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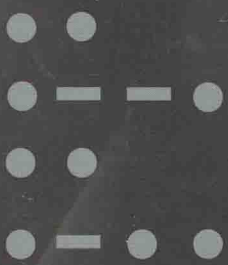
New Frontiers in the Philosophy of Intellectual Property

EDITED BY

Annabelle Lever



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*Annabelle Lever**

The new frontiers in the philosophy of intellectual property lie squarely in territories belonging to moral and political philosophy, as well as legal philosophy and the philosophy of economics – or so this collection suggests. Those who wish to understand the nature and justification of intellectual property may now find themselves immersed in philosophical debates on the structure and relative merits of consequentialist and deontological moral theories, disputes about the nature and value of privacy, or the relationship between national and global justice. Conversely, the theoretical and practical problems posed by intellectual property are increasingly relevant to bioethics and philosophy and public policy, as well as to more established areas of moral and political philosophy.

Perhaps this is just to say that the philosophy of intellectual property is coming into its own as a distinct field of intellectual endeavour, providing a place where legal theorists and philosophers can have the sorts of discussions – neither reducible to questions about what the law is, nor wholly divorced from contemporary legal problems – which typify debates about freedom of expression, discrimination and human rights. These are all areas in which legal and philosophical ideas influence each other at the level of method as well as of substance. My hope is that this collection of essays will appeal to those who, whatever their professional specialty or training, share an interest in the philosophy of intellectual property, and

* With thanks to Laura Biron, Geert Demuijnck and Abraham Drassinower for commenting on parts of this Introduction, and with special thanks to Stephen Munzer for kindly reading and editing several drafts. Any errors, unfortunately, are all mine. However, without the help and support of John Harris, and the wonderful Institute for Science, Ethics and Innovation, The University of Manchester Law School, I would not have been able to see this volume to publication. It is a pleasure to be able to thank John and the Institute for appointing me to their Senior Wellcome Biomedical Ethics Fellowship, and for the help and support – and enjoyably energetic arguments – from which I profited as a member of iSEI.

that it will build upon and advance existing interdisciplinary dialogue and research in this complex, fascinating, and important area.[1]

Most of the chapters in this collection were specially written for a conference on the philosophy of intellectual property which took place at the Institute of Philosophy, London, in May 2009. In organising that conference I had been hoping to learn what, if anything, unites patents, copyright, trade marks and trade secrets and distinguishes them from other forms of property. As a political theorist working on privacy, I had come to be interested in intellectual property as a way of thinking about the relationship between privacy and property rights, on the one hand, and of private and collective property on the other. Finding this hard going, I was keen to have a bunch of experts on hand to answer my questions for me.

My hopes for a ready answer to my questions, however, were dashed by the conference. It quickly became apparent that issues which have been so central to philosophical and legal theorising about privacy seem largely irrelevant to legal theorists and philosophers interested in intellectual property. In the course of editing these chapters for publication, and of thinking about their points of agreement and tension, I have again been struck by how little the nature and justification of property concerns our authors, with the notable exception of John Christman, and how far the idea of patents and copyright as *property* seems either irrelevant to, or actively at odds with, the conception of rights which they seek to defend.

This might suggest that it is unnecessary to clarify what makes intellectual property a form of property – albeit one distinct from the property that we might have in material objects, animals, labour and relationships. Certainly, the quality and interest of the chapters here suggest that such clarification is often unnecessary. But it is also possible that there are puzzles in the theory and practice of intellectual property which we will not be able to solve without a better sense of the ways in which familiar forms of intellectual property are property, and of the advantages, as well as the limitations, of thinking about our interests in ideas this way. My hunch is that the puzzles thrown up by the different chapters suggest that

[1] See, for example, Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001); Axel Gosseries, Alain Marciano and Alain Strowel (eds.), *Intellectual Property and Theories of Justice* (New York and Basingstoke: Palgrave Macmillan, 2008); Charles Beitz, 'The Moral Rights of Creators of Artistic and Literary Works' *Journal of Political Philosophy* 13(3) (2005): 330–58, hereinafter 'The Moral Rights of Creators'; Thomas Pogge, 'The Health Impact Fund: Better Pharmaceutical Innovations at Much Lower Prices', in Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds.), *Incentives for Better Global Public Health: Patent Law and Access to Medicines* (Cambridge University Press, 2010); Allen Buchanan, Tony Cole and Robert O. Keohane, 'Justice in the Diffusion of Innovation' *Journal of Political Philosophy* 19(3) (2011): 306–32.

this, too, is a real possibility. But in order to tell whether it is or not, it will help to look at the chapters in this collection one by one.

Control rights and income rights in ideas

The collection starts with John Christman's 'Autonomy, social selves and intellectual property claims', a piece which builds on his prior work on autonomy, and on an egalitarian interpretation of property rights. In an important article in *Philosophy and Public Affairs*,[2] Christman argued that we can think of the bundle of rights that makes up full property ownership in terms of two different groups of rights: one set he called control rights, and the other income rights. The former include familiar property rights, such as the rights to use, destroy, acquire, alienate and exchange a property, whereas the latter include familiar property rights such as the right to profit financially from the use, acquisition, alienation and destruction of one's property.

Distinguishing control rights from income rights, Christman argued, gives us a way to think about our autonomy and equality interests in property, and to see how they might be reconciled, rather than pitted against each other, as is often the case. In particular, Christman argued, if we care about autonomy and equality, we will want to distinguish the moral and political importance of control rights from income rights, because there is no particular level of income from property which is necessary to our autonomy or equality with others, whereas we cannot think of ourselves as autonomous beings, or as the equal of others, if we are treated simply as objects, or are denied the ability to distinguish our treatment of objects based on our beliefs about what is useful, beautiful, valuable and meaningful. In his chapter for this collection, Christman examines whether this way of thinking about property illuminates the claims by indigenous peoples to intellectual property (IP) in traditional knowledge (TK) and, therefore, how far his understanding of the links between autonomy and control support the claims of people who have often been denied the status of property owners, and legal rights in their ideas and artefacts.

Accordingly, a major part of Christman's chapter concerns his conception of autonomy, and the ways in which it might explain the importance of control over cultural artefacts and knowledge by indigenous peoples. Importantly, Christman wants to challenge the idea that autonomy is a problematically individualist value, and therefore inimical to claims to

[2] John Christman, 'Distributive Justice and the Complex Structure of Ownership' *Philosophy and Public Affairs* 23(3) (1994): 225–50.