CREATIVITY, LAW AND ENTREPRENEURSHIP

Edited by **Shubha Ghosh** and **Robin Paul Malloy**

ELGAR LAW AND ENTREPRENEURSHIP

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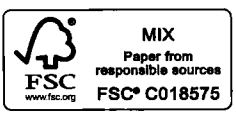

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Preface

Anne S. Miner

Creativity, Law and Entrepreneurship makes an important contribution to entrepreneurship research and to organization theory more broadly. Many scholars see entrepreneurship as a process involving imagining opportunities, and then taking action to create new ventures. The process of *creation* lies at the heart of most definitions of entrepreneurship, even though its definition varies and is to some degree contested.

Popular wisdom embraces two conflicting views of the law. In one vision, the law is the natural enemy of the creation of novel action and entities: it promotes consistency and constrains novel behavior. In the other vision, the law can promote the creation of socially valuable entities – whether creative art projects, scientific inventions or new organizations. This book plays an important role in helping build *conditional* theories of when and how the law shapes creative action, in contrast to both of the overly simplistic visions.

This volume highlights that the law plays a crucial role in creativity in society broadly, and specifically in the context of entrepreneurial processes. As revealed in this book, the law can play several affirmative proactive roles in encouraging creativity in society, as well as in shaping when valuable creative ideas become reality. The law shapes whether, and which, creative ideas see the light of day. It shapes what new organizational forms can arise. It influences conditions in which new individend organizations can be created and supported. It shapes which organizations are seen as legitimate and therefore more able to gain resources. It mediates emerging debates on society's interests in how innovation and creative ventures can best be resolved.

Legal scholarship on creativity, then, offers a crucial frontier for research on entrepreneurship and innovation more broadly. It provides a lens for looking at factors that promote creativity in general, new ventures, survival of new ventures, the distribution of the value gained from creative ventures and even our way of thinking about the creation of new forms of value. This volume helps advance thinking about how legal practices and doctrine can both help and harm valuable creativity. The several papers

on IP practice and doctrine, for example, help advance thinking on the links between external social structure and the actual execution of creative action. This familiar but vital issue has important implications beyond the specific domain of IP, including in the area of new for-profit and public venture creation.

It is easier to study existing organizations and social processes than to study emergent or nascent processes. Existing social entities can be observed. Data can be recorded and systematically assessed. Outcomes can be detected to allow theory about causal processes and about social welfare. Studying collective creativity offers a greater challenge both in general and in the specific context of entrepreneurial activities. The study of law and creativity offers a crucial frontier for research on entrepreneurship, then, both because of the key role of the law itself, and because it helps show the way to the study of creation in society more generally.

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Professor Malloy thanks Dean Hannah Arterian and the Syracuse University College of Law for the continuing support of the Center for Law, Property, and Social Entrepreneurism (PCSE), directed by Robin Paul Malloy. In addition, appreciation is expressed to the Syracuse University College of Law for supporting the Association for Law, Property and Society (ALPS). Both PCSE and ALPS are focused on advancing knowledge and understanding about the relationship among property law institutions and the process of entrepreneurship in a market based society.

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1. Introduction: can we incentivize creativity and entrepreneurship?

Shubha Ghosh

Legal rules and institutions are often understood in instrumental terms. They are a means to certain socially desirable ends. For example, securities laws are justified in terms of creating transparency and more informationally efficient markets. Health and safety regulations, whether in the form of federal administrative rules or tort law, deter socially harmful conduct and create more trustworthy and protected public spaces. And of course, intellectual property laws are described as legal regulations that incentivize the publication or commercialization of creative works, whether those that entertain us or those that increase the stock of scientific and technical knowledge.

Society is considered as including other instruments in addition to law. Business activities, social interactions, creative works, scientific breakthroughs – each understood as arising from individuals who are acting instrumentally, pursuing certain actions to reach certain ends. Poetically, the individual actor may be seen as an instrument of some hidden actor, a muse, a god, a spiritual principal, each serving as a metaphor for an ineffable or unknowable internal force. But such poetry serves to dodge the more challenging question of what drives people to achieve the various accomplishments that law tries to encourage or to pursue the nefarious ends that law prohibits. To replace the spiritual principal with self-motivation or self-interest seems to answer the question only partially. After all, what is the self that is so motivated to act in the pursuit of its own interests but a construct of the society in which it acts? Recognizing that one is motivated to construct one's self through schooling, through social interaction, through meditation, through the myriad set of opportunities one creates or accepts, highlights the quandary of self-motivation and self-interest. Adam Smith more than hints at this quandary when he speaks, on the one hand, of the interest of the baker and other artisans and, on the other, of the invisible hand that coordinates these private interests. The market as instrument functions through two vessels: individuals of flesh and bones and a principal whose substance is spiritual.

It should be pointed out that the spiritual dimension of the market is a trap for the naïve and unwary. Fundamentalists and literalists may take market success as a clear indication of grace and personal salvation. After all, what other signs are there? But the invisible hand often provides a clever artifice to disguise the principals for whom the market serves as instrument. Adam Smith is touted as sanctifying the market institution. But this characterization ignores Adam Smith's real contribution in *The Wealth of Nations*, which recognized human activity as the chief catalyst for creating national wealth. Within the pages of the 1776 book is a detailed document of the many fruits of human industry, factories and distributors as well as government. To the extent *The Wealth of Nations* is a screed against the curse of government intervention into the market, its target is the mercantilists and the physiocrats, agents of the sovereign who would tax trade between nations and guide national commerce all for the aggrandizement of the crown, and not New Deal regulators and their progeny, whose activities actually make the invisible hand strikingly visible. What makes *The Wealth of Nations* a revolutionary book is the recognition that markets and states are the products of human activity, operating through that perplexing and incoherent concept of self-interest.

What I have suggested so far is that law and persons serve as instruments for promoting human activity. I have also suggested that there is a circularity in talking about self-interest as the motivation for different human acts. I am also suggesting a circularity in thinking of the law as instrument. Because if Adam Smith and others are right that the state, including its laws, is just the construction of human beings, then what motivates the creation of laws? To take the example of intellectual property: if copyright and patent are instruments for promoting various creative and inventive endeavors, then what motivates the creation of copyright and patent? A public interest rationale might say that these laws represent a clear promotion of the public good as enacted through the agencies of democratic process. James Madison said as much when he claimed that copyright and patent are undeniably for the public good. More recent pronouncements see the working of self-interest in formulating copyright and patent, the laws not promoting creative activities at all but rewarding the interests of certain well-defined actors who have managed to formulate the laws in self-serving ways. Copyright and patent illustrate the circularity of viewing the law as instrument. The very interest that the law is deemed to modulate is the same interest that defines and becomes defined by the law. Copyright and patent may not so much promote creativity as the pursuit of copyrights and patents.

All this intellectual ground sets the stage for the project represented by the chapters in this book on 'Creativity, Law, and Entrepreneurship.' The

motivation for this project, whether self-inspired or externally induced, is to fill in the void left after recognizing the incoherence of speaking of law, markets and humans as instruments. The project is a constructive one, rather than a purely critical one. In bringing together these scholars, many of whom first met at several Law and Society sessions held in Montreal in May 2008, and then once again at a workshop held at University of Wisconsin Law School in April 2009, my goal was to begin a scholarly program, a conversation, an investigation of how creativity and law operate in action. In this way, all of the participants can be thought of as entrepreneurs, in the original French sense, as people who undertake an enterprise. Entrepreneurship is also a current buzzword in political and academic circles, usually appealing to privatization and individual initiative as substitutes for state largesse. Our project can be understood as examining the building blocks of entrepreneurship, not only legal institutions that might regulate and promote enterprise, but also creativity that drives human activity, including entrepreneurship. The chapters in this book examine creativity and law in action and thereby provide a set of guideposts for reconstructing our understanding of law, markets and human activities.

A first impression of this project is that addressing creativity in law is making a category mistake. Judges dismiss specious legal arguments as instances of lawyerly creativity. Creativity in law is perhaps as desirable as 'creative accounting,' a cover for fraud of various financial varieties. To speak of creativity in law may suggest a type of intellectual fraud. Creativity is about play, freedom from constraint, unrestrained action. Law is about routine, regulation, defined boundaries, standardized process. Connecting creativity and law would arguably be an unproductive exercise, offering the hope that there are the possibilities of order and reason in creativity and of playfulness in law when neither exists. This illusion is what perhaps belied the friendly skepticism of a colleague when I described to him this project. His response was, in effect, there is no creativity in law. My sense is that the colleague saw only the drudgery of law, the lawyer as paper pusher in the background while everyone else – business people, homebuyers, couples marrying, the private citizen – is at play. Perhaps he also saw the judge as the umpire, to borrow a recent metaphor, standing aside while others enjoy and intervening only when the play is about to degenerate into hostile conflict. The colleague's comments illustrate what might be the initial response to a project on law and creativity.

But the comments did not dissuade me from pursuing the workshop. They of course were not designed to dissuade me and were, in fact, quite helpful in making me refine and better understand my ideas. I recall that in response to my colleague's skepticism, I raised the example of Franz

Kafka's *Hunger Artist* (1922), whose art entailed performing painful acts of fasting and self-deprivation. Is the *Hunger Artist* creative? Is his performance a metaphor for what lawyers do? I do not think this example persuaded my colleague, and it perhaps does not persuade you. But in reading many of the chapters in this book, and in thinking about the problem, I have come to the realization that the tension between law and creativity is exactly the tension between work and play. With roots in religious traditions and analogues in secular ones, society is organized on the separation of work and play with the relationship between the two being an uncertain and tenuous one. In some cultures, the separation reflects one between this life and the next one with work being the call of the material world and play being the reward for a life of drudgery. With the vanishing of the spiritual realm, this dichotomy becomes one between work and retirement, punching the clock and vacation time. The dichotomy also becomes self-reinforcing with work being the basis to acquire the financing for the play. Or, from another perspective, play is the mental and physical nourishment that makes productive work possible. So the project about law and creativity is really about the relationship between work and play, what each means separately, what they mean together.

Our inquiry into law and creativity reduces to an inquiry about what people do, what activities and actions do they engage in. What unites law and creativity, work and play, is their shared origins in human activity, however motivated, to whatever purpose directed. Human activity is the raw material for our project. It is the raw material that constitutes creativity. It is the raw material that constitutes law. Furthermore, human activity is the true meaning of entrepreneurship, of undertaking activities that constitute human interactions and engagement with other people and one's surrounding environment.

Like a painting by Hieronymus Bosch or a novel by Thomas Pynchon, the project takes as a given that human activity occurs in whatever form, from whatever source and attempts to depict and capture the wide range of human activity that constitutes creativity. The challenge is to find a broader theory that can help to understand activity that is considered creative. The chapters in this book can be understood as an initial, fruitful attempt at developing this broader theory. Several authors contribute invaluable empirical evidence about creative activity, whether in the realm of patent, copyright or trademark. Several offer insights on activities within the legal process, such as patenting, contracting or transacting more broadly understood. Several also offer insights on transitions between different realms of human activity, such as the move from the physical work of coalmining to the mental work of inventing and creating. When seen as a whole, the chapters in this book successfully examine the

concepts of work and play, tearing down boundaries between the two, and showing the possibility of reconstructing a world in which play and work merge in different types and realms of human action and interaction.

This project is ultimately headed towards a jurisprudence of market and intellectual property theory that moves radically away from a conscious notion of instrumentality to a more focused attention to human activity. Who is agent or who is principal is relevant to our inquiry, but this project represents an attempt to move away from any pretense of a coherent meaning of self-interest or any contention that legal or market institutions operate in a predictably instrumental fashion. The approach is not to completely trash these notions, but to ignore them as an agnostic would ignore any reference to the divine. Observe, learn, think: the way in which scholars play and work to make sense of the shared human predicament within which we all operate. The ideas and insights of the authors that follow are the first step in this process.