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W. Gordon 6/15 5pm

MISC re paper

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0.1 My theory and the preemption problem with 102

Sears/Compco said anything not protected by patent copyright etc is not be be subject to state anti-copying protection. Goldstein says Sears/Compco didn't mean that exactly- rather, states can't control copying where fed statutory policies wd be in conflict with the state protection. Section 102b and generations of copyright cases say ideas, systems, etc., are not copyrightable. That wd seem to suggest that even under Goldstein, ideas etc can't be protected against state law.[1] However, a literal reading of 301 might suggest Cong decided there shd be no preE of such state law protection of ideas. (Explain)

I agree with Abrams that 102b doesnt exclude TYPES of subject matter (an interp which, under 301 , would leave ideas etc NOT subject to pree) but EXTENT of subj matter. If so, 301 doesnt represent a definite statement that ideas shd be free for states to regulate. Is 102b therefore irellevant to preE anal, just cuz it's not mentioned in 301? Are all copyrt provs & policies not mentioned in 301 irrel? In other words: Is 301 exhaustive?

I'd argue it's not. Conflicts w the copyright scheme can exist even outside the scope of 301; I don't think Congress by enacting 301 meant to waive those conflicts. SO: What to do w ideas? Is there a conflict if state protects?

My arg is that the basic preE prob here is the balance Congress has drawn betw deadweight loss & incentive. In certain realms, no public balance: all persons affected are making their own decision. EG contract. EG the contractarian aspects of IP. (Natural law may help to illustrate contractarian aspects- isn't coterminous w it. Contractarian args are good under nat law, or under eco incentives) Therefore, arguably there's no conflict between this sort of state i/p law (like prisonners dillemma misapp also) and

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1. Yet under Kewanee v Bicron, private contracts and anti-immorality cases & statutes win the states are OK even if they prevent copying of ideas. Why: no conflict w incentive provisions of patent laws.

federal law. BUT contracts aren't always acceptable: consider the S CT's rejection of p/d basis for a limit on speech in Willingboro.

0.2 benefits awarded

Revise the "benefits awarded" test to be a "but for" test- Cite NFL, and discuss the similar-to-causation probs

0.3 pos & neg goods

For simplicty, we will assume that the ip goods at issue here are productive of positive value. Property shd follow value, not the creation of negative things. To see this: imagine Dr X creates a plague. There are enough bacilli left for others & he uses only the comon. SHould he have a prop right in it to, e.g, restrin another researcher from taking some ofhis plague strain to work with in search of a cure? Odd to even think re prop rt there. More imptly, a negative item violates the amended (essential) term of the proviso. Also see Becker, who discusses tailoring a laborer or creator's reward to the AMOUNT of net benefit granted; property a suitable reward only in some circumstances.

0.4 Miscellany re Locke

Trianoski says" Locke din't have in mind intell labor, but rather phys labor

One of my students comments that Locke's labor theory doesn't tailor property reward to HOW MUCH labor is put in-- not much proportionality notion there.

Another student argued that in publishing, one PUTS BACK INTO the common. I may want to talk about that- it's a natural step for readers to take.

Honore gives useful Nozick cites. Nozick chain of title arg.

0.5 More for "use" part of paper

Becker: PURPOSES and use define the extent of ownership-62

Re my new taxonomy, maybe reorg a paper this way: "Our inquiry is into the q of what "interference w my use of my prop" shd be protected. ... Use misappropr etc as examples of the liveness of the issue. (INS language re interference)

0.6 Proviso

Remember to mention the Tragic Commons as a way out of Nozick's zip back problem

0.7 Functionality

My general point about reliance and the proviso is at the core of the "functionality" noton that I've been trying to aritculate for fair use and trademarks (culture totem). Make that explicit; add a section re the caselaw problems.

0.8 Slippery Slope: ALSO SEE B:AR611

To the extent there's a slippery slope problem, it may be this:

People do have certain tendencies to "expand" cases. Certain bulwarks against expansion are stronger than others. It is impt to identify the behavioral tendencies which indicate

where the dikes are more or less likely to come under pressure.(Schauer)

One worry in the i/p area is that qualifications on proprty will creep into regular property thus threatening peoples security. The fear is particularly strong since the "desert" notion of ~you keep what you create" is so strong in many people, that they immed see i/p as the STRONGEST case for prop.

One argument I'll be making is that when we realize we're in a realm of "policy not property" (JBW's phrase), decisions made there won't be immediately transferred to the property category.

Implicit in the foregoing argument is a behavioral claim about use of language and the impact of language on idea-formation: that making categories and labels can be impt. That people tend to assume- until convinced otherwise- that when the same word is used in two contexts, the same meaning (and the same legal effects, if used in a legal context) will flow from the word. And similarly, when different words (attempting to denote conceptual categories) are used, people will need to be convinced before they;ll accept that one category should have the same meaning and effects as another. Why is this so natural? Because category-making is assumed to serve some purpose. Sort of a natural law: that new language (new effort) won't be created unless there's a need for it. It's a "law" of conservation of effort.

This law also suggests a reason for distrusting the first tendency- that is, that cuz it takes time effort etc to think deeply enuf to see th need for new language, old language will tend to hang on. And its only when it cuases propblems (reification being probably the most common problem in legal discourse) do we think about changing categories.

Also see b:ar611

0.9 The extent of property as "What one can use"

The MINIMUM the stranger is entitled to (in terms of what complaints he's entitled to make under the proviso) is WHAT HE CAN USE. That's Locke's "test" of when a stranger has no ground of complaint. The MAXIMUM a potential appropriator is

entitled to is THE RESOURCES THAT WON"T SPOIL IN HIS HANDS.

0.10 Becker-competitive loss

Becker argues that the proviso condemns property in anything which would give the claimant a COMPETITIVE DISADVANTAGE (p.71 of Held.) Such an argument might be assimilable to my paper, as another argument against property in "important" i/products, like ideas. It may also be useful to show why a patent-type right against independent creation is a bad thing. But his argument proves more than I want to prove-- works of expression can create comparative advantages, too, and Becker's view of Locke would therefore eliminate them from the purview of property. My instinct is, however, that these things might be propertiable.

Becker's way out of the problem is to reject Locke's all-or-nothing approach to the proviso, and to inquire into "net" benefits that one might give. If the competitve injury is less than the amount of benefit, then, says Becker, some kind of reward-- perhaps even a property right-- should follow. But I am reluctant to get into the morass of "net" inquiries.

Should I accept Becker's interp of the proviso, that it means no product giving a competitve advantage is capable of bearing property? Not completely, because Becker in making that arg wasn't paying attention to how one defines property rights. EG: assume X and Y are both researching some cancer cure, or working on a musical show for a competition. X comes up with a cure, or show, prior to the time that Y is able to do so. If Y is prohibited from copying, Becker would argue, Y now loses the race which (prior to X's success) he had a good chance of winning. Y therefore has lost something.

But Y still has the chance of coming up with his own cure, or his own show. Becker seems to forget that having property doesnt necessarily mean having a complete monopoly-- it can just mean having protection against copying. INdependent creation may be permissable. He seems to think that when an i/product is "fully owned", a monoploy comes with it (page 82). And he admits that the creation of something unique doesn't by itself limit others' opportunities and may in fact broaden them (82).

Nevertheless, Becker has a point. Sometimes, Y will lose out because X has succeeded; using "success" as a criterion implies there is some time frame within which success will be judged, and Y may not be able to catch up by the relevant period. So, Y may be working toward a goal which X puts out of reach. Or, Y may already be serving a market with his product, and is put out of business by X's better product. Y says he wants to share in X's success, or be free to sell X's product, on the ground that had X not existed, he'd have had superior expectations to those he has in a world where X creates her product and claims property in it.

The key may be "expectations" and knowing you're running a race? This needs more thought.

Note also that neither Y nor X might have begun the race had there been no expectation of property to the winner-- e.g., if Y is taking advantage of a prop system (which is different from merely knowing a prop system is in effect), he may have no ground to complain when he's sought to be bound by it.

(Somehow the latter reply sounds jerry-rigged.)

There may be fewer of these cases than Becker thinks. Usually there are (or may be) alternative routes to success and profit. Much of what my paper talks of is delineating those areas in which there aren't alternative routes.

Check out what Nozick says about the proviso & "oppties."

Note: another problem here is that "value" is a tough concept. Locke was talking about the value the land gave to the appropriator- he grew crops for himself & his family. For some types of i/products, the value to the creator is indeed all that matters (diaries; some poetry; Etc.) But for most i/p, the value to the creator is partially instrumental- ie., it's the value in terms of profit that the thing can be made to yield. And that depends on other people. So almost immediately, we're in a potentially "competitive" situation.

0.11 Becker: no restrictions on liberty permitted

Becker argues that any restriction on other people's liberty is verboten under the proviso. (Held 72) I think that's silly: property by definition involves limiting others'

liberty to use. Restricting Y's liberty to use X's product meets the proviso if Y has no entitlement to use X 's product. And Locke tells us that Y has no such entitlement if his ability to create his own products is unimpaired by X's appropriation. The whole inquiry re natural property rights is to ask whether or not peoples' liberty is ever justifiably constrained by the acts of others.

May want to refer to the Becker book here.