

Inner Temple Reader's Lecture Series 2012

Why Stopping People Doing Things can be a Good Idea: the Law of IP

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Students of the Inner Temple, tonight's subject was advertised as, **Why stopping people doing things can be a good idea: the law of IP**. I thought I would make it slightly more interesting, so I am going to go slightly off-piste, but nonetheless I will touch upon the law of IP from time to time.

I spent most of my life doing what is called IP, though in the Court of Appeal they let you play with others things a bit. First I was a fighting barrister, what I discovered about being a fighting barrister, it doesn't matter really what the subject is, or where you are in the common law world, it is the same job.

So don't think of IP chaps as peculiar, they are not, they are the same as everybody who is doing crime, family law, contract, commercial law of all sorts, administrative law, it doesn't make a blind bit of difference. A fighting barrister is the same thing, their job is to win the case, and you win cases by making it simple, and making it inescapable for the judge to think that there is any other way of thinking.

Back to IP, the most amazing nonsense is talked about intellectual property law these days. You hear politicians waffling on, the economists waffling on. This morning I was in the stock exchange at a conference organised there - I heard accountants, I heard business advisors, I heard economists, I heard people from the intellectual property office as they now call the patent office, talking the most amazing nonsense.

If I can teach you anything today, it is what this subject is really about, and what is needed to approach it: a balanced and rational approach. Not one based on media hype, politician hype, economist hype, business adviser hype. It boils down to something very simple: IP rights are rights to stop other people doing things.

The posh name for all of this is, an exclusive right. I always find that a very unhappy word; better is a right to exclude others. Patents stop others using the owner's inventions, copyrights stop others copying the owner's work, trademarks stop others using the owner's trademarks, and design laws stop other people using your design. In some cases only if you copied it, in other cases anyway.

None of these rights allow you to do anything - they are rights to keep the other chap out, not to do it yourself. You may be able to do it yourself, if nobody else has a right to stop you, but they may do. If you make an invention, which improves on a patented invention belonging to somebody else, you can have patent for your improvement. But you can use it without paying tribute to the owner of the bigger right. That may or may not be forthcoming, and there are complicated rules about that. Get it into your heads: it is the right to stop other people.

Likewise if you make an artistic work by copying or modifying the copyright work of another, you will be infringing that other's copyright. Salvador Dali would have infringed Leonardo's copyright by painting a moustache on the Mona Lisa, but he created his own work too.

I have got an example, which is the real example which made me hopping mad when I was doing my bar exams in 1965. It is a real case. There was a film called Cleopatra, starring Richard Burton and Elizabeth Taylor. It was one of those mega movies, and there was an advertisement which appeared in about 1964, early 1965. It was actually a painting, people promoted movies with paintings unbelievably.

There she is, Rex Harrison and Richard Burton behind her on a chaise longue, and it was extremely well known. About six months later the Carry On team - I hope you know what a Carry On film was. Extremely smutty, extremely funny British humour which foreigners can't understand - came out with Carry On Cleo. There is their advertisement - Sid James and Kenneth Williams with the star, Joan Sims, a couple of other characters poking out from under the bed, but obviously based on the Cleopatra advertisement.

20th Century Fox, they were as bad in those days as they are now, complained, and some bloody fool of a chancery judge granted an injunction and they had to take it down from the underground. I was hopping mad then, I am hopping mad now, but it is not all that easy to see what the defence was, because copyright protects a copy or a substantial reproduction of the original work.

He might have said, "It is not really a reproduction at all, it is based on it, but not a reproduction of it." The point of it tonight is that that was clearly very creative but it fell within the ambit of an earlier right.

Now, you will hear huge amounts of stuff about IP driving innovation and so on and so forth. Actually intellectual property rights may or may not be valuable, most of them are not. Most of them are more worthless than a piece of derelict land stuck somewhere in a remote part of the country, they have no value. IP right is only valuable in so far as what it protects is valuable. Accountants will tell you they want to put IP in balance sheets and God knows what. But all they are protecting is part of the business, and they are valuing the business anyway. It is a way of cheating on the value of a company, to value the IP rights separately.

All the essays you wrote at university, your exam answers, are all copyright, your copyright. It will last for 70 years from the year of your death. It ain't worth a lot is it? Now I have talked about the media and politician encouraged hype about IP rights, "Taking forward innovation", "Inspiring creativity". You see it all the time, whenever you hear a change in IP law being proposed by politicians, or governments, or the European Commission, you hear this kind of twaddle talked.

Let's have a current example. Currently copyright, design rights in things like furniture and jewellery last for 25 years from the date they are first put on the market, a quarter of a century. For a quarter of a century nobody can copy them, after that they can be copied, and people can take inspiration from them, modify them and change them, and come up with new designs. The government proposes to change this to 70 years from the year of death of the author, which in practice means a century on average.

I am now going to read from a House of Commons debate this summer, I think actually a committee, it doesn't matter. A man called Ian Wright, I am not sure what side he is on, because it doesn't really matter, because they are as bad as each other in this respect. "Clause 55, Repeal Section 52 of the Copyright Designs and Patents Act 1988 to remove the 25 limitation for artistic works created by an industrial process. The repeal will make such designs consistent with the approach across most UK copyright law, whereby artistic works have copyright protection for the lifetime of the creator plus 70 years. The approach seems sensible and provides a degree of consistency and therefore simplicity. The measure which we support will help industries such as the British furniture and jewellery sectors."

Here comes another politician, "Will the honourable gentleman congratulate Sir Terence Conran, who has articulated the problems experienced by the UK furniture and manufacturing design industry, and accept that the clause will make a massive difference to that industry, which is worth £2bn-£3bn to the UK economy." First bloke, "I am happy to do that I think. There has been a display outside the committee room all week by the UK furniture manufacturing industry, which is an important part of what the country can do. Anything that can boost manufacturing, particular furniture manifesting, should be welcomed."

Students, it is all codswallop. £2bn-£3bn? What about the students up at the University of the Arts, just north of my university, who are trying to design furniture now? Are they supposed to start with a completely clean sheet as though no chair had ever been designed before, get no inspiration from anything? Don't forget what judges can do about the copies, look at that picture there, call that a copy, well judges can.

Is it really right that people who design things like the Mis Vandro chair or the Charles Eames chair, he has been dead for years, should now still be raking in royalties? Charging £2500 for the snob value of a genuine Charles Eames chair? Copyright undoubtedly has got out of hand. 70 years from the year of death of the author means 100 years protection for pretty well anything.

Now I don't want you to think I am against IP. I am not. It is a really important branch of the law for all creators of all different kinds. Unless this subject is approached rationally, it will either be over powerful, or on the other hand rejected altogether. There is nothing new in any of this. Here are some voices from the past. Lord McCauley, 1840, on the proposal to increase the term of copyright from 28 years from publication or until the death of the author, whichever is the longer. Proposal was to take the copyright to 60 years from death of the author, "It is good that authors should be remunerated, and the least exceptional way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good, we must submit to the evil, but the evil ought not to last a day longer than is necessary for the purpose of securing the good. A monopoly of 60 years produces twice as much evil as a monopoly of 30 years, and thrice as much evil as a monopoly of 20 years. But it is by no means the fact that a posthumous monopoly of 60 years gives the author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of 20 years."

I find that unanswerable, but the voice of reason in intellectual property these days is rather silent, or is not listened to. The voices of those with strong interests in no competition are heard loudest. The term of copyright went up from 70 years from 50 years from the year of death of the author in the 1990s, almost without comment. Last year the term of copyright in sound recordings went the same way. Some might say, "Aren't the Beatles and Cliff Richard rich enough already?"

I turn to patents. Here, the debate often goes irrationally the other way. There is much complaint these days about patents, particularly, for example, patents for medicines. Here are these wicked profiteering pharmaceutical companies extorting the poor by charging so much for their patented medicines.

These medicines cost billions to find and test, and have very limited protection, in practice, a maximum of about 10 years if you are lucky. 17% on average of the turnover of a pharmaceutical company is spent on research on the next generation of medicines. Not profits - turnover.

There is nothing new about complaints concerning patents. Late 1700s, Jeremy Bentham, "So long as men are governed by unexamined prejudices and led away by sounds, it is natural for them to regard patents as unfavourable to the increase of wealth. So soon as they obtain clear ideas, to ride next to these sounds, it is impossible for them to do otherwise than recognise them to be favourable to that increase. That in so essential degree, that security given to property cannot be said to be complete without it."

Bentham may not have been entirely disinterested because his younger brother Sam, and he was close with his brother, was an inventor and a patentee of an important patent of 1793. It covered all sorts of mechanical woodworking devices, a rotary planer, different types of saw, a lathe and other things. A man called Marc Isambard Brunel, a Frenchman, you may have heard of his son, who escaped the revolution to go to America, had come to England. Sam Bentham and Brunel, along with a chap called Henry Maudley, were the key figures exploiting Bentham's inventions. They set up the Portsmouth block mills to make pulley blocks for ships.

A ship of the line typically need 1500 pulley blocks, and lots of spares. Until Bentham's inventions they had to be made by hand at huge cost. The block mills were the first British mechanised mass production factory for a mechanical device, down in Portsmouth. Bentham's patent ensured no rivalry, and that there were enough pulley blocks to ensure that Nelson's ships were in perfect working order at Copenhagen, the Nile and Trafalgar. Perhaps the patent system helped beat Napoleon.

Now let's move on, another anti-patent man, a Brit called Michael Polanyi in 1944 - quite why he wasn't fighting the enemy I don't know. Perhaps the government decided that an economist doing their fighting would only get in the way. It might be a good idea if they thought about that now.

This is what Polanyi said, "Floods of patents are issued, the validity of which is uncertain. At the meeting of the British Association held in 1931, we hear patents described as lottery tickets. Manufacturers can never tell whether they are infringing on some patents and becoming liable for heavy damages. 'A bad patents system, writes Nature in connection with this point, is a fetter on the hands of industry, and an instrument of blackmail.'"

Well, irrationality about patents goes on and on, and that includes ignorant courts. Here is the most recent example from perhaps the most ignorant court, the Court of Justice of the European Union. Article 6(c) of a thing called The Biotech Directive, said, "Uses of human embryos for industrial or commercial purposes cannot be patented." Well you can be a bit emotional about this sort of thing. But you might think that what they said you couldn't patent was taking some embryos and using them for commercial purposes.

But according to the CJEU, it goes much further than that. Oliver Brustle, a famous stem cell scientist, used a stem cell, which had been obtained from a single human embryo, to make an invention. The invention was for what were called neural precursor cells. They had potential use for the treatment of all sorts of neurological diseases. When you get to my age you start worrying about Alzheimer's and rather think this sort of invention is a good idea. Not so the European Court. It said, "The context and aim of the Directive thus shows that the European Union legislature intended to exclude any possibility of patentability where the respect for human dignity could thereby be affected. It follows that the concept of 'human embryo', and the meaning of article 62(c) of the Directive must be understood in a wide sense."

So, stage one, human dignity, more important than anything else you can think of. Then it says, "An invention must be regarded as unpatentable, even if the claims of the patent do not concern the use of human embryos, where the implementation of the invention requires the destruction of human embryos. In that case too, the view must be taken that there is use of human embryos within the meaning of the Directive. The fact that destruction may occur at a stage long before implementation of the invention, as in the case of the production of embryonic stem cells from a lineage of stem cells the mere production of which implied the destruction of human embryos is, in that regard, irrelevant."

So way downstream, the fact that all the research was utterly lawful is irrelevant. You can't have a patent if your invention at some point upstream, it doesn't matter how far, involved the use of a single human embryo. That, they say, is contrary to human dignity. It is a very curious concept. All the acts are lawful. The research may lead to cures for a whole range of serious human ailments. Why the bloody hell is that undignified?

Earlier this year, I asked one of UCL's scientists, Professor Pete Coffey, from our Institute of Ophthalmology and our UCL Centre for Stem Cells and Regenerative Medicine, to come and talk about what he was doing. We had an audience of patent lawyers, attorneys and scientists and doctors. He was using stem cells, ultimately derived from human embryo, as a possible cure for macular degeneration, another thing you start worrying about when you are getting a bit older.

There are 7 million blind people in Europe, and another 7 million in the United States. Partly funded by a pharmaceutical company, his work was and is showing real signs of progress. Some patients had actually responded, their degeneration had gone backwards. Would you fund this kind of research, which is going to become very expensive if you want to go on to large scales, taking years, proving that it is effective and safe? Would you put millions, hundreds of millions into this, if as soon as it was established as safe, copyists could come and take it away? No you wouldn't, no you wouldn't.

That is what the Court of Justice did. It was, I think, the most important seminar I have managed to get running at UCL. The Court of Justice of the European Union, by its ignorant, prejudiced decision, has put back European research in this area for years. Is anyone campaigning to change the Directive? No, politicians are not interested in things like that.

Well now students, I suppose most of you will not be doing IP. Nonetheless, whatever you do, you may be brushing up against it. Take employment law, you may even be involved in a case of somebody who made an invention - who owns an invention, who owns a copyright work? The employer or the employee? If the employer, are there any other rights? Can an employee claim

compensation for an invention, which he made when he was employed to invent, and his employers made squillions out of it? The answer is yes. How much? A bit woolly, says Master Floyd. He is the master of this sort of thing, he was the person who changed it all.

He said, actually, you can get a significant amount of money, and in an extraordinarily balanced judgement said, 'Yes, but not too much either.' How far can an employer prevent an ex-employee from using information he learned during his employment? A huge subject. The difference between protectable trade secrets and the employer's ordinary skills remains illusive, and probably always will be.

Those going into contract law may be concerned with IP licensing agreements. This is a subject so full of pitfalls that we at UCL have decided to put on a week's intensive course on the subject for young lawyers. Actually, these days, I make a few bob arbitrating and quite a few involve agreements which have gone wrong.

Those going into crime may think IP is not for them. But there are IP crimes too, both trademark infringement and deliberate copyright infringement are criminal offences. I understand some of that - there is particularly a public interest involved if someone sells counterfeit goods, conning the public. Particularly if the public take them as genuine. Counterfeit medicines are the current extreme example. But IP is an inevitably technical branch of the law, and those of you who are going to do crime, make sure you understand what you are doing, or find somebody else who does.

I once, and only once, sat in the Court of Appeal criminal division, presiding no less. The defendant had bought X-Boxes and the like from John Lewis and such places, and modified them so that they could play pirate games. He carried this out from the attic of his mum and dad's house. He was prosecuted down in Bristol, and you may think that was a bit heavy handed, particularly when you learn that it was a three-day trial. The prosecution's case was that this activity facilitated the market in pirate games. But the technical definition of the crime involved more than that - it involved dealing in a device which enabled pirate copies to be made.

Of course they are made transiently when you play the game on the computer, but the prosecution failed to prove that. If they had, there would have been a conviction. Over three days they failed to prove the most elementary thing. So we let the defendant off, telling him if he did it again they would know what to do next time. There was even an earlier civil judgement, and my friend Hugh Laddie, had told them exactly what they had to prove. He dealt with the whole damn thing in about an hour in the Chancery Division.

Yes, IP forms part of criminal law, but those who get involved in it have got to be careful, and that is the warning to you who go into crime.

Of course there are other aspects of IP, which may need a criminal lawyer. In the 1980s for instance, Vangelis was accused of copying no lesser piece than Chariots of Fire itself. It was said to be a copy of a piece of music, played to him in Paris, by a man who had composed this piece of music, and it had been used for a theme tune for an awful soap opera shown on Greek television.

Vangelis could never have seen this, because in those days there were no international broadcasts, and he was busy in Paris keeping away from the Greek Colonels. I was hired initially by Vangelis, and I had a copyright junior from this Inn, Mark Platts-Mills. Later on, the record company was sued, and

they had separate solicitors, and they decided they had better go with Vangelis' lawyers, that is to say, me and Mark. After a bit, these solicitors panicked, perhaps rightly so. The case was all about whether the plaintiff's key witnesses were lying. The solicitors had the idea that the Chancery lawyers didn't know much about liars. Of course they were wrong about that: liars and cheats, and other sorts of crook, are frequent visitors to the Chancery Division at the High Court.

Anyway, the record company said, "We better have another junior, an expert on lying." It was Master Hooper here. I am ever so grateful he did that, for he and I have been the closest friends ever since. He and I formed two thirds of what Master Hallett called, "The Naughty Boys' Corridor" of the Court of Appeal. Now you may want to know what happened in the case. The judge held that Vangelis hadn't copied, the pieces of music weren't close enough, the plaintiff's witnesses were liars. Anyway, EMI, the plaintiff, who had bought the copyright, hadn't properly bought the rights. I think we won on a couple of other things on top of that, but I can't remember.

So those who do crime can get mixed up in IP too. Those who go into family law may think it doesn't concern them, but it can. First of all, you can have huge questions of valuation of IP owned by one of the warring parties. What are they worth? Supposing J.R.R Tolkien had got divorced. I was once involved in a dispute between an ex-husband and wife. After the divorce was over and the ancillary matters apparently settled, the wife claimed that the lyrics of a piece of music, a very successful piece of music, written by the husband, had actually been written by her, and she was entitled to the royalties on a commercial basis. The case settled so we never found out.

Wherever you are in the law IP can turn up. Watch out for it and be aware of it. You may not understand all this ridiculously complicated branch of the law, but you need to know that it is there. Keep your sense about you when you find it.

Right, well now students, I am going to pose you a problem - that is what I do in my lectures. It is a real case from 1975. In those days, television for children was probably even more important than it is now. There were no games or anything - it was television or nothing, and particularly popular were The Wombles of Wimbledon Common. They were very well known, and the people who created them claimed the rights in the word "Wombles", a wholly created word. A skip hire business, a builder's skip - you remember one of the things The Wombles did was to clean up, tidy up, take rubbish away? Well, a skip hire business in Wimbledon decided to call itself Wombles Skips Limited. The creators of The Wombles sued as they had now trademark registered.

Now then students, who do you think should have won that case? Those in favour of the creators of The Wombles, hands up. Those in favour of the skip hire people? Very English, slight majority in favour of the skip hire I would have said. What I haven't revealed to you is that this was Master Thorley's first case in the High Court. He was for the Womble creators and I was for the skip hire man.

Now then I have tried to give you a flavour of what it is all about - what more can I do in an evening like this? I am very, very proud to have been asked by Inner Temple to come here, and I am very proud to have taught you students.