

THE INTELLECTUAL PROPERTY OF NATIONS

Drawing on macro-historical sociological theories, this book traces the development of intellectual property as a new type of legal property in the modern nation-state system. In its current form, intellectual property is considered part of an infrastructure of state power that incentivizes innovation, creativity, and scientific development, all engines of economic growth. To show how this infrastructure of power emerged, Laura Ford follows macro-historical social theorists, including Michael Mann and Max Weber, back to antiquity, revealing that legal instruments very similar to modern intellectual property have existed for a long time and have also been deployed for similar purposes. Using comparative and historical evidence, this groundbreaking work reflects on the role of intellectual property in our contemporary political communities and societies; on the close relationship between law and religion; and on the extent to which law's obliging force depends on ancient, written traditions.

Laura R. Ford is Assistant Professor of Sociology at Bard College. Professor Ford is a former attorney turned sociologist, specializing in historical sociology and the sociological theory of Max Weber.

Cambridge University Press
978-1-107-19897-5 — The Intellectual Property of Nations
Laura R. Ford
Frontmatter
[More Information](#)

The Intellectual Property of Nations

SOCIOLOGICAL AND HISTORICAL PERSPECTIVES
ON A MODERN LEGAL INSTITUTION

LAURA R. FORD

Bard College



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-107-19897-5 — The Intellectual Property of Nations
Laura R. Ford
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025,
India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107198975
DOI: 10.1017/9781108182935

© Laura R. Ford 2021

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2021

A catalogue record for this publication is available from the British Library.

ISBN 978-1-107-19897-5 Hardback
ISBN 978-1-316-64848-3 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>Preface and Acknowledgments</i>	<i>page</i> ix
Introduction	1
Methodology and Structure	8
Audience and Disciplinary Context	16
Relation to Existing Literatures	17
Mapping the Journey	22
1 Legal Institutions and Social Power: Setting the Stage	31
1.1 Seeing the Intellectual Property in Your Everyday Life	33
1.2 The Property of Nations	40
1.3 Legal Power, Social Power, and Causality	43
1.4 Semantic Legal Ordering: Legal Culture and Institutions	48
1.5 Building and Transforming an Infrastructure of Encouragement	51
2 Legal Orders and Social Performance: Founding Facebook	57
2.1 Patents as Property from a National Government	59
2.2 Zones of Exclusivity and Instruments of Legal Power	61
2.3 Property as Obliging Power in Cooperative Relationships	64
2.4 Social Power and Venture Capital	67
2.5 Drawing Boundaries with Formalizing Words for Social Purposes	72
2.6 Legal Institutions in the Modern Nation-State System	80
2.7 Going Back to Roman Law	81
3 Instruments of Legal Power in the Roman Republic	85
3.1 A Conceptual Map of the Mediterranean World	88
3.2 The Polis and Social Power	92
3.3 Delphic Arts and Oracles – Greek Religious “Technology”	94

3.4	Traditions of Legal Historiography – The Birth of Jurisprudential Narratives	97
3.5	Freedom, Autonomy, and Immunity in the Hellenistic Era	100
3.6	Rome and Delphi: A Unifying World	103
3.7	The Delphian Privilege as an Instrument of Social Power	108
3.8	Zones of Exclusivity and Instruments of Legal Power: An Initial Comparison	110
3.9	Conclusion	113
4	Semantic Legal Ordering: Idealizing Roman Law	114
4.1	Military and Economic Power in Late Republican Rome	116
4.2	Grants of Citizenship and Proprietary Privileges in a Transforming State	118
4.3	Caesar and Cicero: Diverging Types of Social Power	121
4.4	<i>Pro Archia</i> – Cicero on the Benefits of Creative Literature to the State	122
4.5	Republican Citizenship and the Augustan Revolution	125
4.6	Law and Letters in Imperial Rome	129
4.7	Privileged Orders, Local Communities, and Early Precursors for Intellectual Property	131
4.8	<i>Ius Respondendi</i> – The Right of Responding	135
4.9	Rationalizing Roman Law	136
4.10	Semantic Formality in Law: Types of Law and Categories of Things	138
4.11	Conclusion	140
5	Cultural Transformations: Christianizing Legal Power	144
5.1	Imperium Christianorum	146
5.2	Parallels to Intellectual Property in Late Roman Legal Privileges	150
5.3	The Good Barbarian King	152
5.4	The Foundational Pope – Gregory the Great	156
5.5	Building a New Social Model of Orders and Offices	158
5.6	Unity in Diversity and Separation of Authorities	162
5.7	A Recipe for the Future: Popes and Kings, Indulgences and Bulls	164
5.8	The Birth of English Law and Letters	168
5.9	The Law in Books: Councils, <i>Leges</i> , and <i>Historia</i>	169
5.10	Conclusion: Western Legality and Rationalities	174
6	Privileges and Immunities in a Sacramentalizing Order	176
6.1	Cultivating a Sacramental Order of Obligation	179
6.2	Legal Letters and Religious Reform	180

Contents

vii

6.3	Bishops, Property, and Honor	184
6.4	Instruments of Legal Power in Carolingian Europe	188
6.5	Legal Bonds and the Sacramental State	191
6.6	New Legal Communities and Radical Social Change	194
6.7	Clerics to Lawyers	197
6.8	Privileged Republicanism	201
6.9	Conclusion	205
7	Administrative Kingship and Covenantal Bonds: Early Roots of Intellectual Property in England	207
7.1	Bridging the Norman Conquest: Charters and Writs in Anglo-Norman Legal Governance	209
7.2	New Legal Cultures and the Royal Prerogative	213
7.3	Mosaic Traditions in English Legal History – The Power of a Covenantal Ideal	217
7.4	Consolidating Patterns in Anglo-Norman and Angevin Law: Prerogatives and Property	220
7.5	Imperial Ambitions and the Birth of the Administrative State	226
7.6	Natural Law and Prerogative Right	228
7.7	The Tudor Revolution and Claims to Literary Property	234
7.8	Conclusion	239
8	Intellectual Property in a Nationalizing Order	241
8.1	Cultivating a National Order of Obligation	242
8.2	Chroniclers and National Legal Consciousness	249
8.3	Industrialization and the Black Death	252
8.4	Inventing the Anti-Monopoly Tradition	255
8.5	Parliamentary Supremacy	262
8.6	Conclusion	266
9	Cultural Transformations: Naturalizing Intellectual Property	270
9.1	The New Naturalism	273
9.2	Scottish Versus English Booksellers	280
9.3	National Organizing in the New World	287
9.4	Constitutionalizing Intellectual Property	290
9.5	Interpreting the New Constitution	293
9.6	Natural Law and the Early Administration of US Intellectual Property Law	299
9.7	Conclusion	300
10	Semantic Legal Ordering: Idealizing Intellectual Property	303
10.1	La Propriété Littéraire, Artistique, et Industrielle	306

10.2	Semantic Legal Ordering in the Early Revolutionary Period	312
10.3	Codifying French Property	315
10.4	Lordship and Conscience: Positive Legality and Natural Rights in the French Reformation	319
10.5	Reactions to Roman Law in the Lutheran Reformation	324
10.6	Reforming Property in Prussia	329
10.7	Intellectual Property Analogues in Estate Society	332
10.8	Conclusion	336
11	Instruments of Legal Power in the American Republic: Intellectual Property and Telecommunications	341
11.1	The Will Theory of Contracts	343
11.2	Proprietary Voluntarism	350
11.3	Seeing the Impact of Contracts: The Magnetic Telegraph Company and the O'Reilly Contract	352
11.4	Railroad Protection Contracts and Westward Expansion	356
11.5	Contracts of Alliance, Geographic Exclusivity, and Consolidation	359
11.6	The Alternative to Contractual Alliance: The Bell Telephone System	363
11.7	Conclusion: Intellectual Property Licensing in the Institutionalization of a Telecommunications Network	367
12	Legal Orders and Social Performance: Globalizing Intellectual Property	370
12.1	Globalized Intellectual Property Law	377
12.2	Law-Changing Pressure through the WTO	379
12.3	Treaties as National Contracts	381
12.4	In the New Law of Nations	382
12.5	The Westphalian System	385
12.6	Copyright Treaties in the Concert of Europe	387
12.7	International Patent and Trademark Protection	390
12.8	“One Hundred Years of Solicitude”: America’s Jurisprudential Narrative of Progress	392
12.9	The Challenge of Artificial Intelligence	395
12.10	Love and Danger in Globalized Orders of Obligation	398
12.11	Conclusion	400
	Conclusion – The Intellectual Property of Nations	402
	<i>Index</i>	415

Preface and Acknowledgments

This book represents nearly two decades of study and discussion, building on learning gleaned from generous senior colleagues as a junior attorney, fresh out of law school, to academic study of intellectual property law and sociology, then onward to doctoral and postdoctoral study, with the benefit to learning that comes from teaching. I have accumulated many debts along the way, most of which will regretfully remain unacknowledged.

My first debt is to my parents, without whom, in all senses, this book would not be. I cannot adequately express my gratitude for all the support (material and spiritual) that they have given, and this book is dedicated to them. To my father, Robert Orland Ford, who dedicated time out of an intensely busy schedule to read and comment on nearly the entire draft manuscript, and to the memory of my mother, Blanche Elizabeth Ford, who exemplified a deep commitment to compassion and justice, a beautiful person, inside and out. I wish I could have known and loved her better.

My next debt is to the University of Washington Law School's LL.M. program in intellectual property law and policy, and to my professors Bob Gomulkiewicz, Dan Laster, Sean O'Connor, and Toshiko Takenaka. Early foundations for this book were laid in my sociology dissertation work at Cornell University, and I thank my sociology faculty advisers and committee members, especially Mabel Berezin, Steve Morgan, and Richard Swedberg. For guidance in the final stages of transforming my dissertation into a book, I am grateful to the Baldy Center for Law and Social Policy, where I was fortunate to be placed in a postdoctoral fellowship between 2014 and 2016. Thank you to the Baldy Center, and especially to Errol Meidinger, for hosting a book manuscript workshop in April 2019, and thank you to Mark Bartholomew, Philip Gorski, and Damon Mayrl for taking the time to read my long manuscript and offering wise and helpful comments. Thank you also to the other participants in that workshop, who generously gave their time in reading and commenting on the draft manuscript.

Bard College colleagues and students have read and offered comments on various chapters. I am especially grateful to Rob Cioffi, Gregory (“Duff”) Morton, and to the many Bard students who have challenged and deepened my thinking. I hope this book will speak to them, and to their generation.

I owe a debt of gratitude to Dr. Péter Mezei, Associate Professor of Law in the Faculty of Law, University of Szeged. Over the summer of 2020, as I was finishing the book, Dr. Mezei read every chapter, providing helpful (and encouraging) feedback. While I have not been able to address all aspects of Dr. Mezei’s comments, I do hope that he will see the fruits of his labors in the final product.

Chapters 7–9 draw on material that was originally published in the *Journal of the Patent and Trademark Office Society*, Volume 97, No. 2, and I gratefully acknowledge that original opportunity to publish my arguments about the prerogative-based roots of modern patent law.

Finally, I am so grateful to my editor at Cambridge, Matt Gallaway, for extraordinary patience and kindness, as I have worked my way, painstakingly, toward completion.