Introduction

It seems, yet again, that intellectual property law is at a crisis point. Besieged by the creations and practices of the digital revolution, unsettled by the ethical dilemmas thrown up by the patenting of genetically modified plants and animals, and about to be caught out by organic computing, it seems, at least in the eyes of some, that contemporary intellectual property law faces a number of challenges that it is simply not equipped to deal with. While in many ways this can be seen as continuing the pathological concern with change that has long dominated legal analysis in this area, these arguments differ in that they are often premised on a belief that recent changes have created a series of problems for the law that are not only unique but also unanswerable. Within this general framework, there is also a sense in which the past is increasingly seen as being irrelevant, and that while the legal concepts, ideas and institutions that make up intellectual property law may once have been appropriate, they are now outdated and obsolete. John Perry Barlow, the American cyberspace activist, captured the tone of this style of argument when in speaking of what he regards as the 'immense conundrum' created by digitised property he said, '[i]ntellectual property law cannot be patched, retrofitted, or expanded to contain the gasses of digitized expression . . . We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.'[1] In part this book is written against this way of thinking. More specifically, working from the basis that the past and the present are intimately linked, we believe that many aspects of modern intellectual property law can only be understood through the lens of the past. Moreover, while the law's confrontation with digitised property and recombinant DNA has created a number of real difficulties for it, much of what is taken as

[1] J. Barlow, 'Selling Wine without Bottles: The Economy of Mind on the Global Net' in (ed.) P. Ludlow, *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (Cambridge, Mass.: MIT Press, 1996), 10. He adds, the 'lawyers are proceeding as though the old laws can be somehow made to work, either by grotesque expansion or by force. They are wrong': *ibid*.

unique and novel about the interaction of intellectual property law and the new environment in which it finds itself can, especially when placed in an historical context, be seen as examples of the law working through an on-going series of problems that it has grappled with for many years. No matter how attractive the emancipatory appeal of a digitised, organic future may be, because the concepts which are under dispute and the language within which these arguments are posed are mediated by the past, even the most radical of accounts remain indebted to the tradition from which they are trying to escape. Paradoxically, the more the past is neglected, the more control it is able to wield over the future.

While thinking about intellectual property law in these terms opens up a number of possibilities, we have restricted ourselves to the exploration of two interrelated themes. The first concerns the nature of intangible property in law. More specifically we have concentrated on the problems which have confronted the law in granting property status to intangibles and, in turn, to the various techniques that the law has employed in its attempts to resolve these problems. Secondly, our aim has been to explain why it was that intellectual property law came to take on its now familiar form. In exploring these two themes we have largely limited ourselves to British law over the period from 1760 through to 1911: 1760 marking the height of the literary property debate; and 1911 the year in which copyright law in the United Kingdom was codified.

Before discussing these themes in more detail, a number of preliminary points need to be borne in mind. The first is that our overriding concern is with intellectual property *law*. Unlike many of the historical works in this area which are concerned with the relationship between intellectual property and other domains, such as the impact of patent law on the development of technology or the relationship between literary property and authorship, our primary focus is with intellectual property law. This should not be taken as if we are suggesting that the environment in which the law operates is not important or that we believe that legal judgment should be prioritised over other forms of law. Rather, it is to stress that our primary interest lies in what could be called the *doctrine* of intellectual property law, rather than in what, for example, economists or political philosophers may be able to tell us about intellectual property law.

The second point which needs to be made is that our arguments are based on a belief that during the middle period of the nineteenth century an important transformation took place in the law which granted property rights in mental labour (to use the language then employed to describe what we now call intellectual property law). More

specifically we argue that while gradual, haphazard and in some ways still incomplete, by the 1850s or thereabouts modern intellectual property law had emerged as a separate and distinct area of law replete with its own logic and grammar. In order to highlight this transformation, we found it necessary to draw a distinction between what we have called 'pre-modern' and 'modern' intellectual property law. While we appreciate that this distinction is somewhat artificial, nonetheless we believe that it offers a useful basis from which to explore and understand intellectual property law. In so doing, we are not suggesting that modern law is in any sense better than pre-modern law nor that traces of pre-modern law cannot be found in present-day law. Nor are we suggesting that at some particular time during the nineteenth century there was a sudden and irreversible change that neatly marked the move from one period to the other. Rather, we have used these concepts as a way of describing what in many ways amount to very different ways of thinking about and dealing with intangible property. Given the important position that the concepts of pre-modern and modern law play in this work, it may be helpful at the outset to outline what we have taken to be some of the defining characteristics of each of these historical periods.

One of the most important points of contrast between modern and pre-modern law is in terms of the way the law is organised. While today the shape of the law is almost universally taken as a given – the general category of intellectual property law being divided into subsidiary categories of patents, designs, trade marks, copyright and related rights – under pre-modern law there was no clear consensus as to how the law ought to be arranged: no one way of thinking had yet come to dominate as *the* mode of organisation. Rather, there was a range of competing and, to our modern eyes, alien forms of organisation. It is also clear that, at least up until the 1850s, there was no law of copyright, patents, designs or trade marks, and certainly no intellectual property law. At best there was agreement that the law recognised and granted property rights in mental labour, although the nature of this legal category itself was uncertain.

Modern law also differs from pre-modern law in terms of the particular *form* that it took. More specifically, pre-modern law, which provided protection for things such as the printing of designs on calicos, muslins and linens, was subject specific and reactive. That is, it tended to respond to particular problems as and when they were presented to the law. In contrast, modern intellectual property law tends to be more abstract and forward looking. In particular, while the shape of pre-modern law was largely determined passively in response to the environment in which the law operated, in drafting modern legislation the law

was not only concerned with the objects it was regulating, it was also interested in the shape that the law *itself* took when performing these tasks.

Another point of difference between the two regimes is in terms of the subject matter protected and the approach adopted by the law towards that subject matter. One of the notable features of pre-modern law was that it was concerned with the mental or creative labour that was embodied in the protected subject matter. Moreover, in so far as it influenced the shape that intellectual property law ultimately took and the way the duration and scope of the respective legal rights were determined, mental labour played a pivotal role in many aspects of intellectual property law. Despite the prominent role that creative labour played in pre-modern intellectual property law, as the law took on its modern guise it shifted its attention away from the labour that was embodied in the protected subject matter to concentrate more on the object in its own right. That is, instead of focusing, for example, on the labour that was embodied in a book, on what was considered to be the essence of the intangible property, modern intellectual property law was more concerned with the object as a closed and unitary entity; with the impact that the book had on the reading public, the economy and so on. This closure of intangible property was mirrored in the changes that took place in terms of the approach the law adopted when dealing with the protected subject matter. While pre-modern law utilised the language, concepts and questions of classical jurisprudence, modern intellectual property law employed the resources of political economy and utilitarianism. More specifically, while pre-modern law was characterised by self-styled metaphysical discussions about the nature of intangible property – such as how the essence of the protected subject matter was to be identified – with the closure of intangible property, modern intellectual property law abrogated all interest in this way of thinking about and dealing with the subject matter it protected.

Yet another important point which distinguishes the modern law from its pre-modern counterpart relates to the role that registration played in both regimes. While the registration of intangible property has long existed in intellectual property law, nonetheless there are important differences between the regimes used in pre-modern and modern law, notably in terms of the functions that it performed. In particular, while under pre-modern law proof was generally a matter of private control, in its modern guise, proof and the regulation of memory more generally became a matter of public concern. In addition, while in both its pre-modern and modern form registration played an important role in identifying intangible property, under the modern law, which increas-

ingly relied upon a representation of the protected subject matter rather than on the object itself, registration took on another important role: namely that of managing and demarcating the limits of intangible property.

The problems with intangible property

Despite the central role played by the subject matter of intellectual property law, what we have tended to refer to as intangible property, there has been remarkably little attention given to this topic. One of the interesting points that emerged from our exploration of modern intellectual property law was the prominent role that intangible property played in a variety of domains. As well as highlighting the impact that the intangible had on intellectual property law, we have also given particular attention to the way in which the law grants property status to intangibles and to the problems that this generated. We begin our analysis of intangible property by focusing on the debate which took place in Britain in the middle part of the eighteenth century as to the status of perpetual common law literary property. Starting with the distinction which was drawn between labour of the mind and that of the body, we outline the problems that were identified by the opponents of literary property in the law granting property status to intangibles as well as some of the solutions proposed by the supporters of perpetual literary property. While by the end of the literary property debate the law felt comfortable, in a way it had never done before, in granting property status to intangibles, nonetheless problems of the type identified by the opponents of literary property continue to confront the law. Indeed many of the problems that Barlow identifies in relation to digitised property, which are very similar to those raised in relation to literary property in the eighteenth century, can be seen as forming part of a long process where the law has attempted to grant property status to intangibles.

While many of the problems that confront the law in its efforts to grant property status to intangibles are perennial, this is not to suggest that they have not changed over time nor that the way in which the law has responded has remained the same. It is noteworthy that the centralised publicly funded systems of registration that took shape under nineteenth-century intellectual property law became an important forum in which many of the problems generated by intangible property were played out. In particular, in so far as systems of registration required applicants to deposit representations of their creations rather than the creations themselves (as had often been the case previously),

the task of identifying the owner and the boundaries of the property were resolved bureaucratically. Importantly these changes, which reinforced the closure of the property and the suppression of creativity in law, enabled the law to avoid the difficult task of having to identify the essence of the protected property.

The form of the law

As well as exploring the nature of intangible property in law, we also set out to explain the shape of intellectual property law as a legal category. In so doing we hoped to provide answers to the question: why was it that the law which granted property rights in mental labour came to be divided up into the now familiar categories of patents, copyright, designs and trade marks?

As we set out to explain the shape of intellectual property law, we argue against those who present intellectual property law as if it were a timeless entity that has always existed, albeit in a nascent and emerging form. Indeed we suggest that modern intellectual property law did not emerge as a discrete and separate area of law until the 1850s or thereabouts. Prior to this, the law was not only disorganised, open and fluid, there were also numerous competing ways in which the law which granted property rights in mental labour was organised. As such, there were many potential directions that the law could have taken. While the organisational structure of pre-modern law was characterised by its fluidity and uncertainty, by the 1850s or thereabouts the now familiar mode of categorisation had all but come to be accepted, in effect, as the only possible way in which the law could be organised.

In explaining the shape of intellectual property law, we have also argued against those who see the law as reflecting some natural ordering or as having adopted its proper philosophical position. More specifically our aim in writing this book has been to disentangle the conditions of intellectual property law's history, to de-naturalise it and to show that what are often taken as givens or as constructs of nature are, in fact, the products of a complex and changing set of circumstances, practices and habits.[2] We also hope to show that as a juridical category, intellectual property cannot be identified as a purposive technique governed by a teleology of function, principle or norm; nor can it, except at the most banal and trite level, be explained in terms of economic arguments, author's rights personality theory, or in terms of natural or positive law. We also hope to resist the endless temptation to mystify the story of law.

[2] As Barthes, said there is 'nothing natural anywhere, nothing but the historical' anywhere: R. Barthes, *Roland Barthes* (tr. R. Howard) (London: Macmillan, 1977), 139.

In this version of events, the philosophers, the International Conventions, the principles of law, as well as natural-law arguments are displaced from the centre of the narrative. Instead they are placed alongside things such as the act of negotiating bilateral treaties, the formation and exercise of rules designed to regulate the way patent specifications were drafted, and the stories intellectual property law tells about itself, to form an alloy of factors that go to explain the shape of intellectual property law.

Part 1

Towards a property in intangibles

We begin our exploration of intellectual property law with the debate over literary property that took place in Britain in the second half of the eighteenth century. This debate, which was 'costly, prodigious and protracted' and which was 'discussed everywhere and by everybody',[1] turned on the status and nature of common law literary property. More specifically, the debate was prompted by the fact that the Stationers' Company, whose power and control over the publication of books was being undermined, argued that, whatever the Statutes of the day may have said, at common law authors (and their assigns) enjoyed perpetual rights over their creations. While for some, such as Bentham, the discussions that this prompted were akin to an 'assembly of blind men disputing about colours',[2] we believe that they provide us with a unique opportunity to understand both the categorisation of intellectual property law as well as the way in which the law granted property status to intangibles.

While modern intellectual property law did not emerge as a separate and distinct area of law until midway through the nineteenth century, the literary property debate, or at least aspects thereof, can be seen as the law struggling with the conflicting demands of pre-modern and modern intellectual property law. More specifically it became apparent during the course of the debate that the law believed that mental labour, which was to be the exclusive and unifying concern of intellectual property law, was fundamentally different from manual labour. At the same time as the law came to privilege the creative labour of the mind

[1] See A. Birrell, *Seven Essays on the Law and History of Copyright in Books* (London: Cassel and Co., 1899), 121. It also 'exercised the talents of some of the our ablest advocates': *A Vindication of the Exclusive Rights of Authors to their own Works: A Subject now under Consideration before the Twelve Judges of England* (London: Griffiths, 1762), 1.

[2] 'The case of literary property, so thoroughly agitated not many years ago in Westminster Hall, presented a curious spectacle: multitudes of advocates and all the judges in and out of office talking about property in general, not one of them knowing what it was, nor how it was created; it was an assembly of blind men disputing about colours': J. Bentham, *Manual of Political Economy* (ed.) W. Stark (London: Allen and Unwin, 1952), 265 note.

over that of the body, we also see what in many ways was the first attempt to rationalise and order the various areas of law which granted property rights in relation to mental labour. Although the primary mode of reasoning was one of analogy between the subject-specific property rights that existed at the time, nonetheless this was the first occasion in which the shape of the law was openly and consciously discussed. In the first part of chapter 1 we utilise these arguments to explore the categories that were employed in pre-modern intellectual property law. In the second half of the chapter, we turn to focus on the question of the property status of the intangible in law. More specifically, we explore what the opponents of perpetual common law literary property considered to be fundamental and in many ways insurmountable problems that the law faced in granting property status to intangibles. There is a sense in which the proponents of literary property offered a number of plausible solutions to these objections, but we argue in chapter 2 that problems of the type that were discussed in the literary property debate remain a continuing issue for intellectual property law. While the nature of these questions changed over time (notably with the introduction of modern systems of registration) and differed according to the subject matter in question, nonetheless we suggest that they highlight the mentality of intangible property.

1 Property in mental labour

In February 1774, the House of Lords was called upon to determine whether in producing an unauthorised publication of Thompson's poem *The Seasons*, the Scottish bookseller, Alexander Donaldson, had infringed any rights that might have existed in the work. In deciding that Donaldson was free to publish *The Seasons*, the House of Lords not only found against perpetual common law literary property, it also effectively marked the end of the literary property debate. This was the dispute which was conducted in the tracts, pamphlets and newspapers of the day as well as in the English and Scottish courts, concerning the status of common law literary property.

The main impetus for the literary property debate arose from changes which took place at the end of the seventeenth century in the way the book trade was regulated.[1] Prior to this, the production and distribution of books had been regulated by way of controls exercised over printing presses and the types of works that were published.[2] Under this regime, which was designed to prevent the circulation of seditious, heretical, obscene and blasphemous materials, the Stationers' Company acquired a general monopoly over printing as well as over the printing of specific books. One of the consequences of the way these rights were allocated was that individual printers acquired what was in effect a perpetual monopoly over the publication of particular works.[3] With the lapse of

[1] See C. Blagden, *The Stationers' Company: A History, 1403-1959* (London: Allen and Unwin, 1960); J. Feather, *A History of British Publishing* (London: Croom Helm, 1988); L. Patterson, *Copyright in Historical Perspective* (Nashville, Tenn.: Vanderbilt University Press, 1968); M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993), 9–30.

[2] See, e.g., An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Bookes and Pamphlets and for Regulating of Printing and Printing Presses 13 & 14 Car. II c. 33 (1662).

[3] The Stationers' Charter (received from Mary in 1557) provided that no one in the realm should exercise the art of printing unless they were a freeman of the company or had been granted Royal permission. Significantly, the Ordinances made it an offence for stationers to put out a book before they had shown it to the wardens and entered it on a register.