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The Justification of Intellectual Property: Contemporary Philosophical Disputes

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INTRODUCTION

The issue of whether the state is morally justified in affording content-creators a legal right to exclude others from the content of their creations is a sharply contested issue in information ethics. Once taken for granted as morally legitimate, intellectual property rights have come under fire in the last thirty years as evolving digital information technologies have severed the link between expression of ideas and such traditional material-based media as books and magazines. These advances in digital technology have called attention to unique features of intellectual content that seemingly problematize intellectual property protection; any piece of intellectual content, for example, can be simultaneously appropriated by everyone in the world without thereby diminishing the supply of that content available to others. This essay provides an overview and assessment of the issues, arguments, and counterarguments on intellectual property.

At the outset, it is important to distinguish the general issue of whether intellectual property is justified from the more specific issue of whether a particular body of intellectual property law (e.g., copyright law in the U.S.) is justified. Obviously, a particular body of law protecting intellectual property will not be justified if intellectual property protection is, as a general matter, unjustified, but the converse is not true. One can coherently (and reasonably) believe that content-creators have intellectual property rights that should be protected by law but believe also that many elements of existing copyright and patent law in Western nations are unjustified. The arguments in this essay are concerned primarily with the general issue and not with the more specific issue of whether the law of intellectual property (hereinafter IP) in Western industrialized nations is morally legitimate – though some of the more problematic features of existing law will be discussed briefly at the end of this essay.

TWO ISSUES CONCERNING THE JUSTIFICATION OF IP RIGHTS

There are two ethical issues regarding IP not clearly distinguished in the literature. The first is whether authors have a morally significant interest (i.e., one that receives some protection from morality) in controlling the disposition of the contents of their creations, which would include some (possibly limited) authority to exclude others from appropriating those contents subject to payment of an agreed-upon fee; this interest might, or might not, rise to the level of a moral right. The second is whether it is morally permissible, as a matter of political morality, for the state to use its coercive power to protect any such interests authors might have in the contents of their creations.

These are logically distinct issues. The first concerns moral standards that apply to the acts of individuals, while the second concerns moral standards that apply to the acts of governmental entities. Not every morally protected interest an individual has is legitimately protected by the state. For example, I have a morally protected interest in not being told lies, but it would not be legitimate for the state to create a criminal or civil cause of action that makes a person liable for every lie she tells. Conversely, not every morally legitimate law protects some interest that is antecedently protected by morality. Apart from the existence of a law requiring people to drive, say, on the left-hand side of the road, no one has a morally protected expectation that people drive on the left-hand side of the road. Such an interest arises only after the enactment of a law requiring as much – and it arises *because* that law has been enacted.¹ What individuals morally ought to do and what the law morally ought to do are issues that fall into two different areas of normative ethical theorizing.

In what follows, I will assume that the arguments and counterarguments are concerned with the issue of whether the state may legitimately recognize and protect IP rights (which, again, need not mirror the content of existing IP law in the western world) because this is, as far as I can tell, the issue about which theorists and laypersons are most concerned. Some of the arguments, however, are probably most plausibly construed as concerned with the issue of whether individuals have morally protected interests in IP. In assessing the arguments, counterarguments, and discussion that follows, readers should keep this distinction in mind.

IS INTELLECTUAL PROPERTY REALLY *PROPERTY*?

The concept of property expresses a relationship between an entity and a rational free agent. Simply put, a piece of property is, as a conceptual matter,² something that *belongs to* someone; there is no property not linked to some rational agent by the belonging-to or ownership relation. If some entity *p* is properly characterized as “property,” then there is some rational agent *A* of whom it is true that *A* owns *p* – and this is part of what is expressed by the notion that *p* is property. An entity owned by no one is not property, though it might potentially be property if a kind of thing that can be owned.

The concept of property has some normative content because the concept of ownership has some normative content.³ The proposition that *A* owns *p* expresses or implies, among other things, that *A* has some sort of (moral) claim to exclude others from appropriating *p*; other things being equal, it would presumptively be wrong (though not necessarily wrong, all things considered) for someone to take *p* without the express or implied permission of *A*, which might be bargained for as part of a contract or sale. For this reason, “Because *A* owns *p*” is an adequate answer to the question “Why should I ask *A* if I may use *p* before using it?”

I am grateful to Adam Moore, Herman Tavani, Steve Layman, Phil Goggans, Patrick McDonald, Maria Elias Sotirhos, and an anonymous reviewer for JASIST for very helpful comments on an earlier draft.

¹ This is not to say that every law creates morally protected interests, much less moral obligations. There are some laws so evil that they utterly fail to create moral interests or obligations. But some laws, like certain traffic laws that properly regulate the flow of traffic to make it safe, clearly do create such interests.

² To say *X* is true as a conceptual matter is to say that *X* is true wholly in virtue of the contents of the relevant concepts. For example, it is true as a conceptual matter that every bachelor is unmarried; this is true wholly in virtue of logical relationships between the content of the concept “bachelor” and the content of the concept “unmarried.”

³ The concept of property, at least the usage being considered here, is distinguished from concepts like privacy in this respect. The concept of privacy has a purely descriptive usage; on this usage, the information in a locked file cabinet is properly described as “private” without regard to whether I have any special claims to keeping that information private. I know of no purely descriptive analysis of the concept of property. I am indebted to Adam Moore for this observation.

There are a number of moral issues regarding property that correspond to the moral issues regarding IP described above. First, there is the foundational issue of whether there is any property. Some socialists and communists deny the existence of property: as Pierre Proudhon paradoxically put the idea: “all property is theft.” The idea is that no one can have even a *presumptive* (i.e., defeasible) entitlement of the sort implied by property claims. Second, there is the issue of whether *any* property interests ought, as a matter of political morality, to be protected with the coercive force of law. One could take the position that whatever interests people have in owning objects, they are too weak from the standpoint of morality to warrant coercive protection (i.e., laws backed by the threat of force).

The issue of whether and how intellectual objects should be protected by legal property rights is, of course, contested, but so is the issue of whether intellectual content is properly characterized as “property.”⁴ It is crucial to note that the concept of property also has some descriptive (or factual) content: to say that something is “property” is to say that it is an entity of a particular kind and hence to say that it has certain factual characteristics (i.e., characteristics that can be ascertained without value inquiry). Theorists disagree about what kind of entity a thing must be to count, as a conceptual matter, as property and hence about whether intellectual content can be property.

The problem here arises because intellectual content is a radically different kind of thing than the objects to which the concept-term “property” paradigmatically applies. Intellectual entities like numbers and propositions lack the distinguishing properties of material objects like houses and computers. In particular, these entities, unlike material entities, lack solidity, extension (i.e., being, so to speak, spread across space), and spatial location (e.g., the content expressed by “all bachelors are unmarried” cannot be found in space). Similarly, intellectual entities lack the distinguishing properties of mental states: they are not intentional, privately observable, temporal, or linked in *any* causal way to physical states; if, for example, the number 2 is properly characterized as “existing,” it would exist no matter what the universe might have looked like. In consequence, intellectual entities cannot causally interact with material or mental entities or states – although numbers and propositions can be thought about by conscious agents, and these thoughts (or at least the neurophysiological correlates of these thoughts) can causally interact with material beings like us. Intellectual entities, if such there be,⁵ are so-called “abstract objects” that exist in something commonly called “logical space” and cannot causally interact with us.⁶

Some theorists reject the idea that abstract objects are properly characterized as “property” because they believe that something that cannot causally interact with us cannot be possessed in any meaningful sense and hence cannot be owned.⁷ The idea, for example, that one could *possess* and hence own the novel expressed by the book *A Tale of Two Cities* makes as little sense, on this view, as

⁴ In this connection, it is worth noting that use of the term “intellectual property” by federal courts is of comparatively recent vintage. Lemley (2005) found that the federal courts rarely used the term “intellectual property” until the 1940s and that the use of the term by federal courts has steadily increased since then; the federal courts used the term 201 times from 1943-53, but 3,863 times from 1993-2003. The term “intellectual property,” however, has a comparatively long history outside the courts. See, e.g., Moore (2001), Bugbee (1967), Shale (1878), Pagar (1944).

⁵ Not everyone accepts the existence of such objects; hard materialists believe the only entities that exist are material. But it is difficult to make sense of certain sentences if the hard materialist thesis is true. For example, it is hard to make sense of how “2 is an even number” could be true if the symbol “2” does not refer to anything. Reference-failure in the subject term usually results in loss of truth-value. For example, the sentence “the present king of France is bald” is neither true nor false because there is no king of France, as France is not a monarchy. For this reason, most philosophers implicitly accept that abstract objects exist. A soft materialist would accept the existence of abstract objects but deny the existence of so-called mental substances (like souls).

⁶ The idea that abstract objects cannot causally interact with the material and mental world is the standard view. See Rosen (2001).

⁷ Waldron (1988), for example, provisionally defines “property” as applying only to material resources.

the idea that one could possess or own the entity denoted by the symbol “2.” Whatever concepts might properly be applied to abstract objects, the concept of property does not, according to these theorists. The term “intellectual property,” at best, applies to nothing and, at worst, is incoherent.

This analysis is vulnerable to at least two objections. First, it is not clear that ownership, as a conceptual matter, requires *physical* possession. One can argue that the essence of ownership consists in a *power* – the power to exclude others from certain behaviors involving the relevant entity – and not in physical control or possession of the entity. I continue to own my home even when I am away on a trip and not, literally speaking, in physical control or possession of it. Likewise, I continue to own my car even when someone has taken physical possession of it without my permission. Skeptics about the propriety of characterizing content as property seem to rely too heavily on the metaphor of physical possession in articulating the content of the concept of property.

Indeed, the concept of property is frequently used in contexts involving abstract objects – and with little controversy. For example, people frequently claim property interests in corporations, companies, partnerships, and other social organizations. Although it is unclear exactly what these entities are, this much is clear: they are systems and hence *sets* having a structure unique to the relevant types of organization; the system constituting a corporation would presumably include, among other things, a set called “board of directors,” a set called “officers,” a set called “employees,” a document called “articles of incorporation,” and various relations among the persons associated with the corporation. But while sets can contain material things, the sets themselves, if they exist, are *abstract objects*. The people in a corporation are material beings, but the corporation itself is an abstract object.⁸ If, as our ordinary practices and intuitions suggest, one can have property interests in a corporation, then there is nothing objectionable about the general idea that one can have property interests in abstract objects.

Second, theorists who take this view typically infer that so-called IP rights are illegitimate, but the claim that intellectual entities are not accurately characterized as “property” is not strong enough to fully dispose of the normative issue. While it is true that some entity *E* that is not “property” should not be protected *qua* property, it doesn’t follow that *E* should not be protected in other, perhaps very similar, ways. It might be that the law could legitimately allow content-creators to exclude others from, for instance, copying novels without the permission of their authors even if novels do not constitute property.

There are other mechanisms by which the law might afford to content-creators something that resembles a right to exclude others from appropriating the content they create. One quite natural mechanism, for example, would involve deploying the moral and legal principles governing contractual exchanges.⁹ If, for example, I write a poem and you want to appropriate it, you have no antecedent moral right that I share it with you; it might be wrong for me to keep my poem to myself, but my doing so would not violate any rights that you have. Thus, it is arguably up to me to decide whether to disclose it to you – and under what terms. Should I offer to let you appropriate the poem in

⁸ It is true that whether or not a particular corporate set exists depends on whether or not particular persons exist since the identity of a set is determined by the identity of its members; hence, the existence of these abstract objects depend on the existence of certain physical objects. But the dependence is logical and not physical; it is governed by logical laws and not nomological laws (such as are expressed by physical laws of nature) expressing relations of cause and effect. The dependence of such sets on physical objects is consistent with the idea that abstract objects cannot causally interact with material entities. I am indebted to Steve Layman for this point.

⁹ Another such mechanism would be to afford content-creators with a limited legal monopoly over the distribution of the creations as a means of obtaining the benefits of IP protection without characterizing intellectual content as the subject of a natural property right. See Patterson & Lindberg (1991) for a discussion of the “statutory-grant” mechanism for protecting copyrights. They argue that copyright is properly conceived of as a statutory grant of rights distinct and separate from the work itself that is not (and ought not to be) grounded in the idea that content is property.

exchange for a payment and a promise not to share it with others, you are free, according to this line of argument, to accept or reject the proposed terms. If you accept them by making the appropriate promises, you are bound by them. The effect of applying these principles to intellectual content is to afford me with the power to exclude others from appropriating and distributing my poem through contractual mechanisms.¹⁰

Of course, such legal rights should probably be called something other than intellectual *property* rights to avoid confusion, but this is hardly an obstacle. These rights could be called, for example, “intellectual content rights” and it wouldn’t make any substantive difference with respect to the content of the right. Whatever such rights might be called, the effect would be to afford roughly the same protections to content-creators as are defined by the law of intellectual property.

Ultimately, the reason that the claim that intellectual content is not “property” does so little work here is that the analysis of property is purely conceptual (i.e., concerned with fleshing out the content of the concept expressed by the term “property”) and hence descriptive in character while the issue of what the law should do by way of protecting content-creators is morally normative. Although it is important to be clear about the nature of intellectual content, we cannot resolve the moral issue of whether the interests of content-creators in the content of their creations ought to be protected by law without recourse to an analysis that contains some morally-normative principles. Rearranging our linguistic practices (and concepts are defined in part by linguistic practices) cannot resolve normative issues; one cannot, for example, change the moral quality of theft by calling it “non-consensual permanent borrowing.”

ARGUMENTS AGAINST IP PROTECTION

The Special Character of Intellectual Entities

Intellectual entities have a special property thought to militate against the legitimacy of IP protection: intellectual objects can simultaneously be consumed by everyone; you and I can simultaneously appropriate a recipe without diminishing the supply of that recipe.¹¹ In contrast, material entities can be consumed by only a limited number of persons at one time. As the matter is sometimes put, consumption of material entities is rivalrous, while consumption of intellectual entities is non-rivalrous.

This difference is sometimes thought to bear on the legitimacy of IP in the following way. It makes sense to protect material property precisely because it can be appropriated only by a small class of persons at any given time; protection of material property helps to prevent conflicts that would otherwise arise among persons who want to appropriate a given material entity. But this rationale is not available with respect to IP. Since intellectual objects can simultaneously be consumed by everyone, protection of IP rights cannot be justified by the interest in preventing conflict. Indeed, it makes no sense, according to critics of IP rights, to afford exclusive property rights in objects that have these remarkable properties. Legal protection of IP is, the argument concludes, morally illegitimate.

Nevertheless, the most influential arguments purporting to justify material property rights do not rely on the idea that material objects are scarce and rivalrous. Most deontological¹² justifications for

¹⁰ Licensing software agreements would be an example of a contractual agreement limiting what a user can do with content that she has purchased.

¹¹ See, e.g., Hettinger (1989).

¹² Consequentialist theories claim that the moral quality of any act is entirely determined by the extent to which it conduces to some favored state (like the promotion of community well-being); since what consequences an act has depends on features that are not essential to the act (e.g. did the target move when the gun fired?), the moral quality of the act is entirely determined by an act’s extrinsic qualities. In contrast, deontological theories hold that

property rights are grounded in claims about the legitimate expectations of individuals in controlling the disposition of particular material objects. For example, a Lockean argument will point to a party's investment of labor, something from which she is presumably entitled to exclude others, in some material object to which no one else has antecedent claims as giving rise to a property right in that object. Likewise, the idea that material entities are scarce and rivalrous plays no essential role in consequentialist arguments for protection of material property rights.¹³ If such protections maximize the relevant dimension of well-being, they are justified; if not, they are not justified.

In any event, the claim that intellectual entities can simultaneously be consumed by everyone without reducing supply bears limited weight in supporting the claim that IP protection is illegitimate. The former claim is purely descriptive while the latter claim is normative; and descriptive claims need the help of other normative claims to adequately support a normative claim. There is a logical gap, as the matter is sometimes put, between facts and values.¹⁴

What is specifically missing from the descriptive claim is some sort of value-claim about the weight of the respective interests that people have in a particular intellectual entity. To show that IP protection is illegitimate, one must show that such protection violates some morally protected interest – which is a normative claim; it seems clear that no behavior can be wrongful unless it violates some morally protected interest. The fact that intellectual objects can be consumed simultaneously by everyone without reducing their supply, by itself, tells us nothing about whether IP protection is legitimate because it tells us nothing about whether it violates any morally protected interests. While the factual claim is surely relevant in assessing the propriety of IP protection, much more is needed to determine whether such protection is legitimate.

Information Should be Free

The new information technologies have made it possible to disseminate intellectual content to potentially anyone with a computer and modem without having to use any material entity – including paper. Thus divorced from traditional material media, the true nature of information seems, to some observers, to have been made much clearer than was possible before information could be digitized

the moral quality of *some* moral acts is determined (at least *in part*) by their intrinsic qualities; lying, for example, might be wrong because it is inherently deceptive – and not because of its consequences on human well-being.

¹³ It should be noted that there is one consequentialist justification for material property rights that does rely on this idea. (See note 11 for an explanation of the term “consequentialist”). Some theorists argue that property rights are necessary to prevent a tragedy of the commons. The idea is that if property is held in common, there will be a strong incentive to overuse it because the benefits of using it accrue exclusively to the individual while the costs are spread over all users. While self-interested users will always advance their own interests by using the property, the result is that chronic overuse of the object will eventually diminish its value to all. The most perspicuous example of a tragedy of the commons involves a plot of land that a number of persons use to graze their cattle. Although each person continues to benefit by its use, the chronic overuse will eventually render the land barren and unsuitable for grazing. Assigning property rights to the land is sometimes thought to be justified as a means of avoiding the tragedy of the commons. I am indebted to Adam Moore for pointing this out.

It seems clearly true that intellectual property rights cannot be justified as necessary to avoid a tragedy of the commons in the sense described above because information entities cannot be overused the way material entities can precisely because they are neither scarce nor rivalrous. But this is not enough to show intellectual property rights are illegitimate. The issue with respect to any consequentialist analysis of property is whether protecting property maximally conduces to, say, human well-being; the fact that one cannot give a tragedy-of-the-commons style argument for thinking intellectual property protection maximally conduces to human well-being does not imply that intellectual property protection does not maximally conduce to human well-being. A comprehensive analysis of the effects of such protection on human well-being is needed to show that such protection is not justified under consequentialism. Other consequentialist arguments, both for and against intellectual property protection, will be considered below.

¹⁴ For several other worries with this argument, see Moore (2006).

and widely disseminated without distributing copies on paper. And, to many, it seems clear now that IP rights are morally illegitimate because, as the matter is frequently put, “information should be free” (henceforth *ISBF*).¹⁵

Perhaps the first proponent of this line of argument, Barlow (1993) argues for a stronger claim, namely, the claim that information *wants* to be free.¹⁶ On his view, information is a form of life with a moral claim to be free that is grounded in interests and “wants” of its own:

Stewart Brand is generally credited with this elegant statement of the obvious, recognizing both the natural desire of secrets to be told and the fact that they might be capable of possessing something like a “desire” in the first place. English Biologist and Philosopher Richard Dawkins proposed the idea of “memes,” self-replicating, patterns of information that propagate themselves across the ecologies of mind, saying they were like life forms. I believe they *are* life forms in every respect but a basis in the carbon atom. They self-reproduce, they interact with their surroundings and adapt to them, they mutate, they persist. Like any other life form they evolve to fill the possibility spaces of their local environments, which are, in this case the surrounding belief systems and cultures of their hosts, namely, us.

Information should be free, according to this reasoning, because information *wants* to be free; and the wants of these living information entities deserve moral protection of some sort.

Barlow’s argument is problematic because it is simply implausible to think of abstract objects as having wants – or even interests.¹⁷ Since a desire is, by its very nature, a mental state, only something capable of having mental states can have desires; and this implies that only something that with a *mind* can have desires. Accordingly, only conscious beings are capable of having desires; although a conscious being can have subconscious desires, non-sentient entities are no more accurately characterized as having desires than as having hopes. Plants might have interests, but they do not have desires or hopes. Abstract objects are simply not the kind of thing fairly characterized as having desires because they are not conscious beings and do not have mental states of any kind. If information should be free, it is not because it “wants” to be free.¹⁸

One might argue instead that it is part of the very nature of information that it *should* be freely available and hence widely disseminated. Information entities are propositional objects that can be represented (or thought about) in minds to produce a variety of noetic states, including the states of belief, justified belief, and knowledge. It is therefore in the very nature of information that it can be used this way by agents with the right kinds of abilities and hence used to bring such agents to apprehension of the truth.

While this argument is more intuitively plausible than Barlow’s, it is also problematic. The problem is that such an analysis of the nature of information implies, at most, the *descriptive* claim that information *can* be used by rational beings for this purpose. There is nothing in this analysis of the nature of information that implies the morally normative claim that information *should* be used for this purpose – much less that it should be free.

Surprisingly, *ISBF* does little work in grounding a critique of IP rights because the vast majority of intellectual objects protected as IP are not, strictly speaking, properly characterized as “information.” “Information,” as we typically use the term, picks out a certain kind of propositional content – i.e.,

¹⁵ A January 10, 2006, search of the phrase “information should be free” on Google turned up 50,000 links.

¹⁶ This remains an extremely common view. A Google search of this term turned up 288,000 links. Indeed, this was initially the most common way to express the idea that information should be free. I am indebted to an anonymous reviewer for this point.

¹⁷ For a more detailed evaluation of Barlow’s argument and *ISBF* generally, see Himma (2005).

¹⁸ Tavani (2002) has defended a somewhat different claim, namely that “information wants to be shared.”

content that is either true or false.¹⁹ Moreover, ordinary usage seems to imply that it is a necessary condition for propositional content to count as information that it be true. A false proposition can be “misinformation” (i.e., something that purports to be information but is not) but not “false information” (i.e., something that is information but is false). If *A* utters a false sentence to *B*, *A*’s utterance has failed, according to ordinary usage, to “inform” *B* of anything – though *B* might glean information indirectly from the utterance and the circumstances (e.g., that *A* is a liar).

The reason, then, *ISBF* cannot ground a general refutation of IP rights as commonly protected is as follows. Although IP law protects an author’s interest in novels, poetry, film, and musical performances of every kind, the term “information,” as defined above, does not include any of those entities. Insofar as information consists of true descriptive propositional content, the claim that *information* should be free does not apply to non-informative content. And this category includes music, fiction in every form (including film), painting, poetry, and song lyrics.

One might, of course, deny that “information” applies only to propositional content that is true; however, this is of limited help to the critic of IP. Even on the assumption that information can be false, the concept would not apply to music, painting, much poetry and song lyrics insofar as these forms of artistic content are not propositional in character; it makes no sense, for example, to characterize music as either “true” or “false.” If information refers, as seems clear, only to propositional content, *ISBF* simply does not reach such non-propositional content.

In this connection, it is helpful to note that IP law affords comparatively little protection to sentences purporting to express informative propositions. It is well established in U.S. copyright law, for example, that sentences directly expressing facts receive far less protection than representations of poetry, fiction, or music. The law permits a far greater range of “fair uses” of informative sentences than of artistic works of any kind. While it is reasonable to think that even those sentences are not “free,” they are far closer to being free than the artistic works that many critics of IP protection want the most.

Perhaps the most serious problem for *ISBF*, however, is that it is inconsistent with ordinary views about the extent to which it is legitimate for the state to restrict the flow of information. First, *ISBF* is inconsistent with ordinary intuitions about information privacy. The claim that information should be free is a universal one that seems to imply that any state restriction on the free flow of information is morally illegitimate – including privacy laws that make a person liable for disclosing personal information about someone else without her consent. Insofar as one believes, as most people do, some state protection of information privacy is legitimate, one is committed to rejecting *ISBF*.

Second, *ISBF* is also inconsistent with the idea that the state may legitimately restrict the flow of some information for reasons of public safety. *ISBF* is inconsistent with the idea that the state could legitimately forbid publication of information that, for example, would enable a person to construct a small but powerful nuclear weapon out of materials that are too common to restrict. But it seems clear that the state would be *obligated* to take immediate (and drastic) steps to ensure that this sort of information is not disseminated as a means of protecting the public from a grave threat of danger. While it might be true that there are very few instances in which the state would be justified in restricting information on such grounds, one hypothetical example is enough to refute *ISBF*. If one takes the position that state restriction in the above example is justified, then one is committed to rejecting *ISBF*.

The Social Character of Intellectual Content

Some theorists believe IP protection is illegitimate because any novel piece of content is ultimately a social product. On this line of reasoning, no author is solely responsible for the value introduced by a novel piece of content *C* because her ability to create *C* was shaped by the efforts of others from whom

¹⁹ For an extended defense of the semantic conception of information, see Floridi (2004).

she developed her skills and ideas. The value introduced into the world by *C* owes to the efforts of these other persons without whom the author would not have been able to produce *C*. In consequence, it would be unfair to give the author IP rights in *C*.²⁰

The problem with this reasoning is that, at most, it supports the conclusion that the contributions of these other persons should be compensated. It does not imply the stronger claim that every person should have free access to content. This argument provides no reason to think either (1) that someone who contributed nothing to the author's ability to create the relevant piece of content *C* should be able to access *C* without compensating someone or (2) that the author should not be able to exclude such a person from appropriating *C* without paying the author a fee. The fact that others contributed value to *C* does not imply that, for example, *I* should get that content for free.

Moreover, as Adam Moore points out, one can argue that the contributions of those who have contributed to the author's ability to create *C* have been fairly compensated through a variety of social mechanisms. Education, after all, is not free. It requires the payment by someone (e.g., taxpayers) of tuition and teacher salaries, as well as the purchase of books and textbooks. It seems reasonable to think that such payments represent fair compensation for the contributions made by such persons to the author's ability to create *C*. As Moore (2001) puts this important point, "When a parent pays, through fees or taxation, for a child's education it would seem that the information – part of society's common pool of knowledge – has been fairly purchased" (172-73).

Finally, the argument seems to vitiate the legitimacy of many material property rights we take for granted. A group of people who build an automobile need not only the proper materials but also a viable design; a viable design is as important as the materials. But the value contributed by the design is a social product for which the manufacturer cannot claim full credit. Moreover, the ability of the workers to assemble the materials into an automobile derives from the efforts of all those persons who developed the techniques and imparted them from one person to the next – including those who taught them to the autoworkers. And the same is true of those persons who antecedently fashioned pre-existing materials into parts that could be assembled into an automobile. But if it is illegitimate for a person to receive compensation for value attributable to others, then it would be illegitimate for the automaker to receive compensation for the value contributed by these other persons. While this, of course, would not fully defeat an automaker's claim to some compensation (after all, the automaker introduced some value into the world), it suggests that the ordinary market mechanisms for determining the price of the automobile are morally problematic insofar as they fail to acknowledge the social character of much of the value introduced by a newly-manufactured automobile.²¹ It would not be unreasonable to reject any proposition that had such controversial implications.

The Value of Free Expression

IP protection is problematic, on this line of reasoning, because it necessarily entails impermissible restrictions on the moral right to free speech. On this view, the moral right to free speech is so fundamental to democratic systems that any restrictions on this right cannot be justified. Since laws that protect an author's right to exclude others from intellectual content have the effect of restricting this right, they are morally illegitimate.

²⁰ As Hettinger (1989) puts the point: "The value added by the laborer and any value the object has on its own are by no means the only components of the value of an intellectual object. Invention, writing, and thought in general do not operate in a vacuum; intellectual activity is not creation *ex nihilo*. Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus even if one assumes that the value of these products is entirely the result of human labor, this value is not entirely attributable to *any particular laborer*" (38).

²¹ For similar reasons as discussed above, it would not imply that anyone should get the automobile for free.

The problem with this argument is that, according to ordinary intuitions, the moral right to free speech is not absolute. Most people believe, for example, that free speech can legitimately be restricted for a variety of reasons: to protect personal privacy (e.g., laws prohibiting publication of certain sensitive information, like social security numbers) and interests in reputation (e.g., libel and slander law). Indeed, it seems clear that it is legitimate not only to restrict dissemination of certain kinds of governmental information, but also to restrict even scientific information that could easily be used to inflict great damage on other persons; for example, if someone came up with a way to make a one-megaton nuclear weapon out of materials impossible to restrict, the state may (and, in fact, should) restrict dissemination of such findings to protect public safety.

The Information Commons

A number of theorists have argued that there is a morally protected “information commons” to which all have a right. According to this line of argument, the class of information objects is a morally protected resource for all to use. Any protection of IP, then, that gives a right to some person to exclude others from the use of some informative proposition by requiring a fee has the effect of removing something from the information commons and thus has the effect of wrongly depleting it. Thus, the “commons argument” concludes, information should be freely available and not subject to IP protection.

The concept-term “commons” is ambiguous between a number of uses, but the concept that grounds this line of argument ultimately derives from one of the Lockean provisos to his influential justification of property rights.²² According to this proviso, one may legitimately appropriate a material resource through one’s labor only if there remains enough of the resource for others. Since there are limits in a world of scarcity to how much can be removed from the available resources while leaving enough for others, the effect of this proviso is to define a morally protected class of resources: a resource from this class cannot be permissibly appropriated by any one person in such a way as to exclude other persons from appropriation of that resource.²³ As a matter of moral principle, everyone has a moral right to use the resources available in the commons.

The justification for the claim that some class of resources is a morally protected commons presupposes a number of claims. First, it presupposes that people have a morally significant interest in the relevant class of resources; land, for example, is of great importance to human well-being. Second, it presupposes that the resource can be appropriated in such a way as to reduce its supply and cause its depletion. Third, it presupposes that the relevant resource can also be consumed by persons in another way that does not reduce its supply. Fourth, it presupposes that the relevant resources can be readily appropriated (in the protected way) by anyone with access to them; the vistas of a park can be viewed, for example, by anyone who happens to be there. Finally, it presupposes that no one has a prior claim to exclude others from appropriating the relevant resources (in the protected way); the original humans, for example, had no claim whatsoever to any of the land that forms part of a land-commons.

This commons argument fails, however, because the fourth condition is not satisfied. It is not true that all propositional objects exist in a form that can be readily appropriated by anyone who happens to be

²² This argument is discussed below at 16-18.

²³ It is worth noting that the Lockean proviso is not satisfied by distribution of material resources in any Western industrialized nation. It is, for example, false that there is enough unowned land left in any Western nation for everyone else to use because there is no unowned land and plenty of people who could use land; every acre of land, at least in the United States, is owned by some private or public entity or person. Ironically, the Lockean argument for property rights, commonly thought to vindicate the general structure of property relations in Western nations, seems to ground a radical critique of the existing distribution of land in these nations – since the idea that every acre of land is owned by someone is inconsistent with the Lockean proviso. Similar arguments can probably be made for other kinds of material resource. This, of course, does not imply that the critique is correct; it is, however, notable that what people take to be one of the classical justifications for existing property relations seems to go so far in the direction of vitiating the existing distribution of resources.

there. The proof of Fermat's Last Theorem, for example, did not become available for consumption, despite the intense labors of mathematicians for hundreds of years, until Andrew Wiles produced it in 1994. *A Tale of Two Cities* did not become available for consumption until Charles Dickens produced it. While it might be true that someone else would have eventually found a proof for Fermat's Last Theorem, it is not true that someone else would have written *A Tale of Two Cities* had Dickens not done so.

Of course, these propositional objects might have already existed as abstract objects in logical space prior to their discovery, but the important, interesting, non-obvious propositional objects cannot be readily consumed until someone, through the expenditure of her labor, makes them available to other people. The intellectual commons, unlike the land commons, is not a resource already there waiting to be appropriated by anyone who happens to be there; it is stocked by and only by the activity of human beings. Although people can improve the value of land, they cannot *make* land; in contrast, people can (and do) make novels, music, proofs, theories, etc.; and if someone does not make a particular novel, it is not available for human consumption – even if it exists, so to speak, somewhere in logical space.

The Costs of Publishing Digital Information

The basic idea here is that, in a competitive market, the price of information should properly reflect the cost of making it available to users.²⁴ On this line of analysis, while the cost of publishing information in traditional material media like books might be sufficiently high to justify charging users a price for it, the cost (per user) of making information available on digital media approaches zero as the number of users grows larger. For example, there might be some fixed cost involved in making information available on a website, but no additional cost is required beyond that to make that content available to any number of users; the more users appropriating the information, the lower the cost of making it available to any particular user. Thus, the argument concludes, it would be unfair to charge users a fee for appropriating any piece of (digital) information; information should be free (or nearly free) so as to reflect its dissemination costs.

There are two problems with this argument. First, if one accepts the legitimacy of free enterprise, as appears to be presupposed by the above argument, then what is a fair price will be determined by the voluntary interactions of buyers and sellers in a competitive market: the fair price is that which is set by the contractual transactions of free prudentially-rational buyers and sellers. If buyers in a competitive market are willing to pay a price for digital information significantly higher than the seller's marginal cost, then that price is presumed fair. Second, the argument overlooks the fact that the fixed costs associated with producing and distributing intellectual content can be quite high. For example, the Disney Company spent more than \$100 million in making the film *Pearl Harbor*. If one assumes that a fair price allows the producer to recover the fixed costs associated with producing and distributing intellectual content, this would entail that it is fair for content producers to charge a price that is sufficiently above the marginal costs to allow them to recover these fixed costs.

Regulating Digitized Information Entails Regulating the Ideas Themselves

IP protection, according to this reasoning, is illegitimate because one cannot restrict access to digitized information without regulating the ideas themselves – something that even proponents of IP protection believe is illegitimate. According to Barlow (1993), “since it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression.” Though Barlow does not clearly explain the idea, it appears to be that, in contrast to words on a physical page and the ideas they express, there is no ontological distance between a digitized piece of content and the ideas it expresses.

²⁴ This line of reasoning owes to Coy (2004).

If this is the underlying idea, it is mistaken. A digitized piece of information, strictly speaking, is a series of electrical impulses that have certain characteristics and remains as much a physical object as a sheet of paper with ink symbols on it. In contrast, *the content expressed by* these electrical impulses or signals is not a physical object at all. As we have seen, any piece of content is an abstract object that is, unlike electrical impulses, incapable of causally interacting with physical objects. If this is correct, then a digitized representation of information is ontologically distinct from the ideas it expresses.

It is worth noting that this does not presuppose that there is a uniquely correct interpretation of any digitized representation. Indeed, if there is no unique content expressed by a digitized representation of ideas, then the content of the representation will presumably consist of a multiplicity of plausible interpretations. But a digitized representation of a sentence or sentences is clearly distinct from a multiplicity of propositional entities – regardless of what these entities might ultimately turn out to be.

Effects-Based Arguments against IP Protection

Strong and Weak Effects-Based Arguments

Effects-based arguments identify some particular state of affairs as constituting the good that law must maximally promote if its content is to be morally legitimate. These arguments usually converge on the view that human well-being is the good that should be maximally promoted by the law, but disagree on the best indicator of well-being. Hedonist welfarists look to subjective experiences of pleasure and pain as the exclusive indices for well-being; on this view, the subjective experience of pleasure alone conduces to human well-being, while the experience of pain alone detracts from human well-being. Objectivists look to the provision of certain basic goods as the exclusive indices of well-being. These goods are thought to be necessary, as an objective matter, for human beings to flourish in all the ways they should: people, on this view, need material goods (like food, water and shelter), sexual and platonic companionship, and artistic experience – whether they know it or not (see, e.g., Finnis 1980). Other theorists look to satisfied preferences as the index for well-being; on this view, a state of affairs X involves greater well-being to *p* than another state of affairs Y if and only if *p* has a greater number of satisfied preferences in X than in Y. Still others, as we will see shortly, look to economic indicators of well-being.

There are two different species of effects-based argument. Strong effects-based arguments assume that the *only* determinant of the moral quality of a law is its effects on the relevant index of human well-being.²⁵ On this view, whether the content of any law is morally justified is determined entirely by whether it maximally promotes the desired state of affairs; there are no other relevant factors (e.g., moral rights of individuals). Weak effects-based arguments allow for the possibility that something other than the effects of a law on well-being might be relevant, but assume that those other factors either are not present or are outweighed by the relevant effects of the law. Strong effects-based arguments are thus incompatible with the existence of moral rights that would defeat instrumental considerations of human well-being, while weak effects-based arguments are not.

One of the most influential approaches to legitimacy theory in contemporary legal theory is the strong effects-based approach of Richard Posner's (1981) law-and-economics (L&E) theory. L&E proponents typically make both descriptive and normative claims about the content of the law. There are a variety of descriptive claims made: some proponents, for example, claim that, as a factual matter,

²⁵ Strong effects-based arguments can, but need not be, consequentialist in character. See note 12 for an explanation of consequentialism. As I have defined the term here, strong effects-based arguments are concerned only with the legitimacy of the law. The claim that consequences on welfare are the only morally relevant factor in assessing the law does not imply or presuppose that the moral quality of *any* act, private or public, is determined entirely by its consequences on welfare. One might take the position that the state's moral duties, unlike those of individuals, are limited to maximizing human welfare.

the content of the law tends to promote wealth-maximization or economic efficiency, while others claim that legal officials typically intend to adopt laws that promote such values. The normative claim is that the law is morally justified or morally legitimate only insofar as it maximally promotes wealth-maximization or social efficiency. L&E theory, thus, purports not only to explain the content of the law, but also to identify its justifying rationale – the maximization of wealth or economic efficiency.

Unfavorable Effects of IP Protection

Either way, effects-based arguments against IP protection attempt to show that restrictions on the use of IP fail to maximize (and possibly even diminish) well-being for a variety of reasons. Restrictions, for example, on the use of scientific information (such as those entailed by patent law) impede the development of new technologies that would produce efficiency and greater wealth.²⁶ Restrictions on the use of artistic content make it less available to persons with lower incomes and thereby either diminishes their pleasure, deprives them of a basic good needed for them to flourish, or frustrates their preferences (depending on which index of well-being is deployed). Other things being equal, the law should encourage, rather than discourage, well-being. Since IP protection does not maximally encourage the relevant index of human well-being, IP rights should not be protected by law.

It should be noted that consequentialist arguments not utilizing a set of purely economic measures of well-being tend to have stronger conclusions than L&E arguments. While there are a variety of L&E positions on IP protection, many L&E theorists (Posner & Landes 2003) take a middling position on IP protection, arguing that some measure of IP protection is needed to promote efficiency, but cautioning that many existing IP protections have inhibiting effects on these indices of well-being. In contrast to arguments defending abolitionist positions (i.e., IP protection of any kind is illegitimate) or absolutist positions (i.e., IP protection should afford content-creators absolute control over their creations without limits or exception), these L&E positions are fairly characterized as “reformist” in character.

Problems with Effects-Based Arguments against IP Protection

Both strong and weak effects-based arguments are problematic because, at this juncture, the extent to which IP protection fails to promote the relevant index for human well-being is just not clear. For example, one of the most influential arguments in favor of IP rights is grounded in the claim that protection of IP is needed to ensure that inventors have a sufficient incentive to do the research essential to continuing technological progress – which is necessary to promote the relevant index of human well-being. Indeed, as we will see below, there are also facially plausible effects-based arguments in favor of some IP protection. As far as the descriptively empirical issue is concerned, there is no consensus at this point in time that IP protection fails to maximally promote the relevant index of well-being.

In addition, strong effects-based arguments, like Posner (1981), are vulnerable to an objection that is frequently directed at consequentialist approaches to ethical theorizing. Consequentialist theories assert that the moral quality of any act (public or private) is determined entirely by its effects on the promotion of some desired state of affairs. Many theorists, including Nozick (1977) and Dworkin (1981), reject consequentialist approaches to ethical theorizing, in part, on the ground that they are inconsistent with the existence of moral rights. Similarly, many legal theorists reject L&E theory on the ground that the claim that efficiency is the only moral value relevant in assessing the law is inconsistent with the idea that one legitimate function of the law – indeed, the primary function of the law – is to protect certain moral rights of individuals that cannot be, so to speak, bargained away to secure greater total wealth.

²⁶ See, e.g., Lessig (2001).

A COMMON SHORTCOMING WITH THE ARGUMENTS AGAINST IP PROTECTION

All of the arguments above seem to fall short in one important respect: none pays sufficient attention to the issue of whether authors have a morally protected interest in the contents of their creations. Indeed, many of these arguments do not so much as even address this possibility. Claims that focus on properties of information say nothing at all about whether authors have or lack a morally protected interest in the content they create; and all but one of the above arguments are grounded in claims about the character or properties of information entities. The remaining argument, the argument from free expression, focuses entirely on the interests of other persons in free expression and does not consider whether authors might have a conflicting interest of comparable importance in the contents of their creations; in consequence, the argument must rely on the implausible claim that the right to free speech is absolute.

This is problematic because the issue of whether IP is legitimately protected clearly depends on whether authors have a moral right in the content of their creations. If, for example, authors have a moral right to their creations, it does not matter whether information “wants” to be free; information is an abstract object that has no moral rights and hence has nothing that would counterbalance an author’s rights (if such there be). Nor would it matter whether digitized information is identical with ideas; if authors have a moral right to their creations, then they would have a right, other things being equal, to exclude others from the ideas assuming that is the only way to protect the authors’ right to their creations. Similarly, the costs of publishing digital information are irrelevant if the author has the right to control the disposition of her creation and can withhold dissemination entirely subject to payment of a fee. Moreover, if authors have such a right, it is not enough to assert that other persons have a free-speech right in such content; the various conflicting rights have to be weighed against each other to see which one wins.

A fully adequate evaluation of whether IP protection is justified will have to be grounded in part in an analysis that considers whether authors have a morally protected interest in the content that they create, discover, or otherwise make available. As we will see below, many of the arguments in favor of IP protection are grounded in the view that the author has a moral right to control the disposition of her intellectual creations. These arguments are discussed and assessed in the following sections. As we will see, these arguments tend to share a different, albeit related, shortcoming.

ARGUMENTS FOR IP PROTECTION

Effects-Based Arguments in Favor of IP Protection

According to effects-based arguments in favor of IP protection, the law should recognize and protect IP because of the desirable consequences of doing so.²⁷ On this line of argument, society needs IP protection to ensure that content-creators continue to devote their time, effort, and labor to creating (or discovering) new content – whether such content is scientific, artistic or something else. IP protection helps to ensure that authors have a sufficient incentive for intellectual activity that results in intellectual content because it affords authors the right to condition access to and use of content upon payment of a fee. Without such an incentive, the argument continues, authors would not be able to devote time to content-creation, and we would all be worse off because we would have fewer artistic and technological products.

²⁷ In the U.S., the Congress has constitutional authority for the purpose of promoting a desirable consequence – namely the promotion of useful arts and sciences. U.S. Constitution, Article 1, Section 8.

Proponents of such arguments do not necessarily endorse all existing features of IP law. For example, Posner and Landes (2003) believe that some protection of IP is necessary to provide sufficient incentives for innovation, but also that various features of existing IP law are inefficient and hence too stringent:

[T]here is no basis for confidence that the existing scope and duration of either patent or copyright protection are optimal. The doubt is not whether the protection is too meager but whether it is too great, imposing access and transaction costs disproportionate to the likely benefits from enhancing the incentives to produce socially valuable intellectual property (422).

Among other things, they suggest that the term of copyright protection is too long and propose a system of renewable copyright terms that they argue would be more efficient than the extended-term system established by the Copyright Act of 1978.

It should be noted that strong and weak effects-based arguments in favor of IP protection presuppose that a person's interest in intellectual content created by someone else does not rise to the level of a moral right that the state is obligated to protect.²⁸ The reason for this is that, as a conceptual matter, the infringement of a right can be morally justified only by reference to some more important competing right; the infringement of a right can never be justified solely by an appeal to the good consequences of doing so on the well-being of other persons. As Dworkin (1978) has famously put the matter, rights trump consequences.²⁹

Effects-based arguments in favor of IP protection are vulnerable to some well-known objections.³⁰ First, the arguments seem to presuppose falsely that the only incentive there is to create content is material; academics and artists frequently create content without believing that they are even remotely likely to get paid for it. Second, the arguments are not strong enough to entail that protection of an IP *right* is justified; there are other ways of ensuring a material incentive for content-creation if such is needed: the state could, for example, pay a salary to content-creators. Third, as discussed above, the issue of whether IP protection maximally promotes happiness or well-being is an empirical question that remains unsettled. For example, L&E theorists disagree on whether IP protection maximally promotes economic efficiency or wealth maximization. At this point, more empirical research is needed by economists and sociologists, one way or another, to determine the effects of IP protection on technological and artistic development.

Non-consequentialist versions of effects-based arguments also suffer from the same shortcoming as the arguments against IP – namely, they do not explicitly consider whether authors have a morally protected interest in their creations; they simply presuppose that authors lack such an interest and treat the authors' interests as on par with everyone else's. This is not a problem for consequentialist theories because the theories themselves are explicitly grounded on the claim that every person's interests in well-being count the same; authors, on this line of analysis, could not have some special interest in their creations that would take precedence over the interests of other persons. But consequentialist theories are widely considered problematic precisely because they deny that a person

²⁸ As noted above, effects-based arguments do not presuppose a general consequentialist theory of morality. See note 25, above.

²⁹ Spinello (2003) aptly puts it as follows: "If we accept that an ownership stake in intellectual property is a natural entitlement, we cannot sacrifice a property right merely for marginal gains in social utility or suspend that right for the sole purpose of giving new markets a chance to blossom."

³⁰ For a discussion of some of these problems, see Hughes (1988), Moore (2003); and Spinello (2003).

could ever have any sort of interest in anything that would trump the interests of others in their own well-being – including any sort of special interest in or right to life or liberty.³¹

Arguments from Investment

There are a number of what I will call “arguments from investment.” What these arguments all have in common is the idea that a content-creator invests something in which she has a morally protected interest (possibly rising to the level of a moral right) into the creation of content that should, as a matter of justice or fairness, be protected by a legal right to IP. Each of these arguments will be discussed separately below.

The Classical Lockean Argument

It is instructive to begin with a brief look at the classical Lockean argument for “original acquisition” of property (i.e., conversion of an object that no one owns into an object that someone owns). Locke realized that the existence of a moral right to property depends critically on the idea that persons can acquire a property right in objects to which no one else has a prior moral claim or entitlement (i.e., objects which are not the property of anyone else). Transfer of something to which one has an ownership claim is easily justified on the strength of autonomy considerations; if I have an interest in something, then my autonomy rights are such that I can abandon that interest unilaterally or in exchange for payment of some amount. If, in contrast, no one is ever justified in asserting ownership rights in something antecedently owned by no one else, then no one could ever come to have an ownership right in anything since every material entity has a history that can ultimately be traced back to parts that were owned by no one (perhaps before human beings arrived to appropriate those objects).

Locke argues that one can acquire through the expenditure of one’s labor a property right in material objects that are otherwise unowned:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labor something annexed to it that excludes the common right of other men (Locke 1690, Chapter V).

There are two provisos, according to Locke, that restrict original acquisition: (1) there must be enough of the material object for everyone else to appropriate; and (2) no one may acquire a material object to spoil or destroy it.

In any event, one acquires a property right in unowned material objects by investing one’s property on the object in the form of one’s labor. There are a couple of possible explanations for how laboring on an object might give rise to a property right. First, it might be that a person has mixed her labor – hence her property – into the object such that it cannot be retrieved; on this view, putting her property into an object to which no one has any prior property interests gives her a property right to that object. Second, it might be that a person has, by one’s labor, improved that material object thereby creating value that did not previously exist in the world; on this view, it is only fair that she gets the value she creates by investing her property into an object.

³¹ Consequentialist theories have been criticized, for example, as sanctioning the execution of someone known to be innocent of any wrongdoing if necessary to maximize human happiness or well-being. Not everyone accepts these claims, but they are fairly common in the literature critical of consequentialist theories.

Either way, this argument does not clearly succeed in justifying *material* property rights. One might plausibly think that we simply forfeit the expenditure of our labor-property *and* the value we create when we labor on some object that does not belong to us. If I swim out to the middle of the Atlantic Ocean and somehow fence off a portion and improve it by cleaning it of all pollution, most people will agree that I do not thereby acquire a property right in that portion of the ocean. The claim that I own my labor, even if true, does not imply that I own whatever material entities I mix it with or use it to improve.³²

But even if Locke's argument were successful in justifying original acquisition of material property, it does not have any direct or obvious application to IP because content-creators do not necessarily mix their labor with some pre-existing object; while a sculptor might do so, a novelist does not. If it makes sense to think of intellectual content as constituting objects that exist independently of us, they are *abstract* objects with radically different properties than material or mental objects (i.e., ideas, thought, perceptions, etc.). The problem is that, by definition, we cannot causally interact with abstract objects and hence cannot labor on them in the requisite way³³; while we can, for example, think about the object denoted by the symbol "2," we cannot causally interact with it and hence cannot labor on it. If this is correct, then the classical Lockean argument will not justify IP rights without significant modification. At least as Locke formulates the argument, it simply has no bearing on the issues of IP that currently divide us.

In consequence, the classical Lockean argument must be modified to deal with intellectual content. On the assumption that it succeeds in justifying material property rights, what is minimally needed is to reformulate the argument so as to avoid any reliance on the idea that authors create content by mixing their labor with pre-existing objects. One way of doing this is simply to argue that, regardless of whether authors mix their labor with anything, they bring new value into the world that was not available prior to the expenditure of their labor. Since authors are responsible for the creation of this value, it would be unfair not to allow them to define the terms upon which others may take advantage of this value. They are responsible for that value and hence deserve its full benefits.

Although this version of the Lockean argument does not presuppose that authors mix their labor with some pre-existing objects, it remains vulnerable to objection. One can object, for example, that it incorrectly assumes authors are solely responsible for the value brought into the world by any novel piece of content. As we have seen, many theorists argue that the ability of authors to create valuable new content depends crucially on the intellectual efforts of those who created and imparted content before them. On this line of analysis, no author can claim to be solely responsible for the value brought into the world by any novel piece of content. The argument thus, according to this criticism, relies on a false premise.

Another way of avoiding reliance on some sort of labor-mixing idea is to focus exclusively on the author's effort. Michael McFarland (1999), for example, argues as follows:

It takes much thought, time, and effort to create a book, a musical composition, or a computer program. Those who worked to create it have the strongest claim to the benefits of its use, over anyone else who contributed nothing to the project.

³² As Nozick (1974) puts the point: "But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?" (174-5). For neo-Lockean responses to this point, see, e.g., Schmidtz (1990) and Simmons (1992).

³³ This, again, is the standard view of abstract objects. See note 6, above.

It is clear from the passage that McFarland's argument does not rely, either explicitly or implicitly, on the premise that authors create content by mixing their labor with some pre-existing object. The claim is simply one of justice: someone who invests significant effort has a superior claim than anyone else to the content that effort produces.

One problem with this argument (sometimes called the "Sweat-of-the-Brow" argument) is that it falsely assumes that authors invest a great deal of something (whether thought, time, or effort) into their creations. While it is presumably true that one must invest "much" (whatever this means) thought, time, and effort into making a film like *Pearl Harbor*, this is not true of all content-creation. With proper inspiration, a poem or a song might be created in a matter of minutes with little thought or effort. If one must exert oneself to some threshold extent to gain a claim in the product of one's exertion, then this will have to be determined on a case-by-case basis – with the outcome being that not every author will gain an IP right. This might turn out to be the correct position on IP protection, but McFarland's version of the argument, like the other investment arguments, is intended to justify a general right to IP.³⁴

Moore (2001) offers another possibility, arguing that IP protection is presumptively justified in virtue of protecting the author's sovereignty: "[L]abor, intellectual effort, and creation are generally voluntary activities that can be unpleasant, exhilarating, and everything in-between. That we voluntarily do these things as sovereign moral agents may be enough to warrant non-interference claims against others" (108). Moral principles protecting the sovereignty of a rational agent, on this view, will protect the agent's investment of something that requires an unpleasant exertion of sorts. As long as no one is made worse by the author's ability to exclude others from the content she creates, IP protection is justified.

Nevertheless, it is not clear how one's sovereignty over one's own actions would give rise to a right to some object extrinsic to those actions. My sovereignty over myself implies moral latitude to decide what to do with my mind and body. It does not, however, obviously imply any latitude to control objects that are external to me. To the extent that moral sovereignty is related to a moral right to preserve one's existence, one could argue that sovereignty extends to those objects that are absolutely necessary to my survival. But it is simply not clear that this would apply to intellectual objects.

The Personality Argument

What I will call the "personality argument" owes to G. W. Hegel and takes a variety of forms. At the foundation of each such argument, however, is the idea that an individual enjoys an exclusive moral claim to the acts and content of his or her personality, personality being understood to include a variety of character traits, dispositions, preferences, experiences, and knowledge. This special claim to personality is sometimes understood as ownership or something closely analogous to ownership; thus understood, it would resemble the foundation of the classical Lockean justification for property, which relies upon the claim that we own our body and its activities. The idea here is that the claim of ownership over one's personality will extend to the products of, so to speak, one's expenditures of personality through acts that express it.

³⁴ It is worth noting that the U.S. Supreme Court has explicitly rejected Sweat-of-the-Brow justifications for copyright law in the U.S. for a number of reasons. First, the idea that "copyright [is] a reward for ... hard work" is inconsistent with the Constitutional rationale for copyright protection, which is to promote the useful arts and sciences and not to reward the efforts of content-creators. See note 27, above. Second, this idea implies that facts may legitimately be protected – an implication that is inconsistent with "the most fundamental axiom of copyright law – that no one may copyright facts or ideas." *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991).

Intellectual activity, on this line of reasoning, involves such an expenditure of personality. The creative activity of a poet, musician, artist, scientist or mathematician is necessarily an expression of traits forming a part of personality. Such efforts, for example, require the utilization of experience, knowledge, and character traits and are fairly characterized as expressing these elements of personality. As Justin Hughes somewhat paradoxically describes the idea, the creation of intellectual content “materializes” these dimensions of personality (Hughes, 148).³⁵

There are two directions the personality argument can take here. First, one can argue that this “materialization” of personality (i.e., the intellectual content produced by these traits) is something separate from personality and expresses it. Alternatively, one can argue that such content constitutes an extension of personality (or perhaps of the author’s personhood). Either way, the argument concludes that this relationship of content to the author’s personality (which is owned by the author) results in the author’s having a legitimate ownership claim to the content.

Both versions of the argument are vulnerable to objection. Against the first version, one can argue that the claim that one owns one’s personality does not, by itself, imply that one owns the “expressions” of one’s personality. Ownership of one’s personality does not obviously translate into ownership of the expressions of personality. If I combine a shirt and slacks into an outfit that expresses my personality, I don’t have any ownership rights that would preclude someone else’s wearing a very similar outfit.

Against the second, one can argue that it is implausible to think that the expressions of personality in the form of intellectual content are literal extensions of personality (or person) in the sense of forming part of the personality (or person). If such expressions became part of the personality, then it would be reasonable to infer that one owns these extensions; insofar as one owns one’s personality, it would seem to follow that one owns anything that constitutes a part of that personality, as an extension would. But it is just not plausible to think of a novel as a literal part of the author’s personality or person; a novel might very well be expressive of one’s hopes or fears, but a novel is not itself a hope or a fear. The second version of the argument, then, seems problematic because grounded in a false premise.

One can also worry about the premise, shared by both arguments, that the relationship between a person and her personality is one of *ownership*. Although we use possessives to refer to elements of our personality (e.g., *my* memories, *my* dispositions, etc.), it seems odd to think that these possessives are intended to convey a relationship of ownership. If, as seems reasonable, personality comprises an important part of self (in at least one sense of this ambiguous term), then it seems far more natural to say that “I am my personality” than that “I own my personality” – although even this is not completely accurate if I, as seems plausible, am more than my personality. Indeed, it is just not clear what it would even mean to say that I “own” my personality. If the relationships between an author and her personality do not, however, include ownership, then it is difficult to see why this relationship would confer ownership interests on the products of personality. Either way, the personality arguments are subject to various objections.

A COMMON SHORTCOMING IN THE INVESTMENT ARGUMENTS FOR IP PROTECTION

Many investment arguments for IP seem to be vulnerable to a common objection. Whereas the arguments against IP seem to give short shrift to the issue of whether authors have a morally protected interest in their creations, most of the investment arguments seem to give short shrift to the issue of whether people have a morally protected interest in the content created by others. Surely, if the interests of the authors are relevant, so are the interests of other persons. Indeed, one might plausibly

³⁵ I say “paradoxically” because content is not material.

believe that there might be content so important to humanity that the interests of other persons, taken together, defeat whatever interest the author has in that content.

To see the problem, consider again some of the investment arguments. The personality arguments do not consider the extent to which people might have legitimate interests in content created by others; the only interest explicitly considered is the author's interest in extensions or expressions of her self. Similarly, although Lockean arguments are qualified by the proviso that there be enough of the resource left to others, many Lockean and neo-Lockean simply assume that this is true; McFarland, for example, never considers the extent to which the lives of others might be worsened by giving an author exclusive control over the content of her creation. It seems clear that an adequate evaluation of the propriety of IP protection must assess *all* the interests that people might have in some piece of intellectual content.

Some Neo-Lockean have attempted to do just this by theorizing the Lockean proviso in more detail and applying it to IP issues. Moore (2006), for example, interprets the proviso as a principle allowing IP protection to the extent that it is Pareto-optimal. On Moore's view, IP protection is justified because it makes the author better off without depriving anyone else of anything to which he or she had prior access and use (i.e., because it is Pareto-optimal); after all, such content was not available to anyone until the author produced it.³⁶

It is not entirely clear, however, that IP protection does not make others worse off than they would have been. If A discovers the only possible cure for cancer and perversely decides to withhold it from everyone with cancer, the cancer patients seem worse off in the following sense: they had a positive chance of survival prior to A's exclusive appropriation since, after all, someone else might have discovered it and made it freely available; now this chance is denied them. Although such patients might achieve spontaneous remission, their chances of becoming cancer-free are significantly reduced by A's exclusive appropriation of the cure. It seems clear that the patients are made worse off by this appropriation.³⁷

It might be true that allowing a person to exclusively possess any one-of-a-kind object – including material objects like rare automobiles – leaves other people worse off in precisely this sense, but this doesn't have any obviously relevant implications. The Lockean proviso (and hence its interpretation as a principle requiring Pareto-optimality) applies only to situations involving original acquisition. If there is only one such object available in a situation involving original acquisition (which presupposes that no one antecedently owns that object), then the Lockean proviso clearly prohibits affording property rights in the object. But it is crucial to note here that situations involving artifacts like automobiles are not situations of original acquisition because automobiles are not lying around unowned in something resembling a state of nature. In contrast, the creation or discovery of a new piece of content involves a situation of original acquisition precisely insofar as no one has any antecedent ownership claim to the that piece of content.

BALANCING INTERESTS OF AUTHORS AND OTHERS

At this point, it seems clear that a fully adequate evaluation of IP rights will have to consider *all* the interests that people might have in intellectual content. If the investment arguments fail to show that the expenditure of labor is sufficient to create property rights in intellectual or material objects, they

³⁶ As Moore (2006) puts the point: "If no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted. In fact, it is precisely because no one is harmed that it seems unreasonable to object to what is known as a Pareto-superior move. Thus, the proviso can be understood as a version of a "no harm, no foul" principle" (12).

³⁷ See, e.g., Waldron (1993).

have the virtue of considering the issue of whether authors have a morally protected interest in their creations. As such, the investment arguments are suggestive of a plausible approach for determining whether someone should be afforded a limited legal right to exclude others from appropriation of an object. To determine whether the law should allow someone to exclude others from appropriating some material or intellectual object, we must weigh all the competing interests. If my interests in X are sufficiently strong and outweigh the interests of all other parties, then that fact is a pretty good reason (though not necessarily a conclusive one) to think that my interests in X are justifiably protected by the law. This, by itself, will not tell us everything we would want to know about the specific shape such protection should take, but it would tell us that some substantial legal protection of the interest is warranted by political morality.

The Interests of Authors in Their 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, an author must divert time and energy away 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.³⁸

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 available supplies of time and energy get smaller as we get nearer to the end of our life-spans. Second, we tend to become more sensitive to our own mortality as we grow older. It is well known that older people have a 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 their supply of moments is limited.

In any event, it seems uncontroversial that, once we reach a certain age, we will generally regard our investments of time and energy as prudentially valuable. Most of us have a list of projects that are important to us – things we want to do and accomplish in life. If children feel they have an unlimited supply of time and energy, adults generally do not. We have only so much time and energy to do all the things that shape and give meaning to our lives. If we want to accomplish these things, we have to assign significant value to our time and energy – something that is clear to an adult.³⁹ From the standpoint of our own interests, our time and energy have value; that is, we have a prudential interest in our time and energy.

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 or values something does not imply that X has a morally protected interest in it. People

³⁸ Some of the analysis in this section was presented at CEPE 2005 (2005 Conference on Computer Ethics: Philosophical Enquiry) and appeared in the conference proceedings. A more detailed version of the argument appears in Himma (2007).

³⁹ This truism is expressed in a variety of well-known slogans – e.g., time is money.

commonly want and value 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 – and perhaps to the community in general.

There are two normative points here. First, it seems clear that we should, as a matter of prudential rationality, value our time and energy. As a conceptual matter, interests are things we care or ought to care about. But if X cares about – or should care about – obtaining *p* and X knows that *q* is necessary for obtaining *p*, then X has a reason to care about *q*. This is just a principle of means-end rationality: the fact that X values or should value *p*, as a matter of rationality, provides a reason for X to care about any means that X knows are necessary for X to obtain *p*. Since having time and energy are necessary means to obtaining any of our interests and since this is obvious to rational adults, it seems to follow that we ought, as a matter of prudential rationality, to care about our time and energy.

Second, it is reasonable to think that a person's failure to assign any prudential value whatsoever to her time and energy signals some psychological disease. Someone who assigns no value to her time and energy probably assigns little or no value to her own interests generally. Indeed, the claim that X cares about her own interests but cares nothing at all about how her time and energy is spent seems incoherent. The principal resources we have for pursuing our interests are our time and our energy – a fact that is obvious to any rational agent; accordingly, if a person does not care about these resources, it is reasonable to conclude that she does not care about her own interests. But someone who does not care about her own interests is probably severely depressed, and possibly suicidal; it is pathological, as a normative matter of physical and psychological well-being, not to care about one's own interests or about the central resource for pursuing our interests.

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. Human beings have the special moral status of *personhood* which confers a fundamental moral right to respect; and it is hard to see how one could adequately respect a person without respecting those interests that are central to her flourishing in all the ways that she should. This is why, for example, the moral obligation to respect persons demands that we respect their lives and their autonomy.

It is reasonable to think, then, that others should respect those interests that have the importance to beings like us that time and energy have. Again, the point is not just that some of us do care about our time and energy – or even that we *all* do care about these resources; rather, the point is that we all *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. Moral respect for persons surely requires respect for those interests that are utterly central to ensuring that persons flourish in all the ways that they (morally speaking) *should* flourish. Without time and energy, none of us can flourish in any of the ways we should; these resources are utterly central to our well-being and flourishing. If this is so, then it is reasonable to think that our interests in our own time and energy receive significant protection from morality.

The claim that our interests in our time and energy are protected by morality harmonizes nicely with other moral principles we commonly accept. We tend to regard persons who are utterly uncaring about their expenditures of time and energy as morally deficient in a number of different respects. For example, we regard them as “wasting their lives” – waste being something we have a strong moral reason to avoid. Similarly, we regard them as unproductive and hence as contributing nothing to our societal lives together – something they ought to be doing. Industry, productivity, and a desire to

accomplish something are not, of course, the only moral values; a preoccupation with accomplishment to the exclusion of, say, a social life is also regarded as a flaw from the standpoint of morality. But insofar as these traits have moral value, so must the time and energy that people devote to expressing these traits. To the extent that X's time and energy have moral value, it seems clear not only that X has a moral obligation to spend these resources wisely, but also that other people have an obligation to respect X's time and X's energy.

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 value, 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 to some other end) because it enables us to achieve other ends by doing things, time is both instrumentally and intrinsically valuable.⁴⁰ 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 for its own sake 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.

The foregoing analysis suggests therefore 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, within limits, a person's interest in controlling the use of what she has expended her time to create.⁴¹ 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.⁴²

⁴⁰ For a discussion of the significance of the distinction between intrinsic and instrumental value in ethical theorizing, see Himma (2004a, b, and c).

⁴¹ I do not mean to suggest here that this is the only way.

⁴² 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.

The foregoing considerations 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 (though not necessarily absolute) control over the content she makes available to the world.

The Interests of Other Persons

Authors are clearly not the only persons who care about intellectual content; other persons also care a great deal about content. After all, there would not be much of a dispute, as an empirical matter, about IP rights if people had no significant interests in content created or discovered by others. This, of course, is not to say that there would not be an issue, but only to suggest that people would not care so much about it if they had no interests in such content. The IP dispute is contentious precisely because people care so much about the content they create and the content created by others.

The interests of people in content created by others presumably differ in strength depending on the type of content involved. It is reasonable to think, for example, some of these interests in some content rises to the level of a *need*; if some piece of content is vital to the survival prospects of other persons, then their interests are accurately characterized as “needs.” But not all such interests rise to the level of a need. Although human beings cannot thrive in all the ways they should without access to some artistic content, it would be inaccurate to characterize our interests in such content as rising to the level of a need. People simply do not need art in the same way they need food, water, and shelter. Moreover, much desired content is not sought by individuals because it is necessary to thrive in some important way; there is much content, for example, that I seek out simply to amuse or entertain myself – or even just to relieve boredom. These interests amount only to wants that are considerably less important than needs for essential material or for materials needed to thrive.

Weighing the Interests

The foregoing suggests that the balance of the interests will differ depending on the strength of the interests people have in content created by others. It is not implausible to think that people have, for example, an especially important interest in intellectual content they *need* to survive; and this suggests that the interests of authors in intellectual content might very well be defeated in cases involving vital content – though this should not be taken to mean that the author is owed no compensation. It might be true, for example, that we owe it to individuals and nations to ensure that they have sufficient information to compete in a global economy and hence that authors should not be allowed to exclude others from such information.⁴³ Indeed, one might very well take the position that all scientific information that has or potentially leads to technological advancements that would improve the condition of the poorest people in the world ought not to be protected by IP rights.

Indeed, it seems reasonable to think that, at best, very limited IP protection of facts is morally appropriate. First, factual content is far more likely than non-factual content to have applications that would conduce to survival needs; non-factual content does not play a role in the development of new agricultural, computing or medical technologies. Second, the author’s role in making available novel factual content is different than an author’s role in making available novel non-factual content. If Einstein doesn’t discover the theory of relativity, someone else eventually will. But if Dickens doesn’t write *A Tale of Two Cities*, no one else will ever do it. Particular authors are indispensable in creating non-factual content, but not in discovering factual content. In cases where someone else is likely to produce the very same content, the reward for actually producing the content will be more limited than

⁴³ I am indebted to Herman Tavani for this point.

in other cases – regardless of how much time, energy or even effort is involved.⁴⁴ Accordingly, the interests of other persons in factual content discovered by others is important enough, at the very least, to qualify the protection morality provides for the authors' interests in such content.

But, in other contexts, it is arguable that the interests of other persons are just not significant enough to trump the author's interest in the value she brings into the world. It is true, as noted above, that some non-vital intellectual content, like artistic content, is fairly characterized as needed for individuals to thrive in all the ways that human beings ought to thrive, but it seems ridiculous, for example, to assert that I need access to the latest 50 Cent tracks in order to thrive in some morally significant way. Although it might (or might not) be fun to listen to the latest offering from 50 Cent, it is simply implausible to think that no person can thrive without free access to it. What this means is that the interests of other persons in thriving will defeat the interests of content-creators in some, but not all, cases of artistic content.

It seems clear, however, that the author's interest wins over the interests of other persons in content that is merely desired. While it is always a morally relevant fact that some agent *A* wants some thing *p*, the mere fact that *A* wants *p* is not strong enough to give rise to any significant protection of that interest. Other things being equal, if *A* wants *p* and I can satisfy *A*'s desire for *p*, it would be a good thing from the standpoint of morality for me to provide *A* with *p*. But the claim that *A* wants *p*, by itself, does not imply that it would be wrong for me not to provide *A* with *p* if I can do so. Indeed, failure to provide someone with something they want is not even a wrong-making property of an act; while it would be good, other things being equal, to provide *A* with *p*, the claim that *A* wants *p* does not provide any reason whatsoever for thinking not providing *A* with *p* is even *prima facie* wrong. Our desires just cannot do that kind of heavy moral lifting.

In cases where content is merely wanted, then, it seems that the interests of the content-creators in limited control over the content they create outweigh the interests of other persons. On the one hand, the content-creator expends precious resources in the form of a limited supply of life and energy in order to bring value into the world. On the other hand, other persons want merely to pass the time or enjoy themselves with such content.

Of course, there might be many people who want the content and just one content-creator whose interests are at stake, but this is not enough to defeat the content-creator's interest. The content-creator's interest is significant enough to receive moral protection: insofar as my behavior wastes another person's life or energy, it is morally problematic. In contrast, the fact that someone wants content is not significant enough, by itself, to warrant any moral protection: while it might be good for me to give someone something she wants, my failure to do so is not even presumptively wrong. An interest that receives moral protection, like the author's, cannot be defeated by aggregating interests that do not; the difference between the two interests, from a moral point of view, is *qualitative* and not *quantitative*.

Ironically, most of the content that critics of IP want for free is non-informative content that is merely desired. It is reasonable to think that the vast majority of contemporary music, film, and novels (which are not, strictly speaking, information because they do not purport to express true propositional content⁴⁵) are wanted primarily for entertainment and amusement. Those people who are illegally sharing music files online are violating the law for no better reason than they want to be entertained and to experience the pleasure of listening to the newest music – as though this desire is so much more important than the time and effort of the content-creators.

Here it is worth remembering that, at least with respect to artistic content, authors create not only a piece of content, *but also the demand for it*. There would be no demand, for example, for *A Tale of Two Cities* had Dickens never written that novel. There can be no demand for a song that has never

⁴⁴ The analysis here is thus consistent with the idea that facts should not receive copyright protection regardless of how much effort someone puts into discovering them. See note 34, above.

⁴⁵ See Himma (2005) for a detailed defense of this point. See also Floridi (2004).

been written.⁴⁶ Although it is true that people want artistic content and might want content from a particular artist, this desire has no particular focus until a content-creator sharpens it by making available a suitable piece of content. Artists satisfy wants that they bring into existence. Yet many people believe that these desires, which they would not have if not for people who create them, take precedence over any interests that an artist has to control the distribution of her creations. As far as content that is merely wanted is concerned, this seems implausible.

POLITICAL MORALITY AND THE CONTENT OF IP LAW

the interests of authors in their creations ought, as a matter of political morality, to be protected by law does not imply that the content of any specific body of IP law is morally justified. There are many impermissible ways of trying to realize an end that is morally justified. The fact that someone has a legitimate moral interest in something does not give the state *carte blanche* to do anything it wants by way of protecting that interest. For this reason, the issue of whether IP law as currently formulated is morally justified is a different issue from the issue of whether states ought, as a matter of political morality, to protect these interests.

There are a number of elements of existing IP law that have been subjected to trenchant criticism by theorists who seem to accept the legitimacy of at least some IP protection.⁴⁷ Lessig (2001) rejects the idea that IP protection should afford an author “perfect control” over the content she has created. On Lessig’s view, existing IP law goes much too far in affording authors control over the disposition of their contents and has the effect of inhibiting innovation and thereby diminishing the well-being of other persons. For example, the Copyright Term Extension Act affords 20 years of additional copyright protection to individual and corporate authors without obvious justification; the effect is to make it that much more difficult for innovators to utilize past innovations to create new technologies.

Another influential book, Litman (2001), focuses more narrowly on particular flaws in U.S. copyright law. In this work, Litman argues that many elements of U.S. copyright law are obscure, unjustified, controversial, and even arbitrary. For example, she rejects the legitimacy of the Digital Millennium Copyright Act, which prohibits efforts to circumvent technologies designed to prevent copyright infringement. Litman recognizes the interests of content-creators in preventing copyright infringement, but plausibly argues that the law illegitimately restricts morally fair uses and thereby violates the interests of other persons. Like Lessig, Litman believes that IP protection should not afford an author absolute control over the contents she has created.⁴⁸

There are other elements of IP law in the U.S. that one might plausibly believe go too far – even on the assumption that the law should provide some protection of an author’s interest in content she has created. Here are just a couple of interesting examples from the world of sports. Pat Riley has trademark protection for the phrase “threepeat,” while Texas A&M University received a trademark in 1990 for “12th man” – a phrase that had been used for many years by other universities and professional football teams to refer to the role that spectators play in the outcome of a football game. A complete overview of potentially problematic elements of U.S. law is not possible here; for our

⁴⁶ 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 other persons 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.

⁴⁷ See, e.g., Lessig (2001) and Litman (2001).

⁴⁸ See Spinello (2003) for an extended review of these two works.

purposes, the most important point is that one can believe that authors have interests that deserve legal protection without thereby committing oneself to accepting the content of any existing body of IP law. The general issue of whether legal protection of IP rights is morally justified is different from the more specific issue of whether some particular body of IP law is morally justified.

SUMMARY AND CONCLUSIONS

In this essay, I have surveyed and evaluated the various arguments for and against intellectual property protection, concluding that some IP protection is morally legitimate. In particular, I have argued that the interests that content-creators have in the content they create (or discover) outweigh the interests of other persons in all cases not involving content that is necessary for human beings to survive, thrive or flourish in certain important ways. It is true, of course, that the claim that an author's interest outweighs the interests of other persons in certain kinds of content does not clearly imply that the author has a moral *right* to IP. Nevertheless, such a claim surely provides a strong reason for affording some stringent legal protection to the interests of content-creators in the contents of their creations. One reasonable way to do this is to allow authors *limited* control over the disposition of their creations.

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