

Establishing an Ethical Justification for Intellectual Property

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With the rapid evolution of technology over the past few decades, the distinction between the tangible and intangible has become increasingly blurred: music is no longer constrained to cassettes or compact discs, retail services no longer need physical stores, and even social networking no longer requires meeting people face-to-face. However, while the advent of digital storage systems and the Internet has facilitated business practices and daily life, it has spelled disaster for legal and ethical analysts. The distinction between machine and idea has historically offered simplicity within the domain of intellectual property, but the progressive convergence of the two has incited controversy regarding intellectual property rights in today's society.

In 2008, the U.S. Court of Appeals for the Federal Circuit heard the case of *In re Bilski*, a case that highlights the ambiguities in the definition of intellectual property. The applicants Bernard Bilski and Rand Warsaw filed a controversial patent application for a business method (the hedging of risks in commodities trading). The court ruled that to qualify for patent eligibility, the idea must pass a "machine-or-transformation" test: it must either be tied to an apparatus or transform a particular article into a different state or thing. Thus, Bilski's application, which satisfied neither, was deemed patent-ineligible. The applicants petitioned the U.S. Supreme Court for a writ of certiorari, a review by the Supreme Court to overturn the Federal Circuit decision. Certiorari was granted and the case of *Bilski v. Kappos* was heard in November 2009. The Court agreed with the Federal Circuit that business methods and other abstract processes "did little to spur the technological progress that patent laws were intended to promote" (although the ruling has not yet been released). The developments in *In re Bilski* and *Bilski v. Kappos* demonstrate a continuation of the machine-idea dichotomy and an attempt to clarify the domain of intellectual property. However, they fail to answer the question of whether individuals should be entitled to intellectual property rights to begin with and the reason such rights would be justified.

To answer these questions would bring great clarity to the domain of intellectual property. There are thus two moral concerns that must be addressed on the topic of intellectual property. First, should individuals be

entitled to claim certain ideas as their property? And second, if it is the case that they should, what is the domain of intellectual property? Does it only hold claim to a tangible medium, or is the idea inextricably linked to the medium and protectable as well?

The Current Definition of *Intellectual Property*

The American system recognizes intellectual property as a protectable right and establishes three classifications of intellectual property: copyrights, patents, and trade secrets.

Copyrights protect “original works of authorship fixed in any tangible medium of expression” (Copyright Act of 1976). Thus, they are designed to protect the form of expression rather than the ideas that they express. The scope of copyrightable content currently includes literary or artistic works as well as computer software.

Patents are similar to copyrights, in that they protect intellectual property through a medium rather than as an idea. In particular, patents apply to inventions, i.e., products that serve a particular purpose. In order to obtain patents, inventions must “be novel (not previously patented); they must constitute nonobvious improvements over past inventions; and they must be useful (inventions that do not work cannot be patented)” (Hettinger, 1989, p. 18). For instance, new scientific theories cannot be patented, but technologies that implement such theories can be.

Trade secrets include business methods or techniques that are not generally known and provide some sort of advantage for the company over competitors. Companies are typically faced with a choice between patents and trade secrets: a company may choose to patent the product and protect it from incidental discovery (but make their idea publicly known), or keep it a trade secret which offers protection so long as the product remains undiscovered (after which the company loses ownership).

Locke and Property Rights

Intellectual property rights are typically justified on similar grounds as tangible property. Most corporeal and non-corporeal property right theories are heavily derived from the property philosophy of John Locke (1689), which rests upon two core tenets: *labor* and *scarcity*. Locke contended that every person owns his own body and consequently the labor he does. By joining his labor with something else, he adds value to the object. Because his labor is then inseparable from the product, he becomes entitled to it: it becomes his property. If the product is a collective effort of labor, every individual involved holds a share in the property proportional to the labor he invested. However, this right to property is restricted by Locke’s second tenet, which is often known as “Locke’s Proviso.” In the state of nature,^{*} the Proviso restricts property

^{*} The hypothetical world prior to society in which resources were plentiful, often understood in Locke’s time as the frontier or New World.

acquisition to cases in which there is “enough, and as good, left in common for others.” Locke argued that societies formed to handle the distribution and protection of property as resources became strained and limited by larger populations. Furthermore, money developed as a tool to facilitate the fair transaction and allocation of scarce resources.

A Lockean Interpretation of Intellectual Property

While Locke made no argument on the defense of intellectual property, his philosophy on tangible property can also be understood in the context of intellectual property. The world of ideas is largely identifiable with the state of nature. Professor Adam Moore (1997) of the University of Oregon identifies “the individual who takes a good long drink from a river [and] does as much as...nothing at all” (p. 98) with the author or inventor who creates within the infinite frontier of intellectual property. Thus, when an individual comes up with an idea and invests his labor in developing that idea, it is not very contentious to call that idea his own. The tension typically arises when one argues that the individual should have sole access to that idea.

The protection of individual intellectual property rights is established from a more rigorous analysis of the state of nature. In the state of nature, if I pick up an apple, it is wrong for you to steal my apple unless I have done so by robbing you of the opportunity to obtain one; therefore, stealing my apple would be to rob me of the product of my labor. Yet ideas, unlike apples, are non-exclusive. Due to this non-exclusivity, one is inclined to believe that having exclusive rights to an idea would thus preclude others from the opportunity to obtain it, violating the Lockean Proviso. In a way this is true, however many intellectual property rights theorists highlight a fundamental distinction between two types of ideas that demonstrates consistency with the Proviso. The fact that ideas are non-exclusive blurs this distinction between idea types, which I will clarify by calling them *self-identical ideas* and *categorically identical ideas*. For example, if you and I both have knowledge of my guacamole recipe, that recipe is self-identical—it is in essence the exact same piece of intellectual property. On the other hand, if you and I both have our own recipes, those recipes are *categorically identical*—they are the same type of thing, but they are not in essence the same thing. When extending Locke’s property principles to intangible property, this clarification is usually entirely omitted, since the distinction is trivial in the physical realm. When discussing intellectual property, however, it is imperative to consider this difference.

With physical property, multiple ownership of a self-identical object (the same apple) is only permissible under approval of the owner or through shared labor. Otherwise, the individual may claim it for himself, so long as other categorically-identical objects (other apples) remain “enough and as good.” Extending this concept to ideas then, an individual has the right to claim sole ownership of an idea, so long as other ideas

exist that are categorically identical. For example, if I have an idea for a specifically designed engine, I may claim that idea as my own and preclude others from its use, but the possibility of developing other types of engines remains open. Bowling Green State University Professor James Child (1997) describes this as a failure to satisfy the “zero-sum condition”: while one person gains, others are not deprived, so long as they are able and willing to exert the effort to obtain categorically-identical property. Thus, there is no violation of utility in recognizing intellectual property, whereas foregoing intellectual property rights fails to reward one’s labor justly.

It is important to note that under this framework, individuals would be permitted to patent scientific theories or other non-machine-or-transformation ideas; that is, to claim rights over a theory of evolution does not preclude others from developing their own theories of evolution. This is disconcerting to many, since such patents would limit access to information as well as slow scientific advancements and the progress of society. This leads to the focus of the opposition to the intellectual property movement: free thought and the free flow of information.

The Right to Free Flow of Information

While the proponents of intellectual property can be described as rights activists, the opponents can be described as utilitarians. Opponents claim that intellectual property is detrimental to social utility, because the right to claim and protect ideas infringes upon other individuals’ right to free thought and expression. This argument is grounded upon an alternative interpretation of the consequences of non-exclusivity.

As stated previously, intellectual property is currently classified as either a form of expression (copyright), a product’s design (patent), or a process (trade secret). As an abstraction, all intellectual property is inherently non-exclusive. The property rights movement argues that despite non-exclusivity, an individual has a right to intellectual property because other categorically identical ideas are plentiful. To not acknowledge one’s claim to an idea is to neglect that individual’s labor and desert to property. The opposition offers a contrary interpretation: while other categorically identical ideas may remain, the self-identical idea has a unique value that others are deprived of when that idea is claimed as property.

For instance, consider the hypothetical patent of a particular political philosophy, such as John Rousseau’s ideas on direct democracy. There are a number of other ways one could think about implementing a direct democracy. However, while these would be categorically identical, one is still intellectually deprived, since one is restricted from an idea that may have otherwise been beneficial in developing one’s opinion. This argument thus follows similar lines as John Stuart Mill’s defense of free thought and speech as important agents for individual growth and self-actualization. Furthermore, not only do intellectual property rights deprive

others, but the inverse situation (i.e., the widespread distribution of a self-identical idea) does not deprive the owner of his original stake, because the idea is non-exclusive—his personal use remains unaffected. Professor Edwin Hettinger (1997) of the College of Charleston points out that “stealing a physical object involves depriving someone of the object taken, whereas taking an intellectual object deprives the owner of neither possession nor personal use of that object—though the owner is deprived of potential profit” (p. 20). The owner’s stake in the intellectual property debate is therefore *not* his right to *intellectual property*, but his right to *profit* from that property. In particular, this line of argument targets the wholesale claim of ideas as protectable property.

Most advocates against intellectual property are not completely opposed to its protection, but do support more liberal access to restricted intellectual content. Hettinger (1997) concedes that “copyrights are easier to justify than patents or trade secrets...[because] copyrights restrict only copying an expression of an idea...One can [still] freely use the ideas in a copyrighted book in one’s own writing” (p. 33). In this scenario, the right to profit from one’s property does not limit the self-actualization of others. Others are free to express the same ideas, simply in a different manner.

This distinction between classifications of intellectual property leads to defining what differences might or might not entitle ideas to be considered as property. One possible distinction could be in the *usefulness* or *purpose* behind a particular idea. For example, if there is utility in a copyrighted expression, it is only in the idea, not the expression. Patents and trade secrets, on the other hand, are more restrictive of utility. Patents restrict the actual usage of ideas that are designed to (by some definition) be “useful” or have novel uses. Trade secrets are also detrimental to utility, since they withhold valuable information that could benefit scientific or technological advancement. Rather than granting property rights to these types of intellectual content, opponents of intellectual property suggest that alternatives should be considered to ensure their public availability, such as providing public financial support for intellectual laborers.

A Subtle Distinction

The two positions presented thus far provide ethical justifications for and against intellectual property rights. In the proceeding paragraphs, the major strengths both for and against intellectual property rights will be considered in order to establish an ethical foundation, from which we may justify the system we use today (perhaps with greater clarity as well).

The Lockean perspective of property supports the most intuitive argument for intellectual property rights: the object or idea is mine, because I am entirely responsible for its existence; therefore the burden should not be upon me to show that I have a right to that object, but upon you to show that my possession of it is in violation of some greater good. The opposition to property rights offers a strong argument for such a

greater good: the self-actualization of individuals. It is thus in society's best interest to promote the free flow of information and to prevent the restriction of ideas as much as possible. The ideal scenario would be to obtain the best of both of these worlds: protected intellectual content, but only content that fulfills some criterion that does not restrict the intellectual growth of society.

I previously discussed a potential criterion given by the opposition, the "usefulness" distinction, but there are two ethical concerns regarding this matter. First, the opposition states that copyrights are justifiable, but patents are not. However, patents are to the "useful arts" (science and technology) as copyrights are to the fine arts. Patents do not restrict the fundamental scientific theories that are the basis of the product, but only the product itself; one is free to use the knowledge that the boiling point of water is 100°C, but one may not duplicate the water boiler that another designed. Both copyrights and patents defend property rights to a tangible medium, rather than the ideas that they express. Thus, there is a logical inconsistency on the opposition's part. If one accepts the protection of copyrightable material, one should also accept the protection of patentable material.

Second, one must consider if it makes sense to say that an inventor is morally obligated to share information with the rest of the world. To be consistent with individual autonomy and privacy, it would be ethically wrong to force him to divulge his idea; rather, it would merely be *good* for him to share it. The inventor's acquisition and claim over that idea does not prevent any other individual from developing the same idea, because the remaining supply and quality of that idea is essentially untouched. His having the idea therefore does not preclude others from having similar ideas. Hence, a holder of a trade secret, while perhaps not maximizing the information flow of society, does not restrict other individuals from discovering that information through other means, such as reinvention or reverse engineering.

There is now a need to establish a new criterion to distinguish what intellectual property is protectable and what is not. The manner proposed in this paper will draw from Locke's consideration of property as within a society. Previously, it was stated that ideas are created *ex nihilo* and are therefore part of an infinite frontier. However, while the supply of any particular idea lacks finitude, the ability to profit from an idea certainly does, as profit is based upon the demand for the idea by others. If two companies function in the same market, the existence of competition impedes their ability to profit because target customers are a limited resource. For this reason, I contend that as an extension of Lockean protection of physical property, societies should also be responsible for protecting and distributing profitable intellectual property based on individual entitlement (labor or monetary transaction). This foundation upon profitable ideas justifies the stipulation that only "useful" ideas (i.e., expressions and products) are patentable, while ideas (i.e., scientific

theories) are not. By effectively excluding ideas from the realm of intellectual property, the restrictions on the free flow of information are significantly reduced.

Based upon the reasoning presented thus far, one can see why *Bilski v. Kappos* and the machine-or-transformation test are controversial: business practices are classifiable as profitable ideas, despite the fact that they are not contained in any particular tangible medium. This confusion, however, is not with any ambiguity in intellectual property rights, but the definition of a profitable idea. Accordingly, I will offer a further distinction between two types of profitable ideas: those that are *directly profitable*, and those that are *indirectly profitable*. A directly profitable idea is one that is sold for immediate gain. For example, books, songs, and product design plans are all valid ideas that individuals or companies willingly pay for. On the other hand, indirectly profitable ideas are ones that may reasonably lead to profit, but have no such direct causality. For instance, a company does not pay to acquire a business model, but may hire the individual as a corporate advisor.

Another way to think of the distinction is to place the idea in a hypothetical situation of retail. If the idea categorically would have a place in the market, then it would indeed be profitable and it would be seen as protectable intellectual property. This distinction upholds the modern standards of intellectual property while excluding test cases that we would deem too abstract. Under this definition, computer software is protectable intellectual property, while business methods are not (a distinction that with which *Bilski v. Kappos* struggled). Scientific theories and teaching methods are two other examples of ideas too abstract to be granted as intellectual property rights.

Conclusion

The world of ideas is an infinite frontier, but as with any other resource, the demands of society produce a scarcity that requires regulation. Strictly regulating intellectual content that is tied to a directly profitable foundation provides a litmus test for protecting only ideas that are fixed in a tangible medium and separable from their ideological counterparts. This ensures that property rights go unviolated so long as they do not conflict with the free thought, and consequently the self-actualization, of other individuals. In doing so, society provides stronger justification and greater clarity to distinctions such as the machine-or-transformation test, as well as establishing a stronger ethical foundation for the right to intellectual property.

References

- Child, J. W. (1997). Moral foundations of intangible property. In A. D. Moore (Ed.), *Intellectual property: Moral, legal, and international dilemmas*, (pp. 57-80). Lanham, MD: Rowman and Littlefield.
- Copyright Act of 1976, 17 U.S.C. §102.
- Hettinger, E. C. (1997). Justifying intellectual property. In A. D. Moore (Ed.), *Intellectual property: Moral, legal, and international dilemmas*, (pp. 17-38). Lanham, MD: Rowman and Littlefield.
- In re Bilski*, 545 F.3d 943, 88 U.S.P.Q.2d (BNA) 1385 (Fed. Cir. Oct. 30, 2008).
- Locke, J. (1689). *The two treatises of civil government*. Retrieved from <http://oll.libertyfund.org/title/222>
- Moore, A.D. In A. D. Moore (Ed.), *Intellectual property: Moral, legal, and international dilemmas*, (pp. 81-106). Lanham, MD: Rowman and Littlefield.
- Official Transcript of Bilski v. Kapposi*. Case No. 08-964. U.S. Supreme Court 2009.