H-Net Reviews
in the Humanities & Social Sciences

Edward C. Walterscheid. *To Promote the Progress of Useful Arts: American Patent Law and Administration 1798-1836.* Littleton, Col.: Fred B. Rothman & Co., 1998. xii + 516 pp. $75.00 (cloth), ISBN 978-0-8377-1354-0.

Reviewed by Doron Ben-Atar (Fordham University)
Published on H-Law (January, 1999)

Intellectual Property in the Early Republic

To Promote the Progress of Useful Arts chronicles the legislative and administrative history of the American patent law from the Constitution of 1787 to the Patent Act of 1836. It is an uneven work. Well-researched and rich in detail, the book lacks direction and cohesion.

Edward C. Walterscheid of Los Alamos National Laboratory begins by examining a fascinating question: why did the United States Constitution specifically order the new central government to promote the progress of useful arts? The framers have left us little by way of explaining their reasons for writing the intellectual property clause into the Constitution. Why, for example, didn't they specify banking policy or internal improvement, both of which would have to fall under the "necessary and proper" clause, yet insisted on promoting knowledge and even specified that it should be done by securing exclusive rights for inventors for a limited time? Walterscheid believes that the founders' desire "to follow the English practice" (p. 36) was crucial to their decision. Yet, there is no record of any delegate who said so specifically. Given the way the framers felt about England's political economy, why would they want to enact a policy that would lead to its emulation in the American republic? After all, didn't they embark on the Revolution precisely because they sought to bring to a halt the Anglicanization in their midst?

The decision to insert the intellectual-property clause into the Constitution originated, then, not in the desire to emulate Britain, but in local conditions. Here Walterscheid focuses on two factors: the Philadelphia context and the Fitch-Rumsey steamboat battle. By 1787, Philadelphia was the center of the American industrialization effort. The city's elite had concluded that technological deficiencies undermined the region's ability to develop local manufacturing and supported the improvement of American know-how by means that were not always kosher. Walterscheid suggests that Philadelphian Tench Coxe, an outspoken proponent of American manufactures, made a speech on August 9, 1787, that persuaded Madison to include the intellectual property clause in the Constitution. Perhaps? The competition between John Fitch and James Rumsey over who owned the rights to the steamboat was a prominent feature of the era's politics. Just about every leading American seems to have taken side with either Fitch or Rumsey. In late August 1787, just a couple of days after the intellectual property issue was first raised at the convention, Fitch demonstrated his steamboat to some of the Convention's delegates. Walterscheid acknowledges that although "[w]hat was discussed between Fitch and the delegates is not known,... it is likely that he [Fitch] sought some means of obtaining exclusive rights through the federal government (pp. 43-44)."

Whether Fitch, Coxe or someone else was crucial to the inclusion of the intellectual property clause in the United States Constitution remains a mystery. The consensus in favor of the clause suggests widespread cultural acceptance of the measure. In other words, no one in particular had to push the delegates to include it in the Con-

stitution. Clauses promoting useful knowledge existed in the colonial charters and the states' constitutions. Americans may have assumed that a similar provison would become part of the new national pact. That the clause attracted little to no attention in the heated ratification battles may testify to the latter as the most plausible explanation.

The patent acts of 1790 and 1793 stand out among eighteenth-century patent laws in their strict insistence on both originality and novelty. The English patent law, in contrast, was enacted to attract superior European craftsmen to the kingdom. Men who introduced technological innovations hitherto unknown in England were rewarded with production monopolies. Introducers received patents of importation and enjoyed all the privileges of original inventors. The first United States patent law, however, restricted patents exclusively to original inventors–prior use anywhere in the world was grounds for invalidating a patent. This criterion is particularly puzzling because the young nation needed to import technology to develop its industrial base. Moreover, the two most important members of the Washington administration, President George Washington and Secretary of the Treasury Alexander Hamilton, supported granting patents of importation.

Walterscheid examines in great detail the legislative process leading to the passage of the 1790 Act. Future students of the subject will greatly benefit from his thorough examination of every speech, essay, and petition. In his previous work [1], Walterscheid argued that a petition from Philadelphian Richard Wells dissuaded Congress from allowing patents of importation. In this book Walterscheid acknowledges the unlikelihood that a petition from an individual with no particular political clout carried more weight in Congress than the specific recommendation of a President as powerful and popular as Washington. Constitutional considerations, he now believes, moved members of Congress to reject the President's instructions and establish strict patenting criteria in America.

Walterscheid's explanation exposes the limits of the formalistic constitutional and statutory approach. Textual examination of the law may lead scholars to conclude that the young republic rejected piracy of ideas and established a new intellectual property moral code. Reality, however, was different. For all the highfalutin insistence on originality and novelty, technology pirates filed for and received patents from the United States government, even when it was known, as in the cases of William Pollard and George Parkinson, that they pirated rather than invented the machinery. The patent board, composed of the Secretaries of State and War and the Attorney General, declined to examine in what way American claims differed from European patents. As Walterscheid writes, the board's purpose "was to ascertain the nature of the invention; no attempt was made to determine whether it was novel, i.e., 'not before known or used' (p. 179)." Finally, no legal restrictions were placed on immigrants like Samuel Slater who established factories in the New World using pirated British technology, but who did not file for patents.

The 1790 Act instructed the patent board to decide on the merit of each and every application. This requirement became too burdensome particularly for Thomas Jefferson who, as Secretary of State, was put in charge of the entire project. The 1793 Act relieved members of the cabinet from wasting their time examining individual patents. A registration system, modeled after the English practice, was put in its place. The Secretary of State remained in charge of issuing patents, but it now became "a pro-forma process dependent only on the completion of the required ministerial acts by the petitioner for patent (p. 225)." On the matter of patents of importation the revised system maintained the dual demand for novelty and originality, and each patentee was required to take an oath that he was indeed the first and original inventor.

The statutory requirement of worldwide originality and novelty, however, did not hinder widespread and officially sanctioned American technology piracy. William Thornton, the first Supeintendent of Patents, who administered the office from 1802 to 1828, did not insist on the oath of international novelty. The Act specifically prohibited foreigners from obtaining patents in America for inventions they had already patented in Europe. This meant that, whereas United States citizens could not petition for introducers' patents, European inventors could not protect their intellectual property in America. The United States government, then, sanctioned technology piracy as long as imported technology was not restricted exclusively to any particular individual introducer.

In a particularly insightful section, Walterscheid explores how the constitutional provision aimed at promoting useful knowledge for the benefit of the public at large was turned, under Thornton's administration, into an aggressive assertion of knowledge as individuals' property. Thornton believed that he was the guardian of the rights of patentees and, against executive and judicial instruc-

tions, blocked public access to the details of patents. Placing himself as judge, jury, and executive of all matters relating to patenting in the land, Thornton insisted on the secrecy of registered patents, thus privileging the interests of individuals over those of the community. Unfortunately, Walterscheid does not delve deeper into the following paradox: why did the law privilege the inventor over the public in the Jeffersonian era of supposed republican communalism and turned in the opposite direction in 1836–when capitalism and individualism reigned supreme?

I found reading through the narrative difficult. More careful editing would have reduced the frequent repetition of ideas, sentences, and quotes. Each chapter is chopped into many idiosyncratic sub-sections of various lengths, some as short as one paragraph. Walterscheid approaches legal history in a rather old-fashioned way, with lengthy discussions of the legislative process and close analysis of administrative minutia. He tries to pin down the intent of the legislators, as if a collective legislative intent exists. At times, when Walterscheid finds no evidence to support a point, he is not reluctant to speculate about what "must have been" rather than what was. At other times, he uses decisions and treatises written decades after the passage of an Act to explain legislative intent, even though nineteenth-century commentators had no greater knowledge than we do about legislative intent and were merely interpreting the record.

For all its flaws, this is a useful book. To be sure, it is a difficult read, without an overarching historical argument about change through time. All the same, future scholars of American patent laws are advised to turn to it as the starting-point for their research. The notes in themselves are a rich resource. And the fifteen appendixes in which Walterscheid reproduces the various patent acts from 1789 to 1836 make the issues accessible to students of early national law. A product of years of exhaustive research *To Promote the Progress of Useful Arts* contains much useful information about the first fifty years of American patent law.

NOTES

[1]. E. C. Walterscheid, "Novelty in Historical Perspective, (Part II)," _Journal of the Patent and Trademark Office Society, 77 (1993), 781-782.

Citation: Doron Ben-Atar. Review of Walterscheid, Edward C., *To Promote the Progress of Useful Arts: American Patent Law and Administration 1798-1836*. H-Law, H-Net Reviews. January, 1999.

URL: http://www.h-net.org/reviews/showrev.php?id=2692