Intellectual Property and Access to Im/material Goods

Lai, Jessica C. (ed.); Maget Dominicé, Antoinette (ed.)

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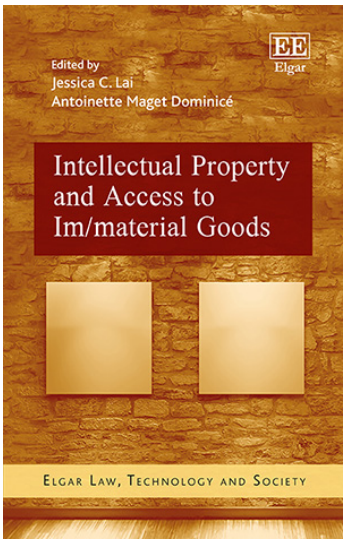

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Traditionally, in order to be protected intellectual property goods have almost always needed to be embodied or materialised (and – to a certain extent – to be used and enjoyed), regardless of whether they were copyrighted works, patented inventions or trademarks. This book examines the relationship between intellectual property and its physical embodiments and materialisations, with a focus on the issue of access and the challenges of new technologies. Expert contributors explore how these problems can re-shape our theoretical notion of the intangible and the tangible and how this can have serious consequences for access to intellectual property goods.

'The lines dividing abstract objects, material objects, information and their relationship to digital processes have always been difficult to draw in the context of intellectual property law. This volume is the first to take on this difficult topic in a comprehensive way. It shows the depth of the difficulties, but also provides a theoretical foundation for new approaches to these divides. It is an original and important contribution.'
– Peter Drahos, Australian National University

'This collection of essays ought to be commended for the comprehensive approach it takes by engaging with a widely known, yet less widely understood, problematic aspect of IP: the requirement of materiality and its limiting effect on access to intellectual creations. While such limiting effect on the digital environment is seen, experienced and discussed in diverse fields, across jurisdictions and many academic texts, this collection brings together discussions of some such issues along with nuanced evaluations of contemporary difficulties surrounding access to immaterial goods. The volume adopts an effective approach to fully educating the reader about the problem of access, while advancing fresh theoretical approaches.'
– Journal of Intellectual Property Law and Practice

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Foreword

The object of intellectual property rights in the modern age was to regulate access to material goods. By abstracting from a material "embodiment" to the intangible work or invention, copyright and patent law dematerialised artefacts, the better to control their manufacture, marketing and consumption. The material features or qualities of a thing, the ingredients and techniques that went into its composition or manufacture, were translated into a "type" which eclipsed its tangible tokens. Upstream, "access" was configured by the rights given to industrial concerns to control the manufacture and circulation of the material tokens; downstream, the exercise of these rights shaped what kinds of cultural experience could be enjoyed, and how. Trade marks, which are not usually taken as the central case of intellectual property, might nonetheless afford the ultimate realisation of this technique; first, because they dematerialise artefacts into a "type" whose reach is coextensive with the reach of the mass media; and, second, because this semiotic figure infuses and animates the artefact (and its consumers) to a degree that no work or invention could do. Apparently, the strategy of dematerialisation is no longer as plausible or as effective as it was. Intellectual property, the pre-eminent science of the intangible, is in danger of overdosing on immateriality. Works and inventions are already immaterial, or already dematerialised. Software inventions are problematic because they seem to lack the tangible articulations and effects of "real" machines, and digital works are not reproduced (or created) in the manner of manuscripts or sound recordings.

The story of how intellectual property emerged as a technique of dematerialisation will be familiar. In the age of the manuscript book, value was almost entirely identified with the material form of each copy. Manuscripts were bespoke artefacts, made up of a number of more or less rarified commodities: parchments of various qualities, carbon or iron-gall ink for the main text, vermillion for initials, headings or highlighting, gold leaf or mosaic gold for the illumination of initials, an array of pigments ranging from azure to verdigris for painted figures, the oak boards, tawed skins, metal bosses, corner pieces and clasps that made up the bindings. Often these materials were sourced by the prospective

purchaser, who also contracted with each of the artisans whose work went into the finished product. Even when the business of commissioning manuscripts was facilitated by the emergence of stationers, who negotiated with artisans on behalf of the patron to commission a work of a quality that suited the patron's taste and means, the product was a unique artefact which was characterised by its material composition rather than its spiritual charge.

The conventional argument is that (notwithstanding the persistence of scribal publication) the printing press created the division between work and the book, or between the creative expression of the author (*opera*) and the industrial manufacture (*opus mechanicum*), to borrow Kant's characterisation of the literary work. It may be that "Gutenberg's moveable type was never intended for mass production as such, but rather was supposed to compete with the calligraphic elegance of manuscript pages",[1] but the stamping out of potentially endless numbers of identical copies of typeset manuscripts, each with the same disposition of text, fonts, page numbers and typographical errors, effectively reduced the material dimension of the book to a mere medium for the expression of authorial creativity.

In the case of inventions, the cleaving of an artefact into its tangible and intangible dimensions was an effect of a different set of cultural techniques. As in the case of copyright, the jurisprudential division was underwritten by the social-economic – one might say ideological – difference between the artefact as an industrial manufacture and the artefact as the *corpus* of an intangible "spirit". In the case of copyright this "spirit" was supposed to be the expressive genius of the author (even in jurisdictions with a thin sense of originality the institution of copyright still needs an underlying myth of genius). In the case of patent law, by contrast, it was the product of a social process of technical innovation that passed through the minds of individual inventors (in the nineteenth century, many of those who wrote justifications of the patent system were careful to point out that innovations would be arrived at sooner or later, and that the purpose of the patent-as-incentive was therefore to give society the benefit of an invention sooner rather than later). So the intangible innovation was identified not only as a competence of the inventor but also as something that could be materialised in a drawing or

[1] Friedrich Kittler, 'Perspective and the Book' (2001) 5 Grey Room 39, 39.

a model. The emergence of the modern notion of invention was made possible by a political and aesthetic technique of representation.[2]

So what sense of materiality and immateriality emerged from this historical settlement, and in what sense did it yield something as determinate as property? The essential point about the technique of dematerialisation is that what it produced was not immateriality as such but rather a specific conjunction of the material and the immaterial. In the case of both copyright and patent law, the object of intellectual property was immanent in matter. In each case, the intangible work or invention had to be elicited from its material embodiment; the intangible could be grasped or visualised only against the background of its material vehicle. So the object was actually defined by the specific intersection between matter and form. This turned modern intellectual property jurisprudence into a kind of forensic science. In cases where infringement is disputed, and where an alleged infringer claims to have independently authored a similar work, the question whether the particular work was copied leads to a close examination of its material composition and appearance. Expert witnesses might be called upon to decipher material traces such as brushstrokes, textures of fabric, erasures and inscribed contours, and to elicit from the materiality of the respective works a hypothesis as to their making, or as to the source of the "inspiration" that guided their fabrication.[3] The "imprint" that makes the work is "reverse engineered" so to as reveal the operations by which form was inscribed in matter.

What has happened to this mode of propertising creativity, or of reinventing creativity as a premise of propertisation? How does the emergence of digital artefacts challenge this old mode of dematerialisation? Or, to pick out the question that holds this collection together, how does *access* work in the age of digital and biotechnical media?

The question here is not just that of how access is restricted or enhanced by legal forms or techniques; more fundamentally, the question is what "access" actually means. We tend to think of access as the counterpart or opposite of enclosure, and so to draw new species of immaterial or emergent thing onto the old ground of ownership. Consider the logic of what used to be called the "digital dilemma": on one hand, digital media, wired into the Internet, are an optimal means of reproducing and distributing informational artefacts; on the other hand, the

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[2] Mario Biagioli, 'Patent Republic: Representing Inventions, Constructing Rights and Authors' (2006) 73(4) Soc Res 1129.

[3] *See* Jose Bellido, 'Looking Right: The Art of Visual Literacy in British Copyright Litigation' (2014) 10(1) Law, Culture and the Humanities 66.

technical competences which facilitate openness also allow digital artefacts to be enclosed more effectively than the products of industrial reproduction. Although the novelty of digital artefacts was recognised, their novelty was not so radical as to prompt a thoroughgoing reconsideration of the basic premises of property logic. Digital works or inventions might be truly open and accessible to all, as freely transmissible as the flame of Jefferson's lit taper, or they might be enclosed more effectively than any piece of real property, but either way we remained within the logic of property as a technique of openness and closure. But what if the "immateriality" of digital and biotechnical goods were actually entirely refractory to the old sense of access and exclusion, and suggestive of a more dynamic and open-ended sense of access?

In the contemporary moment, "immateriality" is associated with modes of distributed creativity, collaboration, or co-creation that are facilitated by the Internet. In this sense immateriality connotes process; or more precisely, a kind of process that cannot easily be rendered in terms of a divide between material and immaterial, or matter and form. To put it somewhat crudely, one can discern two correlative trends. One is the expansion of the category of the machine to the point at which the modern juridical understanding of the machine starts to implode. As the debate concerning the patentability of business methods or diagnostic methods illustrates, operations that were classically considered to be human cultural techniques are now being operationalised in pseudo-mechanical form. The result is that the machine as a specific means of wiring the immaterial into the material becomes problematic. The other, correlative, trend is towards the increasing socialisation of processes that used to be mechanical, or at least mechanised in the sense of large-scale manufacture. Reproduction and distribution are no longer the preserve of industrial actors, but are part of the everyday activities of the Internaut:

> Is there a day when you do not "distribute" or retransmit fragments of articles you have read, when you do not seek to share with friends some image or tune? Is there a day when you do not rework for your job, for your class work, or simply for pastiche or fun, some of the digital material around you?[4]

To begin again with Kant's distinction between the *opera* and the *opus mechanicum*, the effect of distributed creativity is to dissolve the materiality of the *opus mechanicum*. The "embodiment" is no longer mute matter, controlled by the expressivity of an author; rather, it is process in

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[4] James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale UP 2008) 51.

which diverse material and immaterial competences are compounded. Of course, as Marxists would point out, the mass-produced artefacts of the industrial age were also infused with sociality and personality, and that their characterisation in law as mere embodiments of a work or invention depended on a complex process of (ideological) purification. These techniques of purification, of which the legal technique of dematerialisation was just one example, no longer work so effectively. The articulations of material and immaterial elements are just too complex to be pressed into the division between ideas and embodiments. Might this be the occasion for the evolution of new practices of inclusion and exclusion?

In *The Age of Access*, first published in 2000, Jeremy Rifkin suggested that the new millennium was bringing with it a shift from an economy of "property exchanges" made across real, geographical, space to an economy of "access relations" forged in the medium of the Internet.[5] The proposition was that people of the newer generation – so-called "proteans" – were invested not in the accumulation of tangible, material, property, but in the diversification and intensification of "experiences". Although for the most part these experiences could be had only by way of some material infrastructure or medium – a mobile phone or a computer, or perhaps a car or a house – these things were supplied and enjoyed not as property but as platforms for an ongoing relationship between suppliers and consumers, enlivened by addictive strategies of enhancement (think of Apple's *iPhone*). Although the literature on networks, collaborations and remixing that has emerged since 2000 has gone considerably beyond Rifkin's presentation of the infrastructure of access, it is not clear that the implications of the analysis have really been followed through. The crucial insight was that the shift from "property relations" to "access relations" implied a radically different sense of how persons relate to things: quite simply, modalities of access constitute or give shape to the things to which they afford access and to the persons who enjoy access.

Consider one particular theory of distributed agency, which, as it happens, does not necessarily presuppose the mediating infrastructure of the Internet. In marketing theory, co-creation is presented as the upshot of a longer-term shift from a "goods-dominant" to a "service-dominant"

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[5] Jeremy Rifkin, *The Age of Access* (New York 2000).

view of markets.[6] According to this analysis, the premise of the "goods-dominant" view, which prevailed in the first half of the twentieth century, was that value was "embedded" in tangible products by the process of manufacture, which engineered form and function into scarce material resources. The basic function of marketing was to "distribute" or retail these embedded utilities to consumers, who were in turn construed as agents whose preferences had to be brought into alignment with the value offered by the producer. The "service-dominant" view is premised on a very different sense of how market value is generated and circulated; if resources are "intangible and dynamic functions of human ingenuity and appraisal",[7] then it follows that value is not an embedded attribute but a quality that is elicited by diverse agencies of "ingenuity" or "appraisal". In other terms, value is an effect of processes of "qualification".[8] The properties of both goods and services become "immaterial" in the quite specific sense that they are potentialities that are actualised in transactions and appraisals effected by consumers.

How does this work? To return for a moment to the marketing theory of co-creation, the essential proposition is that marketing should be modelled in terms of "information flows" rather than "physical flows".[9] If physical flows transport tangible goods with embedded qualities downstream, along linear channels leading from producer to consumer, then information flows are reversible, multiple, flows in which "information" is communicated from one interpreter to another. Brands are the example often used to illustrate how social processes of communication constitute value and quiddity:

> [b]rands should be understood as the institutional embodiment of a new form of informational capital – much like the factory embodied the logic of industrial capital. Brand management is a matter of putting to work the capacity of consumers to produce a social world through autonomous processes of communication and interaction. Like informational capital in general brands extract value by putting to work the very basic human capacity to create a social world … [10]

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[6] Stephen L Vargo and Robert F Lusch, 'Evolving a New Dominant Logic for Marketing' (2004) 68 J Marketing 1, 2.

[7] Ibid.

[8] Michel Callon et al, 'The Economy of Qualities' (2002) 31(2) Econ Soc 194.

[9] Vargo and Lusch (n 6) 9.

[10] 'Preface' in Adam Arvidsson, *Brands: Meaning and Value in Media Culture* (Routledge 2006) vii.

Here, communication is not simply a means of representing or relaying pre-existing social elements; it is the motor of sociality in general, and the "technology" through which elements of the social acquire their properties or competences. But is the logic necessarily extractive? To pursue this particular example, what do brands do other than give brand managers or corporations access to our general social intellect?

We should begin by noticing that communication, and especially communication as mediated by the Internet, is the basic means of participation in contemporary society. Indeed, participation is so generalised as to be the basic mode of sociality as such: "[I]t's not even clear what to call participation today: consuming, collaborating, voting, protesting, belonging, friending, exploiting, liking, lobbying, volunteering, working, labouring, relaxing, or becoming addicted?"[11] But participation is of course participation *in* something and *with* others. And this sense of communication as the means of forming communities, corporations, publics and polities is the key to the more dynamic sense of "access" that is now emerging. Theorists of "brand community" have emphasised the sense in which the meaning of brands – and hence their value and social effect – emerges from a mode of participation: "brand meaning [is] socially negotiated, rather than delivered unaltered and *in toto* from context to context, consumer to consumer".[12] And what is true of brand communities is also true of persons, individuals, and corporations. There are as many meanings and effects of a brand as there are recursive "threads" of communication in which the material, semiotic and medial ingredients of the brand are composed and put to work. Each (apparently singular) brand is a different thing in each of these communicative processes; the topology of a brand would be a multidimensional representation of this skein of communicational loops.

Where does this get us with the question of "access relations" as posed by immaterial, emergent, artefacts? My somewhat speculative suggestion is that brands are exemplary of the genus of thing that is forged by contemporary processes of participation. The properties of these things are constituted by the transactions within which they are valued, qualified, exchanged and circulated. And what is true of things is also true of the persons or publics who participate in and through these transactions. The identity or self-perception of these actors is bound into the emergent "reality" of the things in which they are invested. This is where the

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[11] Fish et al, 'Birds of the Internet. Towards a Field Guide to the Organization and Governance of Participation' (2011) 4(2) J Cult Econ 157, 157.

[12] Albert Muniz and Thomas C O'Guinn, 'Brand Community' (2001) 27(4) J Consum Res 412, 414.

question of access takes off; when it is relayed not to property but to participation, or to the particular kind of property that emerges from participation.

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