

Book Review

Gustavo Ghidini

Intellectual Property and Competition Law: The Innovation Nexus
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Reviewed by Howard A. Doughty

Who domesticated fire, or cats? Who invented the wheel or first smelted bronze? Even if it were reasonable to imagine some solitary human experiencing a “eureka moment” as she vaulted humanity into a new phase of cultural evolution, the answers to such questions are so lost in deep time that they now seem meaningless to ask.

Only slightly less pointless are questions such as who wrote the *Upanishads*, or the *Odyssey*, or what Christians call the *Old Testament*? In these cases, we confront more proximate creations; but, although archaeologists and philologists, theologians, historians and antiquarians of all sorts can supply helpful hints to anyone interested in such obscure intellectual quests, the best they can do is offer informed speculations, the proofs for which are rarely found.

So, while there is some evidence that it was the prophet Jeremiah who finally cobbled together the first thirty-nine books of *The Holy Bible*, or that Jesus himself crafted *The Gospel According to St. John*, no evidence whatever can be found in an antique copyright office. Ancient legends were, after all, usually constructed and revised by many anonymous minds as they were passed down over centuries prior to their being codified in written narratives, the precise origins of which remain uncertain. And, even when we suppose the existence of an individual author, the question of identity is often murky. Plagiarism or playful borrowing of a bit of plot here, a character there, was all part of a charming game. Did Shakespeare write everything attributed to him? Did Lao-tsū?

It would be nice to have had efficient copyright bureaus and their sibling institutions, patent offices to put an end to countless debates; however, such instruments of law and governance date only from about the fifteenth century. Their extensive regulatory control over the legal niceties concerning the rightful allocation of the money made from operations of the imagination is much more recent.

So, while anthropologists and folklorists may engage in fruitful comparisons of various mythologies, and may indulge in occasional Jungian discourses about their archetypal meanings, they are unable to discuss the claims of the original artists and inventors to what *Black's Law Dictionary* calls the “intangible, incorporeal right” to receive royalties for the subsequent use of their creations. Such a right arises in common law at the moment of creation, and in statute mainly at the time when a work wins official recognition as, for example, the publication of a book or the granting of a patent by an agency of the state. Such a right, however, of little interest to those who first contributed

to the stories of Gilgamesh or Moses. It has no practical consequences for the inventor of the boomerang.

If there are few among the creators of the greatest symbolic and material cultural treasures of antiquity who can be accurately named, there are fewer whose progeny might wish to claim exclusive control over the dissemination and usage of their creations. So, although it might be easy enough to learn the names of the clever fellows who met at Nicea to edit the authoritative version of *The New Testament*, and to say with some confidence that an Arab gentleman named Muhammad first composed the Qur'an, few of the ancients sought to make financial profits from the sale of their words in the form of labouriously copied books, or from the repetition of their words in theatrical performances and prayer meetings. Before the invention of movable type, most literature and popular culture was definitively in the public domain, and most technological devices and implements had evolved gradually over the ages with no ur-Edison about to avow ownership of a startling new discovery. Intellectual property, in short, was yet to be a gleam in an orator's eye, or a synapse in a proto-capitalist's cerebrum.

There are many reasons for the reluctance to rent or sell elements of folklore from traditional verses to sacred texts, nor were artisans eager to patent the invention of the parchment upon which the words may have been copied. One is that, unlike contemporary commercial definitions, previous cultures rarely confused the creative arts and sciences with the production of other marketable assets. The more venerable were part of a collective cultural heritage; the more recent were instances of popular culture emanating from the wit and wisdom of emerging artisans, resident bards, itinerant story tellers, wandering mistrels, monastic chanters and wine-makers. Only in the times of great empires when cities such as Athens and Rome (and eventually London and Paris, Venice and Florence) dominated their geographic regions did professional playwrights and poets come into their own; yet, not even Aristophanes and Catullus were protected against unfair use and shameless scribes, to say nothing of photocopiers and YouTube.

Times have changed.

The extension of the concept of property from precious metals, livestock, boots, castles and slaves to intangible and non-corporeal entities – ideas and expressions – poses considerable difficulties for legal theorists and numerous practical problems both for producers and consumers of intellectual “products.” Recent technical innovations from the aforementioned photocopiers through devices that permit the downloading of musical recordings or the covert filming of motion pictures in theatres are merely among the most obvious means by which individuals can become publishers, producers and distributors of works of art and popular entertainment. Whether copied for personal use or for sale, many authors, singer-songwriters and movie producers accuse members of their audience of theft. Likewise, pilfering designs, stealing trade secrets and engaging in industrial

espionage on a global scale have become important elements in determining the prosperity and fate of individuals, corporations and nations. Think Klaus Fuchs.¹

In the process, the concepts of art and culture are being altered. Extending the notion of property to creative expression leads to the perplexing thought of otherwise cultivated patrons of the arts speaking openly, oxymoronicly and utterly without embarrassment of “cultural industries,” as though even the appreciation of the most elevated and enlightened human endeavours had descended to the level of mere exchange, part of a spiritless cash nexus, as it were.

Those nostalgic for a time when art was created for its own sake, or at least for nothing more enduring than a hearty meal and the admiration of an attentive audience, a quick perusal of such dictionaries as David L. Scott’s *Wall Street Words: An A to Z Guide to Investment Terms for Today’s Investor* will set them straight. The arts and letters are now chattel, commodities, forms of merchandise. So, owners of words and symbols, musical scores and graphic images can expect to receive the same sort of “compensation that is paid to the owner of an asset based on income earned by the asset’s user.” Publishers and printers now stand in the place of mining corporations and petroleum companies making payment to poets and painters who are the functional equivalent of owners of mineral rights.

In addition to an admittedly elitist recoil against the devaluation of art by subjecting it to market forces in the determination of its exchange value, there is also a serious economic consideration in play. Property has traditionally been defined as a material object – anything from a jewel to a dress to a piece of land (“real” property) – that can be valued according to the principle of scarcity and that gives its owner exclusive control over its use, sale, rental or destruction. By these lights, the value of my loaf of bread on a lifeboat filled with starving survivors of a sunken ship may vary according to familiar laws of supply and demand, and my exclusive rights of ownership may surely – were I fortunate enough to consume it alone and unmolested – imply the deprivation of my fellow passengers of the prized source of sustenance. The same, however, cannot necessarily be said for a poem, a song or, more pressingly, a life-saving formula for a pharmaceutical that is withheld by the patent holder, thus making impossible the cheap production and distribution of a medicine to needy patients. These immaterial things differ, after all, from physical objects. They do not disappear when consumed. In fact, removing proprietary property rights may result in their greater dissemination and a marked benefit to the public good.

The drive toward the commodification of art and invention is partly attributed to specific technological advances such as the printing press or, later, the industrial manufacturing processes which took the manufacture (making by hand) of goods out of the control of artisans and guilds. They gradually turned the luxury of books into mass merchandise and

¹ Klaus Fuchs was a member of the Manhattan Project (to develop the US atom bomb in New Mexico in 1945) and a Soviet spy, who passed on atomic secrets to the Kremlin.

took the development of medicinal cures from the minds of wise old women and placed it into chemistry laboratories owned by multinational corporations.

The acceleration of the commodification of creativity was also extended by general advances in technology itself. Modernity is largely defined by the degree to which attention is focused on new fashions and practical devices intended to transform the production and trade of useful (and increasingly anonymous) products. In the process, the term “intellectual property” has become a catch-all for copyright ownership, patents, trade marks, industrial designs, trade secrets and a host of related variations on the theme. What Karl Polanyi famously called “the great transformation” took European (and eventually global) society from the Renaissance to the Industrial Revolution and beyond. It begat urbanization, commerce, mercantilism, increasing prosperity (and increasing inequality), literacy, the rule of law, industrial capitalism, mass production and, to a somewhat smaller degree, democracy. Each, in its own way made life safe for lawyers and the law, for profit and the profit motive, for new cultural forms of expression and entertainment, and for life-altering technological achievements.

Less obvious is whether the protection provided by copyright and patent law has promoted or discouraged innovation. Protecting the rights of creators and innovators by guaranteeing their temporary monopoly interest in their intellectual property would seem to encourage creativity. Creative minds are thus guaranteed a material reward for their creativity. On the other hand, when the oligopolistic tendencies of large global enterprises – the bane of free enterprise according to Adam Smith – are taken into account, an argument can be made that the fate of the individual genius can seem problematic. Whether crafting poems in a downtown loft or re-engineering genetic codes in a lab, the genuine innovator can be seen to be at the mercy of profiteering entities from entertainment conglomerates to the pharmaceutical and agribusiness giants demonized by John LeCarré in the fiction, *The Constant Gardener*, or reported by Kurt Eichenwald in his journalist account in *The Informant*. This is a matter that, among others, is taken up by Gustavo Ghidini in the book under review.

To make its context explicit, it is important to add only that we are now, it appears, well into yet another new techno-cultural transformation which, some vociferously argue, is the equal to, or even greater than, the industrial revolution or the agricultural revolution before it. The mode, means and relations of global production have already shifted to the point where the manipulation of information and the privileging of mental over manual labour is permitting the emergence of a virtual, recombinant world constructed by electronic communications devices. This, of course, does not mean that the majority of humanity has escaped poverty, disease, tyranny and war; the facts are quite the contrary, and have already prompted a considerable market for modern-day Jeremiads.² Moreover, even the once-comfortable North American middle classes are experiencing anxieties that are, if not entirely caused, then at least partly accompanied by declining standards of living, the perception of moral decay and the prospect of ecological degradation

² A Jeremiad (after the prophet Jeremiah) is a piece of writing that presents a very pessimistic view of the future, and just about everything else.

unmediated by an irrational belief in progress. The result is that the economic system, its supporting ideology and the legal framework that defines relationships and resolves conflicts within it are undergoing a dramatic evolutionary process of some lasting importance. All of this may ultimately prove to be for the good, of course, but at the moment the future is not clear to see. Like Edgar Allen Poe in his prescient short story, “The Maelström,” we are tempest-tossed and it is at this vortex, among the swirling waters of change that Gustavo Ghidini comes upon the scene.

Singular within the current turmoil is the movement toward the so-called information society and the consequent growth and change within the domain of intellectual property. It is into this new, tangled and tortuous technological world that Gustavo Ghidini leads us, with the confidence of a wayfarer who is at home in a territory that might otherwise daunt or appal us.

Ghidini approaches his topic from a clear and thoughtful standpoint, one that is firmly based on an economic philosophy that, he believes, is directly connected to the advantages of innovation and its connection to the public good. Among the themes he raises are several that should be of interest to any citizen – especially one with a concern for public sector innovation.

Ghidini is committed to what might well be labelled the political economy of liberalism. He is discontented with over-regulation, with monopolistic corporate tendencies and with concentrated power in all its forms. He favours the notion that competition encourages innovation and that innovation leads to dynamic changes that benefit consumers, producers and society as a whole. Genuinely free enterprise (as contrasted with vertically integrated private sector hegemony is embraced with full enthusiasm and with blinders off. Ghidini wants human creativity to flourish, bringing with it lower prices, wider choices and greater access to (what else?) information. It is at this point that Ghidini’s argument becomes especially interesting.

Copyright and patent protection, he acknowledges, are similar in many respects. They are not, however, the same thing. Ghidini brings forth a nicely argued presentation that clearly distinguishes copyright from patent. In summary form, he explains that copyright law involves *freedom of speech* and relates to “expressions and not to ideas” and classically pertains to “expressive results generated merely for the purposes of intellectual enjoyment, or ‘aesthetic’ pleasure in the broadest sense of the term.”

Patents, in the alternative, protect specific applications of scientific research. Science, itself, is not patentable. It “typically advances by a non-proprietary approach” and relies “on comparisons, exchanges, critical sharing of knowledge and peer reviews of ... new hypotheses.” Sometimes, of course, there is “fierce personal rivalry” among leaders in a field and, occasionally, reputations and Nobel prizes are at stake. Nonetheless, whether Liebnitz or Newton first came up with the calculus, or Darwin or Russel first thought up the evolutionary mechanism of “natural selection,” is not a matter of ownership. At stake are reputations, future consideration in elementary textbooks in mathematics and biology – bragging rights in short – but no one “owns” either intellectual property.

Expression or application seems sensible enough as a means to distinguish between the two legal terms and processes. But there is much more. Ghidini identifies and clearly explains a number of them.

Copyright, he says, involves a perpetual moral right to claim authorship of a particular creation, irrespective of its merits and even of its publication or performance; whereas patents must be submitted for specific tests, licenced and made subject to forfeiture if an invention is not produced and marketed. Further, copyrights are normally of long duration (seventy years in the European Union), whereas patents are usually limited to less than twenty years. Copyright holders, as well, are under no obligation to licence any derivative work and, in fact, are typically able to restrict the production of alternative forms of their creation (as in the familiar language that a book or the televised account of a baseball game cannot be re-sold, lent, photocopied, reproduced or re-broadcast in any way without the expressed written consent of the publisher or Major League Baseball); patent holders' rights are far more restrictive.

Why should we care?

Ghidini produces an effective argument for the strictures upon patents. A boy and his dog (or a bowl of fruit) "may be represented by millions of painters in millions of different ways, each covered by copyright to the same extent as Picasso's drawing." A "practical-functional innovation," however, must meet standards of industrial applicability, physical and technical conditions and also take into account economic considerations. The pertinent effect is that, even if paintings are not "a dime a dozen," they are almost infinitely replaceable. The same cannot be said for a technological innovation that may make airplanes safer, water cleaner, home heating more efficient or diseases curable.

There is, therefore, a marked public interest in opening up competition in fields now constrained by patent legislation. Balance, of course, remains an issue. Incentives for research and development include some expectation that a profit will be made from a new "industrial application" before rivals run in and rip off a creative idea. What matters to Ghidini is an apparent legalistic "turf war."

Emerging today in the field of intellectual property is a trend toward "technology copyright." Ghidini therefore points to "the growing 'encroachment' of copyright law on areas that should be reserved to patent law." The two fields which concern him most are computer software and biotechnology – especially "genetic maps" (graphical representation of DNA gene sequences). He points out that, in the first instance, copyright coverage is now being provided to information technology that has traditionally been excluded from such protection; and, in the second instance, he states that gene mapping is an achievement of basic scientific research and should therefore be exempt from both patent and copyright protection. In addition, he addresses moves to extend copyright protection to databases and finds fault with the fact that such protection amounts to a direct assault on freedom of information.

Blurring of the boundaries between copyright law classically applied to aesthetic creations and patent law traditionally applied to utilitarian inventions has resulted in the broader and more restrictive copyright law being inappropriately applied to areas previously reserved for patent legislation. The result, for Ghidini is an incursion into the domain of competition and the result is the diminishing of the public interest in the free flow of information and the economic benefits of competition. An immediate problem flowing from this trend is the possibility of imposing “a general principle of *pay-per-use* for all uses of all intellectual work distributed on line ... [including] the suppression of any form of ‘fair use’ on the Web.” Quoting Justice Hugh Laddie, he passes on the warning that “in the case of copyright not only the mediaeval chains remain, but they have been reinforced with late 20th century steel.”

The implications are plain in the recent US case in which Viacom has sought payment of over \$1 billion in damages from YouTube for sharing about 150,000 videos that it says it owns. The complaint alleges that “YouTube has harnessed technology to willfully infringe copyrights on a huge scale [threatening] the economic underpinnings of one of the most important sectors of the United States economy.” That sector, of course, is entertainment, which has uniquely profited from the previous extension of copyright to film, television and other media. As Ghidini puckishly points out, “there’s no business like show business.”

The matter has come to the attention of the *New York Times* op-ed writer Lawrence Lessig, who notes that broadening copyright application under the *Digital Millennium Copyright Act* of 1998 was a victory for the “content” providers, but that Viacom is not satisfied with the provisions of the statute which put the burden of proof upon those who possess copyright protection to establish that video-sharing businesses such as YouTube are in violation of the law. Instead Viacom now wants the obligation to monitor its service to ensure that no infringing activity takes place. Moreover, instead of lobbying Congress to amend the pertinent legislation, Viacom is seeking change through the judiciary which, it hopes, will keep the Copyright Act “in tune with the times.” This promotion of judicial activism falls fully in line with Ghidini’s fear that major corporate entities are increasingly using a protection once accorded to starving artists in the ethers of Bohemia to lock up their own technologically mediated treasures. According to Lessig, this means that the entertainment industry now gets “two bites at the copyright policy-making apple, one in Congress and one in the courts. But in Congress, you need hundreds of votes. In the courts, you need just five.” Anyone who remembers the US presidential election of 2000 is in a position to worry about what that might mean.

If the implications for public access to information technology are daunting, the potential and actual consequences for genetic research in areas such as genetically modified organisms and human DNA are Promethean³ – in the very worst sense of the word.

³ Promethean refers to the ancient Greek hero and demi-god Prometheus, who is said to have stolen fire from the gods and given it to mankind. This started humanity on its road to “progress” but the gods were not amused and Prometheus was punished by being chained to a rock and having some sort of bird (probably an eagle) rip out his liver

(which grew back overnight, and so the bird would return and rip him up again).
Promethean describes an overzealous act that display *hubris* (pride) and offends the gods.
So, when Mary Shelley wrote *Frankenstein* (the man, not the monster), she sub-titled it
"the modern Prometheus."