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BOOK REVIEW


Constructing Intellectual Property might just as well have been titled “Deconstructing and Reassembling The Regime of Intellectual Property,” for that is the thesis of Dr. George’s admirable writing. To be fair, a body of law that simultaneously addresses rights in such varied endeavors as Bill Monroe’s musical composition “Wheel Hoss” (copyright), the formula of Coca-Cola (trade secret), Nike’s advertising slogan JUST DO IT (trademark) and an “[a]erodynamic grain handling system” (patent), not to mention boat hull design and plant varieties (among other fruits of human inspiration), is ripe for a reexamination.

Dr. George writes clearly and her prose is straightforward. Constructing Intellectual Property is a work of academic theory, not a practice guide or treatise. However, IP counsel, who exist in the real world of disputes over rights and permissions, can benefit from her understanding and clarity. She postulates “a theory of intellectual property that explains how objects of intellectual property are legal constructs being defined into existence by, and then regulated by” governmental institutions (p. 334) (emphasis supplied). Dr. George’s fresh look at the intellectual property regime contributes greatly to the understanding of how IP law functions today.

Building on the parable of “The Emperor’s New Clothes,” Dr. George posits,”[t]he conclusion that ‘intellectual property’ lacks a readily identifiable meaning, and the possibility that it is the sort of term known as an ‘essentially contested concept’ or an ‘empty/floating signifier’, necessitate a search for an alternative definition...” (page 81). Accepting that the law of intellectual property is a social construct, Dr. George argues that it is more: an “institutional fact”; the law (as opposed to the notion) of IP is a creation of societal institutions. But IP law itself, she argues, is merely a set of rules that only indirectly shape and manage expectations relative to the object of intellectual property, namely (and very generally speaking), the desire to give protection to the outputs of human creation or innovation whether or not they have a physical manifestation.

Those who toil in the mines of trademark or copyright law know this well. For example, brand equity is a witch’s brew of negative and positive associations, known, encouragingly, as “goodwill.” Brand equity is ephemeral, more so in the digital age. Copyright, with different goals and rules, also presents a moving definitional
target. An idea is not protectable, only its expression. And only then if it is accompanied by a dash of creativity (not much at all, really) and is “fixed.”

Any counsel who has tried to explain to a client the relationship between a common law trademark and a registration for that mark understands that there is something metaphysical afoot. Modern trademark law protects “goodwill,” using the notion as a signifier/stand-in for the calculus of “brand equity” and somehow translating this abstract concept into a property right, like owning a toaster. Moreso, as Dr. George helpfully points out, the societally protected rights in these non-physical ideations can be diced and sliced in virtually infinite ways through contractual relationships (e.g., licensing). Against this background, one understands why IP law cannot keep up with technology. Underscoring the endemic futility of the enterprise, Dr. George writes (at page 125) “The scope of an intellectual property object is not certain until ruled upon by a court or tribunal in a given situation, and even then, one can never be sure where all the other boundaries of that intellectual property object lie.” [footnote omitted]. While the uncertainties of ruling authorities applying unique facts and circumstances hold equally to the realm of physical objects, they are amplified where there is nothing but a societal aspiration at the core of what is sought to be protected.

Dr. George, having made this case, explores historical analogs to modern day IP law. She finds parallels in the pre-Industrial Age: “lore” in native communities, heraldry, the branding of animals, guilds of the Middle Ages, and the ancient use of artisanal hallmarks. In each instance, cultural aspirations and expectations were passed on through accepted practices which were never written down; they were accommodating to, but not changed by, the societal norms of the time.

Dr. George’s analysis reveals that the term “Intellectual Property” is a metonym for the cultural and societal rules and norms (including under-examined, even forgotten, assumptions) that foster and reward human innovation. Constructing Intellectual Property benefits from Dr. George’s skilled, thoughtful, and clear approach to the subject. Theoreticians and practitioners alike can benefit from Dr. George’s reexamination of the subject.

Alfred C. Frawley