

## Book Review: *Concepts of Property in Intellectual Property Law*

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*Concepts of Property in Intellectual Property Law*

Helena R Howe and Jonathan Griffiths (eds)

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Although it might appear as a lost cause today, intellectual property scholars continue investing a considerable amount of skill, labour and judgment in drawing the distinction between property and intellectual property law.<sup>1</sup> To a certain extent, we could say that wrestling with the distinction is one of the defining and foundational features of the law. As a curse or as a gift, the rubric of property has always simultaneously constituted an uneasy and slippery riddle.<sup>2</sup> Situated uncomfortably in the making of the discipline,<sup>3</sup> it is not a surprise that even after legislative declarations, both international

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<sup>1</sup> See Mark A Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 *Texas Law Review* 1031; Oren Bracha, 'Standing Copyright on Its Head? The Googlization of Everything and the Many Faces of Property' (2007) 85 *Texas Law Review* 1799.

<sup>2</sup> Augustine Birrell was not the first and certainly not the last to discuss this complex relationship. Interestingly, he problematised it in the following manner: 'The essence of Property is unwillingness to share it, but the literary art lives by *communication*; its essence is the telling of tale with the object of creating and impression and of causing repetition' in Augustine Birrell, *Seven Lectures on the Law and History of Copyright in Books* (Cassell and Company 1899) 17. See also Neil W Netanel and David Nimmer, 'Is Copyright Property? The Debate in Jewish Law' (2011) 12 *Theoretical Inquiries in Law* 241.

<sup>3</sup> Lionel Bently and Brad Sherman, *The Making of Intellectual Property: The British Experience* (Cambridge University Press 1999) 58-59.

and domestic;<sup>4</sup> the reference to property is still contested, or at least, discussed.<sup>5</sup> Some could say that the roots of the friction can be traced back to a historical strategic move to provide immunity against criticism.<sup>6</sup> In this way, the compulsive property ‘metaphor’ was—and still is—invaluable, precisely because of its appeal to the imagination and the concomitant expectations promised therein. While the category of property has ‘little or no explanatory value’,<sup>7</sup> its spell produces real effects when constituting communities, materialising opportunities and developing agendas.<sup>8</sup> Yet other scholars may legitimately suggest that the problem is that their intellectual property colleagues failed to understand—or productively misunderstood—property concepts.<sup>9</sup> However, the fact remains that somehow intellectual property managed to codify itself by developing controversial and effective idioms that became international.<sup>10</sup> It is clear from the outset that the reference to property is still important as a form of criticism, review or support, since it appears to compel intellectual property scholars to ponder it and to set out its boundaries.<sup>11</sup> Although there was no shortage of

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<sup>4</sup> Trade Marks Act 1994, s 2(1); Copyright, Designs and Patents Act 1988, s 1(1); Patents Act 1977, s 30(1).

<sup>5</sup> Henry E Smith, ‘Intellectual Property as Property: Delineating Entitlements in Information’ (2007) 116 Yale Law Journal 1742.

<sup>6</sup> Clare Pettitt, *Patent Inventions: Intellectual Property and the Victorian Novel* (Oxford University Press 2004) 73-74. See also Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1992) 34-37; John Feather, ‘The Book Trade in Politics: The Making of the Copyright Act of 1710’ (1980) 8 Publishing History 19.

<sup>7</sup> Alain Pottage, ‘Instituting Property’ (1998) 18(2) Oxford Journal of Legal Studies 331, 344.

<sup>8</sup> Kathy Bowrey has turned to the ‘commercial, social and legal strategies in play’ to suggest a different understanding of the development of intellectual property rights in the twentieth-century, see Kathy Bowrey, ‘The New Intellectual Property’ (2011) 20(1) Griffith Law Review 188-220.

<sup>9</sup> For an interesting view of intellectual property by a property scholar, see James Penner, *The Idea of Property in Law* (Oxford University Press 1997) 117-121; cf Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing Ltd 2008) 135-145.

<sup>10</sup> Justin Hughes ‘A Short History of “Intellectual Property” in Relation to Copyright’ (2012) 33 Cardozo Law Review 1293.

<sup>11</sup> William R Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell 1981) 3-4; Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press 2009) 1-3; Tanya Aplin and

scholarly discussion on the topic throughout the twentieth century,<sup>12</sup> we may nonetheless ask the concrete terms of the debate now and how it has changed so far. Arguably, the current anxiety to thematise, absorb or draw parallels between property and intellectual property has been facilitated not only by the ongoing, ever-lasting disciplinary anxieties mentioned above but also by a series of pressing factors. Among them, we can list the impact of Strasbourg jurisprudence,<sup>13</sup> the rise of the knowledge economy and the complexities that software and biotechnology brought to the system.<sup>14</sup> Since the law of intellectual property has explicitly been asked to ‘balance’ rights,<sup>15</sup> the need for parameters and calibration has developed under a renewed sense of pressure and urgency.<sup>16</sup> The interesting aspect here is not the call to ‘balance’ but the collateral effects it has produced—for instance, the importance attached to be seen providing the act of ‘balancing’.<sup>17</sup> This critical feature is evidenced by the recent attraction to intellectual property scholarship of regulatory discourses from different—and sometimes antagonistic—quarters: evidence-based researchers, policymakers, law and economics scholars and tort experts. Curiously enough, the external call to define the boundaries of intellectual property has also generated another irritation in the form of an internal response to reconsider its own sub-divisions, boundaries and organising

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Jennifer Davies, *Intellectual Property: Text, Cases and Materials* (Oxford University Press 2009) 2.

<sup>12</sup> Michael Lehmann, ‘The Theory of Property Rights and the Protection of Intellectual and Industrial Property’ (1985) 16 *International Review of Industrial Property and Copyright Law* 525.

<sup>13</sup> Lionel Bently, ‘Identity and the Law’ in Elizabeth Leedham-Green (ed), *Identity* (Cambridge University Press 2010) 26-58.

<sup>14</sup> Alain Pottage, ‘The Socio-Legal Implications of the New Biotechnologies’ (2007) 3 *Annual Review of Law and Social Science* 321.

<sup>15</sup> Trade Related Aspects of Intellectual Property Rights Agreement 1994, art 7.

<sup>16</sup> ‘The rise in economic importance, coupled with uncertainty over the justifiable scope of intellectual property rights in the light of technological change and various global crises relating to health, environmental protection and so forth, has given rise to a resurgence of “property” talk in intellectual property’ in Helena R Howe and Jonathan Griffiths ‘Introduction’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 1.

<sup>17</sup> For a remarkable note, see Ysolde Gendreau ‘Balancing the Balance’ (2013) 44 *International Review of Industrial Property and Copyright Law* 623.

principles.<sup>18</sup> This concern can also be appreciated in the exponentially growing literature concerned with ‘overlaps’.<sup>19</sup>

Howe and Griffiths’ excellent collection recaptures the lively debate by placing it at the core of the enterprise of categorising: legal doctrine. In their introduction, they gracefully point out that analogies between property and intellectual property have been ‘problematic’ and that their conceptual relationship is ‘far more complex than it may, at first sight, appear to be’.<sup>20</sup> Its twelve chapters adequately cover the two major issues around which the collection was initially constructed. The first part of the book interrogates the nature of the property in the various aspects of intellectual property. If the distinction between property and intellectual property was primarily coded in relation to its elusive subject matter,<sup>21</sup> some scholars decided to focus on the concept of the intangible to frame their contributions. Pottage and Sherman go back to Roman and Medieval legal sources to make what they modestly define as ‘a simple point’.<sup>22</sup> Their contribution is nevertheless highly remarkable since their simple point challenges what has been taken for granted until now. Against a substantial amount of previous literature that had worked on the assumption that intellectual property was an ‘awkward’ sub-species of property, they strike back suggesting that intellectual property rights are ‘not peripheral, exceptional, fictional or tenuously analogous forms of true property rights’.<sup>23</sup> By reading closely Marta Madero’s *Tabula*

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<sup>18</sup> Annette Kur and Vytautas Mizaras (ed), *The Structure of Intellectual Property: Can One Size Fit All?* (Edward Elgar 2011).

<sup>19</sup> Jerome H Reichman, ‘Legal Hybrids between the Patent and Copyright Paradigms’ (1994) 94 *Columbia Law Review* 2432; and more recently, see Estelle Derclaye and Matthias Leistner, *Intellectual Property Overlaps: A European Perspective* (Hart Publishing 2010); Neil Wilkof and Shamnad Basheer (eds), *Overlapping Intellectual Property* (Oxford University Press 2012); Robert Tomkiewicz, *Intellectual Property Overlaps: Theory, Strategies and Solutions* (Routledge 2012).

<sup>20</sup> Howe and Griffiths (n 16) 2.

<sup>21</sup> Bently and Sherman (n 3). See also Kathy Bowrey, ‘Book Review’ (2000) 22(7) *European Intellectual Property Law Review* 344; Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing 1996) 153-156.

<sup>22</sup> Alain Pottage and Brad Sherman, ‘On the Prehistory of Intellectual Property’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 14.

<sup>23</sup> *ibid.*

*Picta*,<sup>24</sup> the focus on the ‘legal figure of the tangible thing’ is particularly productive.<sup>25</sup> Detaching themselves from the typical way of looking at intellectual property, their take on tangibility thus allows them to reverse the argument and move to the other side of the coin: intangibility. They define it as an ‘effect of representation, interpretation and argumentation’.<sup>26</sup> Such a statement is attractive for the underpinning hypothesis upon which it is based. If the intangible is imagined as an effect of these practices, the struggle for recognition is played out in the ‘material reality’ (artefacts, drawings, texts) from which it is elicited. Likewise, Gangjee addresses the matter (‘Intellectual Property as Property?’) by referring to an emergent form of intellectual property: brands. He states that the brand is ‘a remarkably elusive and protean, yet an undeniably valuable intangible’.<sup>27</sup> Drawing on an extensive literature on marketing, he traces the different ways in which the intangible (the brand) is constituted via consumer perceptions and practices.<sup>28</sup> A recent case (*L'Oréal SA v Bellure*)<sup>29</sup> that Gangjee identifies as the culmination of the EU process fully protecting brands<sup>30</sup> also provides an interesting angle to consider the way in which marketing concepts have been translated into the legal domain.<sup>31</sup> What makes his contribution peculiarly innovative is however the second part that refers to immaterial labour. In fact, Gangjee develops an interesting critique of EU trademark law, and thus a critique of the property model. He suggests that ‘its doctrinal approach reinforces the exploitation of consumers and others involved in brand creation by editing them out of the narrative ...’.<sup>32</sup>

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<sup>24</sup> Marta Madero, *Tabula Picta: Painting and Writing in Medieval Law* (University of Pennsylvania Press 2009).

<sup>25</sup> Pottage and Sherman (n 22) 13.

<sup>26</sup> *ibid* 28.

<sup>27</sup> Dev S Gangjee, ‘Property in Brands: The Commodification of Conversation’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013), 29.

<sup>28</sup> *ibid* 37.

<sup>29</sup> *L'Oréal SA v Bellure NV* (C-487/07) [2009] ECR I-5185, [2009] ETMR 55.

<sup>30</sup> Gangjee (n 27) 44.

<sup>31</sup> *ibid* 49.

<sup>32</sup> *ibid* 57.

If there is one area of law in which the classificatory struggle is visible and upon which the dust has not yet settled, this is the action for breach of confidence. The reason why breach of confidence is a good and timely illustration for the first question envisaged in the collection is at least twofold. Firstly, we could say that it rehearses the problems of what might be at stake when the property label is applied to intellectual property. Secondly, it pushes the question to the relation between knowledge and information, a feature upon which the system of intellectual property was founded. Possibly because of its recent transformations and the categorical slippage produced, two contributions are exclusively devoted to the issue of confidentiality concerning property and intellectual property. This is to praise the editors: the two essays read well together because they are so different. Bently frames his contribution by narrating the different ways in which the debate around the status of confidential information developed in the British Commonwealth.<sup>33</sup> By closely reading the different ways in which confidentiality has been dealt with in scholarly discussions, case law and textbooks, he ends up with what he calls a ‘taxonomic surprise’,<sup>34</sup> the proposition that confidential information might be ‘intellectual property but not property’. More importantly, the piece sheds new light on the informal ways of explaining the way legal categories emerge.<sup>35</sup> While Bently scrutinises property and intellectual property to consider the status of confidentiality, Alastair Hudson looks at equity to show the different perspectives developed by an intellectual property lawyer and an equity specialist.<sup>36</sup> By focusing on the differing treatment of *Spycatcher*, he shows how the law of confidentiality has been appreciated differently depending on the register from which that interpretation has emerged.<sup>37</sup>

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<sup>33</sup> Lionel Bently, ‘Trade Secrets: “Intellectual Property” but not “Property”?’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 63-67.

<sup>34</sup> *ibid* 92.

<sup>35</sup> *ibid* 89.

<sup>36</sup> Alastair Hudson ‘Equity, Confidentiality and the Nature of Property’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 94-115.

<sup>37</sup> *ibid* 115.

Central to Dreier's contribution is an attempt to measure the distance between the rules on material and immaterial property. His contribution subtly shows how difficult and intricate the task of reconciliation might be. One of the most curious references is, nevertheless, the way in which he narrates the complex definitional questions around institutional self-descriptions. He says that 'the history of the notion and understanding of "intellectual property" in Germany' is also reflected in the 'history of the institutional self-description of the Munich Max Planck Institute'.<sup>38</sup> While the sketch is 'somewhat anecdotal',<sup>39</sup> it is indeed an original reflection of how to trace the impact of legal taxonomies. Even at a speculative level, the example was brilliant. Following a different doctrinal trajectory, Breakey's chapter reminds us of the persuasiveness and persistency of Hohfeldian analytical system of rights and duties.<sup>40</sup> Its commitment to the analytic is an illustration of how a 'plausible account of copyright as property' may emerge.<sup>41</sup> He does so by arguing that copyright focuses on 'the ownership of an activity built on a right to exclude and the property-protection of activity protecting it from harm and interference'.<sup>42</sup> While the normative shift towards liability-rules is a revealing move, it is also possible to suggest that definitional anxieties would not be overcome but displaced. In fact, we could say that if there is a field of law notoriously known for its uncertainty, that is tort, where the meaning of standard-like concepts such as 'reasonableness' and 'fairness' is hotly debated. In his chapter on 'alienability and copyright law', Balganesch equally surveys several problems in the traditional account of copyright as property. He also finds tort liability as a safety doctrinal valve, an arena that—he says—'could provide copyright law with mechanisms that are more directly suited not just to its analytical structure, but also to its various normative

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<sup>38</sup> Thomas Dreier, 'How Much Property is There in IP' in Helena R Howe and Jonathan Griffiths (eds) *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 121-122.

<sup>39</sup> *ibid* 122.

<sup>40</sup> Hugh Breakey, 'Properties of Copyright: Exclusion, Exclusivity, Non-interference and Authority' in Helena R Howe and Jonathan Griffiths (eds) *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013).

<sup>41</sup> *ibid* 160.

<sup>42</sup> *ibid*.

goals and purposes'.<sup>43</sup> Again, it is difficult to see how these different goals and purposes could be accommodated as a matter of principle.

The second part of the collection assembles contributions addressing a different question. The quest is not the assessment of the distinction but the consideration of whether property concepts may be used to remake intellectual property in order to 'ensure an appropriate balance'.<sup>44</sup> At first glance, the approach could be seen as contradicting some contributions given in the first part of the volume. However, it is not. Turning the pages, it becomes evident that several contributors interpret property (and intellectual property) differently. In so doing, their investment in those concepts gives a plethora of meanings to the institution of property and to its potential applicability to intellectual property regimes. Nowhere is this clearer than in Michael Carrier's stimulating chapter.<sup>45</sup> Instead of arguing that property has extended copyright, Carrier contends that the property-link may provide limits to copyright.<sup>46</sup> He offers a reconsideration of boundaries on three different levels (exclusion, transfer and use) to claim that propertisation may provide 'the tools' for the task.<sup>47</sup> In a similar vein, Burrell and Hudson's chapter sketches another avenue that could ameliorate problems perceived in the contours of copyright.<sup>48</sup> According to them, the case of abandonment offers a compelling example to show how property theories may be protective of authors.<sup>49</sup> Given that the doctrine 'respects their capacity to control how and whether they exploit the rights';<sup>50</sup> their view is also compelling, albeit their cautious approach

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<sup>43</sup> Shyamkrishna Balganes, 'Alienability and Copyright Law' in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 180.

<sup>44</sup> Howe and Griffiths (n 16) 5.

<sup>45</sup> Michael A Carrier, 'Limiting Copyright through Property' in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013).

<sup>46</sup> *ibid* 190-195.

<sup>47</sup> *ibid* 204.

<sup>48</sup> Robert Burrell and Emily Hudson, 'Property Concepts in European Copyright Law. The Case of Abandonment' in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013).

<sup>49</sup> *ibid* 206-207 and 223.

<sup>50</sup> *ibid* 207.

as to the prospects of such strategy being successful.<sup>51</sup> What deserves to be highlighted is how subversive and creative these two last chapters (Carrier and Burrell/Hudson) appear since their target is the legal structure of copyright. Mobilising property theories and constructs such as the commons and anticommons, Lametti and Dusolier submit different proposals. On the one hand, Lametti also suggests that there is plenty of ‘very good property theory’ to limit intellectual property.<sup>52</sup> However, the most remarkable feature of his contribution is not the reference to property theory but how he attaches a considerable importance to intellectual property governance as a system of ordering knowledge.<sup>53</sup> In fact, these references are exceptional because the collection does not seem to extend much on the status of intellectual property as a bureaucratic reality. Only a few of the contributors eventually connect intellectual property with patent and trade mark offices.<sup>54</sup> While it could be argued that their corresponding silence might be due to their exclusive focus on copyright, the rise of copyright collecting societies and their role in stabilising copyright could have provided some interesting theoretical reflections. On the other hand, Dusolier’s chapter could be seen as an attempt to follow the difficult migration of concepts developed in law and economics to intellectual property. Her proposal is an attractive call for a legal model of ‘inclusivity’ to unify a legal theory of commons.<sup>55</sup> The last chapter, written by one of the co-editors, endeavours to make the intersection visible between intellectual property law and the fight against climate change.<sup>56</sup> Rather persuasively, she moves from the concept of

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<sup>51</sup> *ibid* 231.

<sup>52</sup> David Lametti, ‘The Concept of Anticommons. Useful, or Ubiquitous and Unnecessary?’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013).

<sup>53</sup> *ibid* 244-246.

<sup>54</sup> Gangjee (n 27) 29-59.

<sup>55</sup> Séverine Dusollier, ‘The Commons as a Reverse Intellectual Property: From Exclusivity to Inclusivity’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013).

<sup>56</sup> Helena R Howe, ‘Property, Sustainability and Patent Law – Could the Stewardship Model Facilitate the Promotion of Green Technology?’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013).

property to the more specific question of how ownership can be imagined differently. If intellectual property could be blamed for exhibiting a particular (individualistic) predilection, Howe finds it helpful to bring in the concept of 'stewardship',<sup>57</sup> as a way to articulate a more community-orientated regime of intellectual property.<sup>58</sup>

After reading the contributions, there is a sense that the view from property scholars should have also been gathered, at least to provide an interesting counter-point. While we know now how intellectual property scholars struggle with property concepts, it might have been interesting to bring in property scholars to see how they observe the distinction. A recent collection on the philosophical foundations of property makes only a brief couple of references to intellectual property.<sup>59</sup> Interestingly, the way one of the contributors demarcates the discipline has much to tell us. His first footnote included the following introduction: 'I will say nothing here about intellectual property. Nor shall I even comment on whether it is usefully characterized as property at all, or whether any unification of property and intellectual property is to be sought'.<sup>60</sup>

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<sup>57</sup> *ibid* 298-304.

<sup>58</sup> *ibid* 298.

<sup>59</sup> Simon Douglas and Ben McFarlane, 'Defining Property Rights' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 240; and Arthur Ripstein, 'Possession and Use' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 156.

<sup>60</sup> Arthur Ripstein, 'Possession and Use' in James Penner and Henry E. Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 156. See also Lemley (n 1).