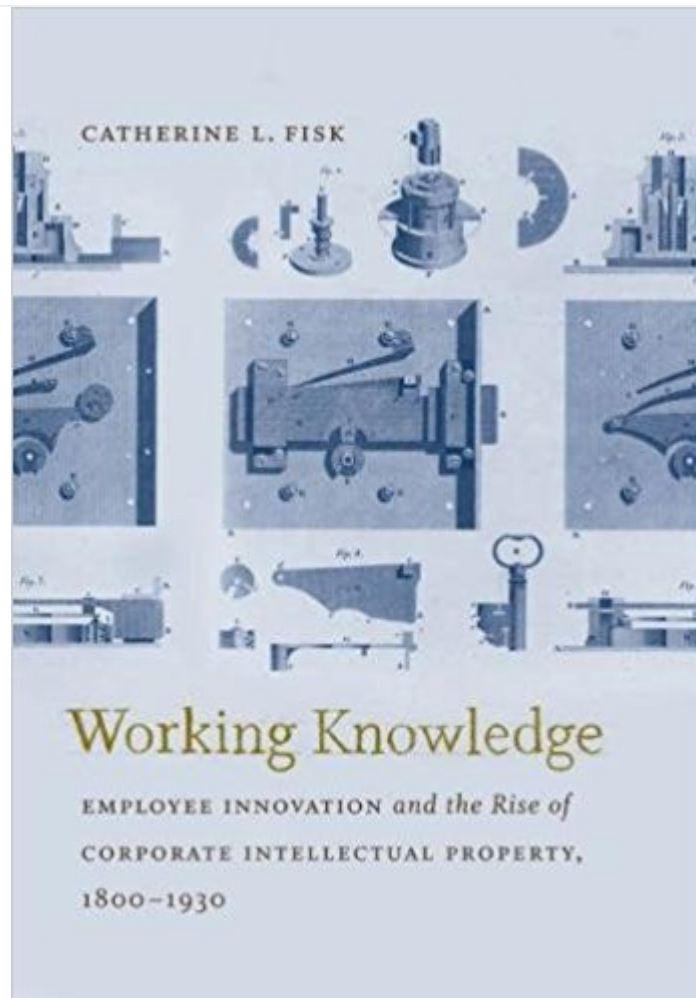


{essays in history}

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Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930



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Reviewed Work(s)

Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930. By Catherine L. Fisk (Chapel Hill: University of North Carolina Press, 2009). Pp. 360. Cloth, \$45.00.

Using a judicious selection of state and federal court cases in conjunction with detailed research in the corporate archives of companies like Du Pont and Rand McNally, Catherine Fisk weaves together an exemplary narrative about the development of the modern American intellectual property regime. Unlike B. Zorina Khan's *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* — a work that examines the positive effects of the American patent and copyright system, which Fisk both cites and discusses approvingly in a historiographical footnote — *Working Knowledge* offers a negative view of corporate consolidation of intellectual property rights and the resultant decline in entrepreneurial innovation.^[1] Much like Morton Horwitz's *The Transformation of American Law, 1780-1860*, the book is an extended argument supported by careful analysis of legal sources.^[2] The author's interest in the subject arose from her concern about the present state of intellectual property law. She explains in a recent interview that her findings in *Working Knowledge* indicate that "today's mix of individual and corporate ownership of the legal rights to workplace knowledge and employee-generated intellectual property is neither necessary nor sufficient to a robust and innovative economy."^[3]

In the first section of the book, Fisk evaluates the underdeveloped state of intellectual property law between 1800 and 1860. The Patent and Copyright Acts of 1790 were drafted at a time when corporations were granted by government charter for the purpose of undertaking some useful but limited function, such as running ferries across a river. These acts offered individual inventors wider access to patenting and copyrighting than similar systems in other industrializing countries, with the happy result that news of inventions could be disseminated in the United States with greater ease. No law of trade secrets or trademarks had yet emerged, and most disputes that arose between employers and

employees over the ownership of copyrights and patents were resolved in favor of the employees—a result that was consistent with the free enterprise-favoring spirit of the Taney Court (1836-1864).

During this period, the Supreme Court recognized the emerging distinction between intellectual property in America and England: Unlike the latter jurisdiction, where patents were exceptions to otherwise-prohibited monopolies, courts in the former viewed patents as property rights. Nevertheless, the American legal community's recognition of this new doctrine did not occur overnight, and many courts in the early nineteenth century still saw employee control of the fruits of their invention as a means of preventing monopoly.

In the second and strongest section of her book, Fisk analyzes the complicated evolution of intellectual property law between 1860 and 1895. Courts began arriving at decisions that favored employers, in many cases basing their decisions on notions of express or implied contract. The “free labor” ideology that inspired many Civil War politicians and inventors was slowly but surely reined in, leaving in its place a judicial philosophy that incentivized the profit-maximizing activities of the large industrial firms that had emerged during the post-bellum period. Furthermore, the recognition by American courts of the English *Lumley* (1852) doctrine gave employers a free hand to enjoin the performances of uniquely talented employees whom they had signed to employment contracts. Even crackerjack Philadelphia Athletics second baseman Napoleon Lajoie—a baseball player at a time when the sport was in its first efflorescence, and athletic talent was both cheap and widely available—was found by the Pennsylvania Supreme Court in 1902 to possess nigh-irreplaceable skills.

Fisk concludes her book with an overview of the decisions that firmly established the modern American intellectual property regime. This section, which covers the span from 1895 to 1930, surveys the creation of a class of inventors who were indentured to behemoth industrial conglomerates. Here she employs her research in the records of companies like Eastman Kodak to great effect, recounting the travails and courtroom defeats of employees who sought recognition for their creative efforts. Items that previously seemed beyond the pale of copyright protection, such as slogans and illustrations produced for advertising campaigns, were brought under its aegis as corporations

worked to stimulate demand for their myriad of “new and improved” products. On this point, she identifies a shift in American middle class ideology in which an interest in entrepreneurship and upward mobility was replaced by an emphasis on lifetime professional employment.

This discussion of a transformation in middle class values concomitant with the emergence of a consumer society is intriguing, but Fisk’s decision to conclude the book in 1930 means that it will have to be continued by other researchers. In particular, her claim that changes in intellectual property law altered class relations as well as labor relations demands further clarification and expansion. Future studies will hopefully expand the chronological frame into the 21st century. Like Horwitz’s *Transformation*, Fisk’s *Working Knowledge* showcases a brilliant scholarly argument that may eventually come to be defined as much by what it leaves out as what it contains. Even so, this masterful book is certain to remain the final word on this topic for a considerable amount of time.

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[1] B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (New York: Cambridge University Press, 2005).

[2] Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977).

[3] From an interview with the author conducted by Tom Lerner, accessed at http://www.law.uci.edu/faculty/profile_c_fisk.html.



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