Table of Contents

b:ar1-12KR

File b:ar1-12 Disk 10
1/12/85, am 1/13 Property Parallels:
(the Dukeminier/Krier Book, among other things)

These are notes re thoughts sparked by reading Dukeminier & Krier, PROPERTY (little Brown 1981) and their TEACHERS MANUAL FOR PROPERTY(Little Brown 1981).

0.1 Overall goal of article

What I may be doing is beginning a unified doctrine of i/p. One part of that doctrine may be parallel with that of ordinary Property, like so: HYPOTHESIS

> The role played in ordinary property law by "possession" [,1] may be played in i/p law by "use".

This can be very important.

0.2 Possession

K & D aren't hot on conceptual analyses of possession. For those who are, they suggest (at 1-10 of T Manual):

1. Tay, Possession and the Modern Law of Finding, 4 Sydney L Rev 383 (1964)

2. Tay, The Concept of Possession in the Common Law: Foundations for a New Approach, 4 Melb. L Rev 476 (1964)

---

1. I am referring to the functional role played by "possession" - possession as a fact rather than as a conclusion. Nevertheless, the parallel may hold even for the conclusory role played by the "possession" concept. For example, to discourage trespass, the owners of land are said to be in "constructive possession" (a conclusion) of all the wild animals thereon. It may be that in dealing with an i/p creator's intent to go into new markets, which he has not yet exploited, that we might want to say he is in "constructive use" of that market if we want to protect his advantage in entering it.

3. and, a bit less enthusiastically: Harris, Comment, 4 Melb. L Rev. 498 (1964)

4. R Brown, the Law of Personal Property 16 (3rd ed W Raushenbush 1975)

5. Shartel, Meanings of Possession, 16 Minn L Rev 611, 615, 619 (1932)

The latter ineterestingly suggests that for some writers, possession meant the intent to USe. He also suggests how ambiguous intent is as a notion (one can intend much or little- consider Wittgenstain, Morawetz on "unintended" acts) and how many things other than intent may matter.

In the TM, K & D summarize what Brown has to say about possn (interesting): "The courts try to do more than merely decide in a logical way who had 'possession.' They often strive to reward the first person who made good-faith efforts to add to the stock of usable goods[,2], to protect those who observe custom, whose efforts to gain possession are part of a livelihood, and to prevent quarrels and altercations,. They might do all this under the "possession" lable, however." TM at 1-23.

The goal of rewarding the first person who made good-faith efforts to add to the stock of usable goods[,3] is interesting. REMEMBER that for regular goods, upon capture there's only one stream of productive use that's possible at a time. With public goods, however, onece there's capture there remain many possible streams of use simultaneously available. One might therefore want to reward the "discoverer" of one streamlet with that stremlet, but keep the rest in the common to reward the next comer. Of course, the next guy will have benefitted by the first person's having made the possibility salient, or maybe even from the fixation itself.

---

2. Potentially important for i/p.

3. Potentially important for i/p, as noted.

0.3 The Rule of Capture

Krier & Dukeminier introduce this as a dominant rule: he who lawfully captures wild animals, or oil & gas, gets to keep what he has captured. They argue that where there is a commons (as with wild animals, or a large pool of gas underlaying many owners' lands), this rule may lead to overspending on the devices of capture.[,4] It may also lead to overconsumption or overuse, they argue, since the process of capturing a scarce good generates negative externalities. It is better, Krier argues orally & Demsetz impliedly suggests, to "divide up" the commons PRIOR TO capture, so that most of the costs and benefits of usage will be felt by those individuals (owners of the divided up resource) who will be making the decisions re allocation.

> Why do they think that leaving the good in a commons, subject to individual expropriation by capture, is likely to have significant externality problems and tend toward inefficient results?
>
> Demsetz: if I am rewarded with the full value of whatever I "capture," and if I lose only my partial right of ownership in the thing captured (partial because I share ownership of resources in the commons with all other relevant persons), then I will have a strong incentive to "capture" and remove things from the common pool. I will do this even if "capture" by myself and similarly-situated persons is to our mutual long-run harm. ("Tragic Commons.") See the K & D TM summary, esp at 1031.

Capture has many intriguing parallels with intellectual property. In fact, i/p is one of the few areas in which there remains a significant pool of common resources, thus giving a particularly modern "bite" to the law of capture. In addition, the i/p rules will have to be different (even if analogous) because i/p resources are nearly inexhuastible. That is, there

---

4. Note that some of the literature on the patent system suggests this "game" of racing to capture may not be so counterproductive after all.

may be some congestion problems, and it depends on a particular situation how bad those congestion problems become.

Aside from the alleged overinvestment in capture technol, the main criticism of the capture rule is that it leads to overruse. For public goods, there may be no scarcity, no possibility of overuse. Even the K & D example comes close to recognizing (1-31, first full paragraph) that where there's no scarcity, there may be no problem. (True? Consider the trader example. If an outsider offered $2 for songs worth $3, is there no harm done if he gets them? A weird question, since the real "worth," where mc=0, may be indeterminate.)

More details on the probs of a cpature rule and meliorating solutions appear at D&K TM 1-34 and 35; also K&D recommend the Friedman article for summarizing this well.

Possible parallels look like this: Prior to crystallizing a creation (reducing it to "thingness," Terrell might say), the i/p resource remains in the commons, uncaptured. When it is crystallized[,5] that is like being "captured." Once crystalized, it is capable of being owned. In regular property, with capture[,6] comes possession. However, possession is an exclusive notion. Only one person can possess at a time. With fixation in i/p, "possession" doesn't follow, except insofar as the law creates an analogue to possession by giving rights to exclude. That is, to the extent "possession" is a factual, physical-world event which implies the physical power to exclude, i/p cannot be "possessed." Thus, with physical goods, capture implies possession. With nonphysical

---

5. The litigation over whether Hemingway's widow had proprietary rights in Hemingway's oral conversations illustrates the interesting line-drawing problems which the notion of crystallization may have.

In the i/p caselaw, there are many versions of crystallization. In copyright, there has to be a "work" of originality "fixed in a tangible means of expression" from which it can be later recalled (e.g., nonfugitive.) In the law of ideas, to the extent there is protection, the idea has to be made concrete. In the right of publicity, Terrel wd argue, there is insuff fixity & therefore the right is improper; I'd argue that the "name or likeness" standard provides some fixity.

6. Assuming that in i/p, "capture" = "fixation".

goods, capture implies merely that one aspect of the resource has been made usable.

What then should be the i/p analogue to possession? Use.

0.4 Abandonment

The "Finders" section suggests that abandonment should be an issue of intent. If it is, then a person who loses his property should be able to later reclaim it. The finder (or the owner, or the owner of the locus in quo, or the state, depending on the circumstances) is not without a protectible interest, however. His possession gives him superior title over later comers.

Note the compromise which is reached: the owner who has ceased to use[,7] the property nevertheless has a potentially superior claim when he wishes to reassert his claim.[,8] He is rewarded for his initial efforts in creating/capturing/buying the thing in question, by having a claim as against later finders. The finders, however, are encouraged to use the thing in question productively by getting a primacy in interest over later comers. They might not be as productive as they might otherwise be, since they have to discount the value of their conditional title by the likelihood that the original owner won't show up, but there will still be a great value to them[,9] and encouragement to use productively.

It may be that some such compromise would be viable in the i/p area. Note: if property law's concept of "possession" equals the i/p concept of "use," then when a creator decides not to exploit a particular avenue he is intentionally abandoning that avenue.

---

7. If the owner has lost the property, he can neither possess it nor use it.

8. With "property," the reassertion of possession may be sufficient. With i/p, the reassertion of use would be a better parallel.

9. Consider that, e.g., one can earn a great deal of interest with even temporary use of money.

0.5 Other parallels

0.5.1 Expansion Markets

The dispute in Pierson v Post over whether actual capture or a "reasonable prospect" of capture is sufficient, is similar to the arg over actual use & likely use (expansion markets). D & K Manual at 1-19. Purpose: to facilitate beginning an exercise, setting one's self up for a launch.

0.5.2 Prop "escaping" from your control & from your ownership

Hammonds (TM 1-26)- no trespass when gas goes under neighbor's land becuz it's then his gas, not "your" gas, once it does. Loss of possession of nonfugitive property doesn't bring with it loss of title (that's the primary moral of the "finders" section) at least not ordinarily (consider adverse possession.) So what makes this different? Is there supposed to be an incentive to keep fugitive things penned up-- or a recognition that by mere capture one hasn't "earned" what one has in a usual sense? The latter wouldn't seem right- after a lot of expense in capture (trapping for fur; well drilling) there's little "windfall" tinge in what's captured. Need to think a bit about the nature of fugitive property and why it's escape is so treated- especially since it can be said that i/p assets "escape" to new uses sometimes, & i/p is notoriously difficult to "pen." After even one or two fixations, or captures, there may still be a "wild stock" (public domain) there for others to capture in their turn, like the neighbor in the gas case.[,10]

---

10. Part of what's at issue here is WHAT POINT in the creative stream the stranger/neighbor enters. If he comes in after fixation and uses what's fixed- egt he use made by CHi Bd of Tr in Dow Jones- he may be in a diff position than if he merely "mines the mother load" that the first fixater's activity identified-eg Abie's Irish Rose.

The traditional copyright distinctions follow this stream analogy. My problem is that I may want Dow Jones not to be

0.5.3 Real property compulsory licenses

1. Spur v Del Webb

2. Note that one of the legislative responses to probs caused by capture rules is like compulsory lic in that it elims the rt to exclude- that is, pooling. See summary at K&D TM 1-35 (oil and gas). Need to think further if it's really like comp lic

0.6 Transaction costs:

Taking externalities into acct is expensive (K & D TM at 1-32, etc.) If public goods are involved, so that exhaustibilty (the primary source of negative externalities) isn't a major problem, the creation of a property system may not be worth the cost.

"Overhead" t-costs of maintaing a system: K & D TM (Citing from an article by Jim) at 1-39

Also see Fres, 1- costs having, autom. 9)

0.7 Incomplete GateKeeper Function even for Real Property

Re GATEKEEPER awards- in one case of gas going under a stranger's land, the gas co kept title AND wasin't liable for trespsass-- which seems inconsistent w property notions. The rationale was merely," conventional principles of trespass law developed out of concern w surface invasions and are not appropriately applied to subsurface invasions."K & D TM at 1-29, citing Railroad Comm'n of Texas v Manziel, 361 SW2d 560 (1972). K & D like it, but it seems inconsistent w restitution, Cunningham's cave case, etc.

---

permitted to complain even if the stranger comes in late, so long as the latecomer is heading up an unexplored road.

0.8 More on GateKeepers: Trespass

K & D TManual at 1-37, citing Posner book at 27-28, 39-40, gives reasons for prohibiting trespass.[,11]

0.8.1 Incentives

Protecting the security of ownership protects/encourages productive investment.

0.8.2 Transaction costs

Self-help protection techniques (and the techniques to circumvent them) may cost more than the trespass system does.

0.8.3 Tort-Property Choice – Procedural & ~~not~~ adv...

Cross-reference:Powers' methodological approach.

If there were no law of trespass and, instead, an owner who's intruded upon had to go to ct to have it decide who (owner or intruder) placed highest value on the property, there wd be these probs:

1. Ct wd have to resolve difficulet evidentiary questions.

    1. Compare Hayek, etc.- the way the market conserves on information costs by making centralized knowledge of the whole unnecessary, and by "testing" the accuracy of claims re; value by making people put their money where their mouths are.

---

11. Note that for Krier and Posner, Trespass is the archetypical legal relation protecting the market system. I may treat it the same way. In fact, however, there are many other kinds of torts with different responses.

2. This will give rise to T costs in judicial resources expended

3. This will give rise to edrror costs (ct may be wrong, putting the land in a lower-valued use)

4. Uncertainty of outcome

    1. Will deter investment

    2. See notes elsewhere re general considerations re expectation and certainty

2. "The law of trespass, by compelling such (market-like) transactions, provides an easy means for moving resources to higher valued uses."

3. Where transactions in market aren't feasable, and ct does have to value competing uses, then rules of reasons-a la negligence- may be "the best we can do."

Source: D & K Teacher Manual at 1-37.

Also, note that in the above summary I may have used some exact language from the K & D T-M. Remember to give proper citations, indications of quotations, where appropriate.

0.9 Problems with a commons

- Overuse- too many externalities

- Negotiations unlikely to occur (K & D TM at 1-33 thru 35; Regan

- have to bargain w everyone rather than with the small no of persons who are your immediate neighbors.

0.10 Unpublished works

How does this "possession = use" scheme fit w the nagging problem of unpublished works? It's a nagging problem because, if your "use" is private contemplation, why should a law based on "use" (which is my contention) allow the author to restrain publication (which is one of my desired results)? The answer may lie w bad acts. If the thing is truly private, no one can get a copy of it without breach of confidence, theft, etc. But the "breach of confidence" notion is terribly elastic. If Author Clemens shows the unpublished essay to Friend Q and Friend Q has a perfect memory, replication of the essay by Friend Q will (on this theory) depend on Friend Q's breach of confidence. But if Author Clemens shows the published essay to thousands, with the contract on the front indicating "he who reads this book is under contract not to make a movie or other unauthorized use of it," then persons who seek to explore the unused avenues will be in breach of contract. Maybe the distinction of "publication" would be useful after all: prior to publication, an author can place on his reader/users certain kinds of limitations. Once he takes advantage of the market, however, showing that his motives are not primarily privacy-oriented, the "use" criterion should come into play.

Such an analysis is consistent w incentive analysis. If your goal in crystallizing,e.g., your thoughts is to give yourself private material for contemplation, then forcing publication will work as a disincentive. Since many journals written for private purposes eventually become of public use (20 years later, the private author may want to write his memoirs, for example), and since it is a very valuable right of civilization to have some space of privacy,[,12] respecting the use of nonpublication for privacy purposes may be important. (Use of nonpermission for other purposes- such as forestalling criticism- may not be so desirable.) If the person's motivations are otherwise, however, like money, then he should do the money job right (full exploitation).

But that raises a normative question: What's wrong with a mix of motives- a desire to publish coupled with a desire to

---

12. Brandeis & Warren; the Posner article on privacy

control the particular modes of publication? The latter desires by artists are so much respected in other countries that they have even given its traditional hosility to droit moral, their own protection-- "droit moral."

0.11 Certainty and Expectation: Summaries of Themes

The D & K Teacher's manual at 1-20 has a nice summary re the benefits of certainty. They are related to the benefits of expectation: encouraging investment, etc. Elsewhere K & D have a similar summary re the benefits of expectation (at 1-1).

Holmes suggested that continued use breeds expectation, and expectation breeds a conviction of entitlement, and such convictions breed a willingness to fight to keep what was expected, so that law should honor expectation to the extent possible lest it fly in the face of people's "deepest instincts", and thus foment disobedience, vioence, & self-help. Holmes, 1897 art in Harv, quoted in D & K text at 82-84.

0.12 Extortion

D & K in T-Manual argue that some harm in necessary to get good results, so we tolerate it (harm thru compet) and some isn't. "Interference [such as extortion] frustrates whle competion promotes the instrumental end..." 1-22. Among other things, threats promote monop, and monop is bad.

0.13 Bilateral Monopoly

D & K T-Manual has a nice summary of the evils of bilateral monop-- primarily strategic behavior preventing one from dealing with the other. (note applicability to the ins v ap case). 8-13. 8-14 (extortion is covered there too). See Stanford Note, which D & K criticize, and Posner at 45- all cited in D & K text at 934 n.5.

I think "bilat monopoly" refers to a situation where X has a monop of buying and Y has a monop of selling. In the INS & refusal to sell[,13] cases, I'm interested in a slightly different question:

0.14 Income Effect

A simple summary of income effects is on 8-14 of T Manual. He cites Posner book at 35-6 n.1.

0.15 Fair Use Generally

The real answer to the Liz Taylor suit to enjoin her tv-biography on right of publicity grounds is that, whatever her rt of publicity might be, fair use should operate to permit the biography on "author-disfavored use" grounds, supplemented by First Amendment concerns.

0.16 Transferability

There's something important hiding in the transferability issue. For example, on reason for not allowing trespass-type gatekeeper damages for use[,14] of good will may be that one isn't SUPPOSED to "trade" in one's good name-- either for Titmus-like reasons of prefering nonmarket dealings in special "goods," or for other reasons. One of these other reasons may be that one's NAME should stay attached to that person. The

---

13. Would the antitrust literature on "refusals to deal" be helpful here?

14. Note that for regular property, use = possession = taking = depriving another. For public goods, one person's use might not deprive another of possession or use or enjoyment even temporarily.

restrictions in tmk law- now maybe an empty formality, however- that there be no transfers "in gross" and no licensing without restrictions on quality control, expresses this. If transferability isn't a good thing, the gatekeeper function (which serves to measure bids for access or trade) is counterproductive.

This may also say something about the right of publicity.

0.17 Entitlements

It will be very important to make clear that while for usual questions we may ask, 'what is a market-like result" based on KNOWN entitlements, the issue here is WHERE SHOULD THE ENTITLEMNTS be. C & M suggest entitlements shd go to highest-valued users, or place where errors can be most easily corrected. (The latter has implications for the certainty concern.) But there may be other criteria as well for where to place entitlements- like Locke's labor theory.

0.18 Proportionality

Re my "more often than not" modes of characterizing property as distinct from other interests, see Ackerman in PRIV PROP & THE CONST at 97-100:

> Layman may properly use his things in a large number of ways withou asking anybody's permission. Even Layman, however, cannot use his things in absolutely any way he wants...
>
> ...A particular thing is Layman's thing when :(a) Layman may, without negative social sanction, use the thing in lots more ways than others can ; and (b) others need a specially compelling reason if they hope to escapte the negative social sancions that are normally visited upon those who use another's things without receiving his permission.

0.19 To Do

1. Antitrust literature on refusals to deal
2. Read Ackerman's ch 4 on Kantian views of takings
3. Read K & D t manual on nuisance- good stuff re entitlements