

Introduction: Philosophy of intellectual property – incentives, rights and duties

*Annabelle Lever**

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

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

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

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

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

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

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

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

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

Control rights and income rights in ideas

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

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

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

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

self-determination made by people who value their unchosen ties to others. Suitably understood, Christman argues, autonomy need not imply or reflect an individualistic picture of self-determination. However, while a link can be made between autonomy and cultural survival in ways that might ground control rights in cultural artefacts, he claims that this is insufficient to justify IP rights in TK, because our interests in autonomy, whether individualistic or not, rarely justify the *income* rights which are part of IP rights.³ Hence, he concludes, claims of autonomy will not justify IP rights in TK, not because there is something wrong with autonomy (it's too individualistic, or indifferent to culturally specific claims) or because there is something about TK that means people cannot have property rights in it, and certainly not because indigenous peoples lack interests in self-determination. The problem, rather, is that *no-one's* autonomy normally justifies the income rights implicit in IP rights, although Christman thinks that indigenous groups might be able to substantiate their claims to income rights in TK based on claims of distributive justice, rather than autonomy.

This is an interesting and helpful argument. It suggests both that indigenous peoples' claims in TK are more complex than is often thought – and that what is true of indigenous peoples' claims is likely true of others' claims in their non-traditional forms of knowledge. However, Christman's ideas highlight two long-standing puzzles in the philosophy of IP. The first concerns the justification for *monopoly* rights in ideas, and the second the relationship between the control and income aspects of IP. Because Christman takes the familiar package of IP rights as given, he argues that our claims to autonomy will only justify IP rights if they show that we have an *exclusive* right to control access and use of a resource. This, as he says, is extremely difficult to substantiate, even in the case of indigenous groups, and is likely to be all but impossible to substantiate for most other people.⁴

Precisely because you can use my ideas without depriving me of the ability to use them, it is difficult to show that my autonomy as an inventor requires me to have exclusive control of my ideas, even if it requires me to have a determinative say in cases where, for example, conscientious objections or deep-seated moral or religious commitments would make some uses of my ideas anathema to me. On the face of it, therefore, Christman's reasons for doubting that our autonomy supports exclusive income rights in our ideas are also reasons for doubting that it supports exclusive control rights in them, too: because experience suggests that

³ John Christman, 'Autonomy, social selves and intellectual property claims', Chapter 1 below.

⁴ Ibid.

autonomy requires us to have a *share* in resources or decisions more often than *exclusive control* over them.

Second, Christman's suggestion that claims of distributive justice, rather than claims to autonomy, might justify income rights in ideas, raises questions about the relationship between justice and autonomy. As Christman puts it: 'restrictions on licensing fees in various forms and degrees in many cases will leave untouched the autonomy of the holders of the IP, as long as the use and publication of the product can be controlled by the creator in ways that are consistent with continued autonomy'.⁵ This is plausible, but the point seems to cut both ways. If, on the one hand, it suggests that the combination of autonomy and distributive justice might justify income rights as well as control rights, it also suggests that the links between our autonomy and the ability to profit from our ideas may be tighter than it first seemed.

Although it is rarely the case that people's autonomy requires them to obtain income from *this* resource, rather than *that* one, it matters to most people's autonomy that they should be able to support themselves by their ideas and ingenuity, and not merely through hard slog and mechanical effort. So the ability to generate income from our ideas, artefacts and knowledge may be necessary for our autonomy, even if autonomy rarely turns on the ability to gain income from *this* particular idea or from *that* specific artefact. Christman's chapter, therefore, points to the way our interests in ideas intersect with basic political, civil and personal rights: because the ability to share in decisions can be as critical to our autonomy as the ability to make them unilaterally; and we can have interests in supporting ourselves through our intellectual and cultural endeavours even though we have no right to income from any particular idea.⁶

Restorative justice, autonomy and intellectual property

Stephen Munzer, too, is interested in the ways that IP rights can reflect and promote the autonomy of indigenous peoples. However, his interest is less in the philosophical elucidation of links between the concept of

⁵ Christman, *ibid.*, pp. 54–5.

⁶ An interesting example of this might be the protection for future earnings by a statutory '*droit de suite*', or resale royalty right, referred to in Beitz, 'The Moral Rights of Creators', at 332, in order to distinguish it from the non-pecuniary moral rights recognised by some copyright systems, such as the French. As Beitz says, even if they are not motivated by economic concerns, moral rights affect the economic interests of creators and of actual and potential owners of creative works. Hence, he thinks, 'Any attempt to justify a system of Moral Rights . . . should at least take account of their impact on these interests, even if, in the end, it turns out that other considerations should be overriding', 339.

autonomy and the different types of rights which make up a typical package of IP rights, than with whether or not there are compelling arguments to justify including protections of IP in legally enforceable reparations for the unjust treatment of indigenous peoples by governments and corporations. Munzer's argument is that there are, because: 'Indigenous peoples have frequently suffered great wrongs – murder, enslavement, rape, torture, theft, forced relocation – at the hands of outsiders. They have autonomy-based reasons for seeking intellectual property IP rights in their TK. There is ample warrant for recognising these rights as a matter of corrective justice.'⁷

Corrective justice is mainly backward-looking, in that it seeks to right past wrongs. However, Munzer notes that it has at least one forward-looking dimension: 'If reparations are justified, we want to have reparations that work.'⁸ Hence, he thinks, six steps are necessary to make a successful argument for IP rights part of a reparations package: that some harms have been committed against an indigenous group or its members; that the wrongdoers are identifiable as a group, or as individual members of a group; that the wrongs unjustifiably harm the indigenous group or its members; that the harmed are identifiable as an indigenous group, or as members of such a group; that the wrongdoers have a moral duty to rectify the wrongs and harm that they caused, and so have no excuses or other factors which remove this duty; and that recognising IP rights in TK would, in principle, form part of an effective package of measures offering compensative or restorative justice to the indigenous group or its members.

As these six steps make clear, familiar problems from the literature on restorative and compensatory justice form much of the subject matter of Munzer's chapter. These include the difficulty of identifying the victims of injustices and of determining who, if anyone, counts as their contemporary representatives and, therefore, the beneficiary of successful claims to compensation. Similarly, there is the familiar difficulty of determining how best to identify and describe the wrongdoers and their contemporary descendants. Here one must bear in mind that if victims and perpetrators are not simply a random bunch of individuals, but members of an identifiable group, that group may no longer exist in its earlier form and, quite possibly, may not exist at all. So, in addition to the potentially complex causal claims involved in determining who did what to whom in the past, arguments for reparations appear also to face potentially irresolvable metaphysical and

⁷ Stephen R. Munzer, 'Corrective justice and intellectual property rights in traditional knowledge', Chapter 2 below, p. 58.

⁸ Ibid.

conceptual problems in explaining what counts as an individual or a member of a group, what counts as a contemporary representative of a past individual or group, and so on. Then, of course, there are the important questions of whether and, if so, how IP rights could form part of an adequate restorative or compensatory package for gross violations of human rights, such as murder, enslavement, rape and torture.

As Munzer argues, from a legal perspective many of these problems are more apparent than real. So, he explains, the fact that bits of property, however precious, are no compensation for murder and other serious crimes, does not mean that they cannot be parts of a package that seeks to rectify injustices that are now beyond the reach of criminal justice – national or international. The appropriate point of comparison for IP rights, in other words, is not *criminal* trial and punishment, but *civil* remedies, which are normally the only forms of legal remedy available to rectify wrongs from long ago. Moreover, some of the wrongs suffered by indigenous peoples at the hands of outsiders include the expropriation and theft of indigenous labour and culture, and the disparagement of indigenous knowledge, artefacts and culture. So IP rights in TK have the great virtue of recognising indigenous peoples' claims in these, and the importance of denouncing and rectifying the wrongs that were done to them in the past.

Similarly, the fact that contemporary members of wronged indigenous groups have a metaphysically complex relationship to their predecessors, as do contemporary descendants of those who perpetrated the wrongs, need not determine the legal status of the respective rights and duties. As in debates over affirmative action, so in debates over restorative justice, we have good moral and political reasons to accept that debts of justice can be owed across generations. These reasons remain, even though there is no perfect way to identify debtors and beneficiaries such that only wrongdoers, or those who benefited from wrongdoing, bear the burden of rectification. Although arguments for affirmative action are often forward-looking in ways that distinguish them from arguments for restorative justice, the fact that both typically concern the current disadvantaged status of members of historically disadvantaged groups means that what matters morally and politically is not the precise way in which people came to be members of one group rather than another, or in virtue of which characteristics individuals can be distinguished into philosophically distinct groups, but what follows from membership, understood as a *socio-political* fact, rather than a *metaphysical* or *biological* one.⁹

⁹ See, for example, Anne Phillips, *The Politics of Presence* (Oxford University Press, 1995); Melissa S. Williams, *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation* (Princeton University Press, 1998); Iris Marion Young, *Inclusion*

In light of Christman's distinction between control and income rights in ideas, an interesting question raised by Munzer's argument concerns whether there would be something wrong – morally, politically or legally – with granting indigenous peoples IP rights to *non-traditional* forms of knowledge, as part of a package of reparations. For Munzer it matters greatly that IP rights recognise the capacities for autonomy of indigenous peoples, and the ways that those capacities have been developed and used to cultivate specific lands, and to produce specific cultural artefacts such as songs, pottery, medicines and food. Precisely because IP rights recognise people's creativity, and that creativity has so often been denied, denigrated or threatened in the case of indigenous peoples, they can be a particularly appropriate form of recognition and compensation. Because IP rights enable indigenous groups to have exclusive access to their land and artefacts, or to decide whether or not to share them with others, they give indigenous groups the sort of legally enforceable options that may help them to exercise their autonomy in a world that is often threatening or callously indifferent.

But it does not follow that it is only IP rights in *indigenous* knowledge that would be justified by these arguments, or that there would be something wrong in supposing that a share in the IP of companies who owe debts of reparations might not *also* be parts of legally enforceable compensatory agreements. Rather, it is important to ensure that these not be regarded as *replacements* for IP rights in TK, where those are desirable and possible. Munzer appears to be unsympathetic to such ideas, at least when formulated as an objection to granting IP rights in TK.¹⁰ However, it seems a merit, rather than a demerit, of his argument, that it suggests a greater variety of remedies for historical injustice than we might otherwise consider, including ones which speak both to the symbolic and the practical aspects of reparations.

Welfare, efficiency and idealisation

Effectiveness is critical, if not determinative, in instrumental justifications of legal rights, although effectiveness is a relative, as well as absolute standard, reflecting the alternatives before us and the nature of our objectives. In previous work, Alex Rosenberg had argued on welfarist grounds that we are justified in having stringent protections

and Democracy (Oxford University Press, 2002). For French light on these debates, see *French Politics, Culture and Society*, 26(1) (Spring, 2008), a special issue devoted to the subject, organised by Daniel Sabbagh and Shanny Peer.

¹⁰ Munzer, 'Corrective justice and intellectual property rights in traditional knowledge', Chapter 2 below.

for patent rights because of the importance of good new ideas to human well-being, and the importance of stringent protections for IP to the supply of good new ideas.¹¹ However, in ‘Designing a successor to the patent as second best solution to the problem of optimum provision of good ideas’, Rosenberg concludes that internal and external threats to the international system of patent rights require us to seek a new ‘second best’ way of promoting good new ideas, and that the model for that second best solution can be found in the reward structure of pure science.

Key elements in Rosenberg’s chapter include the following claims:

- (1) Good new ideas, unlike more traditional factors of production, such as land, labour and capital, do not suffer from diminishing marginal productivity and, therefore, ‘Insofar as welfare is contingent on the total amount of output – the size of the pie, holding shares in it constant – increases in welfare will be subject to diminishing marginal productivity’ unless we can find compensating increases in the supply of good new ideas.¹²
- (2) The capacity of patents optimally to foster good new ideas is threatened by piracy, which constitutes an *external threat* to patents, and reflects the lack of an enforceable global system of IP rights.¹³
- (3) The capacity of patents to foster the optimal level of good new ideas faces an *internal threat* to the patent system: namely, that the holders of patents, which are limited monopolies, may in time be able to use these to build up so much dominance in the market that they are able to manipulate the price for other goods in ways that suit themselves. In other words, they are able to become ‘price-setters’ rather than ‘price takers’ and to avoid the competitive pressures which make the grant of temporary monopolies in a market economy an optimally effective way to promote the supply and use of good new ideas.¹⁴
- (4) The reward system of pure science is, essentially, a prize system in which first discoverers reap all of the prizes of fame and fortune, compared to later competitors. This makes for a maximally efficient use of intellectual resources, and provides the basis for an alternative model to patents, albeit a second best solution, namely, the use of public and privately funded prizes.

¹¹ Alex Rosenberg, ‘On the Priority of Intellectual Property Rights, especially in Biotechnology’ *Politics, Philosophy and Economics* 3(1) (2004): 77–95.

¹² Alex Rosenberg, ‘Designing a successor to the patent as second best solution to the problem of optimum provision of good ideas’, Chapter 3. Hereinafter referred to as ‘Designing a successor to the patent’.

¹³ Ibid. ¹⁴ Ibid.

The availability of the internet makes it feasible easily and cheaply to put together large coalitions of small contributors to establish prizes for particular inventions . . . the feasibility of this proposal turns on the willingness of large numbers of people to provide others with a quasi-public good, even when others free-ride on the costs of the good. Evidence from experiments in game theory suggests that when the amounts individuals pay are low, the number of cooperating individuals is very large, and the benefit is great and non-rivalrous the participants are prepared to tolerate free-riders even when exclusion is feasible.¹⁵

With Rosenberg's chapter, the philosophy of IP lands bang in the middle of the philosophy of economics and in what we might call the philosophy of regulation.¹⁶ It raises important questions about how far arguments for protecting IP should be understood as arguments in ideal theory, and how far as arguments about what is practicable and justified, given the world we live in. Rosenberg believes that the patent system would be close to optimally welfare promoting were it not for piracy and the problem of monopolies. Hence, his arguments for replacing patents by prizes need to be distinguished from the arguments of those who think that patents exacerbate existing forms of inequality, national and global, or that they lead us wrongly to commodify humans, animals and the natural world, or to confuse discoveries with inventions.¹⁷ It is equally noteworthy that Rosenberg does not appear to believe that there is anything intrinsically wrong with pirating patented inventions and ideas, or trying to obtain the benefits of another person's ideas, labour and investments for oneself. So if it turned out that piracy helped to curb or discipline would-be monopolists, and thereby to solve the 'internal' problem threatening the patent system, it would seem that Rosenberg would have no moral objection to it, and might even wish to promote it in certain areas of the economy, while pursuing it more vigorously in others.

In general, the threat to one's market position posed by cheaper competitors can be met in various ways. One can try to lower one's prices, though, given the need to recoup the costs of research and development, it is unlikely that pharmaceutical companies, for example, will be able to compete on price with their unlicensed competitors. Or one can compete on other terms that might seem to justify the higher price one charges for

¹⁵ Rosenberg, *ibid.*, pp. 105–6.

¹⁶ See also Shuba Ghosh, 'When Property is Something Else: Understanding Intellectual Property Through the Lens of Regulatory Justice', in Gosseries, Marciano and Strowel (eds.), *Intellectual Property and Theories of Justice* ch. 5, pp. 106–21.

¹⁷ For a discussion of such concerns, see Annabelle Lever, 'Is It Ethical to Patent Human Genes?', in *ibid.*, ch. 12, pp. 246–64.