

Intellectual Property Rights: A Political Theory Perspective

Written by Annabelle Lever

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ANNABELLE LEVER, JUL 23 2011

Does domestic violence show that privacy is at odds with sexual equality? Do 'kiss and tell' stories show that we have to choose between privacy and robust protections for freedom of expression? Do intellectual property rights have a moral justification? Should democracies legally require people to vote? These are some of the questions I have been working on, as a political theorist, in recent years. They are motivated both by the intellectual interest of the questions, given contemporary ideas about privacy, equality, freedom and democracy as well as by debates in public policy over the best way to identify and protect people's interests. So, I am currently editing a book on the philosophy of intellectual property in which the contributors, who are lawyers, philosophers and political theorists, disagree about whether patents and copyrights, if justified, are justified by instrumental considerations, or by more deontological concerns for liberty or dignity.[1]

Good new ideas can be thought of as public goods, like clean air and clean water, because anyone can reap their benefits whether or not they shared in the costs of providing them. Legal property rights such as patents, trademarks, copyright, are often thought to be a good market-based solution to the problem of encouraging investment in ideas, as the temporary monopolies which they create enable their holders to charge premium prices for their products, and to licence the use of their ideas by others.

However, this way of thinking about intellectual property rights seems to face three problems. First, it's not clear that such temporary monopolies really do encourage ideas – in some cases, they seem to impede them, as scientists are forced to seek endless permissions, and pay endless licensing fees, in order to pursue their research.[2] Secondly, this justification seems to imply that authors and inventors have no more moral claims over their ideas than anyone else. Hence, were it not that efficiency required it, there would be no particular reason to enable them to decide who might use their ideas, and whether or not to charge for their use. But that seems odd, unless we want to say that authors and inventors cannot be harmed by the use to which other people put their ideas – hence songwriters, for example, sometimes object to the use of their songs by politicians whose programmes they reject. Thirdly, it is intrinsic to the way that IPRs promote research that new forms of cosmetics will be much easier to finance than new medicines, and that new medicines which are aimed at the needs of rich people and countries will be easier to finance than the needs of poor people and poor countries.

The point of intellectual property rights, on the instrumental view, is to generate sufficient profits from sales to recoup the costs of past research and investment, and to generate sufficient income for future research and investment. But it is an elementary truth that buying power does not track need. So, a third objection to instrumental justifications for intellectual property rights (and to legal rights based on such justifications) concerns their implications for global disease, and for the distribution of scarce medical resources within rich countries, themselves. [3]

What, if anything, can political theorists contribute to debate on intellectual property rights? One thing they can do is to highlight the diversity and scope for conflict between people's interests as the producers of ideas, as consumers of ideas, and as entrepreneurs in ideas (for example, as investors, publishers, theatre and movie producers). Some of us will fill more than one role and, in liberal democracies, people are not assigned at birth to one role rather than another. Still, this does not mean that we can assume people's interests in ideas are essentially alike or that they are

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essentially harmonious, when different. As with more familiar theoretical debates on freedom of expression,[4] our ability to find a morally persuasive justification of legal rights and public policies turns on our ability to bring politics into our accounts of morality – to paraphrase Theda Skocpol. [5] We must therefore recognise that there is no democratic justification of rights publicly to speak our mind, to profit from our ideas, and to have access to life-saving medicines unless we accept that political procedures and choices matter to what we are morally entitled to do; and that the conflicts between our interests are as important a guide to political morality as the interests we have in common.

This means that we cannot assume that the rights of authors and inventors should trump the rights of everyone else – morally or legally; but nor does it mean that our interests as consumers of ideas and products are inevitably more important than those of producers or investors. At present, we lack a clear sense of the different interests people can have in ideas, and of their relative moral importance. Hence, as with other areas of economic policy, or of global politics, we find it difficult to decide which aspects of current laws, institutions and policies are justified, and what alternatives we have to those which are not.

Granted, even when we have some ideas of what is desirable, we may not be able to implement them. But if one thing is true in politics, it is that you cannot achieve anything valuable unless you know what you want, and what alternatives you face. Hence, in debates over intellectual property, as in debates over freedom of expression, healthcare, global trade, even democracy itself, political theory can be of help, because it draws our attention to the differences, as well as the similarities, between people's interests, and reminds us that conflict, as well as cooperation, can be morally justified.

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Dr. Annabelle Lever's latest book "On Privacy" will be published in December 2011 by Routledge. Her articles on the ethics of voting, democracy and judicial review, on racial profiling and on the ethics of patenting human genes can be found on her website: www.alever.net.

[1] *New Frontiers in the Philosophy of Intellectual Property*, ed. Annabelle Lever, (Cambridge University Press, 2012)

[2] The classic article on the subject is Heller, M. A. and Eisenberg, R. S. (1988) 'Can Patents deter Innovation? The Anticommons in Biomedical Research', *Science* 280. For a more political take on some of these problems see The Manchester Manifesto, <http://www.isei.manchester.ac.uk/TheManchesterManifesto.pdf>, and for a link to responses, see <http://www.isei.manchester.ac.uk/themanchestermanifesto/responses/>

[3] See, for example, Peter Dietsch, 'Patents on Drugs – the Wrong Prescription ?' in A. Gosseries, A. Marciano and A. Strowel eds. *Intellectual Property and Theories of Justice*, (Palgrave, 2008) and Thomas Pogge, 'The Health Impact Fund: Better Pharmaceutical Innovations at Much Lower Prices', in T. Pogge, M. Rimmer and K. Rubenstein, eds. *Incentives for Global Public Health: Patent Law and Access to Medicines*, (Cambridge University Press, 2010)

[4] See, for example, Joshua Cohen's 'Freedom of Expression', *Philosophy and Public Affairs* 22.3. (summer 1993), compared to John Stuart Mill's wonderful *On Liberty*, (available free online) which tends to suppose that opponents of freedom of expression are generally small minded, smug, conformist or authoritarian.

[5] Theda Skocpol, Peter B. Evans and Dietrich Rueschemeyer, eds. *Bringing the State Back In*, Cambridge University Press, 1985