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Publication Date

2005-08-12

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Forthcoming in APA Newsletters in Philosophy and Computers

ABSTRACT: The claim "information should be free" (hereinafter *ISBF*) has become a rallying cry for those who believe intellectual property rights are illegitimately protected by the state. In this essay, I will attempt to (1) determine what *ISBF* means (which will require determining what the concept-term "information" means as used in *ISBF*); (2) evaluate what kind of support there is for *ISBF*; (3) determine whether *ISBF* conforms to ordinary views about the propriety of certain restrictions on the free flow of information; and (4) determine whether *ISBF* provides good reason for thinking that legal protection of intellectual property rights is illegitimate. I will argue that the most charitable interpretation of *ISBF* lacks adequate support in mainstream moral views and thus cannot ground a wholesale challenge to the legitimacy of intellectual property rights.

Information and Intellectual Property Protection: Evaluating the Claim that Information Should be Free

The legitimacy of legal intellectual property rights, once taken for granted by theorists and citizens, has come increasingly under fire in the last twenty-five years. 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 and widely disseminated without distributing copies on paper. And, to many, it seems clear now that intellectual property rights are morally illegitimate because, as the matter is frequently put, "information should be free."[1]

Because the claim "information should be free" (hereinafter *ISBF*) has become a rallying cry for those who believe intellectual property rights are illegitimately protected by the state, it deserves a careful explanation and evaluation. In this essay, I will attempt to (1) determine what *ISBF* means (which will require determining what the concept-term "information" means as used in *ISBF*); (2) evaluate what kind of support there is for *ISBF*; (3) determine whether *ISBF* conforms to ordinary views about the propriety of certain restrictions on the free flow of information; and (4) determine whether *ISBF* provides good reason for thinking that legal protection of intellectual property rights is illegitimate. I will argue that the most charitable interpretation of *ISBF* lacks adequate support in mainstream moral views and thus cannot ground a wholesale challenge to the legitimacy of intellectual property rights.

It is important to be clear at the outset about the conclusions I will reach. First, my concern in this essay is not whether there are moral rights to intellectual property, but whether it is morally permissible for the state to use its police power to enforce intellectual property rights. While the latter *is* a moral issue, it is an issue of political morality because it concerns the legitimacy of using state coercion for enforcing laws protecting intellectual property. Of course, the legitimacy issue turns on whether individuals have a morally protected interest in the intellectual content they bring into the world, but the two issues are logically distinct: not every morally protected interest and moral right are legitimately protected by the state.

Second, the arguments in this essay should not be taken as a justification for existing legal protections of intellectual property rights. There is nothing below that would support a denial of the altogether sensible claim that many elements of intellectual property law, as currently written, are problematic from the standpoint of political morality; indeed, for what it is worth, I have no problem, for example, with the idea that copyright law in the U.S. protects copyright for far too long. Nor should the conclusion of this essay be thought inconsistent with the conclusion that intellectual property rights are, in fact, utterly illegitimate. The claims are purely negative: (1) the arguments typically made for *ISBF* are unsuccessful; (2) *ISBF* is implausible from the standpoint of

ordinary views; and (3) *ISBF* cannot support, by itself, a general attack on intellectual property rights.

One further preliminary observation is in order. The argument purports to be grounded in judgments that I believe are both widespread and presupposed by ordinary moral and social practices. Accordingly, I do not presuppose any particular general theoretical claims here with one exception: I assume that people have some interests that rise to the level of "rights" – regardless of how that notion is defined. If the existence of moral rights is inconsistent with act utilitarianism, as some believe, this argument assumes that act utilitarianism is false.[2]

I. What Does "Information" Mean in *ISBF*?

Obviously, we cannot understand what is meant by *ISBF* or evaluate it without understanding what is meant by the concept-term "information." As a first step towards understanding what is meant by *ISBF*, I begin with a short analysis of what our ordinary linguistic conventions regarding the use of the term – or, as the matter is sometimes put, our "intuitions" about information[3] – commit us to in regard to the content of the concept of information.

A. Information as True Propositional Content

"Information," as we typically use the term, picks out a certain kind of propositional content – i.e., content that is capable of being either true or false. Content expressed by questions (e.g., "Is it raining?") and commands (e.g., "Close the door!") are not propositional and are hence not properly characterized as "information." Other things being equal, *A* cannot inform, at least not directly, *B* of anything by asking "Is it raining?" or by commanding "Close the door!" While it is true that *B* can glean some information from the utterance of those sentences, the utterances themselves do not directly express information.

Moreover, as far as our ordinary usage is concerned, 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. While *B* might be able to make some informative inferences from *A*'s utterance of the sentence (e.g., *A* is confused or lying, if *B* knows the sentence is false), the utterance itself does not directly express information.

In this connection, it is worth noting that this conception of information (hereinafter the "semantic conception of information")[4] is presupposed by mathematical attempts to formalize the definition of "information."[5] "Information," according to the mathematical theory, is defined as an entity that resolves uncertainty and the content of information is measured according to how much uncertainty it resolves, which in turn is measured by how many questions it answers. The only thing capable of "resolving uncertainty" in beings like us, however, is *true* propositional content. Someone who assents to false propositional content might *feel* more certain, but she is more deeply or pervasively confused than she was before assenting to that proposition. Only true propositional content can resolve uncertainty in the objective sense of "uncertainty."

B. Information and the Sentences Expressing It

Although the semantic conception of information is, I think, the most plausible analysis of the concept of information as defined by our linguistic conventions, it immediately causes problems for *ISBF*. Insofar as the claim that information should be free is supposed to "problematize" copyright law, it should say something about the objects of copyright law. But if we interpret "information" in *ISBF* according to the semantic conception, *ISBF* says nothing about the objects of copyright law because copyright law protects specific representations of propositional content (e.g., sentences) – and does not protect the propositional content itself; as the matter is sometimes put, copyright law protects expressions of ideas, but never the ideas themselves (i.e., propositions). Thus, copyright law purports to leave one free to pick out and use propositions as long as one does not use the protected representations in an objectionable way.

To construe *ISBF* as being capable of grounding a general critique of copyright law, then, we need to define "information" such as to include some provisional reference to the representations that purport to convey informative content. Thus defined, *ISBF* will assert that those representations, and not just the content they express, should be free.

The task of defining "information" this way is complicated by the fact that there are many ways to glean information from communicative acts that differ from one another according to how much, and what kind of, background material is needed to do so. If, for example, I were to utter a completely meaningless string of sounds during the course of a serious conversation, the listener might be justified in inferring certain informative propositions. She might, for example, justifiably infer that something is wrong with me – though she might not know exactly what (e.g., am I confused, ill, or just socially inept?).

But, strictly speaking, the information that I am confused, ill, or inept is not *expressed* by those symbols because, by hypothesis, those symbols have no meaning whatsoever. The listener infers that piece of information from the fact that I have uttered a meaningless string, together with a fairly extensive set of propositions that provide background information about social conventions, human psychology, and so on. Thus, while the listener might very well be justified in inferring information from my act, the sentence does not express information.

One can also indirectly glean information from sentences that are false. For example, if I am attending a baseball game featuring the Seattle Mariners and the Boston Red Sox and say that "The Ms will crush the Yankees today," the listener might be justified in inferring some informative content – i.e., that I have mistaken beliefs about the game or have misspoken. But this information is not, strictly speaking, what is expressed by my sentence. The listener acquires true information from my act *together with* a host of propositions providing background information about the game and the circumstances in which people generally utter such sentences. These are examples of what I take to be sentences that contribute to informing a person in an *indirect* way.

A sentence can also directly express information in the sense that the information can be directly gleaned from the sentence using only those strategies that are necessary to achieve competence in ordinary conversational English. These strategies involve

application of just the *semantic* conventions that link words to meanings and the *syntactic* conventions for stringing those words together in a way that compounds the various meanings into one that is (or expresses) a proposition. For example, "Ken Himma teaches philosophy" is a sentence that directly expresses propositional content in the relevant sense: a conversationally competent speaker can extract the meaning simply by applying the "canonical" strategies defined by the semantic and syntactical conventions of a language

The extraction of meaningful content from fiction requires a combination of canonical and other strategies. To understand the story (i.e., the sequence of events that constitute its plot), one must apply these canonical strategies; one cannot understand, for example, "It was the best of times; it was the worst of times" without applying these canonical strategies. But one cannot understand the larger point of a piece of fiction without recourse to a host of other kinds of strategies that are largely unique to literary interpretation. Because these strategies are not necessary to achieve ordinary conversational competence (understanding a parable, e.g., is not required as I define the notion), I will characterize them as "non-canonical" in character.

For our purposes, then, the term "information" should be construed as including the sentences from which competent speakers can extract informative content by means of the canonical strategies. While this does not conform to ordinary usage (and is, quite frankly, somewhat awkward), the point of doing so is to construe *ISBF* in such a way that it is, at the very least, relevant in discussions about the legitimacy of intellectual property. Since intellectual property law protects representations of content and not the content itself, *ISBF* cannot engage intellectual property law unless we define "information" to reach those representations. Considerations of interpretive charity, then, justify defining "information" in a somewhat non-standard way.

II. **The Morally Normative Character of *ISBF***

The claim that information should be free is usually advanced as a criticism of existing copyright law, which provides very strong protection for authors who create sentences that express information. Any legal protection of intellectual property, on this view, is inconsistent with the idea that information should be freely available to all persons. In all fairness to its proponents, then, *ISBF* should be construed in light of the purpose it is deployed to serve – namely as the foundation for a refutation of the legitimacy of intellectual property rights.

To do the work that *ISBF* is intended to do, it must have the following elements. First, and most obviously, *ISBF* is a universal claim that applies to *all* information. On this construction, anything that satisfies the application-conditions for being a piece of "information" should be free.

Second, *ISBF* is a normative claim about what morality requires. The normative claim that information should be free is fairly construed as a criticism of the law only insofar as it is derived from moral principles; the claim that, from my own personal self-interested standpoint, I would be better off if information were free is not the sort of observation that could ground a general refutation of the *legitimacy* of intellectual

property protections.[6] To do the work it purports to do, *ISBF* must be construed as asserting that, as a matter of moral principle, information should be free.

Third, *ISBF* asserts the existence of an obligation. Here it is worth noting that the term "should" is ambiguous as between two different usages. On one usage, the claim that X should do A implies that doing A is good; on the other, the claim that X should do A implies that X is obligated to do A and that failure to do A is wrong. As should be clear, *ISBF* can refute the claim that legal protection of intellectual property is legitimate only insofar as it defines an obligation; on this interpretation, legal protection of intellectual property rights is morally wrong.

Finally, the obligation defined by *ISBF* is owed by the state to its citizens. Insofar as *ISBF* is advanced as a criticism of *legal* protection of intellectual property, it must be construed as defining a duty that belongs to the state and is owed to citizens. While *ISBF* might *also* support attributions of individual duties, it is primarily concerned with the role of the state in protecting intellectual property. Thus construed, *ISBF* defines what the state can and cannot legitimately do, as a matter of political morality, in using the police power to restrict information-seeking and information-using behaviors.

In particular, *ISBF* should be construed as asserting that the state is morally obligated not to use its police power to protect the ability of authors to exclude others from using their creations subject to payment of a fee. To ground a general indictment of intellectual property law, *ISBF* must be construed as asserting that it would be morally illegitimate (and hence wrong) for the state to enforce laws defining an exclusive right on the part of authors to control the disposition of her intellectual creations.

This interpretation of *ISBF* has a powerful consequence. If, as many believe, the limits of legitimate lawmaking authority correspond to rights which citizens have against the state to be free of illegitimate restrictions on their behavior, this interpretation of *ISBF* implies that citizens have a moral right against the state to be free of coercive restrictions on their information-gathering and information-using behaviors. Since *ISBF* is supposed to support the claim that coercive intellectual property protections by the state[7] are illegitimate, citizens have a right against the state to be free of such restrictions on their behavior. Thus, this interpretation of *ISBF* implies that citizens have a negative right to information against the state – and this means that they have a very strong moral interest in, and morally protected claim to, information.

III. **Arguments for the Claim that Information Should be Free**

A. Information "Wants" to Be Free

John Perry Barlow argues for *ISBF* on the strength of the idea that information is a living entity entitled to moral consideration. On his view, information, as a form of life, has a claim to be free that is grounded in interests, and even 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.[8]

On Barlow's view, it is in the interest of living information objects that they be made freely available to everyone free of charge.

There are a couple of serious problems with this line of reasoning. The premise, if not facially implausible, simply begs the question. As commonly defined, a meme is an idea that interacts with a brain such as to produce a desire to share the idea with another person; examples of memes include tunes, thoughts, slogans, etc. Memes are, thus, abstract objects that, like information, exist in a radically different way than material objects; a number, for example, does not have the same kind of ontological status as a bacterium and does not "self-replicate" in any ordinary sense of the word. The premise that memes constitute a form of life assumes the very thing that is asserted by the conclusion – namely, that an abstract object is fairly characterized as a life form.

More importantly, it is simply implausible to think of abstract objects as having wants – or even interests. The concept of desire is such that only conscious beings are capable of having desires; although a conscious being can have some subconscious desires, non-sentient entitles 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 that is fairly characterized as having desires because they are not conscious beings.

Nor are abstract objects, like information, the sort of things that are plausibly characterized as having interests. To say that *X* has an interest in the occurrence of some state of affairs *p* is to say, at the very least, that it makes a difference to the welfare of *X* whether or not *p* obtains. Being sentient is probably not a necessary condition for having interests, but being biologically alive probably is: it is hard to imagine how something that is not biologically alive could have something that counts as its *welfare*. In any event, it seems clear that an abstract object simply does not have anything that would count as its welfare; there is nothing we can do to an abstract object that could possibly make a difference with respect to its "well-being," in part, because abstract objects cannot be harmed, killed, or even destroyed. The abstract object denoted by the numeral "2" exists in exactly the same form, whatever it might be, regardless of what people believe, say, or do. Information, as defined above, is just not the kind of thing that could have interests.

B. It is in the Nature of Information that it Be Freely Available to All

On this line of analysis, it is part of the very nature of information that it *should* be freely available and hence widely disseminated. Information objects are abstract objects that can be processed by the intellect of rational beings to produce a variety of noetic states, including belief, justified belief, and knowledge. Thus, it is in the very nature of information that it can be used this way by agents with the right abilities and hence used to bring them to apprehension of the truth.

While plausible at first glance, this argument cannot justify *ISBF* construed as a morally normative claim. The problem is that an analysis of the nature of information as true propositional content implies, at most, the *descriptive* claim that information *can* be used by rational personal 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.

As a general matter, conceptual claims about the nature of a thing do not generally imply normative claims about how it should be used. For example, the nature of a handgun implies that it can be used to end the lives of beings that have certain properties, but it does not imply that it *should* be used for such a purpose; descriptive claims about the nature of an object, by themselves, lack the right kind of content to imply any moral claims. While natural law theories attempt to derive moral goods from an analysis of human nature, those derivations depend on the normative claim that there exist natural laws that link descriptive features of human nature to certain goods that ought to be pursued. Although one could, I suppose, attempt to articulate a natural law theory of information, the idea that information has some sort of natural teleology is far less plausible than the idea that conscious rational agents have one.

C. Information Objects are Unlimited and Can Simultaneously Be Consumed without Reducing Supply

The idea here is that information objects are different from material entities in two important senses: (1) information objects, unlike material objects, are unlimited and hence not subject to conditions of scarcity; and (2) information objects, unlike material objects, can simultaneously be consumed by everyone. Indeed, it is precisely because information objects are abstract in character, rather than material, that they can be simultaneously consumed by everyone without reducing the supply for other people; everyone, for example, can simultaneously use a recipe for guacamole because the propositions that express this recipe exist in a manner unlike the manner in which material objects exist.

This argument, however, does not support *ISBF* as construed above. By itself, the claim that intellectual objects are unlimited and can be consumed by everyone simultaneously does not imply that we have a right of any kind to those objects. While this certainly provides a reason against thinking protection of intellectual property is morally justified, it does not tell us anything about whether we have a *right* of some sort because it does not contain any information about morally relevant properties of human beings – and the justification of general rights-claims necessarily rests on attributions of value that implicitly respond to interests of beings with the appropriate level of moral standing (in our case, our status as persons).

D. Human Beings Have an Interest in Information

On this line of reasoning, human beings have an interest in information objects.[9] Whether or not we thrive, or even survive, depends on whether or not we have cognitive access to certain information objects. Since it is clear that not having a piece of information can have a substantial impact on a person's well-being, people have a right against the state, on this line of reasoning, to be free of coercive restrictions on their information-gathering and information-using behaviors.

It is, of course, undeniable that we have an interest in at least some information, but this does not imply that we have a right to information inconsistent with the protection of intellectual property. The mere fact that I have reason to desire something does not, by itself, imply that I have a morally protected interest in it – much less that I have any kind of moral right to it. Human beings want all sorts of things that they do not have any right to: happiness, romantic companionship, power, acclaim, prestige, sex, and so on.

Of course, the idea that we have an interest in something is not irrelevant with respect to whether we have a right to it; claims that we have a right of some kind are not infrequently grounded in claims about what interests we have. Indeed, the claim that we have a right to something in which we have no interest seems, if not incoherent, pretty clearly false as a matter of substantive moral theory. The idea that one person might be obligated to another person to refrain from doing *P* when no person has any interest of any kind in whether *P* is done seems hard to justify on any ordinary moral views.

In any event, it is important to note that general non-contractual rights-claims can be grounded only in interests that rise to a certain level of importance. Many people, for example, believe that everyone has a right to enough food to survive (at least in an affluent society with a food surplus) because people have a strong interest in food: we *need* it for our survival. Not everyone agrees with this view, but it seems clear that only interests that rise to the level of needs can give rise to positive rights of this kind.[10] While it might be true that negative rights can be grounded in interests that are not fairly characterized as survival needs, it seems to be a necessary condition for people to have a *right* to *P* that *P* be essential to a person's well-being. Not every interest is sufficiently important as a moral matter to do the kind of work that the claim that we have an interest in information is attempting to do for the opponent of intellectual property rights.

Here it is crucial to note that while our interest in some kinds of information seems to rise to the minimal level of importance, our interest in many kinds of information does not. Much information, for example, is sought for its ability to amuse, entertain, and relieve boredom. While access to such information might very well make a person's life better than it would otherwise be, it is simply not true that it is essential to her well-being. It is, of course, not implausible to think, given the inexhaustible character of an information object, that people have a right to information needed for survival in virtue of having an interest in it. But it is far less plausible to think that people have a right to information they merely want; in general, our wants simply cannot do that kind of work.

E. 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. On this line of analysis, while the cost of making 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 grow 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 information 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.[11]

There are at least two problems with this line of argument is that it relies on a problematic conception of fair pricing. 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. Although this price in a competitive market tends to reflect the marginal costs of the sellers, the fairness of any particular price is explained by its having been, as it were, freely negotiated by rational buyers and rational sellers at moral liberty to decide how much any particular item is worth to them – and not by any particular ratio of price to the seller's marginal costs. If buyers in a competitive market are willing to pay a price for digital information that is significantly higher than the seller's marginal cost, then that price can be presumed as fair – assuming that free enterprise is generally legitimate.

Second, this argument overlooks the fact that the fixed costs associated with producing and distributing intellectual content can be quite high (and hence morally significant).[12] For example, the Disney Company spent more than $100 million in making the film *Pearl Harbor*. If one assumes that a fair price is such as to allow the producer to recover the fixed development 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. Again, if one accepts the legitimacy of market mechanisms, the claim that information should be free cannot be justified by an appeal to principles governing fair pricing in a market economy.

IV. Putting the Arguments Together: Depleting the Information Commons

This line of argument attempts to combine a number of the considerations contained in the above arguments to justify the claim that there is a morally protected "information commons." According to this line of argument, the class of information objects should be regarded as a morally protected resource for all to use – an information commons. Any protection of intellectual property, then, that gives an exclusive 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 intellectual property protection.

The concept-term "commons" is ambiguous as between a number of uses, but the concept that grounds this line of argument ultimately derives from one of the Lockean provisos to his justification of property rights. 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 satisfying this proviso, its effect 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. 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 some sort of 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 members of the group 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 the 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 exploring it. 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 several years ago. *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 by people until someone, through the expenditure of her labor, makes it 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. People cannot make land, but they 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 somewhere out there in logical space.

V. **The Interests of the Creator**

There is a second problem with the Commons Argument that is shared by all the others discussed above; each overlooks the possibility that authors/creators have a morally protected interest in the content they bring into the world. If people generally have an interest in information, they also have an interest in the time, energy, personality, and labor they invest in creating (or discovering) new information. It seems reasonable to think, on ordinary views, that someone who invests time, energy, personality, and labor in creating intellectual content *C* has invested something of value to her and hence – as a matter of fairness – has a morally significant, though not necessarily conclusive, interest in controlling the disposition of *C* that parallels the interest she has in controlling the disposition of a material creation.

Notice that this argument does not presuppose a Lockean framework for justifying property. The idea is not that such interests are morally significant because the author has mixed her labor with some sort of intellectual raw material; rather such interests are morally significant because they implicate uncontroversial principles of fairness. If I have an interest in something because I made it and you have no interest in it whatsoever, it would be unfair, other things being equal, to deprive me of control over the object *vis a vis* you – even if it is not unfair *vis a vis* other people. This suggests that the interest in our intellectual creations is morally significant in the sense that it receives some protection from morality: if depriving me of control over the object relative to you is unfair, it is because principles of fairness dictate this result.[13]

This is not to claim that the author's interest necessarily wins in a conflict with the interests of other persons; but it is to assert that the propriety of intellectual property must be evaluated within a framework that takes into account the interests of *both* the public and the creator. In particular, it is to assert that we cannot adequately assess claims about the propriety of intellectual property protection in any particular case without balancing the interest that the creator has in controlling disposition of the content she has created against the interest that other people have in consuming that content. The moral propriety of intellectual property protections simply cannot be accurately assessed without taking into account *everyone's* interests in a particular piece of content – and that includes the interest of the author in controlling access to it.[14]

VI. **The Plausibility of *ISBF***

Assuming that the forgoing discussion is largely correct, it does not tell us anything about whether *ISBF* is correct; after all, the claim that various arguments for *P* are unsuccessful does not, by itself, give us a reason to think that *P* is false. And the discussion up to now has been concerned only with whether the various arguments for *ISBF* provide adequate support for it.

As it turns out, *ISBF* is difficult to reconcile with ordinary views about the extent to which it is legitimate for the state to restrict the flow of information. First, as many persons have observed, *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 fairly 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*.

VII. What Work does *ISBF* Do?

Surprisingly, the claim that information should be free does remarkably little work in grounding a critique of intellectual property rights. While it, if correct, would support the proposition that copyright protection of *information* is morally problematic, the vast majority of intellectual content protected by copyright law does not satisfy the expansive definition of "information" given above – much less the more narrow definition that conforms to ordinary usage.

The reason is this. Although copyright 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, as well as the sentences from which it can be extracted by canonical interpretive strategies, the claim that *information* should be free does not apply to content that does not constitute information. And this category includes music, fiction in every form (including film), painting, poetry, and song lyrics. *ISBF* simply does not have sufficient content to reach such content.

Here it is worth noting that copyright law affords comparatively little protection to sentences that purport 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 opponents of copyright law want the most.

Of course, one might be tempted to redefine "information" to include all such entities in an attempt to ground a comprehensive challenge to the legitimacy of intellectual property protections; however, this comes at the cost of rendering *ISBF* far less intuitively plausible. It is one thing to argue that people have a right to freely access sentences purporting to provide information about the world. It is another thing to argue that people have a right to freely access the music, fiction, poetry, film, paintings, and photographs produced by other people. There is simply no obvious intuitive reason to think that the latter idea is true. Redefining "information" to include these artistic works simply renders *ISBF* a non-starter from the standpoint of ordinary intuitions.

VIII. Conclusions

ISBF, then, fails on many grounds as a challenge to the legitimacy of intellectual property protections. First, the arguments usually offered in support of it are all problematic in serious ways. Second, *ISBF* is inconsistent with ordinary intuitions about the propriety of certain state restrictions on the free flow of information. Finally, *ISBF* cannot ground a general challenge to intellectual property law because it cannot reach non-propositional content, like music, that is protected by the law. If intellectual property law is illegitimate, this is not because information should be free.

Endnotes

I am indebted to Richard Spinello, Adam Moore, and Herman Tavani for very helpful comments on an earlier version of this paper.

[1] An October 20, 2004 search of the phrase "information should be free" on Google turned up nearly 8,000 links.

[2] In this connection, it should be noted that act-utilitarian arguments involving the legitimacy of intellectual property rights generally come out in favor of some legal protection of intellectual property; the idea is that the law should afford some intellectual property protection to provide a material incentive to create content. While this should not be taken as legitimizing the current body of intellectual property laws, it is logically inconsistent with *ISBF*.

[3] While it might be true that all possible concepts exist as abstract objects in logical space, *our* concepts (i.e., the ones we use) are grounded in our use of the associated concept-terms. Accordingly, the intuitions that inform our use of the terms are either grounded in or reflected by the shared linguistic conventions governing the use of the term. The concept of bachelor, for example, applies only to males because our core conventions regarding the use of the term "bachelor" assert that the term applies only to males. My "intuition" that "bachelor" applies only to males is grounded in my assimilation of the rules for properly using the term. Conceptual analysis of any kind, then, has an inescapably empirical component in that it must, other things being equal, harmonize with core conventions regarding the use of the relevant term.

[4] For an extended defense of the semantic conception of information, see Luciano Floridi's outstanding essay, "Information," in Floridi (2004).

[5] Claude Shannon's groundbreaking work in the theory of information was grounded in the principle that information is anything that resolves epistemic uncertainty. See Shannon (1948).

[6] Here it is important to realize that legitimacy is a moral concept: a law is legitimate if and only if it is morally permissible for the state to coercively enforce that law. Notice that no assumption is made here that legitimate laws necessarily give rise to *moral* obligations to obey.

[7] Here it is important to note that such restrictions are coercively enforced. An individual who violates these laws is subject to being compelled to pay damages on pain of contempt (which can be enforced by incarceration).

[8] See Barlow (1992).

[9] For a more detailed discussion of this idea, see Himma (2004a, b).

[10] A positive right endows the holder with a claim that someone else perform some affirmative act; a negative right endows the holder with only a claim that someone else refrain from performing some affirmative act.

[11] This line of reasoning owes to Coy (2004).

[12] I am indebted to Richard Spinello for this line of objection.

[13] 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 labor we invest in creating new content are sufficiently important, it seems to me, to give rise, irrespective of effects on utility, to a right that binds any third parties who lack any greater interest in the products of those expenditures than a *desire* for those products. Of course, the suggestion that content-creators have a right over their products is not to say anything about the content of that right. In particular, it is not to endorse the conception of that right that is incorporated into, or expressed by, copyright law in the US.

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

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