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Abundance, Rights, and Interests: Thinking about the Legitimacy of Intellectual Property

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Abstract

It is sometimes argued that legal protection of intellectual property is illegitimate because intellectual objects are not subject to conditions of scarcity and can simultaneously be consumed by everyone. I argue that this line of argument is problematic. By itself, the claim that intellectual objects are unlimited and can be consumed by everyone simultaneously does not imply that we have some sort of moral claim to intellectual objects that is inconsistent with the legal protection of intellectual property. While this claim is certainly a reason against thinking that protection of intellectual property is morally justified, it falls well short of conclusive because it does not contain any information about what respective interests the creator and third parties have in intellectual objects. I conclude that a proper analysis of the legitimacy of intellectual property rights must take into account the morally protected interests that content-creators have both in the expenditure of their limited resources (e.g., time, energy, and intellectual labor) and in the value that the expenditures of such efforts brings into the world.

Keywords: intellectual property, rights, interests, legitimacy, intellectual objects

INTRODUCTION

It is sometimes argued that legal protection of intellectual property is illegitimate because intellectual objects are not subject to conditions of scarcity and can simultaneously be consumed by everyone. On this influential line of reasoning, it is illegitimate - indeed, makes no sense - to afford exclusive property rights in objects that are not subject to conditions of scarcity nor rivalrous in the sense that they can be consumed only by some limited number of people. Accordingly, this line of reasoning concludes that legal protection of intellectual property is morally illegitimate.

In this essay, I argue that this line of argument is problematic. The claim that intellectual objects are neither scarce nor rivalrous, by itself, fails to vitiate the legitimacy of intellectual property protection. First, it is false that intellectual objects are not subject to conditions of scarcity. Second, the claim that intellectual objects are non-rivalrous might be true but falls short of conclusive because it does not say enough about the interest of third parties in intellectual objects and says nothing about the interests of creators in the content they create.

I argue that a proper analysis of the legitimacy of intellectual property rights must take into account the morally protected interests that content-creators have both in the expenditure of their limited

resources (e.g., time, energy, and intellectual labor) and in the value that the expenditures of such efforts brings into the world. To this end, I attempt to point to a number of interests that creators have in their creations, from the standpoint of ordinary moral intuitions, are significant enough to justify some measure of legal protection.

THE SPECIAL CHARACTER OF INTELLECTUAL OBJECTS

Intellectual objects have two distinguishing properties thought to be of theoretical significance in the debate about the legitimacy of legal protection of intellectual property¹: (1) intellectual objects are available in an inexhaustible supply and are hence not subject to conditions of scarcity; and (2) intellectual objects can simultaneously be consumed by everyone. Accordingly, intellectual objects can be simultaneously consumed by everyone without thereby reducing the supply of such objects in the world.²

This is thought to distinguish intellectual objects from material objects in two respects. First, material entities are subject to conditions of scarcity. It is important to realize that the claim is not just the obvious point that there are finitely many objects in the world. Rather, the claim is that there are insufficient material resources at any given time to satisfy existing wants; that is, there will always be more wants than needs. Second, a material good can only be consumed by a limited number of persons at one time. While some objects (e.g., a basketball) can be simultaneously appropriated by more than one person at a time (e.g. by playing a game of basketball), many objects cannot be simultaneously consumed by more than one person (e.g., a book).

According to critics of intellectual property protections, these two distinctions between material and intellectual objects bear on the legitimacy of intellectual property in the following way. The protection of property rights in material objects can be justified on the strength of the idea that material objects are scarce and, in general, cannot be appropriated by more than one person at any given moment in time; the protection of property rights in material objects thus facilitates important interests in physical security by seeking to regulate conflicts that inevitably arise with respect to scarce and exclusive material resources.

But this rationale is utterly unavailable with respect to the legal protection of intellectual property rights. Since intellectual objects are unlimited and can be simultaneously consumed by everyone in the world, the legal protection of intellectual property rights is unjustified. Indeed, it makes no sense, from a moral point of view, to afford exclusive property rights in objects that have these remarkable properties. Accordingly, this line of reasoning concludes that legal protection of intellectual property is morally illegitimate.

Justifying Property Rights in Material Objects

At the outset, it is worth noting that the line of reasoning described above misrepresents the justification for providing legal protection of property rights in material objects. The argument above presupposes that the scarce and exclusive character of material objects is both necessary and sufficient to justify affording exclusive property rights in those objects.

But this is problematic. First, the fact that material objects are scarce and exclusive in these respects does not, by itself, justify protecting material property rights on either deontological or consequentialist views. Most deontological justifications for property rights are primarily grounded in claims about the legitimate expectations of individuals in controlling the disposition of particular

¹ It should be noted that the intellectual property issue has both a moral and legal dimension. The moral dimension concerns whether there is a moral right to intellectual property, while the legal dimension concerns whether it is morally legitimate to protect intellectual property by law.

² See, for example, Hettinger 1989.

material objects. For example, a Lockean argument will point to a party's investment of labor, something to which she is presumably entitled, in some material object to which no one else has antecedent claims. A Hegelian argument will claim that someone who creates an object invests her person (or personality) into the object and is hence entitled to the object in virtue of its being an expression of her personhood. In both of these influential cases, the primary consideration is something other than the fact that material objects are scarce and exclusive.³

The claim that intellectual objects are neither scarce nor rivalrous is insufficient on consequentialist views because it says nothing about the effects of legal protection of intellectual property rights on human well-being. If such protections maximize the relevant dimension of well-being, they are justified; if not, then they are not. The claim that intellectual objects are neither scarce nor rivalrous says nothing that would enable us to infer that intellectual property protection fails to maximize well-being.

Second, it is not clear that the fact that material objects are scarce and exclusive plays any necessary role in justifying the legal protection of material property rights. It might be, from a deontological point of view, that my interest in investments of personality or personhood is sufficiently important to warrant, as a moral matter, legal protection in the form of intellectual property rights. If so, then that fact alone might be sufficient to justify protecting material property rights.

Similarly, the effects of protecting property rights in some class of objects on human well-being might be so great as to justify protecting it despite the fact that the objects are neither scarce nor rivalrous. Indeed, this would be exactly the case if consequentialist arguments for intellectual property succeed; on this line of analysis, the effects of protecting intellectual property on well-being would be sufficiently salutary to justify protecting property rights in intellectual objects despite the fact that they are neither scarce nor rivalrous.

Accordingly, the line of reasoning above incorrectly presupposes that the sole issue with respect to justifying property rights in a particular class of objects is whether the objects can be consumed without reducing a limited supply. While this might be one issue that must be considered by any theory of intellectual property, it is not the only one - and is certainly not the only issue considered by any mainstream justification of property rights in material objects.

The Scarcity of Intellectual Objects

At the outset, it is important to note that the claim that intellectual objects are not subject to conditions of scarcity is ambiguous between two interpretations. According to the first interpretation, the claim is that the set of intellectual objects is unlimited; that is, there are an unlimited number of distinct intellectual objects. According to the second interpretation, the claim is that the supply of any particular piece of content is unlimited. For example, the supply of the intellectual object expressed by the set of sentences expressing the novel "A Tale of Two Cities" is unlimited.

Particular Content as Unlimited

As it turns out, it is false, strictly speaking, that there is an unlimited supply of any piece of content. There can, obviously, be more than one physical entity of any kind, but a piece of content is not a physical entity. For example, the proposition expressed by the sentence " $2 + 2 = 4$ " is clearly not a physical entity. There can also be more than one mental state of any particular kind, like headaches, but a piece of content is not a mental entity. Assent to the proposition expressed by the sentence " $2 + 2 = 4$ " is a mental state and hence a mental entity, but the proposition itself is not a mental entity. The term "mental entity" refers to the contents of a conscious mental life; although a mental state might be about a proposition, a proposition is something ontologically distinct from any mental entity.

³ For a discussion of these lines of reasoning, see McFarland 1999.

There are two possibilities left: either pieces of content (like propositions) do not exist in any genuine sense or they are abstract objects. Either way, it is false that there is an unlimited supply of them. If they do not exist in any genuine sense, then it is not true that there is an unlimited supply of them because, well, there is not a supply of them; I take it that there cannot be a supply of anything that does not exist. If pieces of content are abstract objects, then it is true that there is, in some sense, a supply of them, but false that there is unlimited supply because there is only one of each particular piece of content.

This is pretty clearly true of other abstract objects. It is clear, for example, there is one and only one of the number 2. There are an infinite number of different ways to refer to this number (e.g., “3 – 1,” “5 – 3,” “6 – 4,” and so on), but all refer to exactly the same object: the abstract object denoted by “2.” Indeed, it would be hard to make sense of the idea that there are two distinct abstract entities denoted by “2” because there is no possible property by which they could differ.

The same is pretty clearly true of propositional content. There are a number of ways to express a particular proposition, but there is only one of those propositions. It is hard to make sense of the idea that proposition A has exactly the same content as proposition B but they are distinct abstract objects; a proposition is constituted by its content in exactly the same sense that a set is constituted by its members; there could not be two distinct propositions with exactly the same content.

The matter is somewhat more complicated with respect to other kinds of content because it is not entirely clear what constitutes the relevant kind of content. It is not clear, for example, what constitutes the content of the song “Star Spangled Banner” or the content of the novel “A Tale of Two Cities” because songs and novels are subject to a variety of different interpretations. But if songs and novels have a determinate (as opposed to determinable) content, then a song with exactly the same content as “Star Spangled Banner” is the same song as “The Star Spangled Banner.” On the assumption that pieces of content are abstract objects, then, the claim that there is an unlimited supply of any particular piece of content is false.

The most charitable way to construe the claim that there is an unlimited supply of any particular piece of content is as a claim about the ability of persons to consume it. On this interpretation, the claim that there is an unlimited supply of the content of the novel “A Tale of Two Cities” simply means that any number of people, in principle, can consume its content; you and I, along with any number of people, can enjoy the content of this novel without our interfering with each other in any way.

But this interpretation is, of course, logically equivalent to the claim that intellectual objects are non-rivalrous – and, as such, adds nothing to the argument against the legitimacy of intellectual property protections. As such it is vulnerable to exactly the same criticisms as the claim that intellectual objects can simultaneously be consumed by everyone. I will postpone an evaluation of this latter claim to evaluate the other interpretation of the claim that intellectual objects are not subject to conditions of scarcity.

The Set of Intellectual Objects as Unlimited

It is true, of course, that the set of intellectual objects is distinguished from the set of material objects in that the former is infinite while the latter is finite.⁴ Given that there are, for example, infinitely many natural numbers, there are infinitely many true propositions defined by the schema “1 is less than n.” Since the set of intellectual objects includes the set of these propositions, it follows trivially that the set of intellectual objects is infinite.

But claims about the scarcity of a particular resource are logically independent of claims about whether it is finite. The claim that a particular resource is scarce is not implied by the claim that there is a finite supply of the resource. If the amount of the resource greatly exceeds what can be used of it by the relevant population, then it is not scarce. Conversely, the claim that a particular resource is not

⁴ Indeed, there are an *uncountably* (or non-denumerably) infinite number of them: for every distinct real numbers m and $n > m$, there exists an intellectual object that expresses the proposition that $n > m$.

scarce is not implied by the claim that there is an infinite supply of the resource. If the *available* amount of the resource is insufficient to satisfy existing wants, then even an infinite supply of a resource might be subject to conditions of scarcity. Living space is scarce, for example; even if there is an infinite amount of space in the universe, only a finite amount is available to us as living space.

This reveals something interesting about scarcity claims - namely, that they are relational in character. Any claim to the effect that a resource is scarce asserts that there is not enough of the resource to satisfy the desires (as opposed to needs) for it. Food, for example, is scarce at any given moment because there is not enough of it available to feed everyone (though we could greatly increase the food supply by diverting the grain used for growing cattle for meat consumption directly to feeding people). The assertion that a resource is scarce states a relationship between what is wanted and what is available for the satisfaction of those desires.

As is evident from the discussion so far, what matters with respect to claims of scarcity is not, strictly speaking, the total quantity of the resource; rather, what matters is the total quantity of the resource that is *reasonably available* to us. While it is true that there are infinitely many intellectual objects in logical space, not all of them are available to us for consumption. There are, after all, many things we do not know about the world that we want to know, which include normative, scientific, and mathematical issues. Information we lack is simply not reasonably available for consumption in any sense relevant with respect to claims about the scarcity of intellectual property.

This is also true of non-informative intellectual objects. While there might be an infinite number of novels floating about in logical space, only a finite number of them are available at any given moment. Assuming that we survive indefinitely and continue to engage in such creative activities, there are billions of novels that will be written. I would be surprised, in contrast, if there were more than a few million novels written in our history up to now.

The reasonable availability of intellectual objects depends on the activities of human beings in a way that the reasonable availability of material objects does not. Though people must make cars, many material objects that can be directly consumed are naturally occurring; human labor is not, strictly speaking, *necessary* to ensure the availability of land. It is true, of course, people have sometimes increased the supply of land by draining bodies of water or moving soil around, but there was land long before people did anything to try to expand its supply. In contrast, there are no intellectual objects occurring in nature in an analogous way.

While it is true that states of affair (like the state of affairs that consists in its raining today) occur naturally, those states of affairs are a source of intellectual objects - and are not themselves intellectual objects. Intellectual objects are abstract, and hence, non-sensible objects that are grasped by an act of the understanding. The apprehension of even the most trivial fact, which results in an intellectual object, requires intellectual activity on the part of someone. My apprehension of the proposition that it is raining outside, an intellectual object, requires more than just a visual perception; it requires the application of concepts to what is in my visual field and the production of the judgment in propositional form. An intellectual object of any kind can be reached only through the mediation of some intellectual activity.

This is all the more so of complicated intellectual objects like mathematical proofs, scientific theories, and novels. Intellectual objects are not like fruits on a tree that can simply be picked and consumed; someone has to do something to make them available for consumption. Indeed, it might take hundreds of years of concerted intellectual activity on our part to gain reasonable access to an intellectual object in logical space - as was the case with the proof of Fermat's Last Theorem.

This bears on the scarcity claim in the following way. Since intellectual objects are not immediately available in logical space to be picked and consumed, the *available* supply of intellectual objects is not

unlimited. What has been made reasonably available gets larger from moment to moment, but the number of available intellectual objects remains finite.⁵

More importantly, there are not enough of these objects to satisfy all of our desires for them. Again, the fact that there is so much more that we want to know about the world, for example, shows that there is not enough available information to satisfy all our desires for them. The set of *available* intellectual objects, then, is both finite and insufficient to satisfy our desires for them.

Moreover, and this is crucial, the available supply of intellectual objects can be increased in only the same way that the available supply of material objects can be increased - namely, by deploying a resource that is limited and valuable because it is limited: human labor. Every moment I spend in writing this paper has value to me because I will live for only a limited number of moments.⁶ To increase the number of novels available for human consumption, then, someone has to devote her time and her energy, resources of value to any being with a finite lifespan, to produce one. To increase the number of apples available for human consumption (beyond the small number that naturally occur), someone has to devote her time and her energy to it. This is no less true of intellectual objects than it is for material objects.

Indeed, it is not even true that the supply of some currently available intellectual object is unlimited at any given time. As a conceptual matter, the supply of a resource at any given time is determined by how much of it is immediately available for consumption at that moment. If only finitely many people can obtain and consume the resource at any given moment, then the supply of it is finite. The consumption of an intellectual object requires that it be made available in some form from which it can be extracted by beings like us. In particular, it must be represented in some sensible way by use of a language, something that must be done *by* someone.

While it is true, of course, that any particular piece of information can be simultaneously made available to more people through the World Wide Web than could have been made available by printing books, it is simply false that it can be made simultaneously available to any mind that desires it. While broadband space might be more plentiful than paper, it is still finite and hence limited - as anyone who has ever been the victim of a denial of service attack can presumably attest.

This means that intellectual objects and material objects have more in common than the argument assumes. If the concept of scarcity is relational in the sense described above, then it is not true that material objects are scarce while information objects are unlimited. If this is correct, then the claim that intellectual objects are unlimited cannot provide a reason for thinking that intellectual property rights are illegitimate; a false premise, after all, provides no support for any conclusion.

The Simultaneous Consumption Thesis

The discussion in the preceding section has an important result. The proponent of the idea that the legitimacy of intellectual property protections can be refuted by the special character of intellectual objects will have to rest her refutation on just the claim that intellectual objects, unlike material objects, can simultaneously be consumed by everyone without reducing the available supply. Since intellectual objects are subject to conditions of scarcity, as that term is properly understood, a critique of intellectual property rights cannot soundly be grounded in the claim that intellectual objects are scarce.

The idea that intellectual objects can be simultaneously consumed by everyone is a modal claim that can be expressed as follows:

⁵ It is not clear whether the number of available arithmetical information objects is infinite. For this reason, the above should be construed as excluding such propositions. It should be clear that there are only finitely many novels, songs, films, empirical statements available for consumption.

⁶ I will say more on the value of human time, energy, and labor in the next subsection.

The Simultaneous Consumption Thesis (SCT): It is *possible* for everyone to simultaneously consume an intellectual object without thereby reducing its supply.

If, for example, everyone is already in possession of a novel, then everyone can consume it without reducing the number of novels available for consumption. My reading a novel does not reduce its supply the way that my eating an apple does.

It is important to note, as an initial matter, that the relevant sense of “possibility” is not *logical* possibility. The idea that there is some logically possible world in which such objects can be simultaneously consumed by everyone tells us nothing about whether intellectual property protection is warranted in this one because the relevant logically possible world might have radically different features from this one: in a logically possible world in which there is just one person, for example, SCT will be trivially true.

Accordingly, the relevant sense of “possibility” should be construed as targeting a narrow class of *nomologically* possible worlds. These worlds will have the following features: (1) they have the same causal laws of nature as this one does; (2) they are as technologically advanced as this one is; and (3) they have roughly the same number of human beings (and hence have roughly the same needs and desires) as this one has.

Though SCT thus picks out worlds very much like our own, it should be clear that SCT is true only in principle, and not as a practical matter. A novel cannot be consumed without obtaining it in a consumable form; and, as we saw above, it is simply not true that everyone can simultaneously obtain a novel because the availability of printed media, both digital and material, is limited - though to differing extents and in different ways. It is not, at this time, technologically feasible for everyone to simultaneously access any particular supply of intellectual content.

Thus construed, SCT can bear only limited weight in supporting the idea that intellectual property protections are illegitimate. To begin, SCT does not imply that we have a moral right to intellectual objects inconsistent with legal protection of intellectual property. Indeed, the claim that intellectual objects can be simultaneously consumed without reducing their supply does not even imply we have a morally protected interest in intellectual objects because it says nothing at all about whether we have an interest *of any kind* in such objects.

Whether the fact that intellectual objects can, in principle, be consumed simultaneously by everyone without reducing their supply confers moral protection on our interest in intellectual objects depends upon the strength of our interests in those objects. To say that a person has an interest in X is to say either that her consumption of X contributes something to her well-being or that she believes it does. But neither claim tells us anything about the strength of her interest in X because it says nothing about how much it contributes to her well-being.

Some interests are vital in the sense that they make essential contributions to a person’s well-being and hence constitute needs, while others may benefit a person’s well-being in non-essential ways. No one can survive, for example, without food for long, but everyone can survive without a host of things that they merely want. More television channels, a bigger SUV, a more prestigious job are all things that might make one happier and hence conduce to one’s well-being, but the contribution that they make to well-being is considerably less important than the contribution made by food.

The moral significance of an interest is determined, at least in part, by the extent of the contribution it makes to well-being. It is reasonable to think that it is a necessary condition for persons to have a general moral right to some entity X that X is essential to well-being. One might reasonably think, for example, that people have a moral right to be free from hunger when there is more than enough food to feed everyone. Not everyone agrees with this, of course, but everyone agrees that the vital quality of the need for food has a special moral significance; eradicating hunger is, after all, a moral problem of considerable import. In contrast, most people would deny that people have any sort of protected moral interest in wearing the latest styles of clothing, despite the fact that being fashionable can favorably impact one’s social life in a variety of ways.

The problem here is that the strength of our interest in intellectual objects varies from object to object depending on its nature. There is presumably some information that someone must have in order to survive in any given society: she must, at the very least, know how to go about providing for her basic needs. In a society without an economic safety net of any kind, this will presumably require knowing how to make a sufficient living by selling one's labor. In a society with a safety net, this might also require knowing how to obtain transfer payments in the event of a crisis.

From the standpoint of ordinary moral intuition, it is not unreasonable to think that we have some sort of moral right to such objects. Most people in cultures like this agree that we have moral rights to life, liberty, and property - interests absolutely vital to well-being - and that the reasons for these rights has something to do with the importance of the underlying interests.

Indeed, this sort of thought might help to explain the common intuition that the citizens (at least in comparatively affluent societies) have a moral right to an education at public expense that would justify coercively taxing even those citizens who disagree. While the fact that an educated populace produces a variety of social benefits is a reason to think that, as a matter of policy, citizens should collectively fund education, this does not provide a reason to think that some individual has a *right* of some kind to it. The fact that my getting an education might benefit society might explain why society has some sort of legitimate expectation against me that I get an education; but it cannot explain why *I* might have a *right* to an education. Rather it is the fact that I need some education to minimally thrive that would, other things being equal, justify thinking that I have a moral right to it; that is, it is the fact that education is *vital* to well-being that justifies thinking we have a right to it.

But most intellectual objects are simply not essential in this respect. The vast majority of information we consume in any given day is sought not because it is needed to survive, but because it is interesting or entertaining. I seek out information about sports, entertainment, fashion, philosophy, etc. because it engages me in some way. Non-informative intellectual objects, like music, fiction, and film, are sought out for similar reasons. I seek out such objects to relieve boredom or to have an aesthetic experience - and not because I need them to survive.

It is true, of course, that intellectual objects appeal to a wide variety of interests that fall along the spectrum between trivial desires and vital needs.⁷ For example, our interest in certain philosophical or fine-artistic objects might fall short of being a need vital to survival, but one might reasonably think that a person cannot flourish in all the ways necessary to a meaningful human life without access to such objects. After all, what is needed for humans to fully flourish, as Mill might put it, is different from what is needed for pigs to fully flourish (assuming it makes sense to think of a pig as "flourishing").

The import of SCT depends on the nature of the interest in any particular intellectual objects. Other things being equal, the fact that a piece of *vital* information (i.e. essential to survival) can simultaneously be consumed by everyone without reducing its supply provides a plausible reason to think that we have a moral right to it that should be coercively protected by the state because my consumption of the information does not harm anyone by removing it from the stock of information that can be consumed. Not having access to something that I need to survive is fairly characterized as harmful, even if such harm is not morally wrongful.

It might even be plausible to think that SCT provides a good reason for thinking that we have some sort of morally protected interest to intellectual objects that are needed for beings like us to fully flourish in all the ways that we should flourish. I take it that it is uncontroversial that, other things being equal, a state of affairs in which one person flourishes in the relevant respects is morally preferable to a state in which she does not flourish in all of those respects. This, of course, does not imply that we have any right to the relevant objects; but it does, together with SCT, make plausible the idea that we might have some sort of protected interest in those objects.

⁷ I am indebted to an anonymous reviewer for making me see this point.

Still, is hard to see how SCT would elevate even these lesser interests in information - much less the trivial interests in being entertained - into a moral right to information that is, at the very least, inconsistent with existing intellectual property protection. The problem is that SCT tells us nothing whatsoever about whether creators of intellectual content have a morally protected interest of some kind in controlling the dissemination of their creations. SCT tells us nothing whatsoever about content-creators and hence simply lacks the resources, as a logical matter, to preclude the possibility that content-creators may have a morally protected interest in controlling their creations that, at least in some cases, would outweigh whatever interests other people might have in this content.⁸

While SCT surely provides a reason against thinking that protection of intellectual property is morally justified, the strength of this reason is just not clear – beyond its being clear that it falls well short of being a conclusive reason. To determine its strength relative to other supporting and counter-reasons, we need to consider, at the very least, the interests that content-creators might have in controlling the dissemination and use of their creations and the extent to which it might be of moral significance.

But once it is admitted that whether we have a right to intellectual objects inconsistent with intellectual property protections turns on what kinds of interest we have in those objects, the terms of the debate change dramatically. Instead of simply being able to assert some right to intellectual objects, the opponent of intellectual property protection can adequately defend this claim only by an appeal to our interests. It is not enough to simply point to those properties of intellectual objects that distinguish them from material objects; to resolve potentially competing claims to an intellectual object, one must give an analysis that makes reference to the precise interests to which that object appeals and hence to the value of that object to those interests.

THE INTEREST OF CONTENT-CREATORS IN CONTROLLING USE AND DISSEMINATION OF THEIR CREATIONS

The Value of One's Time and Labor

This much should be clear at the outset: content-creators have a *prudential* interest (i.e., an interest from the standpoint of objective or perceived self-interest) in controlling use and dissemination of their creations. To devote time and energy to creating intellectual content, time and energy must be diverted from other activities. This means that any particular deployment of time and energy involves costs that are significant from the standpoint of prudential rationality, including opportunity costs involved when one foregoes other opportunities to devote resources to a particular activity.

It is important to emphasize that the prudential interest is of profound significance. My time and energy matter a great deal to me because I know that I have a limited supply of both. Like everyone else, I am a finite being with an all-too-limited life span. Every moment I devote to a particular task spends one of a limited supply of moments I have in life to do all the things that make life worth living.

And, as I grow progressively older, my time and energy become increasingly precious to me. There are three reasons for this - one biological and the others psychological. First, and most obviously, our supply of time and energy is diminished over time as we get nearer to the end of our life-spans. Second, we tend to become more sensitive to the fact of our own mortality as we grow older. It is well-

⁸ There are also legitimate worries about the contents of such a right. A right to intellectual content of the sort described above would presumably imply that persons could be compelled by legal process to disclose the content of their creations. If you know that I have written a song but not publicly performed it and want access to it, a right to access all intellectual objects without charge would presumably entitle you to coercive legal measures to compel me to disclose the song to you. I think it is fair to say that even the most ardent opponents of intellectual property protection would not be prepared to go this far. While it is not entirely clear what a right to access content would look like, the generality of such a right seems to conflict with ordinary intuitions.

known that older people have a far more acute sense of their own mortality than younger people and that this sense becomes more acute over time. Third, a person's experience of time tends to change as she grows older: the passage of a year is experienced as much quicker by an older person than by a younger person.

As a general matter, these elements lead people to assign more value to expenditures of time and energy as they grow older because all draw attention to the unhappy fact that one's supply of moments is limited. It seems clear, then, that, as a descriptive empirical matter, people generally regard their time and their energy as prudentially valuable.

It is true, of course, that the mere fact that people generally have a prudential interest in something tells us little about whether they have a morally protected interest in it. By itself, the claim that X wants something does not imply that X has a morally protected interest in it. People commonly want things, like prestige and power over others, to which morality affords no significant protection.

But the point here is not just the descriptive point that people generally value their time and energy: it should also be clear that, as a normative matter of practical rationality, people *should* regard their time and energy as prudentially valuable. Someone who cares nothing about how she spends her time and energy is fairly characterized as doing a disservice to herself - if not to the community in general. Indeed, I would be tempted to regard such an attitude as signaling some psychological disease; other things being equal, someone who cares nothing about how her time and energy are spent is probably severely depressed, and possibly suicidal. It is clearly irrational from the standpoint of prudential interest to care so little about what is, in essence, the central resource for pursuing the goods that make life worth living.

The normative import of such interests from the standpoint of rationality, then, provides some reason to think that the prudential interests we have in our time and energy receive some protection from morality. We should care about how we spend our time and energy because they are so central to ensuring that we flourish in all the ways that we should. This distinguishes our interests in such matters from interests that are more trivial from a moral point of view - such as our interests in even more affluent standards of living that allow us, say, to buy bigger and more expensive cars.

A stronger argument is available with respect to the moral significance of our interests in our expenditures of time. It is reasonable to think that we do, and should value, our time as an end-in-itself - and not merely as a means. While it might be true that energy is only instrumentally valuable (i.e., valuable as a means) because it enables us to achieve other ends by doing things, time is both instrumentally and intrinsically valuable.⁹ Time is, of course, of considerable instrumental value because having some time is a necessary condition to being able to achieve *any* end; we can be and do nothing if we do not have an available supply of time. But if continued sentient life is, as seems reasonable, of considerable intrinsic value (i.e., valuable as an end-in-itself), then it follows that having a supply of time is also of considerable intrinsic value to a sentient being: someone who has no available time is no longer alive.

Again, there are two points here - one descriptive and one normative. The descriptive point is that people generally regard the moments of their lives as ends-in-themselves and hence as valuable for their own sakes. The normative point is that we *ought to* regard the moments of our lives as ends-in-themselves and hence as valuable for their own sakes. If we should regard our lives as intrinsically valuable, then we should regard each moment as intrinsically valuable - since, again, a sentient life consists of the moments that a being remains sentient.

Moreover, it seems clear that people should also regard *other people's* time as intrinsically valuable as ends-in-themselves - precisely because every other person's time is - and should be - so intrinsically valuable to her. If, as seems reasonable, we should value the *lives* of others as intrinsically valuable, then it follows that we should value the moments that constitute those lives as intrinsically valuable.

⁹ For a discussion of the significance of the distinction between intrinsic and instrumental value in ethical theorizing, see Himma 2004a, b, and c.

This suggests that our prudential interests in time are afforded significant protection by morality. While the claim that some resource *r* is, or ought to be, regarded as *instrumentally* valuable does not imply that morality protects persons' interest in *r*, the claim that *r* is - and *ought to be* - regarded as *intrinsically valuable* does seem to imply that morality protects the interest in *r*. As a matter of substantive moral theory, what is, and ought to be, regarded as intrinsically valuable to beings like us with the special moral status of personhood is deserving of moral respect because these values constitute our ultimate ends; and it is very difficult to make sense of the idea that we deserve respect *qua* persons if what we ought to regard as our ultimate ends do not deserve respect from others.

One plausible way of respecting this intrinsically valuable resource is to respect the interest in controlling the use and dissemination of what one has expended one's time to create.¹⁰ To respect another person's time requires refraining from doing something that would ultimately convert a worthwhile expenditure of time into a waste of a valuable resource. And it should be clear that protecting the interest in controlling the use and dissemination of one's creation is a value-preserving form of respect. Paying you, for example, a negotiated price for limited use of your creation, and respecting those limits, clearly preserves the value of your expenditure of time.¹¹

Meta-ethical considerations regarding the sense in which moral protection is grounded in attributions of intrinsic value suggest, then, that we have a morally protected interest in the time and energy we spend on creating intellectual content. While our interest in the energy spent might be only instrumentally valuable, it is sufficiently central to our flourishing that it is reasonable to think it receives some protection from morality. Moreover, our interest in the time we spend is intrinsically valuable and hence deserving of respect. And one way of protecting these interests is to allow an author some control over the content she makes available to the world.

Considerations of Justice

Normative principles of justice also suggest that the interest in controlling the disposition of one's creations is afforded some moral protection. In this connection, it is crucial to recall the earlier point that intellectual objects are not naturally occurring in a form that can readily be appropriated by any person. While it might be true that all possible intellectual objects exist in logical space (whatever that is), not every intellectual object is immediately available for appropriation. Intellectual objects are made available through the creative work of content-creators who discover or invent that content and thereby render it in a form that can be consumed by others. If, for example, Charles Dickens does not write *A Tale of Two Cities*, it is simply not available for consumption.

This means that the efforts of content-creators introduce value into the world when they make available previously inaccessible intellectual content. When Dickens completes *A Tale of Two Cities* and makes it available to others, he has thereby produced something of value and introduced new value into the world. And such efforts are necessary to bring such value into the world; if Dickens does not compose this novel, its value is never introduced into the world.

Ordinary considerations of justice suggest that what people deserve is determined by the value and disvalue they introduce into the world by their free acts and that people should, other things being equal, get what they deserve - and hence have some sort of morally protected interest in what they deserve. Such a view underlies, most conspicuously, most theories of punishment,¹² but it also

¹⁰ I do not mean to suggest here that this is the only way.

¹¹ One could argue, of course, that authors who do not wish to give away their creations should refrain from expending time in creating content, but one needs an argument in support of this counterintuitive claim that goes beyond pointing out that other people want those creations. As we have seen, the mere fact that someone wants something does not entail that she has a morally protected interest in it.

¹² Indeed, even utilitarian theories frequently attempt to justify a principle that punishment is justified only insofar as deserved. What distinguishes pure retributivist views from such views is that the retributivist thinks that considerations of desert are both necessary and sufficient to justify punishment while the utilitarian believes that such considerations are necessary but not sufficient. In addition, it must be the case that punishment maximally promotes community utility.

underlies positive views about how to distribute the material benefits and burdens of a society – which, of course, entail views about the extent to which property rights are legitimate. Ordinary intuitions about justice, then, suggest that people have some sort of morally legitimate interest, other things being equal, in the value they bring into the world via their intellectual efforts.

Of course, other things are not always equal. It is quite reasonable to think, as noted above, that third parties have a special interest in intellectual content needed for survival that outweighs whatever interest its author might have in the value she brings into the world - though this should not be taken to mean that the author is owed no compensation. It might also be true that we owe it to individuals and nations to ensure that they have sufficient information to compete in a global economy.¹³

Moreover, the distinction between factual intellectual objects and non-factual objects is relevant here. It is not unreasonable to think that third parties have a special interest in important factual information that outweighs such interests on the part of the author. Facts, after all, are not likely to lay undiscovered forever; if one person doesn't discover some fact, someone else probably will - something that is just not true of non-factual intellectual objects like novels and songs. If it is true that people have some special interest in factual information, this would support the altogether plausible claim that it is wrong to assign property rights in genetic sequences.

But, in other contexts, it is arguable that the interests of third parties are just not significant enough to trump the author's interest in the value she brings into the world. First, if our interest in the value we bring into the world by our intellectual efforts is strong enough, it will outweigh third-party interests in being able, say, to obtain the content for free. Second, in many instances, the author not only creates the supply of the object, but also creates the demand for the object. No one could have had a desire for *A Tale of Two Cities* before Dickens set to work on it. Without the author's intellectual efforts, neither the value nor the demand for it exists in any practical sense.¹⁴

Notice that this argument does not presuppose a Lockean framework for justifying property. The idea is not that such interests are morally significant because the author has mixed her labor with some sort of intellectual raw material in a way that cannot be extracted. Rather, the idea is that such interests are morally significant because they implicate uncontroversial principles of fairness that are widely accepted among persons in our culture. From the standpoint of fairness, I have some minimal claim to the value I bring into the world through expenditures of my time, energy, and intellectual labor - regardless of how minimal those expenditures might be.¹⁵

SUMMARY AND CONCLUSIONS

I have argued that it is implausible to think that a right to intellectual objects (qualified perhaps by a limitation that excludes intellectual objects in which persons have privacy rights) can be justified solely by an appeal to our interests. First, the strength of our presumed interests in intellectual objects varies according to the content of those objects. While our interest in information essential to survival presumably rises to the level of a need, our interests in other kinds of intellectual content like fiction,

¹³ I am indebted to Herman Tavani for this point.

¹⁴ While I am not prepared to argue the point here, I am inclined to think this interest rises to the level of a right. The interest we have in the ideas, time, energy, and intellectual labor we invest in creating new content (and hence bringing new value into the world) are sufficiently important, it seems to me, to give rise, irrespective of effects on utility, to a right that binds any third parties who lack any greater interest in the products of those expenditures than a *desire* for those products. Of course, the suggestion that content-creators have a right over their products is not to say anything about the content of that right. In particular, it is not to endorse the conception of that right that is incorporated into, or expressed by, copyright law in the US.

¹⁵ It is worth noting that such considerations provide stronger support for intellectual property rights than for material property rights in one important respect. One can always plausibly argue that one's investment of labor in a material object is lost because it is invested in an external material object in which one has no antecedent claim; after all, if I carve a sculpture out of an unowned tree, I am putting my labor into something in which I have no antecedent claim. In contrast, one's investment of labor in creating content does not involve working on something to which one has no antecedent claim; I do not carve a novel out of some previously existing object that is external to me.

poetry, film, and music rises only to the level of wants; while some wants are obviously more important than others, content that is merely *wanted* (as opposed to needed) conduces to well-being without being essential to survival.

This is problematic because rights-claims are much more plausibly supported by an appeal to needs (e.g., health-care, education in a competitive society, and a minimum income) than by an appeal to wants (e.g., entertainment or the most fashionable clothing). Indeed, in many cases, our interest in a particular kind of content is no more important than a desire to avoid boredom or to be entertained. I know of no case in which such a comparatively unimportant interest in something receives any significant moral protection.

Second, whatever moral interests we have in a particular kind of intellectual objects must be weighed against the moral interests that the creator has in them. One can plausibly argue that someone who invests time, energy, personality, and labor in creating intellectual content has a morally protected interest in her creations because she has (1) invested something of value to her and (2) brought new value in the world. Accordingly, one can plausibly conclude that she has a morally significant, though not necessarily conclusive, interest in controlling the disposition of that content that parallels the interest she has in controlling the disposition of a material creation.

Nevertheless, it is important to realize that the argument offered here does no more than to elaborate a framework for evaluating various issues that might arise with respect to the legitimacy of intellectual property - and hence tells us nothing substantive about whether there is such a right or about what this right might look like in practice. For example, the analysis in this paper does not imply that content-creators have a moral right to control the use and dissemination of their creations because the claim that morality affords some protection to an interest, by itself, tells us nothing about how much protection morality affords to it. Some intrinsically valuable interests rise to the level of moral rights, like the interest in life, but others, like the interest in happiness, do not; it seems clear, after all, that no one has a moral right to happiness.

Nor does the analysis of this paper imply that the author's interest necessarily wins in a conflict with the interests of other persons. Again, the claim that authors have a morally protected interest in controlling the disposition of their creations does not tell us anything about either how strong this interest is or how strong the interests of other persons in that content might be. For this reason, it cannot tell us anything about how this interest engages with the interests of other persons.¹⁶

But the analysis here does imply that the propriety of intellectual property must be evaluated within a framework that takes into account the interests of *both* the public and the creator. In particular, it is to assert that we cannot adequately assess claims about the propriety of intellectual property protection in any particular case without balancing the interest that the creator has in controlling disposition of the content she has created against the interest that other people have in consuming that content. The moral propriety of intellectual property protections simply cannot be accurately assessed without taking into account *everyone's* interests in a particular piece of content - and that includes the interest of the author in controlling access to it.¹⁷

Accordingly, this analysis does not even purport to legitimize copyright law as it currently exists. It is reasonable to think, for example, that the lengthy duration of copyright protection cannot be justified within this framework since most content creators would arguably be willing to trade their time,

¹⁶ Still, a couple of modest substantive conclusions seem plausible. For example, it seems reasonable to think – at least at first glance – that the author's interest in her time and energy is more important, from the standpoint of morality, than the interests of others in having access to content simply for the purposes of entertainment or boredom-avoidance. If so, then it is reasonable to think that some protection of the author's investment of time and energy will be warranted in cases where the content is intended and used for entertainment. This, of course, would include much, if not all, music, film, fiction, etc.

¹⁷ For an interesting device for balancing competing claims, see Moore (2001), Chapter 5 and 7. Moore argues for something he calls the Weak Pareto Proviso: If the acquisition of an intangible object makes no one else worse off in terms of her level of well-being (including opportunity costs) compared to how she was immediately before the acquisition, then the taking is permitted. As is readily evident, the Weak Pareto Proviso attempts to balance all the competing interests.

energy, and labor for something far less valuable than exclusive control over their content for a period exceeding the life of the creator by seventy years. It is also reasonable to think that this framework might not justify allowing a content-creator to transfer full intellectual property rights to another person or corporate entity; while this framework might allow considerable control over one's creations, such control does not necessarily involve being able to sell one's full set of rights to third parties. Accordingly, the above discussion should not be thought to justify any specific claims about what the content of intellectual property rights should be.

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