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Decentralizing the lawmaking function: Private lawmaking markets and intellectual property rights in law

Robert G. Bone

G. Rollie White Professor of Law, The University of Texas School of Law, United States

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ABSTRACT

In a series of articles and a book published shortly before his death, Professor Larry Ribstein argued for decentralizing the lawmaking function, enabling private parties to make law, and harnessing the market as a force for legal innovation. As part of this project, Professor Ribstein, along with Professor Bruce Kobayashi, called for broader intellectual property (IP) rights in legal creations. Their argument relies on the conventional quasi-public goods rationale for IP rights. Innovators have suboptimal incentives to create new law in the absence of property rights because competitors can free ride on their creations. As a result, without IP rights, privately-made law would be created, as it is today, mostly as a byproduct of other activities such as litigation or political rent-seeking. And byproduct lawmaking is likely to produce suboptimal law. Broader IP rights solve the free rider problem and thus make possible a vigorous private lawmaking market.

This article examines the case for granting broader IP rights in law as a way to incentivize legal innovation in a private lawmaking market. The discussion begins by briefly examining some of the benefits and costs of harnessing the private market to produce better law. With this background in place, the article then turns to the case for IP rights in law. It first surveys the limited scope of protection under current IP law and then discusses the benefits and costs of expanding IP rights. The article closes by focusing on some special problems with granting property rights in aspects of common law adjudication, such as litigation documents and judicial decisions.

In the end, the goal is to inject a note of caution. Private lawmaking is more attractive for some types of legal innovation and less attractive for others, and it is not clear that broader IP rights are necessary or desirable to spur legal innovation in a private market. It might be best to proceed incrementally, by first removing the professional barriers to competition and then expanding IP rights only if experience with the new market supports the need for additional protection.

1. Introduction

In a series of articles and a book published shortly before his death, Professor Larry Ribstein argued powerfully for decentralizing the lawmaking function, enabling private parties to make law, and harnessing the market as a force for legal innovation (Kobayashi & Ribstein, 2011a, 2011b; Ribstein, 2010, 2004; see also Butler & Ribstein, 2011; O'Hara & Ribstein, 2009). He described technological and economic developments that he claimed were pushing the law toward decentralization, and he predicted the eventual demise of the huge law firm, the breakdown of professional rules that restrict the practice of law, and the proliferation of private suppliers of law and legal services competing in a global market (Ribstein, 2010). On the normative side, he insisted that the market could be a valuable device for spurring legal innovation and making legal services more generally available.

As part of this larger project, Professor Ribstein described optimal conditions for the private production of law. Together with Professor Bruce Kobayashi, he argued, among other things, that a vigorous private market in law requires intellectual property rights in legal creations (Kobayashi & Ribstein, 2011a, 2011b, 2013a, 2004). Their argument relies principally on the conventional *quasi*-public goods rationale for IP rights. Innovators have suboptimal incentives to create new law in the absence of property rights because competitors can free ride on their creations and sell at prices below what an innovator must charge to recoup its fixed creation costs. As a result, most privately-made law will be created as a byproduct of other activities such as litigation or political rent-seeking, and byproduct lawmaking is likely to produce suboptimal law. Broader IP rights solve the free rider problem and thus make possible a private lawmaking market that can produce better law through competition.

E-mail address: rbone@law.utexas.edu

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In this article, I critically examine the proposal to grant IP rights in privately-produced law as it relates to the more general effort to spur legal innovation through private lawmaking markets. While I comment on work by Kobayashi and Ribstein, I do not mean to single them out in particular. I understand that Professor Ribstein's views were in flux just before he died, and Professor Kobayashi's ideas have evolved while carrying their joint work forward. In the later stages of their work together, Ribstein and Kobayashi were somewhat more cautious about private lawmaking and IP rights in law, and in very recent work, Kobayashi examines practical limitations in greater depth. Thus, I intend this article as a contribution to an ongoing discussion about the proper scope of IP rights and private markets in law, a discussion that has been shaped in major ways by the insightful work of Professor Ribstein.

My analysis begins by briefly examining the general idea of harnessing the private market to produce better law. The work in this area by Ribstein and Kobayashi, Professor Gillian Hadfield, and others does a wonderful job of loosening the strong grip of the conventional lawyer-centered paradigm and freeing the imagination to envision a very different world consisting of multifarious suppliers of legal products and competitively produced law. I highlight some costs of private lawmaking and sound a note of caution. But in doing so, I mean to guide, not halt, this re-imagining process.

With this background in place, I then examine the case for IP rights in law. While my primary focus is on private lawmaking, the issue of whether to grant IP rights in law is not limited to this context, and many of my arguments apply more generally. I first survey the availability of IP protection under current law and then discuss the benefits and costs of expanding IP rights. The reasons why current law confers only limited rights are also reasons for concern about expanding those rights. In particular, the benefits of extending IP protection depend to a considerable extent on the availability of alternative mechanisms to solve the free rider problem, and the costs of broader IP rights depend primarily on impediments to information diffusion that IP rights create. I close the discussion of IP rights in law by focusing on some special problems with granting property rights in aspects of common law adjudication.

In the end, I recommend a cautious approach. Given the potential problems with broader IP protection, it might be best to proceed incrementally, by first removing professional barriers to competition and then expanding IP rights only if experience with the new market supports the need for additional protection.

A word of clarification is in order at the outset. This article opts for breadth over depth. I make a number of empirical assertions without offering empirical support. These assertions are quite plausible, I believe, but they are also speculative. Moreover, the article is more "think piece" than systematically developed analysis. I raise a number of points but leave it to others to develop them with greater care.

2. A private market in law

This part first describes the private lawmaking model in somewhat greater detail and places it in context. It then examines some of the potential problems.

2.1. The proposal and its benefits

Private lawmaking envisions private actors creating new laws and legal regimes, or customizing existing laws, to fit the needs of particular firms and individuals. These laws include rules governing the creation and operation of corporations; rules governing stock and commodity exchanges; rules of contract law, procedural rules, and so on. They also include the more specific terms of a contract, especially, though not exclusively, when those terms modify otherwise applicable law. Lawyers also furnish advice about the likely effects of different courses of action under existing law and a vigorously competitive private market could supply at least some of this advice if nonlawyers were allowed to participate. However, this is not lawmaking in the sense I use the term here. The lawmaking process that I discuss involves creating rules, principles, or other norms to structure and regulate institutions and relationships.

In a world of private lawmaking, individuals and firms compete with one another to sell legal products to consumers. These consumers might include corporations, associations, individuals, and even governments. For example, the founders of a new corporation might purchase from the lawmaking market a corporate charter that fits the specific needs of their corporation, and this charter might even include provisions governing limited liability, board management, and fiduciary duties that are currently controlled by state law. Or two corporations engaged in a commercial transaction might be interested in purchasing a contract that structures their relationship in a novel and attractive way. So too, individuals might be interested in purchasing a will or a lease.

To assure a robustly competitive market, the power of the state and legal profession over the production of law and the provision of legal services would have to be dismantled. This means loosening restrictions on the practice of law and allowing non-lawyers to furnish legal services. It also means ending the hegemony of the large law firm and allowing greater differentiation so law can be sold in smaller units. And it means letting the market set the price.

Professor Gillian Hadfield, in a contribution to a volume on innovation and growth compiled by the Kaufmann Task Force on Law, Innovation, and Growth, offers a speculative, provocative, and rather expansive account of what might be possible for private lawmaking (Hadfield, 2011). She imagines a world free of the legal profession's monopoly. In this world, firms compete to sell corporate law tailored to the needs of different customers, customized contracts that might include novel rules of contract law, and even regulatory regimes that "substitute for or complement existing publicly provided securities, product safety, intellectual property, and other regulation" (Hadfield, 2011: 41–42). In the latter case, legislatures, administrative agencies, or other public bodies would oversee the competing regulatory service providers, but only at "a relatively macro level" that focuses on meeting broad "performance and outcome targets" (Hadfield, 2011: 44; see also Hadfield, 2001; Hadfield & Talley, 2006).

Supporters cite three main benefits of a private market in law. First, private lawmaking is likely to be more responsive to changing economic, social, and technological conditions than either legislation or adjudication (Hadfield, 2011: 26; Kobayashi & Ribstein, 2013a, 2011b; see also Butler & Ribstein, 2011: 464–66 (focusing on jurisdictional competition)). Legislators lack strong incentives to engage in socially desirable innovation themselves. They cannot internalize all the social benefits that their laws create. Moreover, their interest in reelection biases them in favor of legislation that caters to supporters, and also induces risk-aversion and a conservative attitude toward legal change.[1] As for common law adjudication, its incremental and slow pace makes it a poor instrument for responding to conditions of rapid change. By contrast, decentralized lawmaking places the creation of new law in the hands of many potential innovators, and structuring it as a market creates strong incentives to innovate rapidly and design well-functioning legal regimes—or so supporters claim.

Second, a private lawmaking market can produce better law, at least for the economic sector, regardless of the optimal pace of

[1] Indeed, states in general might be inclined to behave in a risk-averse manner when they fear losing firm business because of an unsuccessful innovation (Abramowicz, 2003: 158).

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