

New Frontiers in the Philosophy of Intellectual Property

Edited by

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Introduction: Philosophy of intellectual property – incentives, rights and duties

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The new frontiers in the philosophy of intellectual property lie squarely in territories belonging to moral and political philosophy, as well as legal philosophy and the philosophy of economics – or so this collection suggests. Those who wish to understand the nature and justification of intellectual property may now find themselves immersed in philosophical debates on the structure and relative merits of consequentialist and deontological moral theories, disputes about the nature and value of privacy, or the relationship between national and global justice. Conversely, the theoretical and practical problems posed by intellectual property are increasingly relevant to bioethics and philosophy and public policy, as well as to more established areas of moral and political philosophy.

Perhaps this is just to say that the philosophy of intellectual property is coming into its own as a distinct field of intellectual endeavour, providing a place where legal theorists and philosophers can have the sorts of discussions – neither reducible to questions about what the law is, nor wholly divorced from contemporary legal problems – which typify debates about freedom of expression, discrimination and human rights. These are all areas in which legal and philosophical ideas influence each other at the level of method as well as of substance. My hope is that this collection of essays will appeal to those who, whatever their professional specialty or training, share an interest in the philosophy of intellectual property, and

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that it will build upon and advance existing interdisciplinary dialogue and research in this complex, fascinating, and important area.¹

Most of the chapters in this collection were specially written for a conference on the philosophy of intellectual property which took place at the Institute of Philosophy, London, in May 2009. In organising that conference I had been hoping to learn what, if anything, unites patents, copyright, trade marks and trade secrets and distinguishes them from other forms of property. As a political theorist working on privacy, I had come to be interested in intellectual property as a way of thinking about the relationship between privacy and property rights, on the one hand, and of private and collective property on the other. Finding this hard going, I was keen to have a bunch of experts on hand to answer my questions for me.

My hopes for a ready answer to my questions, however, were dashed by the conference. It quickly became apparent that issues which have been so central to philosophical and legal theorising about privacy seem largely irrelevant to legal theorists and philosophers interested in intellectual property. In the course of editing these chapters for publication, and of thinking about their points of agreement and tension, I have again been struck by how little the nature and justification of property concerns our authors, with the notable exception of John Christman, and how far the idea of patents and copyright as *property* seems either irrelevant to, or actively at odds with, the conception of rights which they seek to defend.

This might suggest that it is unnecessary to clarify what makes intellectual property a form of property – albeit one distinct from the property that we might have in material objects, animals, labour and relationships. Certainly, the quality and interest of the chapters here suggest that such clarification is often unnecessary. But it is also possible that there are puzzles in the theory and practice of intellectual property which we will not be able to solve without a better sense of the ways in which familiar forms of intellectual property are property, and of the advantages, as well as the limitations, of thinking about our interests in ideas this way. My hunch is that the puzzles thrown up by the different chapters suggest that

¹ See, for example, Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001); Axel Gosseries, Alain Marciano and Alain Strowel (eds.), *Intellectual Property and Theories of Justice* (New York and Basingstoke: Palgrave Macmillan, 2008); Charles Beitz, 'The Moral Rights of Creators of Artistic and Literary Works' *Journal of Political Philosophy* 13(3) (2005): 330–58, hereinafter 'The Moral Rights of Creators'; Thomas Pogge, 'The Health Impact Fund: Better Pharmaceutical Innovations at Much Lower Prices', in Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds.), *Incentives for Better Global Public Health: Patent Law and Access to Medicines* (Cambridge University Press, 2010); Allen Buchanan, Tony Cole and Robert O. Keohane, 'Justice in the Diffusion of Innovation' *Journal of Political Philosophy* 19(3) (2011): 306–32.

this, too, is a real possibility. But in order to tell whether it is or not, it will help to look at the chapters in this collection one by one.

Control rights and income rights in ideas

The collection starts with John Christman's 'Autonomy, social selves and intellectual property claims', a piece which builds on his prior work on autonomy, and on an egalitarian interpretation of property rights. In an important article in *Philosophy and Public Affairs*,² Christman argued that we can think of the bundle of rights that makes up full property ownership in terms of two different groups of rights: one set he called control rights, and the other income rights. The former include familiar property rights, such as the rights to use, destroy, acquire, alienate and exchange a property, whereas the latter include familiar property rights such as the right to profit financially from the use, acquisition, alienation and destruction of one's property.

Distinguishing control rights from income rights, Christman argued, gives us a way to think about our autonomy and equality interests in property, and to see how they might be reconciled, rather than pitted against each other, as is often the case. In particular, Christman argued, if we care about autonomy and equality, we will want to distinguish the moral and political importance of control rights from income rights, because there is no particular level of income from property which is necessary to our autonomy or equality with others, whereas we cannot think of ourselves as autonomous beings, or as the equal of others, if we are treated simply as objects, or are denied the ability to distinguish our treatment of objects based on our beliefs about what is useful, beautiful, valuable and meaningful. In his chapter for this collection, Christman examines whether this way of thinking about property illuminates the claims by indigenous peoples to intellectual property (IP) in traditional knowledge (TK) and, therefore, how far his understanding of the links between autonomy and control support the claims of people who have often been denied the status of property owners, and legal rights in their ideas and artefacts.

Accordingly, a major part of Christman's chapter concerns his conception of autonomy, and the ways in which it might explain the importance of control over cultural artefacts and knowledge by indigenous peoples. Importantly, Christman wants to challenge the idea that autonomy is a problematically individualist value, and therefore inimical to claims to

² John Christman, 'Distributive Justice and the Complex Structure of Ownership' *Philosophy and Public Affairs* 23(3) (1994): 225–50.

self-determination made by people who value their unchosen ties to others. Suitably understood, Christman argues, autonomy need not imply or reflect an individualistic picture of self-determination. However, while a link can be made between autonomy and cultural survival in ways that might ground control rights in cultural artefacts, he claims that this is insufficient to justify IP rights in TK, because our interests in autonomy, whether individualistic or not, rarely justify the *income* rights which are part of IP rights.³ Hence, he concludes, claims of autonomy will not justify IP rights in TK, not because there is something wrong with autonomy (it's too individualistic, or indifferent to culturally specific claims) or because there is something about TK that means people cannot have property rights in it, and certainly not because indigenous peoples lack interests in self-determination. The problem, rather, is that *no-one's* autonomy normally justifies the income rights implicit in IP rights, although Christman thinks that indigenous groups might be able to substantiate their claims to income rights in TK based on claims of distributive justice, rather than autonomy.

This is an interesting and helpful argument. It suggests both that indigenous peoples' claims in TK are more complex than is often thought – and that what is true of indigenous peoples' claims is likely true of others' claims in their non-traditional forms of knowledge. However, Christman's ideas highlight two long-standing puzzles in the philosophy of IP. The first concerns the justification for *monopoly* rights in ideas, and the second the relationship between the control and income aspects of IP. Because Christman takes the familiar package of IP rights as given, he argues that our claims to autonomy will only justify IP rights if they show that we have an *exclusive* right to control access and use of a resource. This, as he says, is extremely difficult to substantiate, even in the case of indigenous groups, and is likely to be all but impossible to substantiate for most other people.⁴

Precisely because you can use my ideas without depriving me of the ability to use them, it is difficult to show that my autonomy as an inventor requires me to have exclusive control of my ideas, even if it requires me to have a determinative say in cases where, for example, conscientious objections or deep-seated moral or religious commitments would make some uses of my ideas anathema to me. On the face of it, therefore, Christman's reasons for doubting that our autonomy supports exclusive income rights in our ideas are also reasons for doubting that it supports exclusive control rights in them, too: because experience suggests that

³ John Christman, 'Autonomy, social selves and intellectual property claims', Chapter 1 below.

⁴ Ibid.

autonomy requires us to have a *share* in resources or decisions more often than *exclusive control* over them.

Second, Christman's suggestion that claims of distributive justice, rather than claims to autonomy, might justify income rights in ideas, raises questions about the relationship between justice and autonomy. As Christman puts it: 'restrictions on licensing fees in various forms and degrees in many cases will leave untouched the autonomy of the holders of the IP, as long as the use and publication of the product can be controlled by the creator in ways that are consistent with continued autonomy'.⁵ This is plausible, but the point seems to cut both ways. If, on the one hand, it suggests that the combination of autonomy and distributive justice might justify income rights as well as control rights, it also suggests that the links between our autonomy and the ability to profit from our ideas may be tighter than it first seemed.

Although it is rarely the case that people's autonomy requires them to obtain income from *this* resource, rather than *that* one, it matters to most people's autonomy that they should be able to support themselves by their ideas and ingenuity, and not merely through hard slog and mechanical effort. So the ability to generate income from our ideas, artefacts and knowledge may be necessary for our autonomy, even if autonomy rarely turns on the ability to gain income from *this* particular idea or from *that* specific artefact. Christman's chapter, therefore, points to the way our interests in ideas intersect with basic political, civil and personal rights: because the ability to share in decisions can be as critical to our autonomy as the ability to make them unilaterally; and we can have interests in supporting ourselves through our intellectual and cultural endeavours even though we have no right to income from any particular idea.⁶

Restorative justice, autonomy and intellectual property

Stephen Munzer, too, is interested in the ways that IP rights can reflect and promote the autonomy of indigenous peoples. However, his interest is less in the philosophical elucidation of links between the concept of

⁵ Christman, *ibid.*, pp. 54–5.

⁶ An interesting example of this might be the protection for future earnings by a statutory '*droit de suite*', or resale royalty right, referred to in Beitz, 'The Moral Rights of Creators', at 332, in order to distinguish it from the non-pecuniary moral rights recognised by some copyright systems, such as the French. As Beitz says, even if they are not motivated by economic concerns, moral rights affect the economic interests of creators and of actual and potential owners of creative works. Hence, he thinks, 'Any attempt to justify a system of Moral Rights . . . should at least take account of their impact on these interests, even if, in the end, it turns out that other considerations should be overriding', 339.

autonomy and the different types of rights which make up a typical package of IP rights, than with whether or not there are compelling arguments to justify including protections of IP in legally enforceable reparations for the unjust treatment of indigenous peoples by governments and corporations. Munzer's argument is that there are, because: 'Indigenous peoples have frequently suffered great wrongs – murder, enslavement, rape, torture, theft, forced relocation – at the hands of outsiders. They have autonomy-based reasons for seeking intellectual property IP rights in their TK. There is ample warrant for recognising these rights as a matter of corrective justice.'⁷

Corrective justice is mainly backward-looking, in that it seeks to right past wrongs. However, Munzer notes that it has at least one forward-looking dimension: 'If reparations are justified, we want to have reparations that work.'⁸ Hence, he thinks, six steps are necessary to make a successful argument for IP rights part of a reparations package: that some harms have been committed against an indigenous group or its members; that the wrongdoers are identifiable as a group, or as individual members of a group; that the wrongs unjustifiably harm the indigenous group or its members; that the harmed are identifiable as an indigenous group, or as members of such a group; that the wrongdoers have a moral duty to rectify the wrongs and harm that they caused, and so have no excuses or other factors which remove this duty; and that recognising IP rights in TK would, in principle, form part of an effective package of measures offering compensative or restorative justice to the indigenous group or its members.

As these six steps make clear, familiar problems from the literature on restorative and compensatory justice form much of the subject matter of Munzer's chapter. These include the difficulty of identifying the victims of injustices and of determining who, if anyone, counts as their contemporary representatives and, therefore, the beneficiary of successful claims to compensation. Similarly, there is the familiar difficulty of determining how best to identify and describe the wrongdoers and their contemporary descendants. Here one must bear in mind that if victims and perpetrators are not simply a random bunch of individuals, but members of an identifiable group, that group may no longer exist in its earlier form and, quite possibly, may not exist at all. So, in addition to the potentially complex causal claims involved in determining who did what to whom in the past, arguments for reparations appear also to face potentially irresolvable metaphysical and

⁷ Stephen R. Munzer, 'Corrective justice and intellectual property rights in traditional knowledge', Chapter 2 below, p. 58.

⁸ *Ibid.*

conceptual problems in explaining what counts as an individual or a member of a group, what counts as a contemporary representative of a past individual or group, and so on. Then, of course, there are the important questions of whether and, if so, how IP rights could form part of an adequate restorative or compensatory package for gross violations of human rights, such as murder, enslavement, rape and torture.

As Munzer argues, from a legal perspective many of these problems are more apparent than real. So, he explains, the fact that bits of property, however precious, are no compensation for murder and other serious crimes, does not mean that they cannot be parts of a package that seeks to rectify injustices that are now beyond the reach of criminal justice – national or international. The appropriate point of comparison for IP rights, in other words, is not *criminal* trial and punishment, but *civil* remedies, which are normally the only forms of legal remedy available to rectify wrongs from long ago. Moreover, some of the wrongs suffered by indigenous peoples at the hands of outsiders include the expropriation and theft of indigenous labour and culture, and the disparagement of indigenous knowledge, artefacts and culture. So IP rights in TK have the great virtue of recognising indigenous peoples' claims in these, and the importance of denouncing and rectifying the wrongs that were done to them in the past.

Similarly, the fact that contemporary members of wronged indigenous groups have a metaphysically complex relationship to their predecessors, as do contemporary descendants of those who perpetrated the wrongs, need not determine the legal status of the respective rights and duties. As in debates over affirmative action, so in debates over restorative justice, we have good moral and political reasons to accept that debts of justice can be owed across generations. These reasons remain, even though there is no perfect way to identify debtors and beneficiaries such that only wrongdoers, or those who benefited from wrongdoing, bear the burden of rectification. Although arguments for affirmative action are often forward-looking in ways that distinguish them from arguments for restorative justice, the fact that both typically concern the current disadvantaged status of members of historically disadvantaged groups means that what matters morally and politically is not the precise way in which people came to be members of one group rather than another, or in virtue of which characteristics individuals can be distinguished into philosophically distinct groups, but what follows from membership, understood as a *socio-political* fact, rather than a *metaphysical* or *biological* one.⁹

⁹ See, for example, Anne Phillips, *The Politics of Presence* (Oxford University Press, 1995); Melissa S. Williams, *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation* (Princeton University Press, 1998); Iris Marion Young, *Inclusion*

In light of Christman's distinction between control and income rights in ideas, an interesting question raised by Munzer's argument concerns whether there would be something wrong – morally, politically or legally – with granting indigenous peoples IP rights to *non-traditional* forms of knowledge, as part of a package of reparations. For Munzer it matters greatly that IP rights recognise the capacities for autonomy of indigenous peoples, and the ways that those capacities have been developed and used to cultivate specific lands, and to produce specific cultural artefacts such as songs, pottery, medicines and food. Precisely because IP rights recognise people's creativity, and that creativity has so often been denied, denigrated or threatened in the case of indigenous peoples, they can be a particularly appropriate form of recognition and compensation. Because IP rights enable indigenous groups to have exclusive access to their land and artefacts, or to decide whether or not to share them with others, they give indigenous groups the sort of legally enforceable options that may help them to exercise their autonomy in a world that is often threatening or callously indifferent.

But it does not follow that it is only IP rights in *indigenous* knowledge that would be justified by these arguments, or that there would be something wrong in supposing that a share in the IP of companies who owe debts of reparations might not *also* be parts of legally enforceable compensatory agreements. Rather, it is important to ensure that these not be regarded as *replacements* for IP rights in TK, where those are desirable and possible. Munzer appears to be unsympathetic to such ideas, at least when formulated as an objection to granting IP rights in TK.¹⁰ However, it seems a merit, rather than a demerit, of his argument, that it suggests a greater variety of remedies for historical injustice than we might otherwise consider, including ones which speak both to the symbolic and the practical aspects of reparations.

Welfare, efficiency and idealisation

Effectiveness is critical, if not determinative, in instrumental justifications of legal rights, although effectiveness is a relative, as well as absolute standard, reflecting the alternatives before us and the nature of our objectives. In previous work, Alex Rosenberg had argued on welfarist grounds that we are justified in having stringent protections

and Democracy (Oxford University Press, 2002). For French light on these debates, see *French Politics, Culture and Society*, 26(1) (Spring, 2008), a special issue devoted to the subject, organised by Daniel Sabbagh and Shanny Peer.

¹⁰ Munzer, 'Corrective justice and intellectual property rights in traditional knowledge', Chapter 2 below.

for patent rights because of the importance of good new ideas to human well-being, and the importance of stringent protections for IP to the supply of good new ideas.¹¹ However, in ‘Designing a successor to the patent as second best solution to the problem of optimum provision of good ideas’, Rosenberg concludes that internal and external threats to the international system of patent rights require us to seek a new ‘second best’ way of promoting good new ideas, and that the model for that second best solution can be found in the reward structure of pure science.

Key elements in Rosenberg’s chapter include the following claims:

- (1) Good new ideas, unlike more traditional factors of production, such as land, labour and capital, do not suffer from diminishing marginal productivity and, therefore, ‘Insofar as welfare is contingent on the total amount of output – the size of the pie, holding shares in it constant – increases in welfare will be subject to diminishing marginal productivity’ unless we can find compensating increases in the supply of good new ideas.¹²
- (2) The capacity of patents optimally to foster good new ideas is threatened by piracy, which constitutes an *external threat* to patents, and reflects the lack of an enforceable global system of IP rights.¹³
- (3) The capacity of patents to foster the optimal level of good new ideas faces an *internal threat* to the patent system: namely, that the holders of patents, which are limited monopolies, may in time be able to use these to build up so much dominance in the market that they are able to manipulate the price for other goods in ways that suit themselves. In other words, they are able to become ‘price-setters’ rather than ‘price takers’ and to avoid the competitive pressures which make the grant of temporary monopolies in a market economy an optimally effective way to promote the supply and use of good new ideas.¹⁴
- (4) The reward system of pure science is, essentially, a prize system in which first discoverers reap all of the prizes of fame and fortune, compared to later competitors. This makes for a maximally efficient use of intellectual resources, and provides the basis for an alternative model to patents, albeit a second best solution, namely, the use of public and privately funded prizes.

¹¹ Alex Rosenberg, ‘On the Priority of Intellectual Property Rights, especially in Biotechnology’ *Politics, Philosophy and Economics* 3(1) (2004): 77–95.

¹² Alex Rosenberg, ‘Designing a successor to the patent as second best solution to the problem of optimum provision of good ideas’, Chapter 3. Hereinafter referred to as ‘Designing a successor to the patent’.

¹³ *Ibid.* ¹⁴ *Ibid.*

The availability of the internet makes it feasible easily and cheaply to put together large coalitions of small contributors to establish prizes for particular inventions . . . the feasibility of this proposal turns on the willingness of large numbers of people to provide others with a quasi-public good, even when others free-ride on the costs of the good. Evidence from experiments in game theory suggests that when the amounts individuals pay are low, the number of cooperating individuals is very large, and the benefit is great and non-rivalrous the participants are prepared to tolerate free-riders even when exclusion is feasible.¹⁵

With Rosenberg's chapter, the philosophy of IP lands bang in the middle of the philosophy of economics and in what we might call the philosophy of regulation.¹⁶ It raises important questions about how far arguments for protecting IP should be understood as arguments in ideal theory, and how far as arguments about what is practicable and justified, given the world we live in. Rosenberg believes that the patent system would be close to optimally welfare promoting were it not for piracy and the problem of monopolies. Hence, his arguments for replacing patents by prizes need to be distinguished from the arguments of those who think that patents exacerbate existing forms of inequality, national and global, or that they lead us wrongly to commodify humans, animals and the natural world, or to confuse discoveries with inventions.¹⁷ It is equally noteworthy that Rosenberg does not appear to believe that there is anything intrinsically wrong with pirating patented inventions and ideas, or trying to obtain the benefits of another person's ideas, labour and investments for oneself. So if it turned out that piracy helped to curb or discipline would-be monopolists, and thereby to solve the 'internal' problem threatening the patent system, it would seem that Rosenberg would have no moral objection to it, and might even wish to promote it in certain areas of the economy, while pursuing it more vigorously in others.

In general, the threat to one's market position posed by cheaper competitors can be met in various ways. One can try to lower one's prices, though, given the need to recoup the costs of research and development, it is unlikely that pharmaceutical companies, for example, will be able to compete on price with their unlicensed competitors. Or one can compete on other terms that might seem to justify the higher price one charges for

¹⁵ Rosenberg, *ibid.*, pp. 105–6.

¹⁶ See also Shuba Ghosh, 'When Property is Something Else: Understanding Intellectual Property Through the Lens of Regulatory Justice', in Gosseries, Marciano and Strowel (eds.), *Intellectual Property and Theories of Justice* ch. 5, pp. 106–21.

¹⁷ For a discussion of such concerns, see Annabelle Lever, 'Is It Ethical to Patent Human Genes?', in *ibid.*, ch. 12, pp. 246–64.

one's product: on the reliability and superior quality of one's product; on the service and training that one supplies to those who use it, and the speed with which one responds to customer needs and complaints; and it is sometimes possible to trade on brand loyalty or, paradoxically, to make the expensiveness of one's product part of its appeal. Given the importance of the placebo effect in medical treatment, the last strategy may be less ridiculous than it seems, although there are, presumably, limits to the extent to which drug manufacturers can treat their products as the equivalent of an especially soothing bedside manner, let alone of an expensively branded handbag or beauty product.

The threats posed by piracy and the limits of international enforcement of patent rights, then, may be less potent and inevitable than Rosenberg suggests.¹⁸ But that does not mean that prizes might not be an attractive supplement for patents. Nor does it mean that we should ignore the ways that prizes might be more attractive than patents, even when the latter work as intended. If prizes mean that good ideas immediately become a public resource, freely available to anyone with the means to understand and use them, then perhaps prizes are really better at promoting welfare than patents? At any rate, prizes would seem to have moral, political and economic advantages which patents lack in the short term.

Of course, if prizes are to replace, or even supplement patents, they must be large enough to attract resources that would otherwise go into the creation of patentable inventions, and that may not be possible. Whether or not it is would probably be a matter of individual and collective will. But once one considers the role of political will in combating over-mighty companies, it is hard to see why the internal threats that Rosenberg identifies could not adequately be met by the sorts of anti-monopolistic

¹⁸ According to Rosenberg, 'the absence of an internationally enforceable patent right is close to the same as no patent right at all'. 'Designing a successor to the patent', p. 90, n. 2. If the American experience is anything to go by, the deliberate promotion of some forms of unlicensed copying can be economically rational, even as one seeks stringently to prevent other forms. Nor, if Zorina Khan is right, is it self-evident that British authors, for example, suffered economically from American piracy, although it is possible that in the short term the pirating of better quality foreign products slowed down the production of home-grown products of comparable quality. See B. Zorina Khan, *The Democratisation of Invention: Patents and Copyrights in American Economic Development, 1790–1920* (Cambridge University Press, 2005), ch. 9 on American copyright piracy and, particularly, p. 273, with its discussion of the way that foreign authors, such as Charles Dickens, made their money from well-paid tours of America, where they read their books aloud to a mass market of readers generated by cheap, unlicensed editions of their work. The same advantages may be possible for spin-offs from the unlicensed use of patented goods, whether cosmetics, medicines or car products.

legislation and public policies that are usually used (or that *could be* used) to prevent monopolies from undermining economic competition.¹⁹

Rosenberg's chapter therefore asks us to consider the nature of the ideals we use to evaluate IP rights and, in particular, the relationship between the idealised models of markets, which characterise neo-classical economics, and the idealised models of norm-governed behaviour, characteristic of contemporary moral and political philosophy. There is nothing in free market theory, for example, that requires governments to be democratically elected rather than authoritarian, and there is nothing in a commitment to increase people's welfare that says we should hold current shares in the national or international pie constant. How, therefore, should we evaluate the alternatives to patents if we want to factor the differences between democratic and undemocratic governments into our analysis? And how should we describe the main policy alternatives from a welfarist perspective, given that the way we distribute shares in national income has complex effects on its future size? In short, the challenges raised by Rosenberg's chapter are not merely at the level of substance, but at the level of methodology as well.

Invention, law and morality

The chapters by Jorn Sonderholm, James Wilson, Kathleen Liddell and Graham Dutfield shed an interesting light on the preceding chapters and on the methodological and substantive issues which they raise. If, on the one hand, they suggest that utilitarian considerations may, indeed, provide the best justification for legally enforceable patent rights, they forcefully raise the problem of how deontological concerns for justice, liberty and equality fit into this framework morally and legally.

For example, in 'Ethical issues surrounding intellectual property rights', Sonderholm suggests that patents may have to be supplemented by prizes or schemes, such as Thomas Pogge's Health Impact Fund, in order to avoid two moral problems which are as endemic to patents as the threat of permanent monopolies, which worries Rosenberg. Because it is intrinsic to the patent system that funds for socially useful research come from the profits generated by temporary monopolies, it

¹⁹ In chapter 2, 'The Patent System in Europe and America' and chapter 4, 'Democratization and Patented Inventions', Zorina Khan shows how differences in patent fees and the ease with which patents could be submitted, affected the relative balance amongst individuals, small and large companies, and amongst patent-holders, and not merely the rate at which inventions were patented. It also affected what was patented, and the focus of both inventive activity and patenting. Chapters 5 and 6 on women inventors in America are particularly interesting in these respects: B. Zorina Khan, *The Democratisation of Invention*.

is inevitable that the patent system will under-supply good new ideas and products for problems where the market is small, or where it is large, but made up of people with limited incomes. Hence the problem of ‘orphan drugs’ – drugs for diseases that affect relatively few people, and the problem of drugs for the diseases that ravage millions of people in developing countries.²⁰ Likewise, because it is the profits of temporary monopolies which must pay for the costs of past and future research, the price of goods under these temporary monopolies is often so high – and necessarily so – as to price all but the wealthy out of the market for these drugs.²¹ However, Sonderholm notes, the main way to respond to these problems is generally thought to require supplementing, rather than replacing patents, on the assumption that these play a critical role in incentivising desirable research.

Perhaps it is true that patents provide critical incentives for desirable research, despite Rosenberg’s concerns. Still, patents have rarely been the sole means to generate investment in socially useful ideas and technologies. For most of their history patents have been supplemented by a wide range of additional forms of funding and support for new ideas – whether government subsidies or direct investment in education, research and technology, or government efforts to shield favoured companies or areas of research from outside competition. So Sonderholm’s helpful account of ethical objections to intellectual property rights (IPRs), and of their possible solutions, reminds us that at least some of the problems which surround IPRs have their counterparts in other areas of public policy, because the problem of how to pay for public goods is no more unique to ideas than are moral concerns with the structure of markets.²²

Indeed, debates about the moral limits of the market underpin James Wilson’s argument in ‘On the value of the intellectual commons’. He contends both that inventors have no special moral rights in their ideas, and that utilitarian justifications for IP may have to exclude medicines. Wilson’s reasoning is as follows: we cannot justify special rights for inventors based on their need to have continued access to their ideas, because *your* ability to use my ideas in no way diminishes *my* ability to use them.

²⁰ Jorn Sonderholm, ‘Ethical issues surrounding intellectual property rights’, Chapter 4 below.

²¹ Ibid.

²² For some classic examples of the latter which shed an interesting light on moral debates about patents, see Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, Mass.: Harvard University Press, 1995); Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, Mass.: Harvard University Press, 1996); and Deborah Satz, *Why Some Things Should Not be For Sale: The Limits of Markets* (Oxford University Press, 2010).

And, he thinks, I have no moral right to exclude you from ideas unless you are willing and able to pay me for their use because *your* use of my ideas does not diminish *my* ability to use them.²³ Nor, Wilson argues, do I have a moral right that you should not benefit from my creative efforts when you can do so without imposing extra costs on me. So, he concludes, inventors cannot have moral rights in their ideas *qua* inventors, because there is nothing about being the person who made up a good idea which means that other people should not be able to share in it. Hence, the justification for private property in ideas cannot be the moral rights of inventors, but must be utilitarian or consequentialist, if such rights are justified at all.

Wilson's accessible and elegant argument appears to support the justificatory assumptions of Rosenberg and Sonderholm, and to fit well with Christman's belief that income rights from TK (and income rights more generally) cannot usually be justified by people's claims to autonomy. However, they seem at odds with Christman's belief that people can have moral rights to exclusive control of their knowledge, and it may therefore be helpful to stop and consider the question of inventors' rights more closely.

It is essential to Christman's argument that indigenous peoples have been excluded or threatened with exclusion from their TK and that, if their moral rights in that knowledge are not properly acknowledged, this loss may undermine a way of life that is, in other respects, viable, satisfying and a reflection of their autonomy. By contrast, Wilson's argument works on the assumption that authors will have the same rights in their ideas as everyone else, and therefore do not need private control rights in order to secure access to their own ideas and inventions.

The differences in these assumptions point to the ways in which ideas are private, as well as public goods and private, as well as public ills. Though in principle it is true that my use of traditional patterns or medicines need in no way diminish your use of them, there are two ways in which this may not be the case. The first is where I am able to translate my use of these ideas into control of resources that you need to use the ideas. Because knowledge or ideas are usually embodied in objects, they are vulnerable to the mistaken, as well as deliberate, destruction and expropriation of their object and purpose. Second, because people can have different and mutually inconsistent purposes, my use of our shared ideas can undermine the value of your use of them, and may even come to prevent you using them at all. So, for example, if my invention of a new

²³ James Wilson, 'On the value of the intellectual commons', Chapter 5 below.

weapon is designed expressly to protect people struggling against unjust domination, then your use of it on behalf of those would-be dominators will diminish the value of my ideas to me and, if you are successful, may wreak so much destruction that my side, over time, is unable ever to use them again.

Wilson assumes that the competitive aspect of ideas is a reason why I should usually have the right to keep my ideas to myself.²⁴ However, he thinks, once I have agreed to share them with other people, I have no moral claim to decide who should use my ideas or how they should be used. Once you have agreed to work for all, so to speak, by making your ideas public, maybe you are no longer in a position to object if some uses of your labour are at odds with your fundamental convictions.²⁵ But there is nothing about ideas which requires us to assume this, or to suppose that their aspect as *public goods economically* should dominate their aspect as *private goods morally*. Indeed, doing so would seem to be at odds with familiar justifications for freedom of religion, expression and personal choice, which entitle people to act on personal considerations, even self-interested ones, instead of collective ones. So an implication of Wilson's arguments, perhaps, is that some legal protections for the *producers*, as well as the *consumers* of ideas, may have to figure in a normatively appealing scheme of patent rights, because the interests of these two groups are not identical, and neither should be left wholly to the whims of the market.

Respect for human dignity, liberty and equality place moral limits on patents, conceived as devices to promote well-being. However, how the deontological and consequentialist claims on patents are to be combined in practice, or philosophically, is far from clear, and these difficulties are legal as well as moral or economic. Indeed, these are the legal problems which motivate 'Immorality and patents: The exclusion of inventions contrary to *ordre public* and morality', Kathleen Liddell's spirited defence

²⁴ Ibid. I say 'usually' in deference to the fascinating – but disturbing – case of the Chamberlen family who, Wilson explains, were able to keep 'the discovery of the obstetrics forceps secret for more than 100 years in order to protect their midwifery business'. While the point of patents is to discourage such forms of trade secrecy, the moral question of whether or not one is entitled to keep such life-saving knowledge secret is not settled by the legal availability of patents. Instead, one faces the question of whether it is ethical to prefer secrecy to claiming a patent on such knowledge, and of licensing it on terms that make it widely available. The example is particularly interesting given Wilson's belief that medicines should sometimes be unpatentable on moral grounds. For details of the Chamberlen case Wilson refers us to W. Moore, 'Keeping Mum' *British Medical Journal* 334(7595) (2007). For Wilson's reservations about patenting medicines, see pp. 135–6.

²⁵ The idea that one's only choice is to reveal and/or share one's ideas, or to keep them secret has the same structure as the idea that once a woman has agreed to have sex with *some* man she can be assumed to consent to sex with *any* man. Hence my scepticism that IP rights require such a dichotomy.

of the morality exclusions from patent protection found, for example, in European IP law.

Liddell's aim, it should be said, is not to defend any particular formulation of those exclusions, nor does her argument imply that all forms of morality exclusion are wise or desirable. But she does want to argue that some standard objections to them – characteristic of Anglo-American lawyers – are ill-founded, and that morality exclusions can usefully be understood as a way to fulfil the utilitarian objectives which justify private property rights in ideas. So understood, she thinks, we will be better placed to reflect on what their content should be, and on how best to interpret and apply such legal exclusions. Indeed, she thinks, properly understood, we will see that morality exclusions are not simply a useful addition to patent law, but that the role they fill is sufficiently important that we should seek to add such exclusions to our law books if they are not on them already.

As Liddell says, it is now fairly uncontroversial that no sharp distinction exists between law and morality. So the people who object to the idea that patent law should not apply to certain things, such as medicines, life forms, or human genes, cannot avail themselves of the idea that morality has nothing to do with law. After all, if you think that the best justification for patent rights is that they facilitate socially desirable outcomes, it seems that you would have to object to patent rights that undermined such outcomes, all else being equal. So why not prevent certain things from being patentable if you have reason to believe that this would be counter-productive? As Liddell says, morality exclusions do not require legal decision makers to 'define immorality with philosophical rigour. Far from solving the puzzles that have troubled and divided philosophers for centuries . . . they simply have to grapple openly and conscientiously with a lower-order goal of responding reasonably to moral pluralism and the empirical information [about people's beliefs about morality] that is currently available'.²⁶

Liddell's chapter persuasively shows that many of the objections to morality exclusions in patent law are overstated or unpersuasive. However, when you consider the political manoeuvring, and the forms of inequality and exclusion which underpin the process of granting morality exemptions, it is hard to know what moral respect to accord *actual* morality exclusions, or whether explicitly building such exemptions into law is such a good idea.

²⁶ Kathleen Liddell, 'Immorality and patents: The exclusion of inventions contrary to *ordre public* and morality', Chapter 6 below, hereinafter 'Immorality and patents'.

One area in which the role of morality is most interesting and controversial legally concerns the ‘threshold test’ for a patent – namely, the proof that one’s brilliant new ideas are an *invention*, rather than a *discovery*. This is the subject of Dutfield’s chapter, ‘The genetic code is 3.6 billion years old: it’s time for a rewrite: Questioning the metaphors and analogies of synthetic biology and life science patenting’. According to Dutfield, there are two problems with contemporary applications and justifications of patents by scientists: the first arises from the difficulty of explaining cutting-edge ideas to non-specialist audiences.²⁷ The second problem is one of scientific hubris, which leads us systematically to denigrate or disparage the role of nature – or pre-existing facts – in our creative activities – as in the quotation from Tom Knight, head of MIT’s Artificial Intelligence Laboratory, from which Dutfield takes his title. According to Knight, synthetic biology is getting ready to rewrite our DNA, because ‘the genetic code is 3.6 billion years old. It’s time for a rewrite!’²⁸ In both cases, the use of metaphor and analogy to facilitate the understanding and communication of complex ideas, Dutfield suggests, makes it difficult for us effectively to police the line between discoveries and inventions and to ensure that patent rights are limited to the latter, as the law requires.

As Dutfield shows, the problem is not metaphor or analogy *per se*, as these are inseparable from creative thinking and the effective exposition of new ideas, but the danger of taking them literally, especially when figures of speech draw on highly specialised bodies of technical knowledge. ‘Frequently we explain a phenomenon, such as the way that something works, by reference to something else that is unrelated. The more complicated the phenomenon, the more likely we are to have to resort to analogy for us to make sense of it.’²⁹ However, when people fail adequately to understand the analogies that are being used, or to recognise the differences between analogical and homological reasoning, Dutfield suggests, they fall prey to manipulation, deception and self-deception.

The implication of Dutfield’s argument is that these difficulties are inevitable features of scientific communication and inevitable in legal judgments about the validity of patent claims. So are there moral, economic or legal reasons to persist with the idea that patents apply only to

²⁷ Graham Dutfield, ‘“The genetic code is 3.6 billion years old: it’s time for a rewrite”: Questioning the metaphors and analogies of synthetic biology and life science patenting’, Chapter 7 below, hereinafter ‘The genetic code’.

²⁸ Ibid. ²⁹ Ibid.

inventions, rather than to discoveries with industrial application?³⁰ The question is especially pressing because the exclusion of mathematical ideas from patent protection, as Liddell implies, may be better understood as a *moral* judgment about the resources to which everyone should have access than as a *conceptual* claim about the nature of inventions, or an *economic* judgment of the best way to promote them. Hence, Liddell and Dutfield force us to consider whether moral concerns for fair access to ideas justify the discovery/invention distinction, despite its difficulties and, if not, whether it has any justification at all.

Copyright, freedom and communication

How far, if at all, do the concerns animating thinkers on patents affect those whose primary concern is copyright? In 'Copyright infringement as compelled speech', Abraham Drassinower advances a deontological account of the nature and purposes of copyright law. Taking aim at what he sees as the mistaken reification and commodification of authorship, he argues that the point of copyright is not to promote some optimal level of creative work, let alone to promote economic development, but to protect 'an author's autonomy as a speaking being'.³¹

In an innovative and influential series of articles, Drassinower has developed a perspective on copyright which seeks to present it as a system, or legal regime, rather than as the terrain for *ad hoc* acts of balancing, compromise and conflict amongst people's disparate interests in ideas. He therefore asks us to turn away from debates about the best way to reward or promote creativity and, instead, to consider the nature of authorship as an act, and copyright as the body of law which recognises and protects that act. So understood, the point of copyright is not to regulate the production of ideas or to distribute benefits or rewards, but to give legal status and protection to a morally fundamental feature of persons, namely, their capacities to originate, or author, works.

Critical to Drassinower's argument is the claim that, for copyright purposes, authors and users of ideas are not two random groups of people,

³⁰ For example, Sir Hugh Laddie questions whether the legal test of 'non-obviousness' in UK patent law serves any useful purpose, given that the main obstacles to producing new products appear to be the expense of research, rather than the intrinsic difficulty or non-obviousness of the ideas and techniques involved. See, 'Patents – What's Invention Got to Do With it?', in David Vaver and Lionel Bently (eds.), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge University Press, 2004), p. 94.

³¹ Abraham Drassinower, 'Copyright infringement as compelled speech', Chapter 8 below, hereinafter 'Copyright infringement'.

engaged in unrelated acts of using and producing ideas. Instead, this body of law concerns authors *as* users of other people's works, and users are of legal significance *as* actual or potential authors. Seen in this way, Drassinower contends, the unity or integrity of familiar features of copyright law becomes visible, and it becomes easier to understand aspects which might otherwise seem unmotivated or *ad hoc*, such as the treatment of simultaneous invention, fair use and the non-communicative use of ideas.

As Drassinower explains, copyright is not concerned with the originality of works in the sense of their *novelty*, but with their *origin*. Therefore, there is no reason why 'simultaneous creators' should be denied legal protection for their independent acts of authorship. On the contrary, *qua* authors, they are entitled to precisely the same degrees and kinds of protection as the most popular, innovative or prolific authors. Similarly, because authorship is impossible in a world without ideas to draw on and respond to, Drassinower argues that fair use is an integral part of copyright, not some exception tacked onto it.³² The point of copyright is to protect authorship and therefore, he claims, authors own their work for some purposes, but not others. In particular, they do not own their works for the purposes of criticism, as in this respect their works are part of the public domain, freely available to all.³³ 'By asserting his copyright, the author seeks to be treated as a person, and not a mere puppet . . . By the same token, his work, as copyright subject matter, is addressed to persons, and not mere puppets, and so contemplates the responses of its audience.'³⁴

According to Drassinower, a proper understanding of copyright also helps us to understand why authors do not own their works in ways that entitle them to monitor or license acts of private copying for personal enjoyment, instruction or discipline, or to constrain their non-communicative use, whether we are baking pies or engaged in the act of accounting. Such uses involve works as tools, rather than as acts of communication, Drassinower explains, in an analysis of the classic case of *Baker v. Selden*.³⁵ They therefore have no bearing on the protection of authorship,

³² Abraham Drassinower, 'Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-mark' *Michigan State Law Review* 1 (2008): 199–232, esp. 208–10, hereinafter 'Authorship as Public Address'. See also 'Copyright infringement'.

³³ Drassinower, 'Authorship as Public Address', 221.

³⁴ Drassinower, 'Copyright Infringement', p. 220.

³⁵ *Baker v. Selden*, 101 US 99 (1879). For the example of baking pies, see Abraham Drassinower, 'Authorship as Public Address', 219, n. 57 and the decision in *Cusenaire v. S. W. Imports Ltd.* (1969) SCR 208, repudiating the possibility that 'everybody who made a rabbit pie in accordance with the recipe of Mrs. Beeton's *Cookery Book* would infringe the literary copyright in that book'.

or communication, and so are irrelevant to the law of copyright, although the use of ideas as tools is central to the law of patents. As Drassinower puts it, ‘Authors hold rights in respect of their work not as owners but as authors . . . Thus copyright is less an exclusive right of reproduction than an exclusive right of public presentation.’³⁶ It prevents copying not as an end in itself, but as a means to other ends: the protection of our ability to author communicative acts.

How do these claims help us to understand the distinctive point and justification of copyright as a systematic body of law? Here Drassinower’s presentation of a rights-based justification of copyright, in this volume, provides a helpful clarification and elucidation of his ideas. In particular, it illuminates the differences between copyright and privacy law in ways that reflect the unity of the former; and it shows how the form/content distinction, so familiar to scholars and lawyers, explains why legal protections for copyright are not reducible to protections for an author’s privacy or reputation, nor for the integrity or financial value of a work.

Copyright, Drassinower argues, prevents the unauthorised publication of unpublished work, not because it is unpublished, but because it is *unauthorised*.³⁷ So while copyright helps to ensure that authors are not forced to speak when they wish to remain silent, legal protections for privacy are no substitute for copyright – no more than rights against self-incrimination would be.

Legal protections for privacy are pre-eminently concerned to prevent the unauthorised publication of personal facts, especially where these were previously unpublished. Copyright, by contrast, is unconcerned with the degree of intimacy or self-revelation involved in a text, but merely with its origin or authorship.³⁸ Copyright therefore protects authors from unauthorised *re-publication* of their works, not just unauthorised *publication*, and takes the latter as seriously as the former. By contrast with laws protecting us from misrepresentation, copyright is concerned as much with the accurate, albeit unauthorised, publication of works as it is with ones that are inaccurate, bowdlerised, misleading or deceptive.³⁹ Finally, as distinct from laws protecting us from exploitation and theft, copyright seeks to protect us from unauthorised publication, whether or not unauthorised publication would harm us financially.⁴⁰ In short, Drassinower contends, because copyright protects the *form*, not the *content* of our ideas, it is necessarily indifferent to features of them that are essential to other bodies of law. Because its concern with form is a reflection of its concerns with *origin* or *authorship*, Drassinower explains, we miss the point of

³⁶ Drassinower, ‘Authorship as Public Address’, 221.

³⁷ Drassinower, ‘Copyright infringement’. ³⁸ Ibid. ³⁹ Ibid. ⁴⁰ Ibid.

copyright if we see it as a way to protect our property right in *things* – books, letters, manifestos, posters – rather than as a system of protections for *acts* of authorship.

But why is authorisation important in the absence of harms to our wallets, our reputations, or our privacy? Here we come to an intriguing feature of Drassinower's account of copyright: namely, the claim that unauthorised publication 'amounts to forcing another to speak. Unauthorized publication is wrongful because it is compelled speech.'⁴¹ Capturing the sense that unauthorised publication is something to be prevented, if possible, rather than compensated *post facto*, the idea that unauthorised publication is compelled speech reflects the fact that publication can *wrong* us, whether or not it also harms our work, our status, or our finances. It helps to account for the sense that unauthorised publication wrongs *authors*, whoever else it wrongs, and therefore captures the reasons why our legal rights in ideas are not simply emanations of our duties to others – important though the latter may be. Finally, it raises interesting questions about the relationship between the harms of copyright infringement and the harms of forced oaths,⁴² or the forced extraction of information under torture, for these rights against compelled speech are inalienable and cease at our death.⁴³

In 'Public reasons, communication and intellectual property', Laura Biron, like Drassinower, turns to Kant in an effort to provide an alternative to economic models of copyright.⁴⁴ Distancing herself from what she sees as misreadings of Kant in authors such as Neil Netanel and Leslie Kim Treiger-Bar-Am, she aims to develop a communicative account of copyright. Biron's chapter reflects Onora O'Neill's philosophical work on Kant and on the creation, storage and use of information.⁴⁵

⁴¹ Ibid., p. 212.

⁴² The classic American legal case is *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943), protecting the right of Jehovah's Witnesses not to pledge loyalty to the US flag. In 1962, the US Supreme Court struck down requirements that state employees affirm allegiance to the national and state constitutions, and disclaim membership of the Communist Party and other 'subversive' organisations. See Eric Barendt, *Freedom of Speech* (Oxford University Press, 2005), pp. 93–8 for a sensitive discussion of 'rights not to speak' bearing on union dues, trade advertisements, licence-plate slogans and gay rights. However, for a sobering assessment of employees' free speech rights in America, see Matthew W. Finkin's Piper Lecture of 1996, published as 'Employee Privacy, American Values and the Law' *Chicago-Kent Law Review* 72 (1996–7): 221–69.

⁴³ See Beitz, 'Moral Rights of Creators', 346–50. Beitz thinks that making moral rights inalienable is hard to justify, and often reflects the scope for conflict between two social interests underpinning moral rights: the interest in promoting or encouraging creativity, and the interest in preserving a cultural or artistic heritage.

⁴⁴ Laura Biron, 'Public reason, communication and intellectual property', Chapter 9 below, hereinafter 'Public reason'.

⁴⁵ Ibid.

According to Biron, reflections on Kant should lead to a justification of copyright grounded in the ethics of communication and, in particular, in a communicative ethics aimed at a potentially universal, rather than circumscribed, audience. As Biron describes it, ‘the idea that thinking for oneself and communicating publicly are inextricably linked is fundamental to Kant’s account since, as he argues, acts of thinking presuppose audiences of some kind, as we endeavour to think “in community with others, to whom we communicate our thoughts and who communicate their thoughts to us”’.⁴⁶ As with Drassinower, Biron also believes that this aspect of Kant’s thought explains why the existence of a public domain is internal to copyright – rather than as a set of *ad hoc* constraints imposed on it from outside. Moreover, according to Biron, attention to the communicative aspects of patents and trade marks can illuminate their commonalities with copyright.

For instance, Biron, like Drassinower, believes that the existence of a rich and varied public realm, permitting critical and transformative uses of copyrighted materials, is necessary to the communicative rationale of copyright itself. So reflections on the normative point of copyright help to explain why copyright cannot extend indefinitely, why it cannot cover content, rather than expression, and why it must allow fair comment as well as satirical and transformative uses of the way that one has framed one’s communication.⁴⁷ In the case of trade marks, Biron believes that a communicative approach to patents will help us to distinguish their *informative* function from their *persuasive* or emotional one, so that the reasons to protect the former are not confused with reasons to protect the latter.⁴⁸ Likewise, in the case of patents, she believes, attention to their communicative, rather than proprietary aspects, reminds us that ‘mere disclosure of information is not sufficient for communication to meet the standards of public reason [suggested by Kant] – other standards besides accessibility are needed. . . . In addition to innovators disclosing information about patents, they must also do so in a way that makes such information intelligible by relevant audiences.’⁴⁹ Hence, Biron believes, a communicative approach puts the burden of proof on would-be patent-holders, to show that they have adequately disclosed the details of their invention, by contrast with the contemporary situation where the onus is on others to prove that disclosure has been inadequate.

Biron’s account is extremely interesting, both in the links it suggests amongst different forms of IP, and between the justification of IP and

⁴⁶ Ibid., p. 237; the quotation from Kant can be found at p. 247. ⁴⁷ Ibid.

⁴⁸ For Abraham Drassinower’s views on trade marks and patents, see his ‘Authorship as Public Address’, 229.

⁴⁹ Biron, ‘Public reason’, p. 257.

political and moral ethics more generally. It reminds us that the deontological elements of a philosophical justification of legal rights need not, themselves, be rights-based but might, rather, reflect our moral duties and the importance of our ability to fulfil them. Not surprisingly, therefore, Biron's approach raises many questions about the nature and justification of copyright, and its relationship to other rights we might have in ideas.

The most pressing of these questions concerns the content of the communicative ethics which best makes sense of copyright norms. Although Biron looks to Kant for inspiration, others might look to Habermas, where the effort to work out a communicative ethics suitable for democratic societies still influences Anglo-American as well as continental moral and political thought.⁵⁰ Or, presumably, one might look to Derrida for inspiration and to ideals of communication that are playful, actively invite challenge, seek to evade, rather than to justify stable power relations, and so on.⁵¹

Once one reflects on the different ways one might try to develop an ethics of communication, and the different forms that it might take, the difficulties of justifying legal rights this way become apparent. If we try to formulate those norms sufficiently thinly, or abstractly, to capture what is common to different ethics of communication, our moral foundation is likely to be too thin to answer practical questions about the legal rights we should have. If, on the other hand, we try to define our communicative ethics with sufficient detail so as to provide legal guidance, 'where guidance is needed' (to paraphrase Rawls), we risk ending up with a body of IP law that is unappealingly sectarian, or that arbitrarily accords great protection to some of our interests in ideas, while neglecting or actively disparaging the significance of others. For example, Biron's distinction between the informative and persuasive aspects of trade marks assumes that the former is more important ethically than the latter. However, it is unclear why this should be so, or what this distinction implies about IP protections for the plastic arts, as well as for music.⁵²

These are familiar problems in political philosophy – whether one is concerned with debates on Rawls and Habermas, for example, or the

⁵⁰ See, for example, Seyla Benhabib and Fred Dallmayr, *The Communicative Ethics Controversy* (Cambridge, Mass.: MIT Press, 1990).

⁵¹ See, for example, Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

⁵² I do not think the informative/persuasive distinction can be seen simply as a reflection of the lesser constitutional protections offered for commercial speech under US constitutional law. This is partly because trade marks presumably fall within the realm of commercial speech, and because American constitutional protections cut across Biron's distinction.

definition of women's rights against harassment and verbal abuse.⁵³ No magic wand seems likely to make these problems disappear, nor are they susceptible to a purely philosophical solution, in so far as they arise from the need to justify legally enforceable rights and duties, and legally constructed conflicts of interest and balances of power. Hence, a counterpart to a communicative perspective on copyright, it would seem, is an account of the scope for political choice in the formulations of legally enforceable rights, duties and permissions, and the alternatives to these as a way to protect our interests. Attention to the role of political choice is especially important, because a deontological perspective on IP need not be rights-based, and might therefore draw the line between the legal and the moral in ways quite different from those with which we are familiar.⁵⁴ In short, Biron's chapter is a salutary reminder that our moral duties may have a role in determining our legal rights, and that these duties are potentially as important for our 'control' rights in ideas as they are for our rights to gain income from them.

Morality, sharing and free riding

Our collection of chapters closes with two qualified defences of free riding, motivated by reflections on peer-to-peer (P2P) sharing in the music industry. Updating and extending an earlier piece on copyright, Geert Demuijnck's 'Illegal downloading, free riding and justice' takes a look at the economics of the music industry in order to explain why the unlicensed copying of the latest hits is often fair.⁵⁵ Inspired by Demuijnck's chapter,

⁵³ See, for example, Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge University Press, 2003) and Stephen K. White (ed.), *The Cambridge Companion to Habermas* (Cambridge University Press, 1995); and for a debate concerning its bearing on women's rights, see Wendy Brown, 'Suffering Rights as Paradoxes' and Annabelle Lever, 'The Politics of Paradox: A Response to Wendy Brown' *Constellations: An International Journal of Critical and Democratic Theory* 7(2) (2000): 208–29 and 242–54, respectively.

⁵⁴ The race to make the human genome publicly available, in order to pre-empt Venter's effort to patent parts of it, suggests that we can cause harm by failing to defend our patents and copyrights against others, and the same may be true in cases where our ideas would be used for immoral purposes unless we seek actively to stop them. See, for example, John Sulston and Georgina Ferry, *The Common Thread: A Story of Science, Politics, Ethics and the Human Genome* (Washington DC: John Henry Press, 2002). Generally, our laws do not require people to defend their reputations or their assets, nor their rights in their ideas. But that does not mean that the best justification of IP would support this status quo, or the conditions of alienability which characterise existing IP rights.

⁵⁵ Geert Demuijnck, 'Illegal downloading, free riding and justice' chapter 10 below, hereinafter 'Illegal downloading'. The earlier piece is Geert Demuijnck, 'Is P2P Sharing of MP3 Files an Objectionable Form of Free Riding?', in Gosseries, Marciano and Strowel (eds.), ch. 7, *Theories of Justice and Intellectual Property*, pp. 141–59.

David Lametti turns to virtue ethics in order to illuminate the morality of file sharing, and its place within a scheme of IP.⁵⁶

Free riding is possible whenever the behaviour of others generates positive externalities – or good side-effects – from which people can benefit without having to contribute. Demuijnck gives the example of his enjoyment of his neighbour's violin playing, which wafts towards him as he sits in the garden. Or one might think of the enjoyment one gets, as a tourist, driving through the beautifully kept villages in France. So understood, it is clear that the enjoyment of positive externalities is not intrinsically immoral – just as there is nothing intrinsically praiseworthy with putting up with negative externalities, such as noise, dirt, or insecurity. When free riding is morally wrong, therefore, it seems to have particular properties, reflecting moral condemnations of ingratitude, selfishness or amorality, which may be particularly appropriate to cases of free-riding on cooperative schemes, as these are often difficult to create and maintain.

However, drawing on Garrett Cullity's analysis, Demuijnck suggests that there are three cases where free riding is morally acceptable:

- (1) where paying for the benefits generated by a cooperative scheme would leave me worse off than I would be without the scheme. In such cases I am not refusing to pay my fair share for a collective good but, at most, refusing to contribute to a scheme whose costs considerably outweigh any gains I might receive from it;
- (2) where a cooperative scheme is so poorly conceived or run that it is unable to generate the collective benefits which would make free-riding immoral. In such cases the refusal to contribute looks more like a refusal to throw one's money away than an unwillingness to do one's fair share to provide a collective good; and
- (3) where the collective scheme is immoral in its means, and/or in the ends which it hopes to achieve, since I can hardly be blamed for refusing to contribute to an immoral enterprise, even if it might work in my favour.⁵⁷

So, Demuijnck supposes, it is morally wrong to take a free ride on an institutional scheme designed to cope with the problem of supplying public goods if the scheme is morally irreproachable, one would benefit from the scheme even if one had to contribute to it, and the scheme is sufficiently well conceived and run that it is likely to achieve its morally attractive goals.

⁵⁶ David Lametti, 'The virtuous p(eer): Reflections on the ethics of file sharing', Chapter 11 below, hereinafter 'The virtuous p(eer)'.

⁵⁷ Demuijnck, 'Illegal downloading'.

What does this mean for the music industry? According to Demuijnck, it means that a lot of unlicensed copying is morally harmless, even if it is illegal, so those who wish to prosecute such unlicensed copying cannot wrap themselves in the mantle of morality in order to justify their behaviour.

In the first place, the popular music market is a 'winner-takes-all market', which means that a lucky few receive rewards that bear no relationship to the costs of their creative efforts, or to the benefits those efforts bring to others. As Demuijnck explains, in a winner-takes-all market, 'reward depends heavily on relative, and not absolute performance. When a farmer is slightly less productive than his neighbour, he will have a slightly smaller income. In the world of music there is no such proportionality. The system of excessive reward creates "a few big winners and lots of losers who have wasted their time"'.⁵⁸ It is not true, then, that everyone benefits from current arrangements for financing popular music, as most musicians make no money from copyright. So unlicensed copying is not the same as free riding on a collectively beneficial scheme, Demuijnck contends, because there is no collectively beneficial scheme which copyright in popular music is currently protecting.

Moreover, Demuijnck argues, because winner-takes-all markets are essentially unfair, we cannot say that copyright is protecting a fair cooperative arrangement – albeit one that fails to benefit everyone. In the case of the music industry that unfairness is particularly marked, as it is copyright itself which makes it the case that the rewards to winners are very large relative to costs and to the benefits conferred, and that these exceptionally large rewards for a few coexist with almost no rewards for most. As Demuijnck notes, the structure of the music industry accentuates the problem, because it is highly concentrated, and the major players own the channels through which content is distributed, as well as the content itself. This makes it economically profitable to mass-market heavily promoted, but otherwise similar products, but very difficult to finance the production either of niche music or of music with a potentially very large market of relatively poor people.⁵⁹ These, in the artistic world, are the equivalent of the market failures Jorn Sonderholm describes in the case of orphan drugs and drugs for diseases in poor countries.

Demuijnck concludes that if people only download the music of those who have won in the lottery that is success in the music industry, they

⁵⁸ *Ibid.*, p. 270. He is quoting Mark Lemley, 'Property, Intellectual Property and Free Riding' *Texas Law Review* 83 (2005): 1031–75.

⁵⁹ Demuijnck, 'Illegal downloading'.

cannot be accused of wrongful free riding on the productive efforts of the artists whose work they use without licence. These artists do not deserve their reward, nor are such extravagant rewards required to motivate artists to produce the works which most people copy for free. If unfairness exists, he thinks, 'it is unfairness with respect to the paying consumers who finance the production' of CDs and other artefacts, rather than unfairness to the big stars whose music is copied illicitly.⁶⁰ Finally, he notes that in so far as the people who download CDs illegally are too poor to pay for them, their failure to buy music at the going rate leaves the market for CDs unaffected. So while copyright serves a legitimate purpose, it is wrong to say that all free riding is immoral, although in practice it may be hard – even impossible – to determine which cases of unlicensed copying are morally blameless.

Demuijnck, then, uses economic theory and facts about the structure of the music industry to reach moral conclusions about free riding. His analysis of the morality of free riding, therefore, raises interesting questions about the relationship between economics and political morality on the one hand, and economics and private morality on the other. For example, perhaps one has duties to contribute to public goods, even if their production is inefficient, or their costs are high, if a failure to do so would leave other people even worse off than oneself. Even in cases where one currently has no duty to contribute to the provision of a public good, one might have duties to criticise the failure to provide public goods, to demonstrate one's readiness to pay for them, and to share in the process of determining how best to organise their provision. Demuijnck's chapter, therefore, forces us to consider the difference between public goods and collective goods, and to consider how far it matters to our views on free riding that consumers of music span countries, and even continents, and are often too young to be citizens, with the chance to vote or to stand for election themselves.

Moreover, the differences between Demuijnck and Rosenberg over winner-takes-all competitions raise interesting questions about the

⁶⁰ Similarly, in response to efforts to show that non-voters are free riders, and that free riding is so morally wrong that we should make voting legally compulsory, I show that non-voting is often justified and that, even where it is morally wrong, the harms that it causes are not really to fellow citizens who vote, but to those who are affected by the action of our country but are unable to vote because they are not yet born, are too young, or are not citizens. If the appeal of free riding-based arguments for coercion, then, is that they seem to work no matter one's particular values or concerns, their weakness is that they frequently fail to capture our intuitions about morality *precisely because* they avoid any strong assumptions about what is just or of value. See Annabelle Lever, 'Compulsory Voting: A Critical Perspective' *British Journal of Political Science* 40(4) (2010): 897–915, esp. 913–15.

assumptions of fact and value that we bring to moral evaluation. It is possible that Rosenberg accepts the justice and efficacy of the winner-takes-all aspect of patents, as in the distribution of fame in pure science, because the 'losers' are generally well placed to support themselves financially through salaries paid for by companies, research labs or university teaching.⁶¹ By contrast, Demuijnck's hostility to winner-takes-all competitions may reflect the economics of the music and literary industries, in which a great many people struggle to survive on very low wages and on piece-work of various sorts because of the way the industry and copyright combine to structure the economics of the creative professions.

However, it is possible that their contrasting attitudes to winner-takes-all competitions reflect a difference of opinion about the tightness of fit between the financial rewards which IPRs bring and what is necessary to motivate creativity. Rosenberg supposes that, by and large, the patent system would approach the optimum production of good new ideas were it not for piracy and the problem of monopolies. Thus, his working assumption is that the income rights from patents generally reflect the costs of production and the risks of failure. By contrast, Demuijnck clearly supposes that copyright forms part of a system of rewards which provides little or no benefit to most musicians – who will earn most of their music-generated income from live performances – while offering extravagant rewards to a few, though these are generally unnecessary to motivate creative effort. So reflecting on the differences between Demuijnck and Rosenberg leads us to consider whether a tight fit between reward and creative outcome is necessary to the justification of IPRs and, if so, how tight that fit should be.⁶²

At first blush, this seems to be an issue only for those who subscribe to instrumental justifications of IPRs. However, deontological approaches face their own version of this question, for what is at issue is the relationship between the income and control rights which make up the IPRs

⁶¹ Rosenberg, 'Designing a successor to the patent', pp. 101–4 on the reward structure of pure science, and pp. 104–9 on prizes.

⁶² Of course, the differences could just be explained by the fact that Rosenberg is concerned with patent rights, whereas Demuijnck is concerned with copyright, as Stephen Munzer reminded me. But it is unclear why this difference, in and of itself, should explain why the structure of winner-takes-all competitions should be acceptable in the one case and not the other. It is true that copyright in music does not involve the research costs and trials involved in the production of medicines, but such factors should affect the size of the reward, not how it is distributed. Moreover, public taste is arguably as fickle as the human body is surprising, so success in the music industry seems no more a foregone conclusion than success in pharmacology. The only difference, presumably, is that one does not risk being sued because one's drug had unforeseen side effects, although the flip side of this is that music producers never get an unexpected surge of orders because, surprisingly, their drug turns out to have secondary, patentable, uses that no one foresaw.

package, and what reasons, if any, we have to suppose that the latter implies the former. Clearly, for Drassinower and Biron, the justification for income from one's copyrighted ideas follows if it does, only from one's claims to control the public presentation of ideas which one has authored. But there is nothing in their account of authorship which implies that authors must be able to benefit financially from their ability to license the reproduction or use of their work, or that seems to shed light on the morality of winner-takes-all competitions. So reflection on the disagreement between Demuijnck and Rosenberg highlights the difficulty of justifying the income which IPRs generate, and the way that that income is distributed, whatever one's favoured type of justificatory strategy.

In light of these questions, it is particularly appropriate that our collection closes with David Lametti's reflections on the ethics of file sharing. Lametti believes that any plausible justification of IPRs must make room for the personal dimensions of music, and the private acts of copying, transformation, sharing and communication which reflect its social meaning. In 'The virtuous p(eer): Reflections on the ethics of file sharing', Lametti argues that the norms which should govern copyright must take account of human flourishing, which is not reducible either to the promotion of creativity or to an ethics of public communication. Instead, he argues, we need to reflect on the role of music in people's lives and, in particular, on the way that the sharing of music, and the creation of copies and compendia sustain ethically important relationships, such as friendship, and a sense of one's personal and social identity.

Music has a social dimension, Lametti argues, which gives personal acts of copying an ethical significance that is not well captured either by talk of theft or piracy, or by legal protections for the transformative use of works in public communications. When we make copies and compilations for friends, after all, we are not usually trying to take something without paying, but trying instead to share what we have, and to make it available to others in a form that they will appreciate. In some cases, the effort of making the copy, rather than buying an original, is what gives the present added value, even in cases where the selection of music to be copied, or the order in which it is presented, are no different from those in the original. Hence, Lametti argues, attention to how people use music suggests that copying has an ethics which makes digital 'locks' on music immoral, and precludes the aggressive pursuit of unlicensed copying by the young.⁶³

⁶³ Lametti, 'The virtuous p(eer)'.

That is not to say that anything goes, or that Lametti believes that all acts of unlicensed copying are moral. Rather, he thinks that ‘if you are in the habit of sampling music in order to decide what music you will later purchase, that practice is ethically justifiable, as one might have done with a cassette in the past; but, in my view, you have to purchase enough music to justify your sampling. In the same vein, if you are sampling to create, then you have to create and, in turn, be willing to share what you have created to some extent.’⁶⁴

But how should the law accommodate such considerations? And how far should it deliberately enable us to make virtuous choices, at the risk that we might make vicious ones?⁶⁵ Such questions about the nature and purposes of law are unavoidable in the philosophy of IP, as in philosophical debates over freedom of expression and association. Resolving them, in so far as they are resolvable, requires us to compare IPRs with other bodies of law which affect our rights in ideas. Lametti’s chapter, therefore, underscores the *comparative* nature of the philosophy of IP, already evident in this collection of chapters. If, on the one hand, these comparative aspects can be disheartening – suggesting that many questions in the philosophy of IP lack a definitive answer – on the other, a comparative approach may help us to make progress on some of the philosophical puzzles which now confront us.

Chief amongst these puzzles, we have seen, is the relationship between control and income rights in the typical bundle of IPRs – a puzzle that does not go away just because one replaces instrumental with deontological justifications of rights. However, another puzzle concerns the implications of recognising that ideas are private, as well as public goods – which means that people may stand to gain or lose a great deal depending on precisely how their provision is secured. We have seen that producer, consumer and entrepreneurial interests in ideas are not alike,⁶⁶ and that there are fairly significant conflicts of interest within, as well as across, these groups. The justice of IP arrangements depends on how adequately legal institutions recognise and protect these different

⁶⁴ Ibid., p. 301.

⁶⁵ For contrasting perspectives on this debate, see Jeremy Waldron’s ‘A Right to do Wrong’, ch. 3 of his *Liberal Rights* (Cambridge University Press, 1993) and Gerhard Overland, ‘The Right to do Wrong’ *Law and Philosophy* 26 (2007): 377–404.

⁶⁶ My hunch is that the specific character and weight of entrepreneurial interests, as opposed to producer and consumer interests, deserve more attention than they have received thus far, as they seem to be elided with producer interests in incentive justifications of IP rights, and ignored or elided with consumer interests in deontological justifications. But this is to miss the specificity of the interests of publishers, theatre producers and pharmaceutical companies, as well as the ways in which the interests of different sets of entrepreneurs may conflict.

interests. Hence, the ways that employment contracts link autonomy and income rights may be a fruitful source of comparison for those concerned with the justification of income rights in ideas, while the nature of democratic elections may provide a point of comparison for the treatment of ideas as both public and private goods.

For example, even those who dislike talk of ‘self-ownership’, or the reduction of labour relations to property relations, are acutely aware of the financial implications of aspects of employment law which seem primarily concerned with autonomy – such as the legal treatment of the ‘closed’ or ‘union’ shop, or of rights to picket and strike.⁶⁷ So reflection on rights of associational and occupational choice, and the degree to which they are legally alienable, may help to illuminate the financial dimensions of copyright, patents and trade marks for those seeking an alternative to proprietary approaches to them.

Similarly, debates about the best way to organise and finance democratic politics may help to illuminate the dual character of ideas as public and private goods.⁶⁸ Democratic elections, after all, are meant to be a public good, although their competitive aspect means that the stakes can be high in any given election and, therefore, in the choice of rules by which winners and losers are defined. Indeed, if democratic elections suggest that ‘winner-takes-all’ competitions can be part of a solution to collective action problems, the fact that basic rights and liberties are necessarily excluded from democratic competitions highlights the conditions necessary for ideas simultaneously to be a public and private good. At a minimum, freedom of thought and expression and freedom from arbitrary arrest and imprisonment, equal rights to stand for positions of power and responsibility in one’s society and adequate access to education seem necessary if access to ideas is not to be the prerogative of an elite, and their use limited to those who are thought ‘deserving’ or ‘trustworthy’. Conversely, the existence of proportional alternatives to ‘winner-takes-all’ remind us that it is sometimes better to minimise than to increase the differences between

⁶⁷ Stuart White, ‘Trade Unionism in a Liberal State’, in Amy Gutmann (ed.), *Freedom of Association* (Princeton University Press, 1998), pp. 330–56; Joshua Cohen and Joel Rogers, *Associations and Democracy* (London: Verso, 1995); Sheldon Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (New Haven, Conn.: Yale University Press, 1992); Charles Beitz on ‘paternalistic’ justifications for the inalienability of moral rights in ‘The Moral Rights of Creators’, 352.

⁶⁸ See for example, Joshua Cohen, *Philosophy, Politics and Democracy* (Cambridge, Mass.: Harvard University Press, 2009); David Donnelly, Joshua Cohen and Joel Rogers *Money and Politics (The New Democracy Forum)* (Boston: Beacon Press, 1999).

winner and loser in socially useful competitions, out of a sense of respect and solidarity, as well as for instrumental reasons.⁶⁹ In other words, open acknowledgement of the private and competitive aspects of ideas may make it easier to decide how best to treat them as public goods.⁷⁰

The new frontiers in the philosophy of IP, then, invite us to stray into new and unexpected areas of law, philosophy and social science. If this collection is any guide, that journey will be stimulating and enjoyably disputatious.

⁶⁹ For the differences between proportional and consociational electoral systems, see Arend Lijphart, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice* (New York: Routledge, 2007); George Bingham Powell, *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (New Haven, Conn.: Yale University Press, 2000).

⁷⁰ See, for example, the discussion about the economic repercussions of corporatism in Jukka Pekkarinen, Matti Pohjola and Bob Rowthorn (eds.), *Social Corporatism: A Superior Economic System (Wider Studies in Developmental Economics)* (Oxford: Clarendon Press, 1992) and Cohen and Rogers, *Associations and Democracy*.