

useful analytical descriptor that the C-words chosen by the author. Likewise, the chapter on development was less than satisfying. Frieden pushes the standard ITU and World Bank line in this chapter on the virtues of investment in telecommunications infrastructure as a means to promote development. Unfortunately, Frieden is too concerned with describing and has given himself little time to reflect and explain some of the central contradictions that continue to be evident in telecommunications development. It is hard to say why this is the case. Apart from explaining it away due to the author's background, it may be that there is little attention given in the text to locating telecommunications in the process of broader global economic change and shifts in production. Not even the information society, let alone the information economy are given attention in this book. The neglect of information as a factor that is relevant to telecommunications traps the narrative into one which constantly describes current telecommunications industry too much in terms of the old monopoly. The result is that we are left with a pluralistic account of change that is written from a US standpoint. For many countries and observers, this may not be the most advantageous position from which to observe the battle.

In sum, *International Telecommunications Handbook* is extensive in scope and provides an excellent introduction to the many interdisciplinary issues of international telecommunications. It is ideal for postgraduate students and is a valuable reference text for researchers in the area. However, its price is well beyond the reach of most students. Whether it ought to be used as a text for teaching will depend on whether description is favoured over analysis and whether a US stand-point is favoured. For this reviewer, who uses the text in teaching, it is best taken in small doses with a keen eye for contra-indications.

Richard Joseph
Murdoch University
Perth, Australia

A Philosophy of Intellectual Property

Peter Drahos

Aldershot, UK, Dartmouth Publishing Company, 1996, £42.50, ISBN 1 85521 240 4

A Philosophy of Intellectual Property by Peter Drahos presents a timely and perceptive philosophical guide to the underlying principles and interests which determine intellectual property rights. The Introduction alerts the reader to the key aims of the work, and to the strong need for interdisciplinary analysis. His primary goal is to develop a distinct theory of intellectual property as a guide to future directions in the field. In mapping out this guide Drahos studiously avoids the 'super theory' approach. The overall theme to emerge cautions against the development of intellectual property theory which is driven by the overriding values of proprietarianism. Rather, Drahos argues, rights must be replaced with the concept of privileges, and guided by the philosophy of instrumentalism.

In Chapter 1 Drahos introduces the reader to the various economic theories which support the justification of intellectual property rights, and their enforcement. Noting the imperfections of the neo-classical paradigm, Drahos is clearly conscious of the operation of power underpinning the traditional concept of the market. He recognises, nonetheless, the need for economic judgment based on cost/benefit appraisal. The theoretical viewpoint developed provides a challenging framework from which to test the

implementation of regulatory measures in the area of intellectual property rights. Drahos safely predicts that the increasing scope of private ownership of abstract objects, and the economic consequences that result, will be important areas for future empirical research.

Chapter 2 provides an interesting overview of the history of intellectual property law. Our regulatory beginnings are traced from the classical period of Roman Law, and the early distinction between corporeal and incorporeal things is outlined. The frame of reference used to justify intellectual property is then analysed with reference to the early statutes and legal decisions in the area of copyright and patent. The preamble of the Act of Queen Anne in 1709 linking copyright to the 'Encouragement of Learning', and the limit imposed on the term of copyright here resonates with the concept of the public domain. The judicial reluctance to affirm common law rights to copyright provides important insight on the philosophical beginnings of our current system of intellectual property law.

In Chapters 3–5, Drahos bravely sets out to demonstrate the relationship of intellectual property law to traditional theories and philosophies developed with respect to tangible property. These chapters explore the contributions of Locke, Hegel and Marx, and the possible ways in which this body of theory might inform us in our quest to understand the nature and effect of intellectual property rights. While this section of the work may have less appeal to the philosophical purist, for the lay philosopher there is no shortage of thought-provoking moments.

We are led to the hard edged conclusion that:

The abstract objects to be found in science and culture lie at the centre of many of the interdependencies to be found in community life. Civil society's relentless pursuit of these objects produces relations of separation and a force for the fragmentation of community. Once property in abstract objects becomes part of a global system, it no longer acts within communities to enable freedom but acts upon them to restrict freedom.

Chapter 6, 'Property, Opportunity and Self Interest', critically assesses the operation of the 'invisible hand' of Adam Smith. Drahos doubts its efficacy as a reliable indicator of the collective good where property rights become privileges in abstract objects. Drahos points to the cost of market abuse, and the effects of factionalised interests in the distribution of intellectual property as a key area for concern. The analysis in this chapter provides a useful perspective from which to examine current developments. The application of the theoretical framework constructed by Drahos is highly likely to assist those, for example, presently engaged in Australia in the National Competition Council's Review of Sections 51(2) and (3) of the Trade Practices Act relating to the licence and assignment of copyright. The work is arguably equally relevant to the current Review into Convergence and Broadcasting and Other Services now being undertaken by the Australian Department of Communications, Information Technology and the Arts.

Chapter 7, 'The Power of Abstract Objects', looks at the links between intellectual property rights, monopoly and market power. By creating property rights in abstract objects, power relationships shift. Abstract objects become capital and a gateway to other capital on which many come to depend. The effect on democratic culture becomes pertinent as one comes to appreciate the way in which capital is constituted and mediated through the legal and legislative process. Drahos tantalisingly queries the form of arrangements best suited for the dissemination of abstract objects.

Answers to this question are explored in Chapter 8 which looks at the 'Justice of Information'. Rawls' theory of justice is applied to judge the distributive outcomes of intellectual property law. The dynamics of institutionalised organisation and structure

here have a major part to play. Drahos seeks to extend on Rawls' theory, which requires a social structure of citizens with equal rights to basic liberties, by arguing that still more is needed:

Citizen's pursuing their equal rights need access to information so that they can make plans and correct decisions. Social institutions themselves have to treat information in ways that minimise distortion of their functions.

Under Rawls' theory political liberties cannot be exchanged for economic gain. The tension which intellectual property creates to this 'self-evident' principle is cleverly illustrated with reference to copyright. Granting property rights in expression indeed holds consequences for other rights, such as freedom to information, or to extend the argument, the implied right to political communication.

In this chapter, the implied endorsement of human capital theory as a legitimate basis from which to extrapolate meaningful future directions for intellectual property rights has its contradictions. The analysis of compulsory licenses in the education sector in particular depicts an all too narrow set of outcomes. Some reference at this point to the underlying policy and legislative intent of such schemes to extend the 'intellectual commons' of the public domain is needed. Indeed it is to this particular area of intellectual property law and practice that Drahos' theory might again usefully be applied. The current negotiation between the Australian Vice Chancellor's Committee (AVCC) and the collecting agency, Screenrights, provides a very local and specific example. Here rest all the practical ingredients for analysis of the rights matrix in the negotiation of a suitable mechanism to ensure the payment of copyright royalties for information broadcast and recorded for research and learning purposes. Drahos has given us a new perspective from which issues such as these can be examined in the formulation of new policy.

The main thesis of the work is succinctly and powerfully concluded in Chapter 9 of the work. Here the case is stated for instrumentalism over proprietorism as the preferred approach to the conception of intellectual property rights. The argument against embracing the creed and attitude of proprietorism is persuasively presented. Proprietorism, as defined by Drahos, is characterised, *inter alia*, by its belief in 'negative community':

Things exist in a state of negative community. They are not owned but their ownership is open to any one individual.

Proprietorism embraces a belief in several elements. These are said to include the moral priority of property rights, the idea of 'first connection' in establishing ownership rights, and the existence of the negative commons. The creed of proprietorism is seen to protect ownership rights over the community interest. The assignment of property rights to a fundamental and entrenched status is queried together with the concept that activities that first give rise to economic value should necessarily lead to property rights. The implications of ranking property interests higher than other interests are explored. The right to extract economic value through the act of first possession is critically reviewed.

In stating his argument, Drahos subtly highlights the ways in which proprietorism has influenced the development of intellectual property law and policy. While avoiding investigation of the causal explanations for the ascendancy of proprietorism, Drahos reminds us of the forces of international capitalism, and their influence on the contemporary global regulation of intellectual property rights. We are left to ponder the overriding question: do we need to replace the creed of proprietorism in our conception of intellectual property rights. If so, with what?

Draho openly acknowledges the limits of his own empirical analysis in testing the broad theoretical framework constructed. He nonetheless provides some clear examples of proprietarianism in action. This is achieved by the commentary on the dynamic and changing environment of intellectual property law in the areas of trademark, patent and copyright.

The global expansion of trademark protection indeed provides an illustrative starting point from which to view the pathway of proprietarianism. In accordance with international legal obligations under the World Trade Organisation's World Agreement and more particularly, the Agreement on Trade Related Intellectual Property Rights (the TRIPS), legal protection now extends to colour, sound, smell and tastes in support of the global commercial demands of corporate producers and manufacturers. Draho puts forward the origins of trademark law, and demonstrates that not all decision making or policy development is, or has been, captive to proprietarianism. The origins of trademark law serve to remind the reader that trademark registration was traditionally viewed as more of a privilege than a right. Restrictions were accordingly placed on the licence and assignment of trademarks in recognition of the statutory right so afforded.

More recently, policy for the protection of consumer and public interest, the underlying purpose for regulatory intervention, appears to have been superseded. Limits to these policy imperatives have been subsumed by the values of proprietarianism as trademarks become for practical purposes characterised as commodities in their own right. Draho queries the extent to which current policy operates with respect to consumer protection and the community interest. The dominant purpose has arguably shifted to the protection of the interests of traders and the preference to reduce consumer search costs. Trademark law is seen as no longer convergent with the public interest as the system develops 'to accommodate the desires of the rent seekers'.

Draho next proceeds to the area of copyright. The capacity of copyright law to narrow and limit content in the public domain is quickly identified. The declining threshold required under law to establish 'originality' is seen to restrict the operation of the 'intellectual commons'. Simultaneously the influence of 'negative community' is enhanced. In effect, copyright becomes a tax on the exchange and distribution of information.

To some degree the limits to copyright protection are underplayed. There is little discussion, for example, on the operation of the fair use principle, existing statutory exemptions for research and study, or systems of compulsory licensing as means of regaining ground for the 'intellectual commons'. The intellectual framework which Draho has constructed is nonetheless an original starting point from which to evaluate the complex balance of rights and interests protected under intellectual property law.

Patent law is the next area where the influence of proprietarianism comes under examination. Here the classic distinction between the 'non-patentability' of discovery and the 'patentability' of invention is discussed. The restriction against the patentability of discovery arguably facilitates access to the 'intellectual commons' by keeping abstract objects and learning available to all. Conversely, the merger of the concept of discovery and invention in judicial determinations potentially promotes negative community.

The practical policy impact on community access to information, creative production and power relations is ignored or relegates less priority in this process. The net result of entrenched proprietarianism in patent law is the transfer of information and knowledge from the public domain into the sphere of private ownership.

Draho warns that patterns of interference in the crucial resource of information can have negative effects, and that relationships of personal dependency in objects have additional features in the case of intellectual property rights. Limiting access to

intellectual capital additionally inhibits the development of individual capabilities of others in creative areas. The statutory scheme which the State provides can, in fact, serve to legitimise the right to interfere in the negative liberty of others. The origins of public privilege again are in such instances replaced by the discourse of property rights.

It is in this final and most significant chapter that Drahos develops the concept of 'negative liberty' which includes the right not to be interfered with, or obstructed. Copyright, by way of example, can be characterised by the right to prevent others from using a work over which ownership rights are attached.

In support of his theory, Drahos provides an interesting appraisal of the 'sweat of the brow' cases, warning of its capacity to shrink the public domain. The revival of this doctrine in recent global initiatives to develop treaty agreements in respect of data base protection again emphasises the relevance of the study in which Drahos is engaged. Cautious argument is advanced against reinventing 'the sweat of the brow' doctrine in *sui generis* form in the international domain.

The protection of plant rights and bio-technology is seen as another recent manifestation of the ascendancy of 'negative community'. The concept that biological materials found in nature are patentable once more touches on an area of international interest. The extension of illegal protection in the area of plant breeding is provided as another example of the way in which ownership rights in intellectual property can limit the 'intellectual commons'.

The effect of institutional structures on the evolution of intellectual property rights is a theme which Drahos regularly reinforces with illustrative anecdotes. It is argued in this chapter that the distribution of wealth and resources does not fully account for the social and economic costs of establishing privilege, or the cost of abusing any such privilege. What benefit, for example, will accrue to Indonesia by establishing a regulatory system for patent enforcement where less than 13% of patents have registered owners of Indonesian origin? Still more problematic is the threat that such privileges pose to democratise institutions. Drahos here cautions against endorsing a freedom inhibiting system of privilege.

The development of the concept of instrumentalism presents an original approach from which future policy pathways can be explored. As explained in the work's Introduction:

Instrumentalism conceives of intellectual property rights as a distinct kind of liberty-intruding privilege. Under the influence of proprietarianism, these privileges come to pose grave threats to negative liberty. The instrumentalism which is presented takes the form of a naturalistic empiricism that is guided by a principle of humanism.

Instrumentalism sees law as a tool in the delivery of pragmatic outcome. Drahos refines this characterisation and suggests that more focus must lie with behavioural aspects, as distinct from ethical or philosophical issues. Instrumentalism investigates the relationship between property and individual behaviour, groups and patterns of economic and social development. It is a viewpoint which endorses economic theory designed to calculate social costs and the distributive effects of property law.

Instrumentalism must also serve moral values. While the preferred approach is to adopt a humanistic form of empiricism in the treatment of intellectual property rights, Drahos is in no way prescriptive of the nature of moral values to apply.

Most importantly the privileges that instrumentalism delivers must also be accompanied by duties. A primary duty is not to exercise privilege in

a way that defeats the purpose for which the privilege was originally granted. As Drahos puts it:

Holders of intellectual property privileges are subject to those duties that maximise the possibility that the purpose for which the privilege was first enacted is achieved.

The dilemma of course remains as to how to ensure or motivate the responsible exercise of the power that confers privilege in the free market global economy.

This publication has much to offer students, scholars and practitioners of law, philosophy, economics and sociology in reaching a broader understanding of the dimensions of intellectual property. In the digital corporate communication age the possibilities for empirical research of the type to which the author refers would appear to be limitless. Whatever these possibilities Drahos has provided a philosophical set of signposts from which future directions may usefully be shaped.

The multitude of regulatory issues posed by the development of intellectual property in the digital age requires a more deliberative analysis of the underlying theory effecting real world outcomes in the global economic market. Drahos sets the foundation from which to appreciate the need for a well-articulated conception of the public purpose and the role of intellectual property law in fulfilling that purpose. He has produced a work of great insight into our regulatory systems and the underlying value systems we adopt to shape our social, political and economic reality. By increasing awareness of how these values are derived, and currently operate within the framework of intellectual property law, Drahos has made a unique and worthy contribution to a significant area of debate of relevance to the international community.

A Philosophy of Intellectual Property sensibly avoids any attempt to prescribe a general theory for the treatment of the many manifestations of current intellectual property rights and interests. This the writer makes expressly clear. The book does attempt, however, to provide directions for theory building in the future. In this Drahos has succeeded admirably.

Jane Innes
University of Wollongong
Wollongong, Australia

Business Research Through Argument

Mike Metcalfe

Boston, Dordrecht, London, Kluwer Academic Publishers, 1995, 152 pp., US\$103.00, ISBN 0 7923 9616 2

Finding a research methods book that is able to diminish, rather than increase, the anxiety of students in the tentative stages of research suggests itself as a worthwhile resource for any library. The goal of Mike Metcalfe's book entitled *Business Research Through Argument* is to do just that by orientating his research students to the ultimate purpose of their inquiry: gaining the approval of a knowledgeable audience. The need to explicitly state what appears as a truism of academic research arises from the confusion of his students who, Metcalfe claims, have been distracted from this fundamental goal. He attributes this confusion to the emphasis given by many manuals in research methods to the scientific method, which he states is unwarranted. In the case of Business Studies, Metcalfe maintains that scientific method is just one of many techniques of evidence *collection* and encourages the reader to engage in reasoned argument through which evidence is given meaning. The benefits of such an approach are worthwhile: