INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE

Edited by

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Intellectual Property and Theories of Justice

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Introduction

How (Un)fair is Intellectual Property?

*Axel Gosseries**

Intellectual property (IP) affects many dimensions of our daily lives. It covers four types of rights: patents, copyright (or '*droit d'auteur*'), trade marks and trade secrets. Here, we focus on copyright and patents only. As Varian (2005, pp. 124–5) puts it, IP rights can be analysed through three of the key variables constitutive of their scope. The first is *height*, which is the standard of novelty required to be eligible for protection. The patent regime is more demanding than the copyright regime in this respect, for it requires 'novelty', 'inventiveness' ('non-obviousness' in the US) and the possibility of an industrial application ('usefulness' in the US). The second dimension is *width*, that is, 'the breadth of coverage that the protection offers' (Varian, 2005, p. 125). Copyright offers less protection than patent since it applies to the expression only – not to the use of the ideas – and even allows for some 'fair use' (e.g. 'quotes' or 'parody'). Finally, there is the *duration* of protection. For patents, it is in principle 20 years. For copyright, it was initially 14 years (renewable once) in the 1790 US Copyright Act, but since 1993 (Europe) and 1998 (US) it is granted to the copyright owner for a period extending to 70 years beyond the creator's death (Varian, 2005, p. 122).

Why analyse IP rights through the prism of theories of justice? This concern is not new. Immanuel Kant, for example, wrote in the eighteenth century on moral questions related to the reproduction of books (see Kant, 1995); and we are still in the middle of what Boyle (2003) calls the 'second enclosure' (the first enclosure consisting of gradually fencing off the arable commons starting in the fifteenth century). For what we are facing today is the gradual proprietarisation of our informational commons. Consider the current debates as to whether we

should grant patents on living organisms such as the Leder's oncomouse (Kevles, 2002), on surgical procedures (Garris, 1996; Wear et al., 1998) or on sports methods (such as some athletic moves) (see Kunstadt et al., 1996; Bambauer, 2005). In the same vein, should copyright protection apply to software or choreographic works (Van Camp, 1994)? Coincidental to this gradual informational enclosure, there is the 'free' software movement which is moving in the opposite direction.[1] Clearly, the simultaneous development of these two trends – the second enclosure and free software – calls for a normative analysis. And besides these practical reasons, the very object of IP, with its non-rivalry and non-excludability dimensions, presents theoretical challenges of its own.

We thus need to address questions such as: Is the exclusion of the poor from access to patented drugs not in clear violation of basic human rights? Does peer-to-peer file exchange amount to an unacceptable form of free riding? This requires a good command of the technicalities of IP tools and their legal and economic dimensions, as well as a full grasp of philosophical theories of justice. Let us not misunderstand, however, what is meant here by concerns of justice. Changes in IP status raise two broad types of concern, associated with worries fed respectively by a given conception of the *good life* and a specific theory of *justice*. Consider by analogy an extension of the market by decriminalising prostitution. Some people will be worried that it will affect the way in which we see our affective and sexual relationships. Others will wonder whether women who engage in such activities are not being unjustly treated by those who either hire their services or are their so-called 'protectors'. There is, of course, room for disagreement at both levels (see Sandel, 1998; Boyle, 2003, p. 35). What matters is that 'good life' and 'justice' are both features in the IP debate. We will focus only on the latter in this book. This does not imply, however, that the former is of little importance when it comes to looking at, for example, the ethics of hackers, the flourishing of a culture specific to free software developers or the way in which readers conceive of the nature of collective knowledge.

Theories of justice

Philosophical theories of justice come in many varieties and differ along various dimensions in the ways in which they justify the existence of and how they define the nature of our obligations. Let us consider here a few key elements for those unfamiliar with these theories.[2]

Mutual advantage?

First, how do we justify the very existence of moral obligations and the need for people to comply with them? One of the answers consists in trying to derive the existence (and content) of such obligations from the self-interest of a so-called 'rational' agent. This, of course, raises the question: Why should we be rational? (Kolodny, 2005). Roughly, the 'mutual advantage', or 'contractarian', strategy amounts to showing that it is in each individual's interest to abide by certain social rules, the latter being required to generate a cooperative surplus that will make everyone better off. Gauthier's work (1986) is paradigmatic of such neo-Hobbesianism.

In contrast, other approaches do not try to derive justice from well-understood self-interest. Consider John Locke, who like Thomas Hobbes was a social contract thinker. Unlike the latter, he clearly defended the idea of 'natural' rights pre-existing (rather than derived from) the social contract (see Morris 1999). Hence, Lockean thinkers (referred to as 'libertarians'), among whom Robert Nozick is exemplary, defend such rights independently of any idea of mutual advantage (Nozick, 1974; Vallentyne and Steiner, 2000). Attas' chapter in this volume looks at IP issues from a Lockean perspective. Note that theories such as utilitarianism and egalitarianism are generally also among approaches that do not rely on the concept of mutual advantage.[3]

John Rawls – discussed more specifically in Dumitru and Shiffrin's chapters in this volume – is emblematic of the fact that theories of justice often remain undecided as to whether or not to rely on the idea of mutual advantage (Barry, 1989). In the use of his hypothetical contractual device (the 'original position'), agents are mutually disinterested, not altruistic. With the idea of a veil of ignorance hypothetically concealing some of one's features, ideal agents in the original position are asked to derive principles of justice applicable to all, including themselves. A neo-Hobbesian would ask real agents: 'Look at whether you actually suffer from such and such a congenital handicap and ask yourself which principle of justice would drive your policy on handicap benefits.' In contrast, a Rawlsian would ask a hypothetical agent: 'Imagine that you *could* actually suffer from such and such a congenital handicap (without knowing anything about the probabilities) and ask yourself which principles of justice would drive your policy on handicap benefits'. The two questions are of course quite different. But the original position device still invites us to conceive of justice as having to do with fear for oneself rather than impartiality. Moreover, Rawls'