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0.1 Summary: relation of KEWANEE etc to my analysis

What is the S Ct's notion of public domain? Does dissemination play the same role I think it should? Here's a look at patent policy. Basically, I think the following shows that the S Ct envisages that there's a separate policy which says that things once made public should stay public. Now I'd tie that to reliance & changes of position. The court doesn't think it through very well; they may have power in mind, or vesting, or just precedent. It's unclear. But it's useful for my purposes that the Ct opinion suggests that they think dissemination (or at least, dissemination plus disclosure) is relevant to what kind of legal protection one should have, aside from common-law copyright itself.

0.2 Kewanee

In KEWANEE, the court says that once something is in the public domain, it can't be redrawn into a protective net. I think what they have in mind are two things: reliance by the public (a factual issue which fits into my scheme) and vesting (a legal sort of conclusion, which doesn't seem to fit my schema). Also maybe Power. (see end page)

In KEWANNEE the S Ct says, "the policy that matter once in the public domain must remain in the public domain is not incompatible with the exsitence of trade secret protection. By definition a trade secret has not been placed in the public domain." 416 US 484 (fn omitted).[1]

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1. In the fn here, the ct cites to various cases holding that an invention may be placed "in public use or on sale withint the mainging of 35 USC 102 b" without losing its secret character-- meaning that an invention can be placed on sale and lose its ability to be patented yet remain secret.

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Lear V Adkins and Kewanee: "public domain" and "dissemination" - 2 -

What does the Ct mean by "in the public domain" here? I suspect they aren't making a reference to a legal conclusion here, for "by definition" a state mode of protection can do nothing to keep an item out of the public domain if the federal law decrees otherwise. Rather, they seem to be making a reference to a PHYSICAL or REAL-WORLD state of affiars, namely, whether or not something is secret or not. The "by denifition" language thus makes sense, since "by definition" a trade secret is secret.

The "policy" they're referring to seems to be this one, from an earlier point in the opinion--

Says the KEWANEE court:

" The Court has also articulated another policy of that patent law: that which is in the public domain cannot be removed therefrom by action of the States.

> "[F]ederal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent." Lear, Inc. v Adkins , 395 U.S., at 668

See also Goldstein, 412 US at 570-571; SEARS; COMPCO 376 US 234, 237-238; INS v AP, 248 US 215, 250."

KEWANEE at 481.

The language about "general circulation" also suggests that that court viewed its reference to "in the public domain" to be referring to a factual state of affairs- above, nonsecrecy, here, "in general circulation." The court's citations following this point are largely consistent with this interpretation. The referenced pages in Goldstein and INS talk about what happens to "ideas and concepts" once they are "communicated to others," this communication being a real-world event.

This suggests that the Ct in KEWANEE was using a "real world" notion of the public domain- e.g., what's known in general circulation is in the public domain, and should be nonprotectable just because of that fact.

However, the import of the citations is not fully clear. Thus, the court's reference to quotes from INS and GOLDSTEIN

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are a bit ambiguous, for they refer not only to "communication to others" (dissemination) but to particular subject matters, like ideas. If ideas are to be generally nonprotected (which GOLDSTEIN implies), then the reference to "public domain" may refer to a legal conclusion. Another problem with interpreting the quotation is thes: S Ct in KEWANEE also cites, on the pub domain point, COMPCO at 237-8. That ref has no component re "dissemination" that I can see. At those pages, the ct in COMPCO merely talked About "the federal policy, found in Art. I , sec 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the patent and copyright laws leave in the public domain." It's true that in COMPCO the court was dealing with an obvious, in the public eye, nonsecret design- but the referenced pages deal not with the fact of public knowledge but with LEGAL CONSEQUENCES from failure to meet statutory requirments. That MIGHT mean the ct say pub domain as to be defined solely in terms of a legal conclusion, as meaning the things that shouldn't be protected. However, it would be meaningless or trivial for the Ct in KEWANEE to have meant (in the quote from page 481) that there's a policy against protecting what's in the public domain if pub domain were defined solely as meaning the things that shouldn't be protected.

Further, such a meaning would be downright incorrect, if one looks at the other KEWANEE quote (from page 484) where the ct says the "trade secrets by definition aren't in the public domain." If "not in the public domain" means there something OTHER than the factual state of secrecy, but also means "protectable", then the sentence translates to: "by definition, a trade secret under state law is protectable." If state laws were suffic to put something out of reach of preemption, the COMPCO state court protection would have been honored. In fact, there would have been no COMPOCT case. Therefore, the ct isn't likely to have meant "public domain" to indicate this.

The only sensible meaning of the above underlined quotation is that trade secret protection INDICATES that a FACTUAL state of affairs (namely secrecy) obtains, and certain legal consequences (e.g., an <u>absence</u> of strong preE or antiprotection policy from Fed law) follows from this fact.

What is this policy, which apparently says that an independent ground of prohibiting state protection hinges on

disclosure?[2] Rosenberg mentions (in connection with some court's hostility to late claims in favor of intervening rights):[3] "These courts deem the intervening rights of the public as paramount to those of the patentee." section 7.14, citing various cases at 1 164.

NOw this is something that might fit w my schema .

Reutrning to the KEWANEE quote at 484: There's a problem of squiaring my interpretation of what publication should mean (namely, reliance) with what the court seems to mean (namely, no secrecy.) Look again at the quote: "the policy that matter once in the public domain must remain in the public domain is not incompatible with the exsitence of trade secret protection. By definition a trade secret has not been placed in the public domain." 416 US 484 . In a fn, the ct cites to various cases holding that an invention may be placed "in public use or on sale withint the mainging of 35 USC 102 b" without losing its secret character-- meaning that an invention can be placed on sale and lose its ability to be patented yet remain secret. That's pretty weird, esp since Rosenberg says

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2. And is disclosure really that important- e.g., in GOLDSTEIN, did the record piracy statute apply only to material first disseminated after the date of enactment? And perhaps more importantly: if something was disseminated under state law- and not "published" in a formal sense-- how could it be brought into federal protection in 1976? This suggests there IS some "legal" meaning to the public domain concept-- that something can stay out of the public domain EITHER by having state protection OR by staying secret. But if the thing is generally disseminated in contexts where people have no obligation to keep from republication, then protection can't later be extended. Such an interpretation isn't inconsistent with my reliance point, for the existence of common law copyright or other prepublication protections gives some NOTICE to persons affected that if they partake, they do so subject to a condition. However, as my Rothbard essay indicates, arguments premising protection on users' implied consent after notice, can go only so far.

3. what happens if you make a claim, put something on sale, and then make another claim covering the changes in what you put on sale

public use is any "nonsecret" use of a completed invention.[4] Maybe the ct means that What is public use for the patent law has nothing to do with real (factual) secrecy of the innards of an invention, and that the public only comes to have rights to a secret when they know the secret. Allowing state protection based on the flimsy ground that the secret ITSELF hasn't been disseminated is consistent with a POWER (Rothbardlike) view of i/p, but NOT consistent with my RELIANCE view, for folks can become DEPENDENT on trade secrets without understanding them.

0.3 PreE of idea protection

In GOLDSTEIN at 412 US 546 at 571, the court notes favorably re the Calif law, "No restraint has been placed on the use of an idea or concept..." This comment follows upon a quote from INS saying that ideas become, after dissemination, "free as air to common use." This intimates that such state protection for ideas might conflict with the goals of copyright.

0.4 Role of dissemination

The S Ct seems to think that after dissemination, inventors, like authors, have a lesser right to claim prop.(Of course). And it ALSO seems to think that prior to dissemination, a whole diff legal regime may be possible. Consider: if i/p is a reaction to market failure- the inability to make good deals cuz not all users can be forced into contracting-- then it wd seem inconsistent for the court to rule against the very initial contract betw inventor and user which we're trying to perfect! If i/p is serving that contract-assisting function, there should be no preE prior to dissemination. The BALANCING involved in i/p law is the extra control over intitial noncontractors vs incentive... there is no such extra control before something becomes known. Or is

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4. PAT LAW FUNDAMENTALS at sec 7.07 page 7-21.

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there a possiblity for deadweight loss even there?

Thus in INS v Ap:

> The general rule of law is,1 that the noblest of human productions-- knowledge, truths ascertained, conceptions and ideas-- become, after voluntary communication to others, free as the air to common use." 248 US 215, 250, Brandeis dissenti

ng]Altho the majority in INS might disagree w Brandeis, the S CT in GOLDSTEIN cites the preceding with favor, and in KEWANEE cites it also with favor & reiterates the GOLDSTEIN quote. Thus, pre-dissem, state law protection for ideas may be OK. That's partially in accord w my theory. But whether the ct thinks it's ok because any other view would be inconsistent with generally prevailing patterns of privacy morality & etc., or whether it's ok because the court thinks there's something about undisseminated works which ENTITLE them to protection, isn't clear.

0.5 Lear v Adkins

The reference to LEAR isn't helpful on the meaning of "pub dom" one way or another, but it has other interest. In full (sort of):

> On the one hand, the law of contracts forbids a purchaser to repudiate his promises simply because he later becomes dissatisfied with the bargain he has made. On the other hand, federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent... ... this basic conflict in policy...radically different concerns of the two different worlds of contract and patent... (fn & cites omitted)

395 US 653 at 668.

The basis of licensee estoppel would seem to be the Kornhauser notion of discouraging strategic behavior once investments are made & reliance begins. (Reliance CREATES the

opportunity for strategic behavior.) How does that relate to "my" reliance notions?

If the issue of patentability is impt enuf, I can see a court saying that the parties can't bargain to take that risk & promise not to challenge the patent--the one who promises not to seek the truth doens't know the value of what he's giving up.

Also, note what's involved: Agreeing not to seek the truth! Other people are affected- to get a discount by promising to give up truthseeking would be like blackmail! BARGAINING WITH ANOTHER PERSON'S CHIPS. See the Lindgren article. The LEAR court itself sees the issue of other people's interest.

Why for trade secrets are other peoples' interests of less moment? I've begun to suspect it's because for trade secrets, any rule of nonprotection would be DISRUPTIVE of too many other desirable & good things.[5] Similarly with Blackmail: we don't force everyone who knows a nasty secret about his neighbor to disclose it even if knowing the secret wd make some others better off; there's too much potential for disruption if we did so.

(The relation between INTENDED grants of rights, and SERENDIPITOUS ones, keeps getting more important.)

Role of power – what can be done w/out leg prot – to share

note benefits of tr sec – people encouraged (Kewanee)

if no tr. sec. law – lots of $ spent on prote[ction] devices.

If you'll get there anyway, law can help.

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5. SLippery slope and the errors that flesh is heir to; Hohfeld's noting that people tend to lump privilege with right and make other carry-overs from one rule of law to another where it doesn't belong.