On the history of intellectual property

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Abstract

Why write a history of intellectual property? Looking back at the publication of the *Histoire de la propriété intellectuelle*, we look at the methodological issues involved in such a history, both in terms of defining the subject and of periodisation. Other contributions of such a history are highlighted, whether in terms of the controversial nature of the subject or the different scales involved in its development. Thanks to the possibilities and alternatives that it sheds light on, the history of intellectual property is presented as a political lever for a future to be built.

Introduction

One book can hide another. By studying the history of the French 19th century inventors in the *République des inventeurs* (2008), I had noticed that the institutions of inventive activity were strongly linked to the question of industrial property. Without reducing one to the other, it was clear that debates on invention could be also debates on patents, and vice versa. The discourse on patents was linked to other types of intellectual property: technical, industrial and artistic.

Later, I repeated this observation through the history of scientific property, which also illustrates a form of syncretism between the different types of intellectual property. Actually, despite their distinct emergence processes, patent law, trademark law, literary property law and design law could be linked to the same history; in practice, they involved comparable or even identical institutions, the same jurists or lawyers, or creators who constantly referred to each other.

It therefore seemed appropriate to tell this common history, from both a scientific and a civic point of view. Intellectual property is a major issue in our daily lives, as demonstrated by the debate surrounding vaccines against Covid-19. Therefore, the construction of a common culture on intellectual property is necessary and in this task, history matters. Understanding this historical construction, with its own contingencies, prevents us from essentialization and helps us to set intellectual property in context, by showing that several alternatives have been possible in its development.

1 This text is a revised version of a lecture given at Sorbonne University on 22 September 2023 at the seminar "Intellectual Property, Past and Present: An Interdisciplinary Conversation".

“Intellectual property”: word and object

Using the term “intellectual property” is a sensitive point. In many respects, this notion may appear both anachronistic in relation to certain periods and even irrelevant. First, it is anachronistic. Today the term brings together rights of different types under a convenient umbrella, which gives them a family resemblance. But, it was only in the late nineteenth century that these two words started to have this meaning. In the early nineteenth century, the term “intellectual property” was sometimes used to describe copyright or literary property. Moreover, the application of the term “property” to the various rights that today make up “intellectual property” has been contested time and again.

So why use such an expression, although it seems irrelevant in certain times and places? An authoritative argument provides an initial answer. Pamela O. Long, studying the ways in which artisanal knowledge was controlled in medieval times, does not hesitate to use this expression to describe forms of control over know-how (Long 2001). In fact, from a methodological point of view, there is nothing to prevent the use of controlled anachronisms as long as we agree on the meaning of the concept. The idea that we can speak of intellectual property when there is a regulated control over the fruits of intellectual activity already provides a robust definition.

Of course, the latter does not necessarily conform to a purist definition in legal terms. But, such a definition, like the WIPO’s one from the Stockholm Treaty (1967), is often a definition by extension, which refers to the various rights that have come under the banner of intellectual property. Actually, the contours of the latter continue to be debated. So it is possible to defend the idea that we can use this expression by being aware of the fact that its referent is not identical either in time or in space. But, like any historical concept, the concept of intellectual property is precisely designed to bring differences to light.

Historicity

Questioning the existence of intellectual property in the Middle Ages thus sheds light on phenomena and dispels prejudices about a golden age of shared knowledge that cannot be sold. Of course, the framework of medieval property is completely different from our modern one; however, the fact remains that the question of the value of intellectual work – which historians such as Jacques Le Goff were already interested in – led to attempts at control, and then to the search for privileges. This curiosity for a long history also helps us to avoid thinking of intellectual property as a kind of *causa sui* triggered by the advent of an inevitable modernity. We need to study transitions rather than spontaneous generations.

This historicist approach also leads us to question the reality of certain comparisons conjectured at key moments in the history of intellectual property. We may sometimes

be tempted to justify things by the famous “Zeitgeist”. But it is difficult to understand, for example, how it is possible to make John Locke a thinker of literary or intellectual property. It is tempting to consider him the founding father of modern literary property, given his role in the emergence of property thinking and in the development of the License Act in the 1690s England. Nevertheless, the traces of his direct intervention in favor of copyright seem rather tenuous. The historicist approach is also a critical one. It dissolves the misuse of history, the invention of ideological traditions and the illusion of continuity in favor of political or economic interests.

The historicist approach enables to revisit the construction of the chronological framework. The history of intellectual property has probably his own pace, which does not necessarily fit the political chronology. A close look at the twentieth century leads to think about periodization in a particular way. The effects of the two world wars may be downplayed in favor of a time division centered on the late 1890s – and the emergence of Big Business – and the early 1960s, when a new cycle of international trade began within and between the two Cold War blocs. Trying to think about the evolution of intellectual property beyond the turns of political history makes it possible to link it to the cycles of trade and of capitalism.

Controversies

The instability of intellectual property is one of its essential features and its history is a history of paradoxes and chronic contradictions. In France, for example, the patent law of January 1791 was contested the very day after it was passed, leading to its amendment a few months later. Generally speaking, patents were the subject of extremely strong disputes throughout the nineteenth century, to the point where the Netherlands abolished its legislation in 1869. At a time when liberalism was gaining ground, the idea of imposing a monopoly – albeit a transitory one – on an economic activity was the subject of intense debates. The way in which the patent system worked was also challenged, even in the courts. Some court cases had major economic consequences: the fuchsin case in the 1860s, for example, had an impact on the entire French and even European chemical industry. The history of intellectual property is a history of controversies (Machlup and Penrose 1950), of sometimes intense, even if muted, struggles.

Controversy has not been extinguished, as shown by recent debates on healthcare (access to Covid-19 treatments) and the patentability of living organisms. The use of the Internet also changed the situation. The ease with which immaterial objects can be disseminated increases the possibility of circumventing intellectual property rights. It led to policies aimed at reinforcing them (with the creation of the French Supreme Authority for the Distribution of Works and Protection of Copyright on the Internet, for instance), which in turn led to an increase in disputes.

Of course, this conflict dimension may be continuous or structural, but it also varies. Better still, a historical approach allows us to be attentive to the tensions between traditional modes of justification and the current reality of intellectual property use. The way intellectual property is legitimized today is not the same as it used to be. How can we defend a right that has long been considered an individual right when the main holders are not individuals but gigantic corporations? How can we consider it a progress when it prevents the spread of medical treatments, for example?

In this game of controversies, we need to pay close attention to the balance of power and the weight of the interests at stake. The late nineteenth century – the so-called "second industrial revolution"—was marked by the increasingly prominent role of large corporations in production and international regulation. This seems to me to be a break in the history of intellectual property: big business and interest groups find their voice, at first, through intermediaries such as the International Association for the Protection of Industrial Property and patent agents., then more and more openly. The *Union des fabricants*, created in 1872, was one of the major players in the international regulation of trademarks. Closer to home, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was largely prepared by multinationals.

Scales

Another common thread is the "playing of scales" (*jeu d'échelles*) in which intellectual property is embedded. Whether in the contemporary period or in the long run of history, intellectual property is constructed through national models – which means that it is not limited to the Anglo-American model – but also through transnational dynamics. For example, in the eighteenth century, French debates on literary property were informed by what was happening in England, and vice versa. Intellectual property is always constructed on these several levels: a national level, which refers to sovereignty, but also a transnational level, which refers to the circulation of intellectual works, and even a sub-national level.

This multiscale dimension creates a tension between national legislation, private but transnational interests and international agreements, which does not date back to TRIPS. It goes back at least as far as the Paris Convention [on patent and trademark law] (1883) and the Bern Convention [on the protection of literary and artistic works] (1886). The Paris Union Convention was strongly contested from the outset by protectionist movements who saw it as a Trojan horse for free trade. And it has to be said that this international regulation of patents and trademarks facilitated investment and trade that could have been held back by the protectionist legislation of the time.

This game of circumvention is repeated in contemporary times. It seems that the 1994 TRIPS agreements are a way of circumventing the international regulations put in place in the 1960s: the World Trade Organization integrates intellectual property into a much more global game of trade-offs. To put it briefly, poor countries can be encouraged to

ease up on intellectual property when rich countries establish part of their value chain internationally. Multinationals have a vested interest in this: as they relocate their production abroad, they seek to strengthen intellectual property rights to avoid counterfeiting. There is a trend towards homogenization, to which TRIPS is undeniably contributing. But there are still some singularities that players need. Intellectual property, and patents in particular, are and will continue to be the subject of debate, both in their implementation and in their principle, as the debate surrounding Covid-19 has clearly shown.

Possibilities as a non-conclusion

In conclusion, it seems that a long-term perspective enables us to take stock of intellectual property in time. For instance, TRIPs were presented as the promise of rebalancing innovation capacities, but with 20 years' hindsight, we can say that this is not really the case. Apart from BRICS, many countries are not free to make their own development choices. It is true that South Africa, India and Brazil have been able to develop their pharmaceutical capacities, but in part in opposition to TRIPS.

All this brings us back to the famous quip by economist Fritz Machlup (Machlup 1958):

> "If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it".

Generally speaking, intellectual property is far too deeply rooted in the way the economy works today for us to do without it altogether. A world without intellectual property might have been possible however: it is a historical construction, not an inevitability. If a general disruption is probably dubious, or at least difficult, a world with a different kind of intellectual property is undoubtedly possible. The history of intellectual property is a history of power relations between those who create and those who disseminate creation, between companies and between countries. Intellectual property always depends on a specific historical configuration. So the game remains open.

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