Disk 28 File b:ar12-18.85
W. Gordon

TAXONOMY

The legal treatment of the sharing-benefits issue runs along the following Hohfeldian continuum. To state four steps from most sharing to least sharing, I need a small cast of characters. They are:

- the term "donor" will refer to the persons who are the potential source of benefits.[1]

- the term "the public" will refer to the person(s) who seek to share benefits which they themselves have not created.

Here are the three chief steps along the route:

(1) At one extreme, the law may place a right to benefits in the public. Example of an individualized right of this sort: the Tarasoff case, in which the potential victim of a mentally deranged person was held entitled to some right (tempered by reasonableness and other considerations) to be warned of the danger by that deranged person's psychiatrist. Example of a right/duty complex of this sort, but which is mediated through central government : various schemes of subsidy (e.g., welfare, emergency assistance grants) paid for by taxation.

(2) As a mid-range case, the law may place a privilege in members of the

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1. The donor may be someone who has actually created some valuable resource, or someone upon whom the law seeks to impose a duty to spend, or create and share, resources.

public, allowing them to take advantage of those benefits which are otherwise available. By saying the public has a "privilege", I indicate that the law creates no special avenues to assist the public to obtain these benefits. When the public has a "privilege", so does the class of donors; the law is neutral and will not take any steps on behalf of either party except for those steps mandated by principles unrelated to the privileged matter. Example: general ideas are supposedly incapable of being owned in our system of intellectual property law. Persons who learn of other peoples' ideas are free to use and copy them, so long as they violate no other principles of general law in the process. If they do violate such a principle of general law, then they will be called to account under whatever principle has been violated. THus, for example, if all that is given to the public is a mere privilege to use ideas, then members of the public can make free use of ideas only if those potential users have made no contract to hold the idea in confidence. If there is a contract, then general principles of law re contractual relations may prohibit free use, and give the donor a right of damages for breach.)

(3) This next is a hybrid case without a simple Hohfeldian label. It's where the law gives the public more than a privilege, but less than a right, and works like this:

- the public can use whatever idea it finds or can take;
- it can't use the legal system to compel revelation of the idea or taking;
- but the legal system won't operate on the donor's behalf even when (other

things being equal) the law would have otherwise been available.

Example one: the user makes a promise, supported by consideration, that he won't use or reveal an idea. On the basis of this contractual understanding, he is allowed to learn the idea. He uses it or reveals it. The court refuses to enforce a breach of contract action. (THIS IS THE TAXONOMY OF THE PREEMPTION QUESTION. KEWANEE ETC.). Example two: the user breaks into the idea creator's house, rifles through the drawers, finds an idea, uses it or reveals it. The court refuses to prosecute criminally or (and this is separate) refuses to allow the creator in his trespass action to obtain as damages the costs arising out of the purloiNed concept. (THIS IS THE ISSUE OF WHETHER C LAW COPYRIGHT WAS JUST A PRIV OF NONDISCLOSURE, OR WHETHER IT WAS SOMETHING MORE? UNSURE. SEE OLD NOTES.)

Note: what happens in these cases is likely to be very fact & policy sensitive, i.e., what is the value of the general rule of law (contract, burglary, trespass); will disallowing its application here undermine that general rule in other areas; will disallowing its application bring disrepute to the law; will allowing its application interfere with the public's effective pursuit of the goods which the privilege meant to be sharable. Etc.

(4) At the other extreme, the law may place on the public a <u>duty</u> to refrain from benefitting from the resources created by another. This is an independent duty, not arising from any principle of general law like contract, but because the lawmakers think it desirable that the law intervene to protect

those donors who do not wish to share from doing so. Example: the sequences of words which make up writings are capable of being owned in our system of copyright law. Person who read other people's writings (in which the copyright has not been forfeit or expired) are under a duty to refrain from copying substantial portions of those writings.

The same continuum can be stated in terms of the donor's entitlements. Where the public has a right, he has a duty. Where the public has a duty, he has a right. Where the public has a privilege, so does he. That's how Hohfeld's categories work, as a defitional matter. So: (1) If the public has a right to share, then the donor has a duty to provide the benefits in question. The legal system will force the donor to provide them, or penalize him if he fails to do so. Tarasoff and taxation are again the salient examples. (2) If the public has a mere privilege to obtain whatever benefits may be obtained without violating legal rules created for other purposes, then the donor has a privilege to keep whatever benefits he wishes, with the proviso (of course) that he is unable to use legal intervention to keep those resources to himself. The public domain of ideas is another example. (3) If the public has a privilege to use the resource (share the benefits) which is supplemented by other privileges not ordinarily available to the public (e.g., if it can breach contracts so long as the subject of the contract is royalties for an idea or confidentiality[2] for an idea), then the donor classes has less rights than other classes of persons. Some of those rights have become mere

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2. Is confidentiality different from the royalties issue?

privileges: if the donor is successful in keeping something secret, that's fine, but he can't expect even indirect legal help in his efforts. (4)If the public has a duty to refrain from sharing in benefits, then the donor has a right to use the legal system to prevent them from doing so.

What the taxomony might reveal reagarding the relationship of i/p to tort law

Is the following true?

- The taxonomy centers around benefit. Does that mean that intellectual property law is not the converse of traditional tort law, for traditional tort law deals with "misfeasance," the doing of harm. Intellectual property law is rather the converse of that branch of tort law known as "nonfeasance", the failure to share benefit.

It is important to see the relationship between intellectual property law and the traditional categories of tort law.

Note that some aspects of i/p law ARE forms of misfeasance: ie, when real harm is done. (Explain.) But the trickiest issues don't involve the public doing harm to prior investments and expectations, but the case where the public, by taking advantage of what's been created, itself generates new value. Should the public be entitled to get benefit from prior creations?

Just as tort law has two branches, misfeasance and nonfeasance, i/p law and other forms of property law might be said to have two branches. For

physical property, the right to control entry usually gives owners control both over harms and over benefits. Where it doesn't (Raven v Red Ash), we get the same problems we do for this part of i/p.

A retry at clarification: Where it's already established that something should be owned, we have no trouble saying "pay the owner for damage done to his property." We do, however, have a great deal of trouble saying "pay the owner for the non-harmful use you've made of his property."

Where it's not established that something should be owned, we still may intervene to avoid certain kinds of harm (I'd argue that's what's going on re INS v AP and the p/d model of misappropriation law), but it used to be incredibly rare that we'd intervene to avoid the nonharmful use of a resource.