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A Philosophical Analysis of Intellectual Property: In Defense of Instrumentalism

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of
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Abstract

This thesis argues in favor of an instrumental approach to Intellectual Property (IP). I begin by reviewing justifications for IP that have been offered in recent literature, including Lockean labor theory, Hegelian personality theory, Kantian property theory and utilitarianism. Upon a close and careful analysis, I argue that none of these justifications suffice to ground contemporary IP practice. I review some recent works that offer ‘pluralist’ justifications for IP, which draw from multiple theories in order to account for the diverse field of IP-related laws and practices in existence. I argue that these pluralist theories are also insufficient, because there is no principled reason why one theory is adopted over another in any particular case. In conclusion, I show that an instrumentalist attitude can best explain and justify IP laws and practices.

Introduction

In this thesis I will provide a broad philosophical analysis of intellectual property. In chapter one I will begin by looking at the major justifications that have been offered and note a number of issues associated with each of them. My analysis will show that none of the justifications considered can completely account for the entirety of intellectual property policies and practices. Because of their insufficiency as individual theories, I will then look at some pluralistic theories, and show why these kinds of justifications are also insufficient - particularly in dealing with situations where the different theoretical foundations that makeup the pluralistic theory effect an emphasis on incompatible values. Also, a pluralist theory struggles to guide novel instances of intellectual property.

In chapter two I will present two competing visions for intellectual property theory - instrumentalism and proprietorism - and argue that proprietorism should be rejected in favor of instrumentalism. In support of this I will also show that many of the traditional justifications that lend strong support to proprietorism fail to adequately justify an exclusive right to own intellectual property. I will conclude that a philosophical analysis on intellectual property suggests that the only acceptable justification is a broadly instrumentalist one, where some general goal helps to dictate which of the distinct theories of a pluralist theory are for use in which particular contexts. Once an instrumentalist

attitude is adopted towards IP, philosophical reflection, together with empirical analysis, can help us in successfully justifying, reforming or creating well-justified intellectual property laws and policies.

In the final chapter I will explore some ways that a historical and philosophical analysis of the fundamental assumptions behind intellectual property can help guide the difficult empirical tasks that make up part of the instrumentalist theory. I will show that, when the creative process is closely examined, it becomes clear that “authors” and “inventors” play an important, but only a partial role in the process of creation and innovation. Overall, the goal of this project is to make it clear that intellectual property should be guided not by obsolete rhetoric borrowed from justification of material property, but instead by the degree to which it actually achieves the goals that have been established for it.

Chapter One: Classical Arguments, Pluralism and Conflict

This chapter will consist of a critical review of what I will call the “classical” arguments for intellectual property. These arguments are those that can be found most frequently in academic work, legal decisions, and political rhetoric. The most common of these arguments is the utilitarian argument. Utilitarian arguments for intellectual property are unique amongst the classical arguments because they are consequentialist, meaning that these arguments work by paying close attention to the outcomes resulting from the establishment of intellectual property policies and practices.

The other classical arguments I examine here are broadly non-consequentialist. These arguments are adapted from the works of the philosophers Locke, Kant and Hegel. What unites these arguments is that they take some important or fundamental aspects of the human condition or human experience and show that intellectual property is required in order to properly respect or realize these important features of human experience. For Locke, ownership of one’s self and of one’s labor is essential to the existence of property rights. In the Hegelian account, the importance of one’s personality and the expression of selfhood in things necessitates property rights. The importance of individual autonomy and the human need to carry out self-motivated projects makes up the Kantian argument.

These three non-consequentialist arguments can be seen to postulate broadly *intrinsic* or *natural* rights to intellectual property. Rights of this sort are seen to exist *prior to* or *outside of* government. In this view, part of the role of the state is to recognize and defend these rights in citizens. Another feature of rights conceived in this way is that they are immune to concerns over their consequences. A wholly natural right to intellectual property would protect such rights even if they were shown to be detrimental to the well-being of society. As an example of this sort of right, people are often considered to have an intrinsic right to individual liberty, and so slavery is a violation of the right to liberty, even though it could possibly result in some increase in economic or industrial efficiency.

The analysis of the various classical justifications provided in this chapter will note both strengths and weaknesses of each of the arguments. It will be clear that no one of these classical justifications can fully account for or justify intellectual property rights, conceived broadly. This sentiment is shared by a number of contemporary authors who seek to provide a justificatory account of intellectual property rights. Recognizing the flaws of the various classical arguments, authors like Robert Merges and David Resnik offer “pluralist” accounts of intellectual property. In a pluralist account, the various classical arguments are invoked in order to provide a satisfactory justification depending on the specific issue or context at hand (Resnik 331). I will argue here that pluralism fails to provide an acceptable justificatory or explanatory account of intellectual property because a pluralist theory struggles to provide clear

guidance in cases where the different theories suggest conflicting kinds or degrees of protection over abstract objects.

Locke and the Labor Theory

Locke's justification of private property rights in the *Second Treatise on Government* is the most common of the intrinsic or natural rights theories of intellectual property. Locke's theory presupposes two important features about the world. First, Locke claims, that God "has given the Earth to...Mankind in common" and "for the Support and Comfort of their being" (Locke 286). In Locke's theory all people are under a divine directive to support and maintain themselves, and because of this they must at some point appropriate the commonly-owned things of the earth if they are to fulfill the directive. Property is a natural and necessary notion, for once I consume a bit of food to sustain myself, it effectively becomes my property and ceases to be of use to any other person.

It is necessary, then, for Locke to show how individuals can justifiably take things from the commonly-owned Earth and appropriate those things to themselves. Locke begins this justification of private appropriation by pointing out that though the things of the Earth are (originally) held in common, "every man has a Property in his own person" and that "[t]he Labour of his Body, and the Work of his Hands...are properly his" (Locke 285). From this natural possession of one's own body and one's own Labor, the Lockean justification of Labor goes:

Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something

that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men (Locke 288).

But Locke is careful to note that this appropriative ability is not unlimited. The mixing of one's labor only creates a property right "where there is enough, and as good left in common for others". The presence of this limitation on justified appropriation in Locke's theory is significant. While there is some vagueness about what is meant by "enough" and "as good", it is clear that the Labor theory of property is subject to consequentialist concerns at at least this minimal level.

Locke's labor theory can be appropriated in support of intellectual property quite easily, though a few differences need to be considered. When Locke says that all of the earth is given to mankind in common, it is easy to conceptualize the trees, land and lakes as potentially usable by anyone. When it comes to the kinds of things that come to be owned as intellectual property, it is not so easy to conceptualize ideas or abstract objects as owned in common. Is a novel or an invention not yet written something that should be taken as owned in common? Does an author or inventor remove things from the common when creating or inventing? The actions of intellectual laborers might more appropriately be conceived of as creating something wholly new that did not previously exist in the world. If this is the case, then it is not clear why the appropriation even needs justification, since it does not involve a 'taking' from the commons. On the other hand, if the domain of all the things that could possibly be created or invented by humankind is conceived of as owned in common, then the restriction Locke

places on appropriation can be seen to thwart the exclusive appropriation of intellectual or abstract objects.

Consider that intellectual property, in its current form, represents a limitation on individual's ability to freely act in important ways. Patents can prevent someone from utilizing a particular product or process that was independently discovered before knowledge of another's patent covering that product or process was obtained. Another's ownership of the patented thing, removes that thing from the commons and leaves a commons that is depreciated - one that is clearly not "as good" as before the creation of the property right.

Authors and inventors, if viewed as laborers who take as resources some commonly owned ideas, cultural material or established techniques, and add their intellectual "work" to the synthesis of material and the advancing of techniques, can readily be seen as entitled to an exclusive property right to that 'intellectual object' in the Lockean sense. But there are significant problems with Lockean theory as it applies to both material and immaterial property, and with its presuppositions about the world.

One of the most obvious concerns with the Lockean theory is in its theological presuppositions. Recall that Locke's theory posits at least three divinely ordained facts: that god put humans on earth to flourish, that god gave the earth and its contents to humans in common, and that god has given property rights to people over themselves and their labor. These presuppositions form a large part of the foundation of Locke's theory of property. But for those who are skeptical that things are divinely ordered in such a way, some of these

presuppositions are unlikely to be adopted. Does the Lockean theory still work if these presuppositions are denied?

In the most minimal of Lockean-style labor-based justifications for intellectual property, a person only needs a claim to ownership over their labor for the Lockean mixture metaphor to hold some water. But it is not clear why, without the theological presuppositions, ownership of one's self or one's labor is justified if 'ownership' is what we are seeking to justify. It could be argued that, since a significant amount of labor and effort went in to the creation of my own body, that others (parents or guardians, perhaps) have some claim of ownership over my person. If ownership of one's self and of one's labor is in question, then the logic of the Lockean argument can be undermined.

Another concern arises from the indeterminacy of the metaphor of mixing in the creation of a property right to a thing. A few important and difficult questions can be posed. First, how is the scope, or boundary, of a property right determined by Lockean theory? Robert Nozick (1975) puts it most eloquently when he asks whether he comes to hold property in the ocean by emptying his can of tomato juice into the ocean. To put the issue more specifically, how are we to limit the bounds of property when using the labor theory? My working of a few square feet of land can easily be seen to give me a right over that few square feet of land, but not an entire field. As regards intellectual property the capability of the mixing metaphor to suggest an answer to this question is even less clear. When granting a property right over an invention, as an example, should such a

right cover inventions that are substantially similar? And if so, how similar? The Labor theory cannot give us clear answers to these questions.

The final concern over Lockean theories of intellectual property is that, were we to develop intellectual property policies and practices that are primarily Lockean in origin, they would radically differ from the kind of policies and procedures we have today. This is not a criticism of the Labor theory itself, but instead a problem in using Lockean theory to explain or justify the kinds of intellectual property policies and practices currently in place. Because Locke's theory was originally used to justify property rights in material things, the rights have no reason to be time-limited. Most forms of intellectual property today, though (with the exception of trademarks, trade secrets, and many non-institutionalized practices) are durational. No component of the Lockean theory seems to justify this part of intellectual property rights.

As well, Lockean theory runs into problems when dealing with more complex situations where the labor upon a thing is distributed across multiple persons. How is a potential property right over an object (material or immaterial) determined when labor is done by more than one individual? If a group works to build a building, or to develop a complicated piece of software, wouldn't the Lockean labor theory suggest a jointly-held property right over the created thing? We can find no guidance in the Lockean theory as to how a jointly-held property right might function. Also, what if the labor expended by the team of laborers was uneven, i.e. one person did a lot of work while another did very little? To address this issue, it seems, we need a conceptualization of property that comes in

degrees. Significant laborers would need to have more of a claim to the property right than the contributors of lesser significance. Again, it is not clear how the Lockean theory can provide guidance in these cases. This is a matter of great importance in today's world where creation and invention results from processes of labor that are distributed across time, space and persons. It seems as though the imagery provided by the Lockean labor theory - that of an individual mixing their labor with a determinate thing - fits only a limited amount of cases where property rights would need to be justified.

These are just a few of the issues associated with using the Lockean theory of property to justify rights to intellectual property. Despite the problems, though, the Lockean theory speaks to something important about the relationship between the individual and the things that he or she puts labor or effort into. The Hegelian personality theory is another way at exploring this relationship, and we will now turn to an examination of this justification

Hegel and the Personality Theory

When marshaled in support of intellectual property, the Hegelian theory seems remarkably similar to the Lockean theory detailed above, except instead of labor as the owned substrate that is mixed with an external thing, one's *will* or *personality* is seen to be mixed with or manifested in an external thing. Because of the central role of personality, the Hegelian theory of intellectual property is sometimes referred to as the personality theory. Put in its most succinct form, the personality theory claims that "an idea belongs to its creator because the idea is

the manifestation of the creator's personality or self" (Hughes 330). Such a property right in external objects is necessary to encourage recognition of one's will by others (Hegel 85), which is an important step in the process of realizing individual freedom.

Hegel's treatment of property is part of a much larger, complex philosophical system. The relation of property to the other components of Hegel's system cannot be fully dealt with here. It should be noted that a wide-scope analysis of the role of property in Hegel's system, from Drahos (91), shows how the increasing scope of intellectual property protection has the potential to restrict individual freedom by impeding participation in a cultural community. While any appropriation of Hegel's theory of property is likely to be a narrow and limited account of property's role in the realization of freedom, his treatment of property in the *Philosophy of Right* has come to serve as the authoritative philosophical basis for the personality theory of intellectual property.

The personality theory is particularly effective when used in support of intellectual property practices surrounding literary and artistic expression. It is easy to think of the personal attributes of an author or artist as contained, in some sense, in their works. But the personality theory does not clearly provide the same degree of support for property rights in things that are not so clearly expressions of individual will or personality, like industrial processes or computer software - both of which are strongly protected under current intellectual property laws (Spinello and Bottis 166, Hughes 340). The personality theory also faces the interesting questions concerning joint creative endeavors that the Lockean

theory faces. What kind of property right emerges from a work of joint authorship? What sort of guidance can the personality theory provide when the creators of a thing disagree about how it ought to be made manifest in the world?

Another important concern with the personality theory is how it can align with the economic or pecuniary aspects of intellectual property rights. If creators have interests in their creations sufficient to grant a property right, and this interest is seen as an essential support of the individual's quest for freedom, then what are we to make of acts where the rights over these creations, which embody the personality and will of their creators, are sold or transferred? It is unclear how freedom is advanced when a creator is alienated from their expression and no longer has the kind of control over their creation that the Personality theory maintains as holding an essential value.

Like the Lockean labor theory, it is clear that a Hegelian personality theory cannot do as an overall explanation for or justification of intellectual property policies and practices. Nonetheless, both of these theories do reflect some important values worthy of consideration. These two theories can also lead to contradictory attitudes about property rights in abstract things. Consider an architect, who puts some labor, but many creative expressions of his personality into the plans for a new building. These plans are taken up by a builder, who puts much labor and a little bit of his own personality into the brute construction of the building. Both the labor and personality theories work to justify some kind of property right over the building, but depending on which of these theories are

more valued, the extent of the rights granted to each party may vary. Does labor trump personality, or vice versa?

An example like this can also be made involving more distinctively abstract things. Consider an author who, together with some famous person, writes a book about the exploits of the famous person. The personality of both the writer and the famous person can clearly be seen as embodied in the work, but the distribution of labor in the creation of that work is weighted on the side of the writer. A labor-based theory of intellectual property would be more likely to grant a significant interest to the writer, while a personality theory might suggest a more significant interest to the famous person whose personality is represented in the work. These sorts of conflicts show the limited usefulness of intrinsic or natural rights-based theories of intellectual property.

Kant and Autonomy

A distinctively Kantian account of intellectual property is the most recent addition to the list of potential justifications for intellectual property. Like the Hegelian theory described above, any possible Kantian theory must face the harsh reality of being just a small part of a large and complex edifice represented by Kantian philosophy. Robert Merges takes up the foreboding task of outlining a Kantian justification for intellectual property which focuses on the importance of individual autonomy.

The Kantian property theory is in many ways similar to Hegel's. Both theories hold up individual autonomy and personal freedom as a feature of

human existence that can only be fully realized through the recognition of individual property rights. Both of these theories foreground the relationship between an individual and an object (Merges 71). Individuals have an interest in property in the Kantian scheme because property supports a maximal “range of freedom”. Freedom is enabled by property because it allows individuals “to carry out projects in the world”. Projects, particularly those of the creative classes, require some degree of physical control over things in order to be realized. Property rights are the best way to help individuals achieve the full degree of freedom possible to them (72).

Because of the similarities between Merges’ Kantian account and the Hegelian personality theory detailed above, many of the same criticisms of the personality theory apply to the Kantian theory. But another, more important criticism arises when Merges makes clear in his argument that intellectual property must first and foremost focus on the concerns of the individual creator. The Kantian account offered by Merges holds the right to property to be a pre-societal, intrinsic right. Recall that rights such as these are demanding of protection *even if* they are shown to have detrimental effects on society or other individuals. As Merges makes explicit, “society ought to bear [the] slightly higher transaction costs” that result from a focus on the exclusive rights of individual creators (82).

But such a narrow focus on the autonomy of the individual creator hides the extent of the costs imposed by exclusive property rights on the autonomy of other potential creators. Property rights, by their nature, inhibit the freedom of

others by disallowing them from accessing or using the things covered by property rights. While Merges' focus on enabling the highest degree of freedom for individual creators can plausibly be seen to help achieve the highest degree of freedom, it also at the same time inhibits the freedom of creators. Merges' frequent example is that of the sculptor Michelangelo and a piece of stone. In order to realize his freedom as an artist, he needs to have control over the stone so that he may fully realize the project of turning that stone into a finished sculpture. This also requires the need to prevent others from altering or destroying the stone. In this example, prohibiting other creators from messing with Michelangelo's stone is a reasonable infringement on the freedom of others. But intellectual property rights represent a more significant impact on the freedom of others because they are not limited to particular entities. Copyrights and patents involve exclusive ownership of broad categories of things, and can result in severe restrictions on the freedoms of creators who engage in transformative works. This objection will be covered in more depth in Chapter 2.

So far I have detailed three similar justifications for intellectual property right that hold such rights to be in some way *natural* or *intrinsic*. In general, the problems with these theoretical justifications are that they encounter problems when dealing with the specific nature of abstract objects, the reality of creative processes, and the concomitant limitation that they effect on the rights and freedom of others. Each of these theories can be characterized as broadly individualistic. Their focus is on the creator or laborer as an isolated thing, looking to advance their own individual concerns. We will now turn to a

discussion of a decidedly different theory, one that takes seriously the consequences of enacting any sort of scheme of exclusive intellectual property rights. We will return to the problems with an individualistic conception of intellectual property rights in Chapter 3.

Utilitarian Justifications

For utilitarian philosophers, things are right or good to the extent that they promote some predetermined value such as utility or happiness. Along these lines, intellectual property is justified, for the utilitarian, if it helps to promote some similar value. This can be seen in the familiar Article 1, Section 8 of the U.S. Constitution which gives Congress the power “[t]o promote the progress of the science and the useful arts, by securing, for limited times...exclusive rights to their discoveries”. In the American case, then, intellectual property exists for explicitly utilitarian reasons.

Using utilitarianism as a ground for intellectual property positions intellectual property rights as a reward, granted to creators of things that will help contribute to an increase overall good. In this sense, intellectual property serves as an incentive which in practice will increase the production of beneficial goods, and therefore improving overall well-being. An important feature of utilitarian justifications for intellectual property is that the determination of the ideal institutional form of intellectual property depends upon a significant amount of empirical data about what the outcomes of any existing intellectual property policy might be. As industry and markets, and other related aspects of the

working environment for intellectual property change, how intellectual property rights are institutionalized can and should change to ensure that those rights continue to serve their original purpose. For the utilitarian, intellectual property is a flexible tool, one that depends on the particular contingent features of the domains in which it functions.

Utilitarian arguments for intellectual property are criticized most commonly for their inability to account for the full range and scope of existing intellectual property practice. As an example, it is sometimes claimed that utilitarian arguments cannot account for things like trade secrets and authorial attribution (citation) practices. Merges claims that there is no evidence that overall well-being is promoted by ensuring that authors are properly credited when their books and papers are published, even after any copyright has been sold or transferred (Merges 325).

Authors have also attacked the utilitarian account because of its epistemological dependencies (Merges 7) Determining the optimal form of intellectual property requires an immense amount of background evidence about the markets in which the rights function. The utilitarian justification cannot serve as a firm foundation for intellectual property rights because of the uncertainty inherent in this epistemological project.

Enter Pluralism

In response to the insufficiencies of the classical arguments, recent works have offered a pluralistic theory of intellectual property. David Resnik suggests

two positive reasons for adopting a pluralistic theory that adopts multiple normative foundations and justifying principles. First, because intellectual property is a broad and diverse field that encompasses different kinds of right that apply to different kinds of things, it is reasonable that different arguments are used to account for the diverse practices individually. Second, a pluralist theory allows for fruitful public discourse concerning intellectual property in a globalized world, where the participants in that discourse come from “different ethnic and cultural backgrounds and have different moral, philosophical and religious beliefs” (Resnik 331).

A pluralistic account can overcome these disputes over foundations by encouraging a more contextual approach. To resolve IP disputes using the pluralist approach, “one must weigh and balance the different values that are at stake in the situation and determine which one should have priority” (331). How the values in a particular scenario are “ranked” can vary from one case to another. What is it then, that determines the ranking? Resnik suggests that contextual factors will make it clear what should be emphasized. As examples he suggests that in disputes about patents, utility should be emphasized because “the legal and social function of the patent system is to promote the progress of science and the natural arts”. In allocations of “intellectual credit” (i.e. academic citation practices, moral rights of authors), the interests that authors and creators have in being treated fairly should be of the highest importance (331). In these examples, though, it seems equally plausible that other values could be emphasized. Patents could be guided by an emphasis on the moral rights of the

creator - they could be of unlimited term, for instance, and “intellectual credit” could be guided by utilitarian concerns (it might be that the art world would flourish if copying and imitation were totally unrestricted, both as law and in everyday practice). So what is it that guides the selection of emphasis in these cases?

One way of responding to this question is to say that what values are emphasized can be determined by the original, historical intent of the practice. This seems to explain the emphasis on utilitarian ideas in patent practice, which has a long history of being justified primarily with regard to encouraging technological innovation and cultural progress. But this way of responding to the question amounts to little more than saying something like “we do things this way because that’s how we’ve done them all along”, and such a response is insufficient as a philosophical justification. There has to be something more in order to justify *why* we have these rights in place, rather than not have them. Resnik’s suggestion that particular contextual factors of the different situation in which intellectual property is at work can determine which values to emphasize is vague - each of the important values he lists can be seen to be at work across all types of different cases. There’s always an author or creator whose interests need to be considered. There’s always a way that utilitarianism can be emphasized. Autonomy or personality can always be maximized. The deference to contextual factors presents the same problem anew - which of the contextual features of the domain do we pick out as most worthy of emphasis?

An important consequence of this deficiency of a pluralist theory is that such a theory cannot help us to formulate novel intellectual property policy. In an area where no current policy exists, what is needed from a sufficient theory of intellectual property is one that can tell us why we should have some sort of intellectual property policy rather than none at all. A pluralist theory like the one provided by Resnik seems best adept at explaining why we have some of the intellectual property that we have today, but this is philosophically uninteresting.

Current debates surrounding intellectual property issues, such as those dealing with access to patented pharmaceuticals and copyrighted knowledge in developing countries, represent a serious battle ground for the competing values in intellectual property. A utilitarian account would suggest that we should maximize the distribution of knowledge and medicine that can benefit those who are in need. But creators and owners respond that they have the right to price and distribute their intellectual property at the price and under the terms they desire. In complex cases such as these, Resnik suggests that “the pluralistic approach would address this difficult and complex issue through a careful balancing of three values - utility, autonomy, and justice - in light of the facts and circumstances of the case” (332). This ‘balancing act’ positions Resnik as a consequentialist and as an empiricist about intellectual property. How we should develop our policies and practices are determined by their real, concrete effects, not on *a priori* theorizing about the relationship between the individual labor and the things labored upon, or the relation between personality and freedom or autonomy.

The emergence of pluralism as a potential account of intellectual property can be seen as a result of the conflation of such different practices as copyrights, patents and trademarks, privacy rights, personality rights, and many other practices under the umbrella term “intellectual property”. By lumping all these practices into one category and searching for a common foundation, it is no surprise that some foundations work for one area but not for another. It is not clear what benefit comes from adopting a pluralist account of intellectual property, conceived broadly, so why bother? Why not treat apples as apples and oranges as oranges?

Resnik’s final appeal to context sensitivity and a “balancing” of values suggest that there is an overall metaprinciple that can serve to both motivate the development of policy and adjudicate amongst the competing values at work in problematic cases. In the next chapter I will argue in favor of what Peter Drahos calls the “instrumentalist attitude”. Intellectual property policy that is instrumentalist should serve some explicit goal or end. This is most in line with the utilitarian style of justification covered above, in that some moral or value is being promoted, but an instrumentalist attitude towards intellectual property policy and practice need not always address something like overall well-being or utility. Under the instrumentalist attitude, intellectual property exists to further some important value or set of values, it does not exist as an embodiment or institutional recognition of a natural or intrinsic value of human existence.

Conclusion

In this chapter we examined the strengths and weaknesses of the classical arguments used to support intellectual property. It was clear that none of these accounts can do the big job of justifying all of intellectual property practice. We then examined the strengths and weaknesses of a pluralist theory of IP, and argued that such a theory does not provide any principled reason to determine how to balance the competing interests at work in intellectual property. We explored the need for an overall metaprinciple that can guide the disparate fields and introduced the instrumentalist attitude as a candidate.

Chapter Two: For Instrumentalism in IP

I have argued in the previous section that none of the traditional, classical, justifications of property can be successfully appropriated and used to justify intellectual property as currently manifest in institutions and practices.

Additionally, I argued that theories of intellectual property that are foundationally pluralistic - those that combine elements of the various classical theories - fail to provide a coherent, cohesive, and complete justification for intellectual property, broadly conceived. I argued that the use of pluralist theories does not answer the important questions that arise in cases where basic values are in conflict. In short, the problem with pluralist theories is that they do not provide any principled criterion for weighing out the conflicts amongst differing rights and interests at the level of actual practice.

In this chapter I will argue in favor of a broadly-defined theory that, I believe, can best guide intellectual property policy and practice. This theory - the instrumentalist attitude - places at the forefront the idea that intellectual property law should exist to advance some predetermined moral value. This kind of theory is in strong contrast to the natural or intrinsic rights approaches which maintain that intellectual property deserves recognition and protection as a result of some fundamental value or natural facts about human beings. The natural rights

approach establishes rights that are, by and large, unresponsive to concerns over the consequences of those rights.

To illustrate the distinction between these two foundationalist enterprises, I will summarize the positions of two authors who both have presented substantial philosophical accounts of intellectual property rights. First, I will distinguish between two general strategies - proprietarianism and instrumentalism. A proprietarian is often, but not necessarily, a natural rights theorist. What is distinctive about proprietarianism is that the protection of the property rights of individuals is foregrounded, and taken as the most important aspect of any system of intellectual property. Consequentialist concerns are either ignored or relegated to a status of secondary concern. Instrumentalism, on the other hand, foregrounds concerns about how these rights are functioning in practice.

This distinction comes from Peter Drahos' *A Philosophy of Intellectual Property* (1996), who uses it to argue in favor of policies that are broadly instrumental. More recently, Robert Merges (2011) has argued in favor of what I will show is a strongly proprietarian set of foundations for intellectual property. Using Merges as an example I will show the deficiencies of the proprietarian stance. Both Merges and other authors sympathetic to the proprietarian stance, such as Spinello and Bottis (2009), justify their positions in part by attacking instrumentalism. I will defend instrumentalism and show how such a theory can in fact more adequately address all the varying components of intellectual property law and practice. I will further built the case against proprietarianism by

offering an account of an argument put forth by James Wilson that IPRs cannot be justified by an appeal to an intrinsic or natural right.

Moral and Economic Rights

Before we get started, it will be beneficial to take a closer look at the different practices that we refer to when talking about intellectual property. “Intellectual Property” is used to refer to a broad category of practices, both legal and extra-legal. Throughout this chapter I will distinguish between *economic rights* and *author’s rights* and the different ways that these rights are justified and instantiated in practice. The economic rights aspect of intellectual property refers to the ability of right holders to earn a profit off of the thing that is owned. Typically this involves excluding others from making, using or distributing the thing covered by the property right.

On the other hand, author’s rights refer to the rights that creators and inventors (not always the same person as the right holder) have to ensure the continued integrity of their creations and ensure that they are properly attributed as the source of the creation or invention. Authors in some countries, for example, have rights over their works even after a copyright has been sold or transferred to some other party. Author’s rights, in this sense, refer to practices that closely link creators with their creations. These rights need not be limited to explicit legal practice. Plagiarism, for example, involves the taking of another’s work and passing it off as one’s own. This may or may not involve a violation of copyright, but even if it does not, the moral rights aspect of intellectual property

views such actions as morally wrong. Practices related to plagiarism are typically not regulated by law, but instead by custom or by non-governmental institutional practices. We must be careful in both the descriptive and normative projects of intellectual property analysis, to separate these different senses and be wary of the ways in which not making this distinction can obfuscate the important differences that exist.

Proprietarianism in Intellectual Property

As noted above, much of my argument in this chapter will draw from Peter Drahos' *A Philosophy of Intellectual Property*. In this book, Drahos argues against proprietarianism and in favor of instrumentalism. Proprietarianism, for Drahos, places the property rights of creators and inventors at the forefront when offering a justification for IPRs, when creating new laws regulating IPRs, or when adjudicating related conflicts. Drahos and numerous others have noted the increasing dominance of proprietarianism in intellectual property. In support of this claim it can be noted that the kinds of things subject to patenting has steadily increased, and duration of copyright has seen a similar steady increase (Drahos 179-180).

Drahos laments the rise of proprietarianism in IP. His work begins, like nearly all philosophical works on IP (including this one) with a historical account of the development of IP, and a review of the predominant philosophical justifications that have been offered in support. Like I argue in Chapter 1, Drahos finds that none of the justifications, on their own, can fully account for intellectual

property laws and practices as they currently exist today. He is skeptical, though, about the possibility of a “general theory” that would unite the philosophical, economic, legal, and other aspects that make up intellectual property. The contours of physical property, he notes, are determined in large part by historical and cultural contingencies (like the form of government and type of economy), and because of this, property law changes over time and across national boundaries. Intellectual property is no different, and a general theory of intellectual property, he suggests, could be seen as attempting to offering the impossible, “objective truths and relations” about property (Drahos 196).

What Drahos first offers, instead of a general theory of intellectual property, is a warning about how IP should not be developed. This is his criticism of proprietarianism. Second, he offers a positive account of a general, overarching meta-principle that should drive the development of intellectual property law and practice - the “instrumentalist attitude”. I will focus on the instrumentalist attitude in detail later in this chapter, but first let’s take a close look at his account of proprietarianism and why he believes it should be rejected.

Drahos and the Instrumentalist Attitude

According to Drahos, proprietarianism typically involves a commitment to three principles. First, it involves a belief that property rights have a “fundamental and entrenched status” (200) which gives them precedence over other rights or interests. Theories that give property rights this feature may consider property rights as natural or human rights. An individual’s right to hold property, in this

view, exists prior to or outside the domain of the state. For theorists of this type, part of the justification and purpose of the state is to defend this fundamental right of citizens. Also, a natural right to property can be seen to “set permanent limits on what is morally permissible” (200) by other actors in a society. As an example, if I were a farmer, working to cultivate an area of land, part of my interest in setting up or submitting to a government is the expectation that the government will protect my right to own the field and defend me against those who might try to take it from me. If my right to the field I am cultivating is considered a natural or human right, then, the state must respect that right, even if by not respecting it, and seizing my land, it could make use of the land for some greater social benefit.

The second feature of proprietorship, according to Drahos, is a belief in negative community (202). What this means is that the original state of all (non-human) things in the world is to be unowned. This is contrasted with positive community, where all (non-human) things are seen as collectively owned by humankind. Locke’s theory of property, as shown in Chapter 1, involved a version of positive community. The distinction between positive and negative community matters when determining the process by which things can come to be owned by individuals. For a believer in positive community, the appropriation of something owned in common by an individual can be seen as a taking from others. This then complicates the morality of any such appropriation, as the new owner’s benefit comes only at some cost to everyone else. The believer in negative community does not face this problem, as to take something from the

domain of the unowned is not seen as causing as strong of a wrong or harm to others.

The third feature of proprietorship is a belief in what Drahos calls a “First Connection” thesis. This claims that the person first associated with some product or process is entitled to a property right in that product or process. Think here of Locke’s “mixing” metaphor, or the engagement of personality upon some object in Hegelian personality theory. The individual who makes a first connection with an unowned thing is said to have a “right to extract or appropriate economic value” (201). This is in line with common sentiment about property - ‘I found it, so it’s mine’, and entails that some degree of physical control over a thing is required in order to make it into one’s property.

Drahos neatly sums up his view of proprietorship in the following passage:

“A proprietor is one who believes that activities that first give rise to economic value also necessarily create property rights and that there is no limit to the things in the world at which such activities can be aimed. Proprietorship is a creed which says that the possessor should take all, that ownership privileges should trump community interests and that the world and its contents are open to ownership. (202)”

It should be noted, though, that this account of proprietorship is an extreme case. If the entire world is open to ownership, for example, than human beings are open to ownership, and it is unlikely that anyone would adopt a position that would justify slavery. But, as I will argue later in the chapter, we can discover proprietorship tendencies at work in some recent works that attempt to justify the contemporary conception of intellectual property rights. The proprietor, as

constructed by Drahos, is an ideal figure, not likely to be instantiated in any real person. It is the proprietarian tendencies that Drahos wants us to look out for.

Against Proprietarianism

Drahos' argument against proprietarianism in IP centers on the claim that it leads to a significant reduction in negative liberty. Negative liberty, roughly conceived, is the "idea that there are actions of individuals that should not be obstructed" (211). Common examples include the rights to life and liberty, which entail that others should not infringe upon another's right to life (this implies a duty not to kill others) and that people should not deprive other of their freedom (which implies a duty not to enslave others, for example). A right to property is typically considered one of these important aspects of negative liberty. Of course, Drahos is not arguing that all rights of property are unjustified violations of negative liberty. As noted in Chapter 1, rights need to be carefully evaluated as part of a large and interrelated system of values. Property rights can indeed be seen to support negative liberty, and as such are justified, but not in an unlimited sense. For everyone who is not the ideal proprietarian, the extent to which property rights are granted needs to be weighed against the impact that such rights will, in practice, impact to some extent the rights and liberties of others.

Property rights in physical things are in fact limited in many ways, and the core of Drahos' argument is that proprietarianism encourages intellectual property rights that are increasingly insensitive to the impact that they have on the liberties of others. Intellectual Property, motivated by proprietarianism,

interferes *substantially more* so than material property rights (211). This is because there are important differences between the kind of things that come to be owned as intellectual property, and the things that are subject to physical property.

Universal Accessibility

While property rights in both material and abstract objects are conceived of as rights, there are many important differences. In showing how IPRs are more damaging to negative liberty, Drahos points out that abstract objects are “capable of universal accessibility” (211). This means that the things covered by IP are at least theoretically able to be made use of by many or even all people at the same time. A piece of music, for example, can be enjoyed by a large audience or even the whole world, without impacting the level of any individual’s enjoyment. Material property, on the other hand, does not have this feature. My ability to enjoy a piece of land is strongly impacted by another’s use of that same piece of land. This difference between material and abstract objects will be covered in more depth later in this chapter, but the point here is we need good, well-justified reasons to restrict the accessibility of something that is otherwise capable of universal accessibility.

Drahos notes that people accept the liberty-infringing aspects of rights when those rights operate in a “reciprocal way to make coexistence possible” (212). I respect your right to own a piece of land because I wish for others to respect my claims to a piece of land. Your claim to your land infringes on my

negative liberty in only very limited ways (for instance, if I want to build something or travel across your land and cannot, or if you do something on your land that impacts some other right of mine). Drahos argues that ownership of abstract objects results in significantly more of an infringement on negative liberty than material objects because abstract objects represent a special kind of resource that people use in the pursuit of “all kinds of social, cultural and economic projects” (212). Many of the concrete examples already covered illustrate the importance of abstract objects in the pursuit of human goals. A number of individual rights are infringed upon when a farmer is told that they cannot grow or harvest a crop because the crop strain is owned by another party. This could impact one’s ability to survive, feed one’s family, and pursue other life goals.

Drahos has other reservations with proprietorism. The historical origin of intellectual property, he argues, is in attempts by government to grant beneficial privileges to a few at the cost of “common disadvantage” (213). This general idea continues today, when the cost of the overall system is justified through an appeal to its incentivizing effects. But the contemporary couching of IP in the language of property and of rights obscures the historical origin of these practices as public privilege.

We should remember that Drahos’ project does not intend to show that intellectual property rights, in general, are unjust. His critique of proprietorism is intended to show that the emphasis of proprietorism in justifications of intellectual property results in laws and policies that give too much power to the rights holders, and involve a corresponding infringement on the negative liberty

of everyone else. But just like property rights in material objects, IPRs do not have to be in this way. In place of proprietarianism, Drahos suggests that IPRs should be conceptualized, justified and formulated using the *instrumentalist attitude*.

The Instrumentalist Attitude

Drahos calls the instrumentalist attitude a “humanistic and naturalistic form of empiricism about property” (215). First of all, it is naturalistic because it disavows the idea that property is a natural or intrinsic right of persons – rights that all people have in virtue of just being human. This entails a change in focus for inquiry into intellectual property from metaphysical investigations about how property comes about in the world, to an emphasis on the behavioral aspects, or how it actually functions in the world. The instrumentalist attitude is a form of empiricism because, in order to determine precisely how intellectual property is at work in the world requires concrete investigation of the institutions and practices involved. This is in stark opposition to the labor and personality-centric theories covered in Chapter 1, which represent little beyond *a priori* speculation about how the individual and the things in the world are related (217). Finally, the instrumentalist attitude is humanistic because it encourages the development of justifications and policies that are oriented towards “an understanding or improvement of human experience” (215). In saying that the instrumental attitude should be humanistic in this sense, we can see that in addition to the rights of

creators, the rights of others also need to be recognized and considered more profoundly than a proprietarian attitude would encourage.

One of the consequences of individual property rights, we saw, was that as more and more property rights are granted (in the name of protecting the liberty of individuals), there was also a corresponding decrease in the individual liberty of others. For the instrumentalist, how much or how profoundly individual liberty is restricted is not a question to be answered by *a priori* philosophical analysis. It is a question, albeit a very difficult one, of empirical analysis and inquiry. Under the instrumentalist attitude, property rights are seen to exist *at the will of the state*, and as such are malleable and sensitive to empirical realities. Instrumentalism promotes a scientific analysis of the domains of intellectual property law and policy with a very wide scope.

Instituting and enforcing intellectual property policies is costly and, as recent advances in technology have made distribution of abstract goods becomes easier, the costs of enforcing intellectual property rights has increased. When looking at what sorts of policies should be enacted in a particular society the costs of maintaining and enforcing such policies are far from negligible (219). As well, as the means of distribution of abstract goods easier, the harm caused by the exclusionary practices inherent in intellectual property rights becomes more and more salient. Full-blown proprietarianism advocates for protectionist policies that are insensitive to the impact on others and the opportunity costs of such policies.

Merges' Defense of Intellectual Property

With the distinction between instrumental and proprietary attitudes in mind, we can now proceed to take a closer look at another contemporary philosophical work that seeks to explain and justify intellectual property. Robert Merges' *Justifying Intellectual Property* represents what is probably the most extensive and lengthy treatment of this matter. We discussed Merges in Chapter 1 in when giving an account of the Kantian justification. Here I will argue that his overall theory exhibits many attributes of proprietorism.

Merges claims to be offering a complete and coherent account of intellectual property - one that is both descriptive and normative. As an introductory metaphor, he likens his project to the mapping out of an old but quickly growing city. In describing the main roads and passageways of the city, he is identifying the common elements of the city, familiar to all of its residents. These common features represent that which unites the city and holds it together as a single, unified thing. IP is like this, he says, because the disparate areas of IP practice (patents, copyright, etc.) are all united by "common themes and motifs" (2) which serve to unite these distinct practices under the umbrella term intellectual property. Merges' normative project - what he says about how IP law and policy should continue to be refined and developed - is an extension of his descriptive project. In showing *why* we have the kind of intellectual property rights we have today, he is implying that these very same reasons *should* motivate any changes or extension of those rights.

We saw in Chapter 1 that a pluralist theory can draw from any or all of the different justifications. Much of Merges' work is concerned with the distributive and consequentialist effects resulting from IPRs. It is obvious, from this, that his theory is not proprietarian in the sense of the ideal proprietarian that Drahos described. Nonetheless, Merges clearly elevates the justificatory role of deontological (Kantian) and labor (Lockean) theories over others. In doing so, he aligns himself strongly with a number of the features of proprietarianism that Drahos outlined. For one, his allegiance to deontological theory, which emphasizes the importance of individual autonomy, represents an interest that individuals have that cannot be disregarded, or fail to be recognized by governments. This places those interests at the level of intrinsic or natural rights.

But Merges is careful to not too strongly align himself with such strong positions. He explicitly notes that he is *not* a natural rights theorist about IPRs (5), because his overall theory is one that is sensitive to concerns of social utility. However, at the foundational level, Merges' adherence to the theories of Locke, Kant and others who posit property rights as the kind of rights that exist prior to or outside of the state, suggest that his theory is open to many of the same criticisms as natural rights theories of intellectual property. Before we get further into these criticisms, we should first take a closer look at just how Merges argues that instrumentalist concerns can play a role in a theory of intellectual property.

Efficiency

Though Merges admits a role for instrumentalist concerns in IP, he relegates the majority of such concerns to a secondary status in his theory. To understand the place of instrumentalist concerns in his theory, we need to briefly examine the overall structure of his theory, which is divided into three conceptual layers. At the bottom are the “normative foundations”, which represent the conceptual origins of the institution of IP, such as Lockean labor theory and Kantian property theory. One step up are the “mid-level principles” - these are disparate values that IP is seen to serve, like dignity, efficiency and proportionality. These principles, Merges admits, do most of the hard work in any theory of IP. But they are not foundational because they cannot, in themselves, account for all of the important features and practices of IP theory. At the top level of his theory are the “specific practices” - the doctrines, rules and institutions that make concrete the conceptual matters at work in the two lower levels.

Efficiency is one of Merges’ mid-level principles. He defines “efficiency” as “getting things done as cheaply as possible” (153). In the context of IP law and policy, he argues that absolute “efficiency” in IP would be Pareto optimality. Pareto optimality refers to the state where all resources in a society are distributed in such a manner as that no further transfer of resources can be made that leave one party better off while also not making any other party worse off. Because IPRs that are based on a foundational principle of efficiency would be structured so as to realize this end, those IPRs would need to be designed with

enough background knowledge about how markets in creative works, inventions, and other intellectual objects function.

Even though Merges himself has put much work into the analysis of efficiency in IP, he argues that the “utilitarian project will always be at best aspirational” (3). The relative measurement of all the possible intellectual property-related policy options present an “overwhelmingly complicated task” (2), and because of this it cannot be relied upon as a foundational principle of IP. The existing work in this domain of economics provides a nearly complete but not “lock-solid” (6) case for enacting IP laws, but what is left lacking is significant enough to preclude efficiency as a foundational principle. Merges also notes that even a lock-solid case for IP would not be able to address all the important practices that make up IP. The author’s rights (or moral rights) aspect, he says, does not make sense from the utilitarian viewpoint of IP.

There are a number of ways of addressing Merges’ claims about the insufficiency of utilitarian justifications as a foundation for IPRs. First, even if it is true that utilitarian justifications for IP are imperfect or terminally indeterminate, this cannot be a sufficient reason to hold them at a different level than those principles (labor and autonomy) that Merges accepts as foundational. As we saw, neither Lockean, Kantian nor Hegelian traditions can account for every aspect of intellectual property laws and practices, and each of these theories are not without their own particular problems. It is difficult, for example, to align the durational feature of patent and copyright with the kind of right that a theory like Lockean labor theory seems to entail. Why then, does Merges relegate efficiency

to mid-level status while maintaining that these other incomplete and imperfect theories remain acceptable as foundations?

The answer is not clear. But further investigation into the role of the foundational theories and the mid-level principles in Merges' theory can help explain why the relegation of efficiency to a zone of secondary importance is not trivial. He notes that in the everyday functioning of the intellectual property system, the foundational principles remain mostly mute. Dialogue about particular features of patents or copyright typically proceeds at the level of the mid-level principles or specific practices. Merges sees this as a virtue, and takes inspiration from Rawls' idea of "overlapping consensus" - the idea that in a cooperative society, people with differing foundational beliefs (e.g. religious beliefs) can live together and engage in productive dialogue about practical issues despite potential foundational differences. This was also discussed in Chapter 1 as a virtue of the pluralist theory offered by Resnik. For Merges, the mid-level principles are the intended level of debate about intellectual property issues. If this is the case, what role then is there for the foundations?

Merges is not very much concerned with the answer to this question. Obviously, these foundations of IP give us a way of explaining why we have these things called IPRs, but in the normative sense, he claims that in some infrequent instances the foundations can help to resolve "borderline cases" (11), where the interests of two parties (and the corresponding values) are at odds with one another (e.g., IP holders vs. consumers). This is indeed a crucial role for

any sufficient theoretical foundation, and so the importance of foundational theories should not be understated.

Academics and other concerned intellectuals are working on intellectual property-related issues because of the perceived increase in the frequency and severity of these borderline cases. Philosophical inquiry into the foundations of intellectual property should, at least, provide for increased clarity in these borderline cases. As we saw in Chapter 1, a pluralist theory diverts the question of which kind of theoretical foundation to emphasize in controversial cases, to the question of which of the many values at work in a particular situation are most worthy of emphasis. A satisfactory philosophical theory of intellectual property should give compelling reasons why those rights take some particular form, which would include a justification of *why* any particular instance of such rights emphasize some values over others. The prescriptive function of foundational theory should not be a sideshow; it should be the main event.

Additionally, foundational theories are important because they can be used to illuminate areas where novel intellectual property laws or policies might be instituted. Much of the contemporary controversies are of this sort. As an example, advances in biological science have made it possible to engineer living organism and human genetic material. Questions have arisen about how intellectual property rights, particularly patents, should be deployed to regulate the use and distribution of those organisms. What kind of normative, foundational theory we prefer determines, in large part, what stance we adopt in these kinds of cases.

Because Merges foregrounds the deontological and labor-based foundations, he is prone to answer these controversial questions in a way that would “favor an owner or a rightholder” (11). This is the most clear-cut manifestation of proprietarianism in Merges’ theory. Because of this emphasis, he avoids the vagueness of a pluralist theory like that of Resnik discussed in Chapter 1, Nonetheless, he fails to provide a strong enough account of why we should emphasize autonomy over other values like efficiency - one that can overcome the substantial infringement on negative liberty that a proprietarian attitude entails.

Hopefully I have provided a convincing analysis of Merges’ arguments that detail how his theory leans more heavily towards proprietarianism than instrumentalism. While I have argued some reasons why instrumentalism should be preferred, there is another significant obstacle to adopting a proprietarian stance. In this section I will argue, following Wilson (2008), that economic rights cannot be justified by an appeal to an intrinsic or natural right. The impossibility of justifying the economic rights-related aspect of intellectual property by appealing to Lockean, Kantian or Hegelian style arguments further undermines the arguments of Merges and other proprietarian-leaning pluralists. This should refocus attention on consequentialist justifications as the strongest available grounding for intellectual property in the form of an economic right.

Types, Tokens and Rivalrousness

Wilson's argument depends upon a fundamental ontological fact about the kinds of things that come to be owned through intellectual property. This distinction has been noted by many, including Hettinger (1989) and Trierse (2008). Philosophers get at this same fact about ideas by appealing to the familiar distinction between types and tokens. The claim is that rights to intellectual property involve ownership of types rather than tokens, and that this matters when considering the extent of IP protection.

Simply put, types are abstract categories of things and tokens are things that exemplify or instantiate types (Trierse 120). Traditional property involves ownership of tokens - I own this particular Buick LeSabre, not all instances of Buick LeSabres currently remaining in the world. My act of laboring on some particular tract of land gives me a claim to ownership only over some specifically defined and limited property title, not all similar such tracts of land. A patent, on the other hand, grants the property holder power to restrict occurrences of things of the type laid out in the patent. Copyright can also be seen to involve ownership of types. My copy of Nabokov's *Lolita* is an instantiation of a type, as there are many other copies out there in the world, some just like mine, some different, but all of those things that are copies of Nabokov's 1955 novel are subjects to ownership by the copyright holder (Nabokov's kin) until 2050.

By distinguishing between traditional property and intellectual property, we can see that the kinds of things covered by intellectual property are capable of universal accessibility, meaning that use by one person does not preclude the

enjoyment of other possessors of tokens of the same type. For me to scan and copy my token copy of *Lolita* and give it to someone else does not reduce my ability to enjoy my token copy of *Lolita*. In fact, sharing of the work would probably help me enjoy the work even more as I could engage in dialogue and interpretation of the text in unison with others.

My ownership of my bicycle, on the other hand, is different. If I give my bicycle to you to ride, I can no longer enjoy it in the same way. Your possession and use of the bicycle is exclusive in that your use excludes usage by others. As Trerise (123) notes, this distinction between token and type is not philosophically unproblematic. One could challenge the claim that intellectual property involves ownership of types. Nonetheless, in this simple form it helps make clear a fundamental distinction between traditional conceptions of property over land and material objects and the kind of ownership of abstract objects that occurs in intellectual property.

Another way of getting at this distinction is to distinguish between rival and non-rival goods (Wilson 403). A good is rival when enjoyment of it is diminished as more people make use of the good. Nonrival goods, on the other hand, do not exhibit this property. Abstract objects, the kind of things that become owned under intellectual property, are nonrival. My enjoyment of a song is not decreased the more people listen and share the song. I can still listen to and enjoy the song the same when a million people own a copy as when I am the only one to own the copy.

Wilson argues that the rivalrousness of traditional property is an important background fact in the justification of traditional property rights:

[W]hen we think of the justification of private property, two features are usually first and foremost: first, the kinds of things that we want to potentially own are potentially *scarce* (that is, it is possible that there will not be a sufficient supply of them to meet the desires of everyone that might want them), and second they are *rival* (and so they can only derive their full usefulness for their owner if the owner is able to exclude others from them). (404)

When these two conditions do not obtain, the justificatory logic of property no longer works in the same way. This is just the argument that Wilson makes. The fact that particular things that are subject to intellectual property claims are nonrival and can be enjoyed by many people simultaneously means that there is no scarcity in the distribution of that particular good. Any scarcity that does exist, he says, “is due to us creating an artificial scarcity” (404).

The “Rights Justification Principle”

Wilson argues that an intrinsic right to intellectual property cannot be used to justify the economic rights aspects of IP. What Wilson means by an *intrinsic* right is that such a right makes claims about what sorts of “features of human beings are of sufficient moral importance to hold other moral agents to owe moral duties to the right holder” (402). In the case of IPRs, the duties that other (non-right-holding) individuals have are duties to respect the IPRs of the rights holders. If an economic right to IP was adequately justified, non-rights holders are expected to recognize the rights of others and so not profit off the thing covered by the right.

The economic aspects of IP, remember, are separable from the author's rights aspects. Economic rights are backed up by law and play out in the market and in the courts. Author's rights are not always institutionalized in the legal system, as we saw. Wilson is silent on author's rights. His goal is to show, in a semi-formal fashion, that one cannot appeal to an intrinsic right to exclusive ownership of *types* of intellectual objects.

Intrinsic rights to IP are unjustified when they fail to satisfy the "Rights Justification Principle":

Any justification of an intrinsic moral right must show that violating the right would typically result in either a wrongful harm or other significant wrong to the holder of the right, which is independent of the existence of the right we are trying to justify. (408)

To help understand this, note that we do not justify the existence of other natural or intrinsic rights, such as the right not to be tortured, by appealing to the harms caused by the violation of the right itself. Instead it is argued that torture has a serious impact on many other things that human beings find valuable and worth protecting, like one's right of autonomy or the right not be subject to unfair or undue treatment. Appealing to the fact that a right holder's right to own IP is violated when others make use of their IP as sufficient grounds to justify these exclusive property right would be "viciously circular" (407).

Well-justified (per the Rights Justification Principle) examples of moral rights are typically things like freedom of conscience, freedom from torture, or autonomy (Griffin 33). For Merges and other pluralists who advocate for foundations that are derived from Lockean or Kantian traditions, the rights are considered to be of the *intrinsic* sort. Merges' appropriation of Kantian theory in

support of IP can be seen to avoid this attack on intrinsic rights by arguing that IP is justified to the extent that it helps protect and enable individual autonomy rights. But it is not clear that, even if we support Merges' Kantian standpoint on IP that this justifies an economic intellectual property right in such a way that it authorizes overriding the other relevant and related autonomy rights of non-intellectual property rights holders.

Whether or not appeals to important human values like autonomy are justified when examined with a wide scope is a difficult question to address. Doing so requires obtaining a lot of background information about how exclusive rights to IP impact those who are not rights-holders. This project, and the empirical commitment of the instrumentalist attitude, seem remarkably similar. Wilson's argument serves not as a knock-down-drag-out reason to *not* have economic rights to IP, but instead it encourages debates on IP to be sensitive to the rights of both creators and consumers. Natural or intrinsic rights arguments place too much of an emphasis on the creator or inventor *as an individual* and not as a creator embedded in a complicated and changing set of contexts. In the next chapter I will take a look at IPRs with a wide philosophical lens, and argue that the realities of our cultural world and of the creative process suggest that this individualistic viewpoint about IP (which tends to lead to proprietarianism) is the wrong way to think about how we should institutionalize and justify intellectual property rights.

Chapter Three: Instrumentalism and the Creative Process

In this chapter I will take a look at some interesting ways that a historical look at creative and inventive processes, when put up against a philosophical analysis of the assumptions that underlie much of intellectual property law, suggests further reasons for resistance to the rise in proprietary sentiments in intellectual property. Previously I argued that we should adopt an instrumentalist attitude towards intellectual property policies and practices. As part of that, we should reject proprietary arguments because they entail an unjustified infringement on overall individual liberty. The instrumentalist attitude, recall, is an empirical and humanistic attitude that should be taken when evaluating, explaining and justifying the various aspects of intellectual property.

Drahos argued that a property instrumentalism should serve moral values, but not serve as the basis of moral value (Drahos 214). In other words, the property rights themselves are not intrinsically valuable, but valuable to the extent that they promote some other value. Determining what moral values intellectual property, conceived broadly, should advance is not my task here. It is certainly possible that the different domains of intellectual property could not all serve the same moral value. For the purposes of this chapter, I will take the language of the United States Constitution¹ to provide an explicit moral value for

¹ See Article I, Section 8 of the U.S. Constitution.

intellectual property - that it should exist to promote the progress of science and the useful arts. To focus my discussion here, I will limit myself to consideration of copyright and patent law.

Using the instrumentalist attitude, once we determine *what* it is we intend to promote, the next step is *how* we can best achieve this goal. The predominant way of doing this is by incentivizing the production of various forms of creative cultural artifacts and novel, useful inventions. Producers of these artifacts are granted exclusive rights to the use and alienation of their products, so that they can in turn receive due compensation for their efforts and even additional reward (profit) as encouragement. It is implicit that without this legal apparatus, there would be significantly less, or no reason at all, for producers to toil over these mechanical, scientific, or artistic artifacts. Society as a whole would suffer, both now and into the future, if there was little or none of this effort.

The Public Domain

But there is another side to this practice. In patent and copyright law, the exclusive rights exist only for a limited time. After the expiration of this limited period, these cultural artifacts and inventions lose the exclusive right of protection, and enter into the 'public domain'. This expiration date on the exclusive economic right is also seen as serving the progress of science and the arts. Creators of new things can freely build upon or otherwise utilize the contents of the public domain as raw material and inspiration. Without a well-stocked public domain, it is likely that the production of new works would suffer,

as producers would lack the freedom to engage with elements of the pre-existing cultural and technological entities that make up the world in which they are embedded.

As noted in the discussion of proprietarianism in Chapter 2, the domain of things able to be covered by both patent and copyright law has steadily increased. As well, the duration of the exclusive economic right of embodied in copyright law has repeatedly been extended. Cultural and legal theorists have sounded an alarm over what is seen as an encroachment into the public domain that will eventually undermine the ends that copyright and patent law are intended to promote. Critics of the extension of patent law to cover things like software and biological organisms have noted both negative economic effects and serious moral problems with such extension.

Many of these critics argue that the dominant justifications and explanations behind intellectual property overemphasize the view of authors and creators as the sole efficient cause of the products, and that this stance conceptually isolates them from their wider social and cultural contexts. This results in intellectual property laws that place excessive weight on the part of the copyright that allows creators and authors to reap rewards from their exclusive rights, and fails to recognize the role of the public domain in facilitating the creative processes.

Much of the critical work on copyright attributes the movement of copyright practice in this direction to a conception of authorship that emerged in the eighteenth century, when practices of writing and publication (in the sense that

we now know it) emerged. This conception of authorship, the critique goes, emphasizes the ‘original genius’ of the producer, glorifying the individual contributions of the author and downplaying the substantial role played by the author's wider cultural context.

We will now look more closely at some critical perspectives of this conception of the “creator” and consider how a re-conceptualization of the creator can lead to a corresponding reconceptualization of an instrumentally-motivated intellectual property.

The Creator

As noted previously in my discussion of the utilitarian justification, determining precisely how to maximize something like innovation or creative expression through the use of intellectual property is a difficult and complicated task. I have argued that this difficulty was not sufficient grounds to reject the utilitarian or instrumentalist accounts as a foundation. Much to the contrary, for the instrumentalist, this empirical task is the most important project in the analysis and development of intellectual property policies.

One way to proceed in this analysis would be to engage in a kind of armchair economics, speculating about what motivates people to create, and then speculating about how institutions and rewards can be arranged to help encourage creative efforts. But this method is decidedly unempirical. Nonetheless, something like this is what is usually offered as a utilitarian justification - that intellectual property rights reward people who engage in costly

and risky creative efforts. Without such a system of reward, we would not have as much creativity and innovation in the world. This is taken as an axiomatic truth.

I do not intend to argue that this is false, only that it needs to be proven. The instrumentalist is committed to an empiricism that necessitates a more scientific and well-documented analysis about what best facilitates creative and innovative processes. This task cannot be taken up here. In fact, as Merges noted, there is much work already done in this area, but the verdict is still out. What can be done here is a brief conceptual analysis of the things that make up the creative process, broadly conceived. Most prominent in the rhetoric of intellectual property law is the concept of creator who serves as the ultimate or efficient cause of some new thing.

As an illustration of this, recall that most of the classical justifications covered in Chapter 1 centered around a solitary creator, conceived of as a laborer (in Lockean theory), or as a self-contained individual or personality (in the Kantian and Hegelian theories). Creators, whether inventors, authors, artists or innovators, are isolated and identified, granted ownership rights and rewarded. If we are to have an ideally-functioning set of intellectual property laws that best achieve their established ends, it is important that creators are properly conceived of. A clear notion of the creative entity will allow us to ensure that whatever incentives or pecuniary rewards are distributed are done so in a way that best achieves the goals of the intellectual property system.

The Romantic Author

To this end, I would like to take a look at some work by contemporary authors on the idea of the author. The legal scholar and cultural theorist Rosemary Coombe suggests that in contemporary “constructions of authorship”:

...the writer is represented in Romantic terms as an autonomous individual who creates fictions with an imagination free from all constraint. For such an author, everything in the world must be made available and accessible as an “idea” that can be transformed into “expression,” which becomes his “work.” Through his labor, he makes these “ideas” his own; his possession of the “work” is justified by his expressive activity. So long as the author does not copy another’s expression, he is free to find his themes, plots, ideas, and characters anywhere he pleases, and to make these his own. (211)

Coombe here emphasizes what copyright scholars refer to as the Romantic conception of the author. This view conceptualizes the author as an isolated wellspring of creative inspiration and genius. This model of the author, she claims, is dominant in Anglo-American copyright law.

Prior to this “Romantic” conception of the author there existed a radically different view, as Boyle notes:

[e]ven the most cursory historical study reveals that our notion of “authorship” is a concept of relatively recent prominence. Medieval church writers actively disapproved of the elements of originality and creativeness which we think of as an essential component of authorship: “They valued extant old books more highly than any recent elucidations and they put the work of the scribe and the copyist above that of the authors. The real task of the scholar was not the vain excogitation of novelties but a discovery of great old books, their multiplication and the placing of copies where they would be accessible to future generations...” (53)

The point here is to note that the current conception of the author has only emerged in the eighteenth century (curiously around the same time that people like Locke, Hegel and Kant were writing), along with the rise of the printing press

and the book trade. The romantic author is seen as an inspired, “original genius” (Craig 211), who works not by divine inspiration, as medieval and early modern writers did, but by the creative and transformative labor of their own mind.

Carys Craig has also argued that “the modern conception of the author as the sole independent creator of an original work is profoundly ideological and historical” (210). The historical milieu from which the romantic author emerged was rife with a new found emphasis on the individualized powers of man.

Politically, emphasis was being placed on the affirmation and exercise of the natural rights of individuals. Religiously, individualism was affirmed in the rise of Christian denominations that emphasized the ability of the individual to have their own personal relationship with god, not mediated by church or clergy. In general, the movement of humanism was thoroughly characterized by a philosophical ideology of individualism – an affirmation of the power, potential, and rights of the individual human being. The most “true authorship”, under this new individualistic worldview, is that which “represents the essence of human individuality” (212).

These foundational “ideals of individual origination inform our sense of the author's right, as so have become engrained in the underlying rationale of the copyright system” (215).

Effectively, conceptions of romantic authorship helped to motivate the establishment of copyright law, and as well, copyright law has in practice reinforced the conception of authorship on which it is based. If a more tenable conception of authorship could be offered, then this cycle of mutual reinforcement that unduly promotes the interests of authors can be broken. Once

that cycle is broken, it should be possible to reaffirm the aspect of the copyright that can best serve its explicit intent.

The Creator, Reconceptualized

Lior Zemer argues in his book, *The Idea of Authorship in Copyright*, that all copyrightable entities are necessarily products of a joint enterprise between the individual author(s) and the public. He rejects the view of Romantic authorship and advocates “a public property right in every copyrighted entity” (21).

Copyright law, motivated by this view of the Romantic author, grants too much power to the individual author in the form of exclusive rights of ownership and control. Simultaneously, such copyright law devalues the role that publicly-constituted external sources play in the process of authorial creation (77). “Every copyrighted entity”, Zemer claims, “depends on the consumption of cultural and social properties that make an author capable of interpreting and absorbing the significance of these properties” (2). But one might argue in response to this that the author is the only one who actually *labors* in the creation of a copyrightable entity. Zemer responds that in fact both author and public labor in the act of creation:

While the individual author invests qualities from his original make-up, his subjective interpretation of the external reality, his talent, and financial resources, the public invests the social and cultural capital, necessary to transform an individual into an “author” and make him realize and translate his talent into the language of authorial creation. (5)

Zemer's view of the individual author is that she is a "transformative entity". Her "personal qualities and abilities such as talent and creativity...can be realized and then vested in actual creative expressions only by the contribution of the public" (79). This active participation of the public-at-large is a literal "authorial contribution" that is should be recognized by "an equal proprietary entitlement" in all copyrighted works.

If we take Zemer's view of authorship seriously, it would certainly lead to a substantial reconceptualization of copyright, and changes in the way that the law treats authors. Zemer's suggestion that the public should have some claim of entitlement to a copyrighted work would seem to negate any role for copyright altogether, in the sense that it serves as an economic right to exclusively profit off the work in the market. This might not be a practical response to the reconceptualization of the creator, but the real value of Zemer's work is that it shows that the alternative conception of authorship recently developed by Byle, Coombe and others paints a picture that is in stark contrast to individualistic picture that is dominant today.

The instrumentalist attitude takes seriously the empirical outcomes of any existing or potential intellectual property policies. By reconceptualizing authorship, we can construct an alternative model of the creative process that not only values the individual creator, but also recognizes the importance of things like the public domain and the contributory role of the public. Whether or not a model like Zemer's should be adopted would depend on how well it serves the values that copyright is intended to serve.

In some other domains of intellectual property, similarly contrasting pictures of the creative environment could be formulated (excluding trademarks and trade secrets). Mark Lemley has vividly argued that there is a similar “myth” at work in patent law - one that holds up certain notable historical characters such as Thomas Edison or Alexander Graham Bell as spectacular, genius creators. Lemley argues that invention is best conceived of as a social, not an individual phenomenon: “Inventors build on the work of those who came before, and new ideas are often ‘in the air,’ or result from changes in market demand or the availability of new or cheaper starting materials” (2). Lemley’s conclusion is not that the patent system should be abolished. Instead, he argues for a patent theory that takes historical facts seriously, as well as the fact that innovation and invention is a social, collaborative process (55).

My conclusion to this reconceptualization of the creative process, in general, is a similar one. Unlike some, I am not willing to eliminate intellectual property all together, hold come some blockbuster empirical findings which conclusively show that innovation in the sciences and the arts would be maximized without such laws. An optimal institutionalization of intellectual property laws might lie somewhere between two extremes - between strong protection for creators and no protection, where everything created goes into the public domain. Most importantly, intellectual property policy should involve a sensitivity to empirical reality and concrete outcomes, and also the capability to change in response to changes in the contours of the creative process.

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