BOOK REVIEWS

*Robert Chalmers**

THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911

Brad Sherman and Lionel Bently

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This book[1] is a meticulously researched overview of the evolution of modern intellectual property laws in Britain, which contains some interesting discussion of the evolution of some fundamental principles of the field. Its primary focus is a historical review of developments from a so called 'pre-modern' to 'modern' state in the fields of law relating to copyright, designs and patents (with some limited discussion of

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1 Part of the Cambridge Studies in Intellectual Property Rights series.

trade marks towards the end of the text). The time periods focussed on range through the eighteenth, nineteenth and early twentieth centuries, with particular emphasis on the nineteenth century. The geographical focus of analysis is basically restricted to the United Kingdom, although there is some brief discussion of other legal systems. The book's coverage ranges from the consideration of the notion of property in mental labour (and the move towards protection of the created object rather than the act of creation), the design of the law (as well as the law of designs), to the crystallisation and shaping of the various 'modern' categories of protection. It is both history and jurisprudential discussion.

There is quite a lot of discussion of copyright, designs and related rights - including some early specialised forms of protection such as the 1787 *Calico Printers' Act.*[2] There is also comment on the 'marginalisation' and denigration of designs that has occurred subsequently in the development of jurisprudence relating to the area of intellectual property as a whole. This text shows how pivotal 'design' type rights were to early evolution of the whole field.

One of the points that the text makes is that of the 'pre-modern' tendency to statutory protection of such technology/subject matter specific developments. Query how different this really is from our latter day examples of plant breeders' rights[3] and computer chip protection.[4] There have also been consistent calls, even after international entrenchment of a contrary position through TRIPS,[5] for computer software to be accorded separate protection rather than being bundled under the 'literary work' rubric. Indeed, we seem to be moving towards such a de facto position by stealth through

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2 Or, to give it its full name: *An Act for the Encouragement of the Arts of Designing and Printing Linens, Cottons, Calicos and Muslins by Vesting the Properties thereof in the Designers, Printers and Proprietors for a Limited Time 1787* 27 Geo 3, c 38.

3 *Plant Breeders Rights Act 1994*, UPOV Convention.

4 *Circuit Layouts Act 1989*, Washington Treaty.

5 Agreement on Trade Related Aspects of Intellectual Property Rights (an annex to the World Trade Organisation Agreement from the Uruguay Round: see <http://www.wto.org/>).

developments such as the *Copyright Amendment (Computer Programs) Act 1999*, and other changes proposed in the Copyright Amendment (Digital Agenda) Bill 1999. Many critics have bemoaned the current fragmentation of systems across the field of intellectual property law, and longed (with unhopeful wistfulness) for its replacement with some general law against unfair competition. It is somewhat heartening to look back on the early modern systems and see a vastly more confusing array of specialised laws.

It is also interesting to consider the discussions relating to the historical development of design law given the 'imminent' local reform pending in that area, as a result of the Government's response earlier this year to the Australian Law Reform Commission's review of industrial design laws.[6] That report was commissioned after concerns that the current laws do not strike an appropriate balance between protecting rights and encouraging innovation. In particular, there were concerns that registration was too easy to obtain (restricting competition) while infringement was too hard to prove. We are now awaiting draft legislation (due by early 2001) to improve the system through:

- clearer definitions;
- stricter eligibility and infringement tests;
- a more streamlined registration system; and
- better enforcement and dispute resolution procedures.

This reform, combined with the controversy in relation to the copyright/designs overlap stirred by the recent decision of *CIPEC v First Melbourne Securities*,[7] gives renewed significance to the history of developments in this field.

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6 Report 74: Designs. The full government response to the Australian Law Reform Commission's recommendations is available at <http://www.ipaustralia.gov.au/news/govreslaw.htm/>.

7 (1999) 44 IPR 512.

Chapter 6 'Completing the framework' deals with the 'closure' of the field of intellectual property. Its thesis is that the shape of intellectual property law was settled over the second half of the nineteenth century, off the basis of what had by then become a fairly shared background of principles and ideas. This settling meant that the attention of the law in this area shifted to 'matters of detail' and the 'less glamorous ... minutiae':

> While commentators in the eighteenth and first half of the nineteenth centuries had debated about the nature of intangible property and whether and how the boundaries were to be drawn around this property, such questions were succeeded by discussions about the size of the paper and the colour of the ink to be used when drafting patent specifications, the number of people using the Patent Office library, and the gender balance of patentees.[8]

From then on it was more a case of the law 'policing the borders' of intellectual property rights rather than being engaged in their formulation. Of course, at the moment the basic principles and boundaries are once again being debated vigorously, and post-modern fluidity mirrors the pre-modern situation. This lends added relevance to the book's re-examination of the evolution of our current principles and systems. In recent times we have had (amongst other things):

- the designs reform response discussed above;
- the *Copyright Amendment (Computer Programs) Act 1999*;
- the Copyright Amendment (Digital Agenda) Bill 1999;
- the Advisory Council on Industrial Property (ACIP) Review of Enforcement of Industrial Property Rights (March 1999);[9]

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8 Brad Sherman and Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (1999) 139.

9 Available at <http://www.ipaustralia.gov.au/library/L_resrc1.htm

- the second of the two-part Report from the Copyright Law Review Committee in response to its simplification reference;[10]

- the Competition Review of Intellectual Property (see below);

- the Patents Amendment (Innovation Patents) Bill 2000.

The last mentioned review process, which is still current, is a wholesale review being undertaken by the Intellectual Property and Competition Review Committee.[11] This Committee has been appointed by the Australian government to determine whether the intellectual property system is 'meeting the needs of Australian business and consumers while maximising the benefits of domestic and global competition'. The review has been set up to consider not just the impact of competition law on intellectual property, but almost the whole field of intellectual property law.[12] The Committee is directed to consider any restrictions on competition constituted by the relevant legislation, the economic effects of such restrictions, and notably 'whether there are alternative, including non-legislative, means for achieving the objectives' contained in that legislation. Of course, Australia is limited by its international obligations, which are expressly mentioned in the terms of reference.[13] On this point, it was also interesting to see the book's discussion on the impact of international treaty obligations in shaping the law. Then as now such developments tended to push domestic reforms.

#patents/>.

10 Available at <http://clrc.gov.au/clrc/gen_info/clrc/rep_index.html/>.

11 The Committee's website is at <http://ipcr.gov.au/>. The Committee has recently released an issues paper available for comment, available at <http://ipcr.gov.au/ipcr/issues/issues.html/>.

12 Its broad terms of reference include examination of the *Copyright Act 1968*, the *Designs Act 1906*, the *Patents Act 1990*, the *Trade Marks Act 1995* and the *Circuit Layouts Act 1989* (noticeably not the *Plant Breeders Rights Act 1994* or laws relating to confidential information).

13 So it is unlikely that we will see very radical proposals for reform that would conflict with these obligations.

The book is necessarily constrained by its chosen historical window. It is also constrained by its chosen geographical scope. There are some tantalising reference to indigenous intellectual property law, but very little real discussion on this topic. It would be very interesting to see the exercise undertaken in this book extended to more recent history, and 'postmodern' developments, on a comparative basis. Of course this would be a massive task!

The text has something of a deconstructive approach, recognising and critiquing the organising narratives and other factors that have shaped the law. However, there seemed to be on occasion some reluctance to 'go the whole hog' with a deconstructive approach: the text backs off and speaks about the law both constructing and uncovering intangible property.[14] It is obviously appropriate to recognise these laws as the human constructs they are. It is also interesting to see more 'literary theory' style legal analysis, and intriguing to consider the analysis of how practical factors (including those connected with the registration and administration of rights) influenced the development of the law.

The authors argue for a rounded discussion of all of the factors which have influenced the development of the law, rather than concentrating on one theory.[15] However, in some of the discussion there is perhaps an over emphasis on the strength, if not primacy, of stories about the law as shaping narrative. I found some of the earlier discussion of and stress on the autopoetic nature of the law a bit incomplete or unconvincing.[16] I think this was a valid line to

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14 'Although we are drawing attention to the positive role that the law plays in creating intangible property, we should not be taken as suggesting that intangible property is purely a figment of the legal imagination': Sherman and Bentley, above n 8, 58. Perhaps this is a form of positivist deconstructionism?

15 Comprising the 'alloy' that has shaped the law. See ibid 6–7.

16 To indulge in some of my own po-mo criticism, perhaps this was because the text, in pursuing its attempt to highlight the importance of this issue (and applying its own words) was engaged 'in a process as impossible as it is necessary ... forced to pursue something that it can never completely imagine, which is always beyond representation': ibid 58.

take but it needed something extra to make it hit home to the reader, and perhaps also ironically needed less focus to make its point more compelling. There are also overtones of what feels like some background distaste for the economic drivers and explanations in this field.[17] This made me feel like the early to mid sections of the book, in haste to profile (rightly and in an informative way) some of the previously discounted or neglected factors that influenced the shape of the law,[18] gave added weight to those factors which it marginalised.[19] However, I think that the concluding part of the book did a good job in pulling the different strands of argument together and making a more robust and convincing pitch for the significance of the law as a creative narrative.

One of the interesting topics the book deals with is the 'fear of judgement' that has stalked the field of intellectual property, and evolution of systems to marginalise its role in the systems designed to protect and enforce rights. As the book points out, suppression or marginalisation of judgement and creativity does not remove it. Our current 'objective' systems are still riddled with important points (whether within IP Australia or the courts) where qualitative decisions are required. Indeed, there are now calls for re-injection of more judgment into the processes for the registration of rights, with the aim of improved quality of rights which are harder to obtain, but enforceable with more certainty and ease.[20]

It was enlightening to step back from the immediacy and assumed authority of our current legal system and trace its evolution and the

17 'We ... hope to show that as a juridical category, intellectual property cannot be identified as a purposive technique governed by a teleology of function, principle or norm; nor can it, except at the most banal and trite level, be explained in terms of economic arguments, author's rights personality theory, or in terms of natural or positive law': ibid 6.

18 In this respect I think the book did a great job in its discussion of the impact of the registration systems.

19 To be fair, there is some discussion of economic issues in relation to trade marks towards the end of the text: ibid ch 9.

20 See for example the Australian Law Reform Commissions Designs Report, and the Advisory Council on Industrial Property Review of Enforcement of Industrial Property Rights (March 1999).

thought battles that shaped it. Past battles are far from irrelevant as they take us back to the core issues of the need for, appropriateness of, strength and manner of implementation of rights. Many of the issues discussed are as relevant to current debates as they were to the old debates – as technological advances force us to move from focussing piecemeal technology specific reforms to reconsidering the ground rules underlying entire systems of law.[21] This is the 'need to remember' which the book concludes with.

Of course, the new technologies which we have may alter the balance of concerns considerably as they change the forms of distribution and control that are technically feasible. Therefore we need to be careful about how we deal with these new creations and processes. Blind application of principles developed for another age may not be the answer. The current vogue for 'technologically neutral' solutions sounds great but its proving hard to implement (witness the debates over the Digital Agenda Bill). In relation to the debates over digital copyright reform, a number of different and opposing interest groups are drawing on the past shapes and principles of copyright law as justifications for their positions. This book provides a useful discussion and critical analysis of these principles, which could assist debates over their latter day and future implementation.

The conclusion also calls for the 'invention' of new narratives to guide the future evolution of intellectual property laws. Writing these new stories, and drawing strength from the old ones, is a considerable challenge. *The Making of Modern Intellectual*

21 As an example, the book (at p 193) refers to the references to the seminal and ancient cases of *Millar v Taylor* and *Jefferys v Boosey* in the recent decision of *Sega Enterprises v Galaxy Electronics* (1996) 35 IPR 161 in that decision's attempt to deal with 'immaterial' digitised video games (as 'embodied' films).

Property Law will be of assistance to those engaged in post-modern endeavours to reshape (genetically re-engineer?) the chimeric beast that is intellectual property, as well as providing a very detailed overview of the history of British developments in a crucial period of the earlier evolution of this field.