Introduction

‘What is an idea?’
‘What is the relation between an idea and a concept?’
‘In what sense are they immaterial?’

It might seem that by positing these questions, we have initiated a philosophical discourse and in a certain sense we have. Many philosophers will find themselves engaged by these questions. We could turn to several of the great treatises that have been written throughout the history of philosophy in order to find tentative responses to these questions. The question of the Being of Ideas for instance could be tackled by giving an exposition of the metaphysical theories of Plato, Descartes, Locke, Leibniz, Hume or Kant about these issues. It could for instance also be dealt with philosophically by setting up a new environment of thought in which the idea is constituted in its being or its becoming. A question can evoke and be evoked in multiple ways however. Posed in the same grammatical form these questions could also engage a jurist in the course of working within the legal regimes of patent law or copyright. The mode of engagement will obviously be very different in each case. By way of illustration, let us evoke one of these phrases again:

‘What is an idea?’

The short question uttered by a slightly agitated female voice, resounds against the walls of a courtroom in Brussels. The question is raised by the attorney, Mrs Blanchard, in the closing remarks to her plea before the judges of the court. The atmosphere has become quite heated at the closing of the morning session of the Court of Commerce. The nature of ideas has become an issue in the complex patent dispute that she has worked on for the last few years. The attorney of the adverse party had just, a few minutes ago, called the invention she has been advocating a mere ‘idea’. Her question is a response to this disqualification. The fact that we are dealing with a specific legal question becomes clear by her subsequent question: ‘What is not susceptible of protection?’ or when she asks whether the matter of dispute is ‘an “idea” in the sense of patent law or intellectual property law?’ The being of ideas is here raised in a specific
Grounds of the immaterial legal way. The question evokes a host of similar matters of dispute that have been authoritatively qualified as ideas and inventions in other court cases, and through which the meaning of these concepts has itself come to be reconstituted. In this sense, an ‘idea’ or an ‘invention’ is a legal concept that obeys specific conditions different from the ones in other disciplines and in everyday speech. Legal concepts are imbedded in a web of different spaces, places, actions, objects, people, conditions, procedures and other concepts. In order to understand the use of legal concepts like ‘idea’, ‘concept’, ‘intellectual creation’, ‘invention’, ‘work’ or ‘sign’, we have to turn to the specific practices of intellectual rights in which they are deployed and where they are constituted as immaterial entities. We first have to get familiar with the modes of operation of the practices of copyright, patent and trademark law in order to be able to grasp their meaning.

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This is a book in between law and philosophy; or rather, it is an experiment with positions and movements in a philosophical thinking that is addressed by the legal regime of intellectual rights. We cannot call this book a philosophy of law in the sense in which it is regularly practiced. It contains rather the thoughts of a philosopher evoked by a confrontation with the peculiarities of this legal regime moving past, through or in divergence from several legal positions. These movements of thought first have to be engaged in – doing philosophy – in order to show what thinking could be in a legal-philosophical sense, without directly grasping and locating it according to the co-ordinates of existing legal theory. This approach is partly borne out of a lingering dissatisfaction with the existent approaches to law and the laws of intellectual property more specifically. It is dissatisfaction with the distant abstract treatment and theoretical fixation of both the legal doctrine and the philosophy of intellectual property, but also dissatisfaction with the critical analysis of intellectual property with regard to the calculation of its economical and societal effects in the information society, or the unmasking of its hidden presumptions. Their explanations often get before, after, above or below the objects of intellectual rights that they investigate in order to explain them, but they never get to the middle of things – in medias res – where IP is still a vital event (eventum) that is in the process of happening. We could thus ask in what way they have managed to approach the matters of intellectual rights at

1 We will return to these relations between law and philosophy in Chapter 6.
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all. This book will endeavour to provide such an approach by engaging in a trans-versal philosophy, understood as a ‘turn’ and change in the orientation of legal thinking, which moves ‘across’ the legal matters that it is engaged by (not to be confused with trans-cendence as a ‘jumping over’). Thus oriented we will find a very specific kind of encounter between two regimes: How do practitioners of intellectual rights deal with conflicts about technologies and render them solvable?

In order to arrive in medias res we are however required to cover quite some distance and, in contrast to Horace’s adage, we will not hasten our path to the events. Chapter 1 will first treat the history, philosophy and doctrine of intellectual rights in order to understand the existing theoretical positions on intellectual property. We will discuss the historical developments of copyright, patent and trademark laws, the discourse on intellectual property, the theory of immaterial goods and its culmination into information goods in the knowledge economy. After discussing some of the problems with several of the theoretical ‘approaches’, Chapter 2 will provide an outline of a transversal approach to law mentioned above. It will explore a path towards intellectual rights in action by investigating a practice turn in law and (legal) theory. Only then will we relocate our research within the legal practice of law firms and courts in Chapters 3 and 4 respectively, where extensive empirical case studies have been conducted. Here we can once again take up the questions posed at the start and begin anew our investigations. Legal concepts like ‘idea’, ‘concept’, ‘work’, ‘invention’ and ‘sign’ will be studied as they are evoked by legal practitioners in the proceeding of a concrete dispute. Things play an important role in this process. As matters of dispute they are the occasion for the legal process. We will closely follow such a matter of dispute on its proceedings from technological or commercial sites of enterprises, through the offices of law firms, the court registry, the courtroom, the judge’s office, until we finally arrive at judgment. Throughout these processes, non-legal matters of dispute will slowly be grounded as immaterial ideas, concepts, works, inventions or signs by the ceaseless operations of legal practitioners. This legal grounding requires a lot of work and will be the topic of the present study. The focus will be on the ways in which this immateriality is constituted when a matter of dispute passes through the legal instruments and vocabulary of intellectual rights practices, to be transformed in a matter of fact before becoming an immaterial legal object of intellectual rights. This leads us to the formulation of a first research question, addressed in Chapters 1, 3 and 4: ‘How is immateriality constituted in intellectual rights?’

In addition to the issues and problems that arise within the legal regime of intellectual rights, these studies will also be occupied with creating a setting in which a new philosophical approach to law could become
possible. The two strands are two sides of the same coin. One cannot
dissociate an investigation of the nature of fundamental concepts and
distinctions of intellectual rights from the specific legal practices in which
they are deployed and from the way these practices and concepts are
approached by the researcher. This leads us to formulate a second objec-
tive of exploration: ‘How to approach legal phenomena as a philosopher?’
This question will first be addressed in sketching the transversal approach
to legal practices of intellectual rights in Chapter 2. It will be taken up
again in the discussion about the relations between law and philosophy
in a set of coda to this book (Chapter 6), through a double analysis of the
juridical features in philosophical thought (Plato, Bacon, Kant, Freud)
and the approaches to law and legal practice in legal theory (Hohfeld,
Holmes, Hart, Dworkin). These theories will be confronted with the trans-
versal approach to law and the case study findings in Chapters 3 and 4.

In this way, these investigations might provide the groundwork for the
construction of a different legal philosophy. The term ‘philosophy’ here
refers not so much to a disciplinary demarcation of an intellectual terri-
tory, but to the different movements of thought performed throughout and
between the chapters. Here, along a range of different sites, a series of dif-
different encounters take place between philosophy and law that could send
them off on a path of mutual becoming, both with regard to the manner
in which legal practices deploy their own operations and theories on ques-
tions of philosophical interest and to the different ways of becoming-legal
of philosophy itself. Finally, along these journeys through law, several
phenomena of possible interest to philosophy are encountered, each time
from different directions depending on the matter of investigation. The
index to this book registers and links the different occurrences of these
phenomena at various sites. These hyperversal connections make visible
certain characteristics, which are offered for further exploration.