copyright is partly based on the nature of abstract objects. They are, as he makes clear in the following passage, incapable of being possessed:

But the property here claimed is all ideal: a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone.⁷⁰

The deeper part of Yates' argument lies in his clear assumption that ideas are open to all. The nature of ideas are such that, once they are published, they are incapable of sole use and enjoyment. The act of publication is necessarily 'a gift to the public', an entry of those ideas into the commons.⁷¹ It does not follow from this that authors are not entitled to a reward for their efforts. Invoking the principle that every man is entitled to the fruits of his own labour, Yates agrees that authors are entitled to a reward, but this reward has to be subject 'to the general rights of mankind, and the general rules of property'.⁷²

Yates makes a subtle and interesting use of natural law principles. It is because the law of personal property is based upon natural law foundations that there cannot exist a common law right of literary property. Property, he says, is founded upon occupancy and abstract objects cannot be occupied.⁷³ As Yates makes clear at the end of his judgement, the claim that such a right exists is completely inconsistent with the general principles of property. Justice does require that the author be given some reward. The legislature, by having enacted

68 Blackstone points out that occupancy was 'taking possession of those things which before belonged to nobody': Sir William Blackstone, *Commentaries on the Laws of England* (1765; 1783 edn, reprinted by Garland Publishing, New York, London, 1978), Book 2, Chapter 16, 258.

69 98 E.R., at 230.

70 Id., at 233.

71 Ibid.

72 Ibid.

73 Id., at 230. Occupancy was crucial to the explanation of both Grotius and Pufendorf for the emergence of private property. The following passage from Grotius illustrates the point: 'When property or ownership was invented, the law of property was established to imitate nature. For as that use began in connection with bodily needs, from which as we have said property first arose, so by similar connection it was decided that things were the property of individuals. This is called "occupation", a word most appropriate to those things which in former times had been held in common.' See H. Grotius, *Mare Liberum* (1608; R. Van Deman Magoffin (trs., New York, 1916)), 25.

the *Act of Anne*, which grants the author a limited monopoly, fulfills the requirements of justice. The grant of the monopoly is justifiable because it is consistent with justice and it encourages learning and science. But the exercise of this monopoly is subject to the overriding requirement that it be consistent with the natural rights of others. Others have a right to make use of ideas and others have a right to trade in the subject matter of the monopoly privilege. The view of community which is implicit in Yates' judgement is not the strong conception of negative community that is present in Aston's analysis. Abstract objects remain a resource for all to use. They become part of a commons to which all have natural rights of access and use.

Millar v. Taylor turns out to be a revealing case on at least two levels. At one level the three different justifications which are to be found in the case for the existence of common law copyright have a modern relevance. Willes' incentive argument is a precursor of modern economic arguments which assume that the motivation towards creativity will be strengthened through the use of property rights in abstract objects and weakened by their absence.⁷⁴ Aston's natural rights justification is along similar lines to those offered by some modern libertarians for private property rights.⁷⁵ At another level, the case reveals that the course which a first order justificatory analysis of property is likely to run is deeply dependent upon the metaphysical scheme in which the analysis is housed and in particular upon the characterisation and assumptions made about community. This dependence is so great that, within the same first order ethical theory such as natural law, different views of community lead to different conclusions about the justifiability of particular property arrangements.

One of the puzzles with the early cases on common law copyright is the apparently conflicting signals which they send. Holdsworth has pointed out that most English judges found in favour of a common law copyright and yet in English law an economic, pragmatic concept of copyright law ultimately triumphed.⁷⁶ Why this happened is worth exploring. After all, Locke's natural rights-based account of property

74 On the importance of property rights generally, see D.C. North and R.P. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge, 1973).

75 R. Nozick, *Anarchy, State, and Utopia* (Oxford, 1974).

76 See W.S. Holdsworth, *A History of English Law* (2nd edn, 1937, London), vol. 6, 379. The same might be said of the United States where the US Supreme Court in *Wheaton v. Peters* 33 U.S. (8 Peters) 591 (1834) extinguished common law copyright.

rights was widely accepted in 18th-century England.⁷⁷ Most English judges took as their point of departure the strong connection between individual labour and the existence of a private property right, a connection which had been discussed by theorists of the natural law tradition. Very few judges took the view proposed by Pollock in *Jefferys v. Boosey* that copyright is 'altogether an artificial right'.⁷⁸

Perhaps the economic concept of copyright law arrived in English law because of natural law principles rather than despite them. The right of every person to pursue a trade had long been a part of the common law and, more than most rights, enjoyed a fundamental status.⁷⁹ Judges who had to decide the issue of common law copyright could not but help contemplate the economic consequences of a perpetual monopoly in literary property. Rather than separating the interests of publishers and authors, they chose to limit the potentially absolute common law rights of authors by upholding the operation of the *Act of Anne*.⁸⁰ The triumph of the economic view of copyright turns out also to be an example of the way natural law property principles were adapted to fashion practical solutions to meet changing economic and technological circumstances. In adopting an economic concept of copyright, English law was not really rejecting a natural rights justification for copyright. Rather, it took the principles of natural law and gave them a practical interpretation which saw authors gain some reward for their labours and others be allowed to pursue their natural right to freedom of trade. It was an interpretation that ultimately suited the expanding industrial economy of the second half of 18th-century England.

77 On Locke's influence, see P. Larkin, *Property in the Eighteenth Century* (Dublin, Cork, 1930).

78 4 H.L.C. 815, 10 E.R. 681 at 729.

79 The right to freedom of trade is described by Yates J in *Millar v. Taylor* as a natural right. See 98 E.R. at 250. The *Case of Monopolies* discussed later in this chapter is also authority for this proposition. Examples of other cases which assert the fundamental nature of this principle are *The Case of the Tailors, &c. of Ipswich* (1614) 11 Co. Rep. 53a, 77 E.R. 1218 and *Norris v. Staps* (1616) 11 Co. Rep. 53a, 80 E.R. 357.

80 On the need to separate these interests, see L.R. Patterson, *Copyright in Historical Perspective* (Nashville, 1968).

Patents

Significantly, there was never a serious argument that inventors should enjoy the same perpetual right as authors. The rights of inventors, it was settled, depended on Crown privilege or an Act of Parliament.⁸¹ The reason for this probably was that inventions were thought to be too important in terms of their social utility to tie up in the hands of their inventors. Those judges who argued in favour of common law literary property were left with the task of trying to distinguish property in inventions from property in books.⁸² This is a difficult analytical job, for invention and authorship both involve the labours of the mind. Why should one form of labour ground a natural right of property, while the other grounds nothing at all unless the state decides to award a privilege in the form of a patent? The philosophical answer which English law adopted is that authors create something while inventors merely uncover what is already there.⁸³ This is not particularly convincing. The idea that inventors create nothing confuses the pre-existence of the laws of nature with their novel application. The latter does demand creative labour. Despite the creative element in invention, it remains true that English law was highly instrumentalist in its treatment of patents. Patent rights for centuries never escaped the language of privilege. There was more judicial disagreement over whether this was also true of copyright, but eventually copyrights, like patents, were thought to be privileges rather than natural rights.

Patent law, like copyright law, has its beginnings in the prerogative-based privilege system of mediaeval England. The sovereign could, on the basis of its prerogative power of grant, make grants of all kinds including grants of interests in land, offices of various kinds and franchises. The range of this power of grant was extensive, but in relation to the grant of monopolies it had to be exercised with care. The problem was that it was not. For successive English sovereigns, the grant of monopoly powers became a convenient source of revenue.

81 *Jefferys v. Boosey* (1854) 4 H.L.C. 815, 10 E.R. 681 at 745.

82 For some attempts, see *Millar v. Taylor* 98 E.R. at 216 and 226.

83 'If Milton had not written *Paradise Lost* it would never have been written: if Watt had not discovered the use of high-pressure steam, someone else would have done so.' See Halsbury, *The Laws of England* (London, 1912), vol. 22, p. 127, para. 267.

Holdsworth neatly captures the money-making attitude with which sovereigns tended to treat what in theory was a limited power to grant monopolies.

James I was always hard up; and for a consideration he was prepared to grant many privileges both of the governmental and of the industrial varieties ... Of the second of these varieties of grants the following are a few examples: grant of an exclusive right to export calfskins; grant of an exclusive right to import cod and ling; grant of an exclusive right to make farthing tokens of copper.⁸⁴

The reason that the power to grant monopolies had to be exercised with great care by the sovereign was that, as the *Case of Monopolies* was to make plain, the power was a very circumscribed one. It was clear that the royal prerogative was subject to Magna Carta and the common law, both of which were aimed, in terms of ideals, at the protection of the negative liberties of subjects.⁸⁵ Prerogative-based monopolies were a particularly strong form of interference in negative liberties because they prevented individual subjects from pursuing certain kinds of trades altogether. Conventional property rights did not hold the same danger for negative liberty because they operated to protect the property holdings that an individual might amass during the course of pursuing a trade or business. They did not prevent others from following a trade or business.

The response of the common law courts to the grant of monopolies was to give the principle of freedom of trade a primary status, even where the consequence of doing so was to interfere in the freedom of contract.⁸⁶ The courts, however, had to wait for an opportunity to declare the law on monopolies for they had no jurisdiction to assess the validity of an exercise of the royal prerogative.⁸⁷ They were given the jurisdiction to deal with monopolies by proclamation from the Queen in 1601, and in 1602 one of the most famous cases in English law, the *Case of Monopolies*, was heard by the Queen's Bench.⁸⁸

84 W.S. Holdsworth, 'The Commons Debates 1621', 52 *Law Quarterly Review*, 481, 487 (1936).

85 An early case declaring the common law freedom of trade is *Davenant v. Hurdis* (1599) referred to in *The Case of Monopolies* 77 E.R. at 1263.

86 See *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company* [1894] A.C. 535, per Lord Watson at 552; see also *Trego v. Hunt* [1896] A.C. 7, per Lord Macnaghten at 24.

87 See K. Boehm, *The British Patent System, I: Administration* (Cambridge at the University Press, 1967), 15.

88 (1602) 11 Co. Rep. 84b, 77 E.R. 1260. Also reported as *Darcy v. Allen* (1602) Noy 173, 74 E.R., 1131; *Darcy v. Allen* (1602) Moore K.B. 671, 72 E.R. 830.

The story of this case has been told often enough.⁸⁹ Our interest is in the arguments used in the case to support the conclusion that, with some exceptions, monopolies were contrary to the common law.

The case involved the acquisition by Darcy of a patent that created exclusive rights to provide playing cards in England, which meant amongst other things the exclusive right to sell and import playing cards. Darcy sued Allen arguing that Allen had sold cards and therefore defrauded Darcy of the benefit of the patent. There were several successful arguments that were put forward by Allen's counsel concerning the general issue of whether Darcy's monopoly was good.⁹⁰ One line of argument related to employment. Monopolies which prevented others from working were against the interests of the commonwealth. Under the common law every subject had the right to lawful trade.⁹¹ Another line of argument was straightforwardly economic. Monopolies ultimately were for private gain and this meant they had certain undesirable qualities. Amongst other things they raised prices. They also tended to impoverish those who prior to grant of the monopoly were able to pursue the trade but, once a monopoly in it was granted to someone else, could no longer do so. Both the common law and the 'equity of the law of God' condemned this feature of monopolies.⁹²

One clear and major theme in the case is that monopolies are a profound interference in the liberty of subjects to trade and so for that reason are void at common law. The prerogative power to create privileges could not be exercised so as to injure subjects of the realm. Allen's counsel argued that there was one exception to this in the form of monopoly patents. In those cases where useful trades and inventions had been brought into the commonwealth by a person, 'the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not'.⁹³ Here is a clear indication of what is generally acknowledged to be the purpose of the patent system in England at this time – to encourage the transfer of valuable trades and technologies to England. The Crown would,

89 See W.S. Holdsworth, *A History of English Law* (2nd edn, 1937, London), vol. 4, 349–353.

90 The submission of the Defendant's Counsel is reported in Noy, 173, 74 E.R. 1131.

91 See 77 E.R. at 1263.

92 *Id.*

93 74 E.R. at 1139.

if it were exercising its prerogative properly, grant monopolies only to those persons who had invented something or had brought an invention or trade from abroad.⁹⁴ It was therefore not just discovery that was being rewarded at this stage, but also entrepreneurship in importing foreign discoveries. The crucial objective of the patent system was in effect to promote the growth of human capital. Once the relevant knowledge had been diffused throughout the society the Crown could not renew the monopoly, for that would be to undermine trade.⁹⁵

Apart from this instrumentalist line of justification for the patent system there was another important line of argument based on religious morality which provided reasons for limiting the role of monopolies. Allen's counsel sought in the case to demonstrate that the monopoly in question was against the law of God. His argument was that it was an ordinance of God that men labour so that they and their families could survive. The labour of men gave rise to various trade skills and this was part of God's design. Anything which prohibited a man from pursuing his chosen trade was not only an interference in his liberty but also a breach of the laws of God. Although this argument is shortly put, it probably had considerable persuasive effect on its judicial audience, for it drew on a Church teaching which had condemned monopolies in the strongest possible terms. There were several reasons why the Church had labelled many monopolies a sin.⁹⁶ The ability of the monopolist to dictate price contravened just price theory.⁹⁷ Monopolies were seen to have a speculative economic character and so became part of the general moral criticism directed against usury. Many monopolies related to food. The monopolist's capacity to create scarcity in basic necessities could not be, it was thought, in the public welfare.

94 For a clear statement of this, see *The Clothworkers of Ipswich Case* (1615) Godbolt, 252, 78 E.R. 147. For some of the training conditions that were imposed on early patents, see E.W. Hulme, 'The History of the Patent System under the Prerogative and at Common Law', 12 *Law Quarterly Review*, 141–154 (1896).

95 *The Clothworkers of Ipswich Case* (1615) Godbolt, 252, 78 E.R. 147.

96 A classical but general description of the impact of religious thought and ethics on commerce is R.H. Tawney, *Religion and the Rise of Capitalism* (West Drayton, Middlesex, 1938 edn). See also D.J. Gerber, 'Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct', 38 *Saint Louis University Law Journal*, 673, 720–725 (1994).

97 For an account, see R. De Roover, 'Monopoly Theory Prior to Adam Smith: A Revision', 65 *Quarterly Journal of Economics*, 492, 500 (1951).

The argument that monopolies are against the law of God makes labour of central importance. The labour of others within a Christian community becomes a reason for not unnecessarily creating or extending the role of patents. It is precisely because patents interfere in the labour of others that they are a privilege. Their creation has to be consistent with the rights of others to labour, for, as Allen's counsel argues, the capacity of men to labour is part of God's design. Patents have the potential to interfere in this design and so whoever has the power to create them must act responsibly. The king's prerogative (used to create patents) is 'no warrant to injure any subject'.⁹⁸

The instrumentalist attitude which dominated the approach of the common law courts to monopolies made its way into the *Statute of Monopolies* (1623). Section 1 of the Statute made clear that monopoly privileges had not performed their intended function of promoting the 'publique good' and so declared all monopolies to be contrary to the laws of the realm and so therefore void. There was one exception. The declaration in section 1 did not extend to the grant of a patent to an inventor of a manner of new manufacture.⁹⁹ The grant was conditional upon it not being contrary to law or 'mischievous to the state' in some way. The Statute made clear that patents belong to inventors by virtue of a privilege and not a natural right of some kind. The opening section stated that monopolies are contrary to the 'auncient and fundamental lawes' of the realm. By implication, if they are to be tolerated it is only if they contribute to the public good. The Statute was in many respects a straight piece of economic policy.¹⁰⁰

The reluctance of the legislature to encase patents in the language of natural rights is perfectly understandable in the light of the Crown's abuse of the privilege system. Even in those countries such as America and France where the concept of natural rights was exercising a revolutionary political influence, the degree of that influence on patent rights seems to have been qualified, if the early patent law in those jurisdictions is some kind of guide. Classical natural rights, such as the right to liberty, were not thought to carry expiry dates.

98 74 E.R. at 1139.

99 Section 6.

100 W.R. Cornish, *Intellectual Property* (2nd edn, London, 1989), 67.

However, from the beginning, patent rights were seen in these two countries as rights which could be readily shaped, limited and finally extinguished by positive law.¹⁰¹

Conclusion

We are now in a better position to appreciate why the justification for patents was so highly instrumental within English law and why copyright, after some argument, went the same way. It was uncontroversial within the society of the time that individuals had to exist by their labour. This was part of God's design. Inventors and authors, like others, laboured and were entitled to a reward, but the reward which they could be given consistently with God's design was no more than a temporary privilege. Anything more would be too great an interference with the labour of others and therefore against the law of God and the fundamental laws of the realm. At best an inventor or an author could expect some kind of temporary advantage over others. The character of this advantage was a privilege. It could never amount to anything more because that would constitute too great a threat to the negative liberties of others, particularly in the area of commerce and trade. The right of free trade was a fundamental common law right. It meant, in theory at least, that people had a right of entry into the labour force. Temporary privileges in abstract objects had, it was thought, the long-term effect of increasing the industry of others. Such privileges were consistent with fundamental law and God's design. Natural property rights in abstract objects never could be. Natural property rights in the physical objects which one's labour had produced were consistent with the divine plan.

The interesting feature of the instrumentalist justification for copyright and patents is that it is worked out in the context of a natural law tradition, a tradition which at first sight might be thought not to be sympathetic to such a treatment of the mental products of one's labour. That such a justification emerged shows that, when it comes to justifying intellectual property, the crucial choices are between not

101 For a discussion of early US patent legislation see B.W. Bugbee, *Genesis of American Patent and Copyright Law* (Washington, D.C., 1967). In France the decrees of the Assemblée Nationale in 1791 concerning patents, while using the language of natural rights, required that the inventor's idea be useful and also limited the right to a specified period of time. See Bugbee at 153.

first order ethical theories (natural law versus utilitarianism) but rather the concept of community and the metaphysical scheme upon which that concept of community is dependent. As it happens, the modern emphasis on the question of justification is at the level of first order ethical theory. This does not mean that concepts of community are irrelevant to the question of justification. Rather, it suggests that they are the silent drivers of the debate.

This text is taken from *A Philosophy of Intellectual Property*,
by Peter Drahos, published 2016 by ANU eText,
The Australian National University, Canberra, Australia.