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Alexandra George, "Constructing Intellectual Property". New York: Cambridge University Press, 2012, 405 pp.

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This is an impressive work of applied legal philosophy that should be of interest to sociologists. The author asks, "What is intellectual property?" In answering, she excavates the role of jurisprudential discourse in explaining the institutional coherence of intellectual property (IP) in Anglo-American law. She argues that each IP doctrine constructs and applies a similar set of conceptual criteria to convert ideas linked to tangible forms into private property, to which the doctrines attach property rights. The manner in which IP law defines into existence its own objects of regulation – "intellectual property objects" (IPOs) – is what defines intellectual property. The author locates her work in analytic or applied legal philosophy and draws on philosophical, jurisprudential, and critical schools of thought.

The premise of the book is the observation that "intellectual property" is a recognizable social phenomenon in the form of a discrete department of law. We consider a group of legal doctrines—in particular, copyright, trademark, patent, and design to be "intellectual property." The author asks whether analytic philosophy can help explain why the legal system classifies these doctrines as "intellectual property" and what lawmakers and other stakeholders mean when they use the language of IP. The author's warrant is that many political, normative, and doctrinal discussions of IP take for granted that it exists or that we know what it is. The book challenges assumptions, often deployed by lawmakers and companies with large IP portfolios to the advantage of their interests, that IP is a pre-legal fact. The book reveals the puissant role of IP in social ordering despite its contested meaning, and it should help broaden the debate from how to regulate IP to one about whether it should exist and in what manner [p. 46].

The first body chapter reviews dominant methods for defining IP in textbooks, domestic law, and international treaties: 1) enumeration – defining IP as the sum of its legal doctrines or of its objects of regulation; 2) defining IP as an intangible type of "property"; 3) stipulation defining IP as whatever the law says it is; and 4) intuition – the "I know it when I see it" method of definition. The author argues that some of these definitions are useful to those responsible for organizing and applying IP law, but that they do not adequately illuminate the nature of IP. She concludes that, while "intellectual property" has meaning, it is an essentially contested concept.

The following chapter explains IP as an "institutional fact" – a culturally and historically specific phenomenon that has no natural form or meaning outside of social institutions. IP is a conceptual legal construct composed of other conceptual legal constructs. The author investigates how the legal system constructs "intellectual property" by looking at its "metaphysics," or analyzing the jurisprudential language of copyright, patent, trademark, and design to see if they share structural features that play similar roles in each doctrine. The author shows that each doctrine entails a) ideational objects, evidenced in b) documented forms, and c) legal rules that create and regulate d) IPOs. The latter two are "institutional facts," while the first two are "brute facts" that do not

depend on human institutions for their existence. Using a copyright dispute over the song Pretty Woman and a trademark dispute over a clothing brand as examples, the author demonstrates that, while the law often describes the IPO in terms of its documented form, the boundaries of the ideational object, documented form, and IPO do not coincide: IP rules convert parts of the ideational object (as instantiated in the documented form) into the IPO. The IPO extends beyond the boundaries of the documented form but does not encompass the ideational object. Further, while tribunals apply the rules to define into existence the IPO, its boundaries are fuzzy and determined by comparison to other works. The author draws on the theories of law as an autopoietic system, legal fictions, and performative utterances to illustrate IP as a system that creates its own objects of regulation.

The next chapter asks why IP remains recognizable as a discrete legal department despite absorbing new doctrines and the expansion and transformation of component doctrines. The author hypothesizes that certain core conceptual criteria characterize IP: "originality," "creatorship," documented form, and ideational object. Her argument is that IP doctrines construct and apply the concepts of "originality" and "creatorship" to isolate parts of ideational objects evidenced in documented forms and convert them into IPOs over which it affords the "creator" monopoly rights. The core criteria have same "function" in that they work together to construct the IPO, forming an "integral part of the institutional apparatus that allows intellectual property law to operate" [p. 234].

The author argues that the four main IP doctrines include the concept of "creatorship" in requiring an intentional communication by a creator [p. 207]. Three fascinating examples illustrate that IP notions of creatorship are based on a Romantic conception of authorship and invention as an organic emanation from the individual, and that this conception misaligns IP creatorship with the actual social context of scientific and artistic creation, as well as with understandings of creatorship in these communities. The first example depicts how consumers created the brand meaning of the Harley Davidson trademark. Trademark law defined the IPO's scope as including the meaning that consumers created an association between Harley Davidson and a rebellious biker lifestyle. However, while consumers collaboratively created much of the IPO, or aspects of the ideational objects that IP law delineated as an object over which to afford monopoly rights, the law conferred these rights only on the company. The second example from Australian Aboriginal law and copyright illustrated that IP creatorship was at odds with collective, incremental creation and social practices that recognize communal stewardship of ideas. The third example addressed conventions in scientific authorship.

The book also shows that IP doctrines include a requirement of "originality," which "rewards an original way of putting a thought into a documented form rather than originality per se" [p. 218]. This construct is a criterion for the propertization of ideas and a means to distinguish IPOs from one another and from the public domain. An example of Picasso's interpretations of Velazquez's Las Meninas questions the IP notion of "originality" and illustrates a potential difference between it and social understandings of originality.

An effective part of the argument is that IP law creates its own objects of regulation in part by constructing its own conceptions of creatorship and originality, and that it

is irrelevant to the operation of IP law that these conceptions diverge from like conceptions and practices in other institutions. The author suggests that IP constructs are even beginning to shape how creative work is carried out, as evidenced in a discussion of reforms in scientific authorship.

The author briefly addresses the second set of core criteria rights. She argues that IP rights are similar to other property rights in consisting of monopoly privileges to obtain, use, make, provide to others, and authorize others to do the former with respect to property.

In Chapter 5 the author asks whether the core criteria are not only necessary but also sufficient to explain why the legal system classifies certain doctrines as "intellectual property" The author looks at other systems that "regulate human behavior with respect to ideas, information, knowledge, or signs," and entail similar "rights," but are not considered to be intellectual property law: indigenous customary lore, heraldic systems, animal branding, and workers' marks. The author characterizes them, based on Wittgenstein's concept of "family resemblance" as ancestors and neighbors of intellectual property. She argues that heraldry, animal branding, and workers marks seem to include the core criteria of IP doctrine, and, drawing on HLA Hart's theory of definitions in context, suggests that historical and political reasons explain why the legal system does not classify them as IP.

Social scientists should find the book methodologically meticulous and appreciate that the author clearly explicates a formidable range of philosophical theory (rejecting a common tendency to exalt its cabalism). The examples are imaginative and varied, and her opening of the book with the fairy tale of the Emperor's New Clothes primes the reader will for analyzing IP as an institutional fact.

The book is an excellent inquiry into the role of jurisprudential discourse in producing IP as a coherent institution that maintains and reproduces itself. The book provides a convincing case for the relative autonomy of legal rules in articulating IP as an "autopoietic system" and making it, despite its interface with other social systems, resistant to the norms and practices of the artistic and scientific communities that create the "brute facts" IP law propertizes, prone to expansion, and even somewhat imperious toward other social systems. The author demonstrates that the four main IP doctrines construct and apply similar conceptual criteria to create the IPO despite their different (but related) historical trajectories.

What this reader found to be one of the book's most notable achievements also appears a weakness due to the framing of the argument in several places. There seems to be some confusion in the book between a goal of "establishing the phenomenon" [Merton, 1987] of IP and providing a causal account for why it exists as it does. The author asks about a historical outcome—why government bureaucracies, international treaties, and legal actors classify copyright, patent, trademark, and design as "intellectual property." She looks for structural conceptual similarities in the doctrines as evidence that they play a role in the historical outcome and institutional intelligibility of IP. Parts of the book dilute this argument and suggest IP has some "intrinsic" meaning [pp. 142-143]. For example, chapter 5 purports to "test" the "theoretical structure" of the core criteria. The author argues that since the core criteria are necessary but not sufficient, something more "sociological" [p. 321], apart from "theoretical explanation" [p. 278], is needed

to understand why the legal system does not classify other doctrines displaying the core criteria as IP. She hypothesizes "contextual" [p. 323] reasons of history and politics, particular the development of these doctrines alongside or outside a commercial context and regime for conferring private property rights on ideas. Characterizing this as a more sociological or "contextual [p. 323] as opposed to "theoretical" account is misleading, since the author has really presented an institutional argument throughout the book about the power of ideas to maintain IP as an autopoietic system. Positioning "theory" as a quasi-mystical cause in opposition to historical, political, and institutional explanations weakens one of the books' expository achievements showing that IP doctrines are rules people have created and use to construct their objects of regulation.

Another minor critique is the ambiguous notion of how the law conceptualizes the ideational object and relationship between the ideational object and documented form. The author sometimes depicts the ideational object as a thought with stable (albeit unknown) boundaries existing "prior to and separate from" and independent of the documented form [p. 92] and conceptualizes the documented form as deriving from the ideational object [p. 152]. In her early example of the copyright dispute over the song Pretty Woman, she characterizes the ideational object as the idea of a man watching an attractive woman walk by. However, her later discussion and examples make it clear that the ideational object is not stable, prior to, or independent of a documented form and sensory perception. The parts of the ideational object the law recognized as the IPO in the Harley Davidson example, for instance, did not precede or inspire the company's documenting of the mark, and the trademark sign did not originally project the ideas the consumers created. She in fact somewhat critiques the law's concept of creatorship given that "intellectual property objects are collaboratively produced by members of society" [p. 190]. She also refers to music [p. 154] and a computer program [p. 152] as constituting ideational objects, which, of course, are sensuous. It would seem that most ideational objects only exist when expressed a painting, for instance, does not exist in the mind of the artist as the ideational object before he/she paints it. The painter creates both the representation and a represented ideational object simultaneously in the course of painting. Her example of Picasso's Las Meninas interpretations also suggests that there is no stable ideational object that generates the documented form or is "behind" the documented form, and that the documented form in part creates the ideational object the idea is an "image" in the Las Meninas example and the documented form projects and generates the ideational object. The law protects the demonstration of the idea's ability to assume a tangible form. The author in part captures this relationship in the requirement that an IPO must have a documented form as evidence that there is an ideational object, but she seems to overlook the dependent relationship between the unstable ideational object and documented form. A more clear explanation would be to conceptualize intellectual property law as propertizing either a) the expression of an "incorporeal" thought; or b) an "ideational object" that is not prior to the documented form, stable, or exists independently of the documented form. It may be that the ideational object required for the law to define into existence an IPO is different from the ideational object the law identifies in delineating the scope of the IPO.

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