

The Ontology of Cyberspace: Law, Philosophy, and the Future of Intellectual Property by David R. Koepsell, Peru, Illinois: Open Court Publishing, 2000, ISBN 0-8126-9423-6, (Price \$26.95); Paper: ISBN 0-8126-9537-2, \$19.95, pp. 139

By Thomas V. Finnerty

2005 Juris Doctor Candidate

Suffolk University Law School

Introduction

David R. Koepsell is Executive Director of the Center for applied ontology and adjunct assistant professor of philosophy at State University of New York: Buffalo. He is also one of the few corporate ontologists in the world, holding the position of Business Web Exchange Ontologist for Bowstreet.com, Inc. *The Ontology of Cyberspace: Law, Philosophy, and the Future of Intellectual Property* by David R. Koepsell is a technical examination of the dichotomy created by patent and copyright laws as applied to intellectual property. *The Ontology of Cyberspace* makes suggestions as to how the laws should be applied to intellectual property.

Ontology is the part of philosophy that is concerned with the nature of being and of metaphysics. Koepsell first discusses in detail the ontology of cyberspace¹ and then shows how that ontology is applied or misapplied by the courts with regard to intellectual property law. He then goes on to discuss what direction he thinks the legal ontology of computer-mediated phenomena should go and the reasons why. This review focuses on the legal aspect of

¹ David R. Koepsell, *The Ontology of Cyberspace: Law, Philosophy, and the Future of Intellectual Property*, Open Court Publishing (2000) p. 2 (noting that he will use the terms “cyberspace” and “computer mediated phenomena” interchangeably).

intellectual property and how it fits into the patent, trademark and copyright laws. The review incorporates Koepsell's philosophical theory and how his view proposes to change the future of intellectual property law.

Background

Koepsell begins his book by stating that cyberspace is just another expressive medium; challenging the assumption that cyberspace is intangible. He then gives a brief description of the various computer-mediated phenomena such as: software, internet, e-mail, wide area information servers, usenet, and virtual reality. Koepsell then goes into a rather detailed discussion on the differences between metaphysics and ontology noting that metaphysics is the study of *qua* being while ontology is the merely the study of being. He highlights that ontology considers the question of being without resolving the conflict between the idealism and realism views of metaphysics. The evolution of intellectual property law resulted in an ontology without regard for rules or common sense. Koepsell finds this result unacceptable.

Koepsell plans to remedy the situation by applying basic principles to laws that are purely positive, that is, laws that have no a priori elements. The principles are: first, choose a legal object and unravel its ontology; second, determine whether the existing ontology abides by formal ontology and logic; third, determine whether the existing ontology is correct; fourth, if it is not correct determine what practical problems because of the incorrect ontology and; fifth, determine how the law could be adjusted to reflect the correct common sense ontology. (p. 41). He starts his analysis by providing a brief history of the three types of intellectual property laws: patents, trademarks and copyrights. Congress amended the Copyright Act² in 1976 to account for the development of software because software did not exist when Congress originally enacted

² 17 U.S.C. § 117 (2004).

the Act. In fact, the common law provided that for writings to be subject to the Copyright Act the writings must be directly perceived by others.³ An amendment to the Copyright Act rejected this direct perception test. Koepsell notes that intellectual property law distinguishes between ideas that are never subject to protection and other products that may be subject to patents, copyrights or trademarks.

Koepsell continues his analysis by assessing the current state of the legal ontology of software. He concludes that a problem presents itself because the courts view both patent and copyright laws as applying to software. The problem lies in the distinction between expression and idea and he explains that the purpose of copyright laws is to promote creative works rather than to hinder them. Furthermore, he explains that the difference between formulae and algorithms is even harder to decipher with regard to patent law.

“Common sense ontology” categorizes objects in much the same way that ordinary people might. (p.77). He differentiates this from an ontology of a common sense world by explaining that though an object might be outside the realm of commonsense objects, any object may fit into a common sense ontology if the category is objects that include everything which may be thought of existing. He then goes on to categorize the different objects of cyberspace from bits, to bytes to algorithms to networks. Koepsell espouses the theory that people often confuse form with function. He takes exception to the school of thought that information conveyed in the form of bits are very much like pure thought just because it is reproduced so readily. He maintains that bits are not information but rather the medium by which information is stored, conveyed, or retrieved. Koepsell then explains that while expressions must be intended

³ See *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (holding that player piano rolls were not an illegal reproduction because the “writing” could not be directly perceived by others).

ideas, intended ideas need not always be expressed. He compares a Jackson Pollock painting to the drop cloths Pollock used while completing the painting. Koepsell asserts that an idea cannot be meaningless and while Pollock's painting is an expression of his ideas, the drop cloths are meaningless. He goes on to make the point that books and computers differ only from one another in their degrees of complexity. (p. 93). He argues that there is no reason to treat information stored in a computer different from information stored in any type of machine.

Analysis

Koepsell argues that the current ontology of cyberspace must be replaced because the current law creates a paradox between patent and copyright law which both apply to cyberspace. An expression must have a utilitarian purpose to satisfy the patent laws, while utilitarian works may not be copyrighted. Therefore, software on one hand must have a utilitarian purpose to be patentable, and must be primarily aesthetic to satisfy the copyright laws. Thus the dichotomy is born between these two conflicting laws.

It is exceeding costly to complete patent research and to defend against patent infringement claims. Larger companies often swallow up the software start up companies or the start ups go completely under because of the exorbitant costs. Koepsell fears, and I agree with him, these costs hinder the growth and development of new ideas. Copyright actions are less burdensome to defend against than patent infringement actions and Koepsell questions why there is a need for two avenues of prosecution. He maintains that copyright law offers all the protection software needs.

Koepsell advocates eliminating intellectual property law. He argues that intellectual property protection breeds complacency. Without it, companies would need to consistently improve their product and beat their competitors to the market. He cites the success of *Doom*,

Id's Software computer game that was originally distributed on shareware. *Doom* outsold all other computer games because Id remains innovative and reaches the market before anyone else. Koepsell admits this is a radical concept, perhaps too radical to ever come to fruition. A return to a world without intellectual property seems highly unlikely considering that cyberspace generates a large amount of business for those that practice intellectual property law.

The other solution Koepsell offers is that of a single intellectual property regime. He argues that copyright law could cover everything that patent and copyright law covers because man made, intentionally produced objects are expressions. He argues that protection for a shorter term of years could protect all man made objects including computer mediated phenomena. The limitation that prohibits copyright protection for utilitarian works will need to be lifted for this solution to be viable. Koepsell argues that a single intellectual property regime based on copyright law would generate new technologies without the burden to these new technologies that patent law brings. If adopted, Koepsell's single intellectual property regime will eliminate the inconsistency between copyright and patent laws that limit the innovation and growth even as computers become more powerful.

Koepsell makes a compelling case that the ontology of intellectual property should be completely overhauled but again, how realistic is his argument? Koepsell maintains that cyberspace is not intangible, but rather physical, as all of its components are physical. The current ontology of cyberspace which fits it into two mutually exclusive categories is incorrect. That all man-made intentionally produced objects are expressive objects and could best be treated by one intellectual property regime. With regard to cyberspace a dichotomy exists between copyright and patent law and a long journey lies ahead before the courts treat cyberspace as an expressive object like all others.

Until lawmakers recognize that cyberspace is an expression, it will not reach its full potential and this lack of recognition will continue to stunt the growth of cyberspace. Koepsell asserts that computer mediated phenomena will be the most powerful force of economic and social growth, but not until the legal ontology of cyberspace is revised. One could argue that even with the limitations of the current ontology of intellectual property it will be the most powerful force as we move forward into the future.

Conclusion

This book would be of interest to those that practice in the field of intellectual property because Koepsell makes suggestions, some radical, on how the courts should handle cyberspace. Koepsell proposes revisions and different interpretations to the intellectual property laws but at this time the courts have not heeded his suggestions. It is unlikely that his proposed revisions will be adopted any time soon, if ever. It is a highly technical discussion and one must truly have an interest in this area of law to be interested in *The Ontology of Cyberspace: Law, Philosophy, and the Future of Intellectual Property*. If one is not well versed in technology, then the ontological discussion certainly has the potential to confuse the reader. Koepsell's premise that all computer- mediated phenomena should be treated as expressions and thus subject to copyright law is an interesting one but at this point not being followed by the courts. While this book is an interesting read and makes one question how the intellectual property laws adversely impact cyberspace, Koepsell's proposed revisions are light years away from ever actually happening.