Technis opinion: From the History of Intellectual Property to Policy Concerns: Approaching Law as Technology

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November 2015

Key words: Historically informed policy, IPR, co-production, trading zones

The management and policy planning for intangible rights and assets under the rubric of "intellectual property" (IP) continue to trigger disputes and to preoccupy legal scholars, philosophers, historians, and business analysts. Recent historical work that is based on a joint book with Graeme Gooday[1] inform these current public controversies and associated policy debates by contributing insights from past experiences. By contextualizing the issues of knowledge management implicated in past patent disputes in the electrical industries, recent historical work from the field of history of science and technology can make three major contributions to the scholarship of law and the technosciences. First, it can be stressed the significant contribution of the adversarial system — in all its complexity and contingency — to the making of Anglo-American patent law and patenting practices. Second, it can be emphasized the extent to which the character of emerging "intellectual property" rights regimes was industry-specific rather than applying universally to all technologies. Third, it can emphasized that the historiography of patents in electrical technologies consists of much more complex phenomena than the self-evident growth of IP rights for patentees.

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Following a suggestion by Biagioli to understand "law as technology" that means just as much as any other feature of technological systems, legal frameworks and practices both enable and constrain key aspects of technological trajectories, from the process of invention to the take-up by consumers. This approach enables us to provide a dynamic, contextual understanding of the making of patent law and the performative interpretation of that law into selective attribution of inventors' rights by patent agents, lawyers, expert witnesses, and judges. It can be argued that that the collective contribution of these legal actors to the making — and unmaking — of patent rights substantially shaped the cultures of litigation and of patenting practices far beyond the courtroom. By stressing the performative aspects of patent contestation, it is shown how the supposedly robust and concrete rationality of patent law becomes rather malleable in the hands of skilled and strategic legal personnel. In this respect, the role of the judges appear to be crucial: their verdicts went far beyond following statutory rules or following case law, moving to the creative interpretation of patent specifications and offering selective trust in expert witnesses commenting on those specifications. As in the late nineteenth century, such adjudication processes and their verdicts are not only under the scrutiny of interested parties and legal experts, concerned about the trustworthiness of the adversarial approach to patent cases. More important are critical deliberations on judges' decisions in the public tribunal of the press. What was, and is still, at stake is the legitimacy of the judges' expertise to decide on technologically complex issues that extend far beyond simple legal considerations — into both the details of sophisticated hardware at one extreme, and the moral economies of invention at the other.

[1] Stathis Arapostathis and Graeme Gooday, Patently Contestable: Electrical Technologies and Inventor Identities on Trial in Britain (MIT Press, 2013).

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Echoing concerns expressed in our studies of late nineteenth- and early twentieth- century cases — and irrespective of whether the decision is ultimately made by judges or juries — contemporary studies have shown the same lingering uncertainties and ambivalences concerning the seeming arbitrariness of purportedly absolute decision making procedures about the awarding or voiding of patent rights. To provide a less contentious system for adjudicating inventors' rights, a new inclusive form of social contract could address the concerns of all relevant stakeholders in the processes of patent legislation and litigation — not just the patentee and government. Such a social contract could be the basis of public accountability for key actors like judges, lawyers, and expert witnesses. As in the late nineteenth century, patentees still have the power to create patent-based monopolies that are often of contested legitimacy.

Instead of drawing idiosyncratically on selective individual-focused narratives of the mythologized "true and first" inventor upheld in courtroom rituals and procedures, an alternative approach would be to accept the historical evidence that invention is often an accretional or distributed process, in which no single participant can claim exclusive responsibility or credit for all relevant innovations. This would make judges' decisions in patent cases more difficult, but more sensitive to the historical complexity of invention as a distributed rather than individual accomplishment. In studying the late nineteenth-century practice of patent litigation, current historical work has shown that the distribution of legal expertise was localized to particular regimes of professional jurisdiction: the workshop or laboratory, the patent agent's office, the Patent Office, the lawyer's chambers, and finally the courtroom — the place where all of them can be called to resolve a patent dispute. Any resultant change in the patent system needs to comprehend the practice of patenting as a multisite and multistage process; there is not just a single patenting culture to reconfigure. Different industrial groups and actors, working with different economies of credit, coevolve with institutions and governing bodies, each with different cultures and values. These arguably create "trading zones" where hybrid forms of industrial life emerge, and in which legal, technological, and financial skills are forged together as the meaning of patents is stabilized. Patent laws and their associated cultures thus reflect the diverse approaches and practices of knowledge management that in turn reflect different traditions, cultures, and priorities.