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Intellectual Property

Is Intellectual Property Legitimate? *

by N. Stephan Kinsella **

As Socrates pointed out, the unexamined life is not worth living. As citizens, lawyers, and, more particularly, as intellectual property lawyers, we should, from time to time, examine just what it is we are doing in our lives and careers. It is interesting, for example, that patent lawyers take for granted the legitimacy of having a patent system. In other words, most of us think we should have patent laws — and copyright and trademark and trade secret laws, as well. It would probably surprise many IP lawyers to know that the legitimacy of IP laws historically has been, and continues to be, the subject of some controversy, at least in theoretical or academic circles. Since we are in the business of obtaining protection for clients under these IP laws, perhaps the legitimacy of IP laws bears examining.

Locke and Bentham

Proponents of IP laws typically use two types of arguments to justify IP laws — such as copyright and patent laws, which I will focus on here. The first is a Lockean-style natural law or natural rights argument, which argues that creations of the mind are entitled to protection just as tangible property is. Part of the motivation for this theory is fairness — IP is brought into being by its creator, so as a matter of fairness, the creator has a right to own it and profit from it. The second type of argument is more utilitarian and wealth-maximization based, and essentially argues that production, creativity, and innovation in society is maximized by granting monopolies to writings and inventions so as to "encourage" authors and inventors.

It's Just Natural

One problem with the natural law approach is that intangible property such as patents and copyrights is not like tangible property; most significantly, IP is not naturally "scarce," in the economic sense. Under Lockean theory, the state of nature contains natural property, which is economically scarce, meaning that my use of Blackacre conflicts with your use of Blackacre. Use of such property is exclusive, since my use excludes yours, and vice-versa. So that scarce property and resources can be used without potential users eternally warring over these tracts, ownership is allocated (to the first user who "mixes his labor" with it, according to Lockean theory; or to the creator for created goods) so as to solve this problem.

However, were we in a Garden of Eden where land and other goods were infinitely abundant, there would be no scarcity and thus no need for property rules. For example, your taking my lawnmower would not really deprive me of it, if I could conjure up another in the blink of an eye. Lawnmower-taking in these circumstances would not be "theft". Thus, classical property rights do not seem to naturally apply to things of infinite abundance.

Like the magically-reproducible lawnmower, ideas (as implemented in inventions or creative works, for example) are also not scarce, at least not in the same way as tangible or physical property. For example, if I invent a new technique for growing bananas, it does not take my technique from me if you also grow bananas in this way. Your use does not exclude mine. We can both use my technique to grow bananas; there is no economic scarcity and no possibility of conflict over the use of a scarce resource, and thus no need for exclusivity.

Similarly, if you copy a book I have written, the original (tangible) book is still there. Thus, books are not scarce in the same sense as is a piece of land or a car. As Thomas Jefferson, himself an inventor and the United States' first Patent Examiner, wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." Thus, the argument goes, since use of another's idea does not deprive him of its use, no conflict over its use is

possible, which undermines the natural-law justification for property rights in IP.

A Fair Dinkum

As for the charge that it would be unfair to not provide a right to one's intellectual creations, even advocates of IP do not maintain that the legal system must reward everyone for every single useful idea they come up with. For example, philosophical or mathematical or scientific truths cannot be protected: commerce and social intercourse would grind to a halt were every new phrase, philosophical truth, and the like considered the exclusive property right of its creator. But if it is fair to leave these creators unrewarded (e.g., more theoretical science and math researchers and philosophers), why is it unfair to not reward other types of creators (more practical inventors and entertainment providers)?

Indeed, it could be argued that it is unfair to discriminate between classes of intellectual creators, by providing one group with IP rights and the other group with nothing. For example, I can get a patent on a new mousetrap, but, in one recent case, In re Trovato(1), the inventor of a new way to calculate a number representing the shortest path between two points, an extremely useful technique, was denied patent protection because this was "merely" a mathematical algorithm. Why the distinction here (a critic might ask)? Do not both discoveries require creative intellect, and benefit society? In short, the fairness argument falters, since it cannot be applied uniformly and consistently without itself causing unfairness (and virtually no one is willing to provide IP protection broadly enough to eliminate this perceived unfairness).(2)

Utility Belt

The utilitarian defense of IP has also come under attack. Utilitarianism, founded by Jeremy Bentham, holds that utility, by some measure (such as wealth or its proxies, creation and innovation) should be "maximized," and thus favors legislation that causes certain desired results or consequences to be produced. The utilitarian theory is based on the assumption that such creators would not invest the time or capital necessary to produce such products, if others could copy them with impunity. This is the common justification patent lawyers typically give — "patents are needed to encourage inventors to invent". It is also the rationale in the U.S. Constitution's grant of copyright and patent authority, which provides that Congress shall have power "To promote [i.e. encourage] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."(3)

Critics point to several problems with justifying IP on utilitarian or similar grounds. The first objection is that utilitarianism is an ends-justifies-the-means philosophy, which is itself problematic. Horrible violations of individual rights can be perpetrated in the name of this philosophy, as the history of this bloody century shows. As for IP, utilitarians hold that the "end" of encouraging more innovation and creativity is used to justify the arguably immoral "means" of restricting the could not rely on a near 20-year monopoly.

Further, some argue that the grant of a patent for processes and discoveries having practical application skews research and development away from theoretical R&D. It is not clear that society is better off with more practical invention and less theoretical R&D. Additionally, many inventions are patented for defensive reasons, and much overhead is spent on patent lawyers' salaries and PTO fees, that would not otherwise have to be spent if there were no patents.

Paying the Bills versus Intellectual Integrity

It is not surprising that IP attorneys seem to take for granted the legitimacy of IP; after all, it pays the bills. This acknowledged self-interest does not necessarily mean that we are wrong to support IP; but it does give us cause to be skeptical of the seductive appeal of what may be makeweight rationalizations. As members of our community and as participants in the governmental and legal machinery, it behooves us to recognize our own built-in bias and, on occasion, to question and reflect on the widely-held justifications that we hear ourselves sometimes repeating by rote.(4)

*A version of this article previously was published in 1 Pennsylvania Bar Association Intellectual Property Newsletter 3 (Winter 1998). The patent law subcommittee invites your comments on this important issue. A "chat room" has been set up at <www.free-market.net/forums/federalist>. Please take a moment to read the other posts, and weigh in on this issue.

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views expressed herein are those of the author alone and should not be attributed to any other person or entity.

1. 33 U.S.P.Q.2d 1194 (Fed. Cir. 1994).
2. Except, perhaps, for Galambosians. See Andrew J. Galambos, Sic Itur ad Astra: The Theory of Volition: Volume I, Peter N. Sisco, ed. (1999).
3. U.S. Const. Art. I, § 8.
4. 4 For further discussion of some of the ideas in this editorial, see Tom G. Palmer, Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects, 13 Harv. J. Law & Publ. Pol'y 817 (1990), as well as other articles in same issue (No. 3, Summer 1990) and in Vol. 13, issue no. 1 (Winter 1990) of this journal; Tom G. Palmer, Intellectual Property: A Non-Posnerian Law and Economics Approach, 12 Hamline L. Rev. 261 (1989); Wendy McElroy, Contra Copyright, The Voluntaryist (June 1985) and Liberty on Copyright and Patents (unpublished drafts on file with author); Murray N. Rothbard, The Ethics of Liberty (1982), at 123-24; Murray N. Rothbard, 1 Man, Economy, and State: A Treatise on Economic Principles (1962), at 652-60; Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 Stan. L. Rev. 1343 (1989). Symposium: Toward a Third Intellectual Property Paradigm, 94 Colum. L. Rev. No. 8 (December 1994). A classic series of essays on economic and other aspects of IP is Sir Arnold Plant, Selected Economic Essays and Addresses (1974); see also Edward C. Walterscheid, The Early Evolution of the U.S. Patent Law: Antecedents, appearing in multiple parts at 76 JPTOS 697 & 849 (1994); 77 JPTOS 771 & 847 (1996); 78 JPTOS 77, 615, & 665 (1996).