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In Search of the Moral Justification for Intellectual Property Rights

1. Introduction

In this presentation paper I shall explore the normative thinking behind intellectual property rights. I shall argue that there are two main lines of defence for the idea that the institutions of intellectual property rights (IPRs from now on) are morally justified: the consequentialist and the non-consequentialist or deontological line. My thesis in this paper is that both of these clusters of arguments suffer to some extent from flawed reasoning and, if IPRs are to be justified at all, these lines of argument are in need of revision. Finally I shall present some related philosophical questions that are in need of addressing in this context.

2. The Normative Sources of Intellectual Property Rights

The Intellectual Property Rights are a set of legal apparatuses designed to protect the interests of the inventor or holder of an idea by a special institution of ownership. The World Intellectual Property Organisation, which operates under the mandate of the United Nations, has proposed that Intellectual Property shall include the following groups of property rights:

- copyright
- trademark

- patent
- trade secret
- design and related rights.

The legal scope of each of these groups is distinct and has local variations in existing legal systems. My aim here is to briefly examine and illustrate the moral justifications given to this arrangement in total.

The relationship between law and morality has been one of the traditional questions in jurisprudence. As the influential legal philosopher Lon Fuller writes, moral thinking provides the necessary normative basis without which law as an institution would simply be impossible.[1] This is a simple descriptive notion: no matter what, we cannot eliminate moral underpinnings from legal arrangements. The issue is, rather, what those underpinnings are and whose morality is represented in the law's letter – i.e., what the morality in the law ought to express.

Moral philosophy is preoccupied in determining the different sources of normative thought on which legal institutions can or will be founded, that is, whether there is a single set of principles to guide all normative thinking or whether the principles are necessarily diffuse and vary from case to case.

There is a moral account or a normative standing behind every position holding IPRs as valuable – a proposed moral justification – that can be made explicit and inquired

about philosophically for soundness. This is the task to which I set myself in this short essay.

Every position one in favour of IPRs relies on the idea that the ownership of ideas is a good or a right thing – i.e., has value. This value can be either extrinsic or intrinsic: IPRs are valuable either because they enable other, intrinsically valuable things, or, they can be seen as valuable in themselves. This divides the possible positions in two clusters: the consequentialist cluster that holds IPRs valuable as a necessary tool for other goods and the non-consequentialist or deontologist cluster that seeks to justify IPRs as valuable in themselves.

Before assessing these competing positions, some conceptual clarifications are in order. First, Intellectual Property Rights are rights of exclusion. As Peter Drahos writes, by claiming ownership of an idea the holder of an IPR appropriates the idea from the Intellectual Commons.[2] Before the appropriation takes place, the idea is common game (or non-rival good) in a rather radical sense: it cannot be exhausted by exploitation (or else, we'd be forced to define exhaustion in quite an alien manner). Therefore, the appropriation by claiming an IPR is exclusion in an equally radical sense.

What, then, is an idea? The existing intellectual property laws cover a broad scope of different ideas by this single concept: an idea can be held to mean a medical formula, a computer programme, a smiley, a certain combination of shapes and colors in furniture or clothing, a type of animal of certain partially artificial genetic structure, a certain combination of sounds, and so forth. An idea is always a type and never a

token; yet all we can perceive are tokens of these types, and therefore IPRs set limits to the proper and improper expressions of these ideas. Idea, then, in the sense that intellectual property laws see it, is the idea itself – and all the possible expressions it can have.

Hence, the norms expressed in intellectual property laws set standards to both properness of attribution and appropriation of the idea, as well as properness of expression of the idea. The norms are thus threefold: they are norms of a) attribution (or, who is properly recognized as the originator of the idea), b) appropriation (or, who is the proper holder of the rights of exclusion), and c) expression (or, what is a proper expression or token of the idea).

It could be argued that some of the ethical questions concerning copying arise from this linking of three quite different sorts of norms too closely together. For instance, does proper attribution entail rights of exclusion or standards of expression? Or, why do the rights of exclusion extend also to the tokens or the materials of expression of the idea? These are philosophical questions that call for serious discussion.

3. The Deontological/Nonconsequentialist Cluster of normative sources

The Natural Rights view

The first cluster of moral justifications for IPRs that I consider is the nonconsequentialist one. There are three possible positions that can be held in this

manner: a natural rights based view, a fairness based view, and a Hegelian identity based view. All of these positions hold in common that IPRs are to be treated as having intrinsic value and as expressions of fundamental rights of one sort or another.

The first of these, the natural rights view, can be, for example, found in an articulate form in the writings of Robert Nozick[3] and his followers[4]. The argument stems from the thinking of John Locke and Immanuel Kant, and proceeds in the following manner. John Locke argues in his Second Treatise on Government, that man has natural rights to his "life, liberty and estates", rights that include his natural endowments and capabilities. Property is created by mixing ones labour and effort in with nature in order to produce something hitherto nonexistent – so long as: 1) it leaves "enough or as good as" for everyone else to enjoy and no-one's wellbeing is lessened by the appropriation; and 2) as long as nothing goes to waste.[5]

Robert Nozick argues that this is the case with intellectual property as well. Ideas are fruits of labour just like any other, and people are entitled to natural property rights to them.[6] According to Nozick, they fulfil the two aforementioned provisos of non-waste and "leaving-enough-or-as-good-as" because human beings have a limitless imagination, and by making ideas private property they can be exploited to the maximum. Further, following Kant, he argues that the violation of these property rights is a violation of the Categorical Imperative: if people are denied this natural right, they are being used as a means and not as an end in themselves. Therefore, the norms of attribution and appropriation find justification in the natural rights they preserve.

However, objections can be made. First of all, Nozick is not well aware of the problem that arises from the norms of expression included in IPRs. This trouble can be best seen in patent rights: a patent covers not only an idea, but also other ideas similar to it, or different ideas applied in the same purpose as the original idea, depending on specific scope of the patent in question. Same goes with copyrights: similarities with Mickey Mouse or Windows will earn a legal issue in copyright infringement, even though the ideas would be autonomous in their own right.

The more specialized, complex and vital the idea protected, the more is the first Lockean proviso violated. Medical patents are a paradigmatic example of this: there can not be anything as good as a single protected molecular structure that is the only one that fits the purpose of saving human lives from a medical condition. In one sense, the appropriation of a vital or otherwise high-utility idea lessens the relative wellbeing of everyone else.

The fulfilment of the non-waste proviso is also dubious. First of all, the appropriation of an idea does not entail the exploitation of the idea to the maximum as a logical consequence. In fact in many cases IPRs are used as competitive arsenal to prevent competitors from exploiting an idea. The claim that making an idea a form of private property will maximize its exploitation is empiric in nature, wherein it is open to question. Whereas ideas are non-rival goods by nature, privatization is actually a form of wasting the idea's inherent potential.

4. The Rawlsian scheme of intellectual property

The second position, the fairness view, can be formulated by following the thinking of John Rawls.[7] One attempt at this can be found in the writings of David B. Resnik, who conjures up the Difference Principle in defence of IPRs.[8] The argument goes as follows.

Differences in wellbeing within a society are to be tolerated only if the difference benefits in one way or another also the worse-off –-by creating incentives for industriousness, for example. IPRs are privileges that create differences in wellbeing by limiting the free use of ideas; but on the other hand, they are also fair compensations for effort. By administrating IPRs as a system of rewarding inventors for their efforts, the society creates spill-off benefits: IPRs encourage innovations, and these innovations also trickle down goods to the worse-off members of the society. Therefore, the normative basis of the IPRs is to be found in the principles of distributive justice and fairness.

However, there are some problems in this view too. Fairness in itself is a first-order principle that dictates only the general rules by which benefits and burdens should be distributed within a society. It does not dictate exactly how this distribution is to take place. A fair compensation for innovative effort could be admitting rights of exclusion, or it could be something else: a bunch of flowers and a warm handshake, perhaps. IPRs as such are not a necessary conclusion from the principles of fairness; we still need to discuss in more detail the second-order principles to determine the exact contents of rewards. In the above example, Resnik confuses a second-order

principle of utilitarianism to be equivalent with the first-order fairness; but the second-order principle can be either utilitarianism or something else.

This opens the door for considerations of fairness from the viewpoint of all others that are excluded from the use of the idea. Do not the principles of fairness also oblige the appropriator of the ideas to benefit those excluded in some way? For example, we could formulate the principles of fairness in such way that the more vital the idea is, the more open the access to it should be. The fairness view thus formulated does not give a satisfying justification for the forced marriage between the norms of attribution and the norms of appropriation and expression.

5. The Identity based view

A growing number of writers have recently been defending what might be called an identity-based view.[9] Flowing from a more or less Hegelian/Marxian undertow that considers the creative process and the related recognition to be important parts of a personal identity project, they tend to argue that protecting ones right to original self-expression is vital to ensure the autonomy of their will and personality.

This is more or less a diffuse way of arguing; in general it may be said that these types of argument see the idea and its expression as metaphysical extensions of their creator's personality or moral essence. The identity view has much in common with a natural rights view, especially in that people have a natural right to the fulfilment and flourishing of this essence. Accordingly, the purpose of intellectual property laws is to

protect this right from the intrusions of others' wills into one's essence. This view gives special emphasis to the norms of attribution.

More can be said about this view, and it surely deserves a better examination than I am capable of doing here. This type of argumentation is typically rehearsed in the context of unique artistic expression, and its application beyond this context is dubious: the fulfilment of the creative human nature is typically not the first item in the agenda of the multinational companies that propagate strong IPRs in software or in the pharmaceutical industry. Are the works of artistic expression analogous to software or medical formulae – in that they are unique expressions of a creative mind as suggested? And if entertainment or design becomes industry in the sense that it exploits to the maximum the methods and benefits of mass production, do we not lose some of the original appeal of this type of argument? I would suggest that we do; however, this rich line of argument needs to be examined more fully elsewhere.

6. The Consequentialist cluster

The second cluster of arguments seeks moral justification from the consequences of institutions of IPR. This may be articulated as an utilitarian view or an economist maximizing view of IPRs. They hold in common that IPRs are nothing more and nothing less than policy tools that maximize the benefits of some or another intrinsically good thing.

This is the utilitarian ethos behind all economic models of IPRs, and can be found in the common argument that IPRs are necessary as an incentive to maximize innovations that in the end contribute to the net wellbeing (often equated with GDP) of the whole society. The norms of attribution and appropriation strictly flow, therefore, from the other goods that they enable to become maximized.

The validity of this line of defence is dependent on the truth-value of the claim that the IPRs help to maximize the net wellbeing of the society at large. The nature of this claim is empirical, and therefore outside the scope of purely philosophical assessment. However, it should not be taken as an a priori assumption as it so often is. This claim originates historically from an age of more closed and less complex economies, and has not been widely re-examined since.

There are several reasons why this case of argumentation is flawed. The first is that economic models are easily underdetermined by facts. An economic model is a theoretical construct that cannot be applied to reality in a straightforward manner, but needs a set of ceteris paribus clauses and additional assumptions to find connection with the reality of empirical facts. The truth value of the model relies on these additional assumptions. If the number of assumptions added to the model has no limiting factor, we can basically draw a caricature, where any two competing but contradictory, equally elegant models of explanation can be used to explain the same set of facts. The facts themselves do not determine which model is true; hence they are underdetermined by facts. We cannot choose rationally between models solely on the basis of facts, but need other values and ideological preferences to make a choice.

This is the case in the IPRs too: the model where IPRs maximize the net wellbeing is often presented as the only possible option, whereas this apparently is not the case. It is simply a matter of technical effort to design a competing model that fulfils the same net result. This might be interpreted as a simple call for alternatives, rather than a strong argument for refutation of IPRs in total, if so wished.

The consequentialist view has also disputable assumptions about the targeted ends, even if we accept the models as holding some truth value. Is, for example, the maximum number of innovations an intrinsic good of such proportion that it can outweigh all the trade-offs? This remains a question open for debate.

7. Some concluding questions

To refute the moral justification of the IPRs is not to refute them overall, as the above may suggest. We have, so to speak, refuted the antecedent, which does not entail the refuting of the consequent as well. The remaining, here undisclosed argument in defence of the IPRs would be a legal positivist view that sees IPRs as purely contractarian and/or conventional institutions.

I would like to dedicate the remainder of this paper for opening some questions. The first question is: ought there to be "one Idea to rule them all", as suggested in the intellectual property laws? Many of the philosophical problems arise from the background that ideas of all sorts are treated in equal terms as intellectual property.

This, in a philosophical or conceptual sense, does violence to the diversity of ideas and their origin, and results in a rather clumsy and easily exploitable legal apparatus.

The second question is addressed to the background assumptions concerning our view of the creative process that underlies the IPR institutions. The norms of attribution often exclude the fact that ex nihilo nihil: every idea has a history of influencing factors, and that originality of ideas is actually quite limited. We humans as creative beings are "dwarves on the shoulders of a giant", so to speak. Strong IPRs imply a Romantic age myth of the solitary creative genius. Should this conception be revised, and if so, how should the IPR institutions be restructured to match our best knowledge of innovation process?

Third question arises from extending the concept of 'property' to intellectual matters by terms of analogy from material property. This reasoning by analogy is best observed the comparing an IPR violation to theft. By rights there ought to follow other features involved in property rights than mere ownership, such as the questions of distributive justice and equality, should this analogy be proper. How should we address the questions of intellectual wealth, in contrast to the appropriating non-rival goods from the Intellectual Commons? Does the distribution of intellectual property meet our conception of distributive justice? Or, in the case that we abandon the "property metaphor" and treat IPRs as a wholly new and autonomous type of rights, does this abandonment undermine the current IPR institutions in some way or another?

In these questions to feed further thought on the subject I shall end this brief paper, hoping to have shed some light on the moral issues concerning the IPRs.

Markus Neuvonen

Department of Social and Moral Philosophy

University of Helsinki

PL 9 (Siltavuorenpenger 20 A)

00014 Helsingin Yliopisto

Finland

markus.neuvonen@helsinki.fi

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[3] Nozick, Robert: *Anarchy, State and Utopia* (Oxford, UK: Blackwell Publishers 1974).

[4] For example Child, James W.: The Moral Foundations of Intangible Property. In Moore, Adam D. (ed.): *Intellectual Property. Moral, Legal, and International Dilemmas* (Oxford, UK: Rowman & Littlefield Publishers, Inc.1997). Pp 57 – 80.

[5] Locke, John: *Two Treatises on Government*, chapter V. (http://www.constitution.org/jl/2ndtr05.txt, originally published in 1690; cited in 21.07.2008).

[6] Nozick 1974. Pp. 175 – 182.

[7] Rawls, John: *A Theory of Justice* (Cambridge, MA: Harvard University Press 1971).

[8] E.g. Resnik, David B.: "A Pluralistic Account of Intellectual Property", *J. of Business Ethics* 46 (2003): pp. 319 - 335 (Kluwer Academic Publishers).

[9] See for example Fischer, William: Theories of Intellectual property. (http://www.law.harvard.edu/faculty/tfisher/iptheory.html, originally published in 2001; cited in 21.07.2008)