

# Moral Foundations Of Intellectual Property Rights

By Arthur Kuflik

First, do patents and copyrights create (or secure) property in ideas? And second, is the practice of assigning patents, copyrights, and other forms of intellectual property morally defensible? I argue for two theses: first, the intellectual property system cannot be satisfactorily grounded in the principle that a person literally owns, as a matter of natural right, the ideas that he is the first to conceive. And second, underlying, and to some extent shaping, the practice of granting patents, copyrights, and other forms of intellectual property is the need to strike a suitable balance among three important considerations: freedom of thought and expression, incentive to authorship and to technological innovation, and fairness.

## **INTELLECTUAL PROPERTY LAW AND THE OWNERSHIP OF IDEAS**

### **What is owned, if not ideas?**

Abstract ideas, mental processes, methods of thinking or of solving intellectual problems – no matter how new or original they might be – are not proper subject matter for a patent application.

First, having a useful idea – even granted that it is not only new but also nonobvious – is not a sufficient basis for holding a patent. Second, patenting, even when one has a sufficient basis for it, does not literally give one ownership of an idea.

What qualifies a person for a patent is not that he has an idea – even a useful idea – but that he has a useful idea of a highly specific and practicable sort. That is, it is the design for a machine or mechanism, the formula for a composition of matter, or process for the transformation and reduction of a physical substance to a different state or thing. And what he comes to own, or indeed monopolize, is not the idea as such but, for a limited period of time, the right to “make, use or sell” that which answers to it.

### **Freedom of thought and speech as a constraint on intellectual property rights.**

The rules of intellectual property system must not be formulated in ways that might jeopardize freedom of thought and speech.

Turning to the laws governing copyright, one finds that the rights of the copyright holder are delimited by the “fair use” doctrine under which a work may be reproduced “for such purposes as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” without infringing the copyright holder’s proprietary rights (17 U.S.C. sec. 107)

## **JUSTIFICATIONS FOR INTELLECTUAL PROPERTY RIGHTS**

### **A libertarian argument**

Thus, to decide whether the use that other people make of an idea has deprived the person who first thought of it of something that is rightfully his, one has to decide whether the first to think of it is entitled to exclude anyone else from using the idea without his permission, such an entitlement is not a mere liberty, but a power or prerogative: to have it is to have a measure of authority or control over the lives of others. It may be perfectly legitimate authority, but appealing to personal freedom is not going to be sufficient to legitimize it. One must appeal to other (presumably stronger) considerations.

### **The appeal to a natural, inherent property right in the products of one's own mind**

An idea that is yours (that is, that you have thought up on your own) ought to be yours; you should have the right to think it and to put it to any use that does not violate anybody else's rights.

Those who argue for patent rights ... need to argue that a person not only owns (nonexclusively) the application of any useful idea that is the product of his own mind but also has, if he is the first to think up the idea and reduce it to practice, the right to exclude others from using it.

Whoever is the first to think up some important idea, whether practical or theoretical, he is almost certainly not drawing upon his own mental resources only.

From a putative right to the products of one's own mental activity it does not follow that anybody can rightly claim exclusive control over a useful invention that he is the first to conceive. For nobody can rightly claim that a useful invention, or indeed any intellectual achievement, is fully and solely the product of his own mental activity.

### **Right to privacy and freedom of contract as the basis of patent rights**

Patent right – the right to exclusive control over the production and distribution of the invention – arises as part of a contractual agreement between the inventor and the government. The inventor discloses his invention in return for being granted a (limited) monopoly privilege.

Patent rights are not basic rights but they are the legitimate product of the exercise of two other rights: the right to privacy (which implies the right not to disclose any details about one's invention) and the right to make contracts.

### **Patent right as a matter of just desert**

A principle of desert for successful accomplishment would imply that independently successful inventors also ought to be rewarded

How much of a reward does an innovator deserve?

It is far from clear that desert is an appropriate basis for the design of legal and political arrangements.

### **Progress in technology: a forward-looking defense of patent rights**

U.S. Constitution in Article 1, Section 8 authorizes Congress to enact laws whose purpose is “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

The patent system emerges as a device for getting the best of both worlds. Monopoly privilege serves as an initial incentive to innovation; its limited duration eventually allows for the usual effect of free and open competition. Moreover, all this takes place within a framework that preserves the basic freedom of thought and speech so essential to the long-term progress of both science and technology.

Whatever contribution the patent system makes to the progress of technology needs to be weighted against the reduction of quality and the increase in price that are the usual consequences of monopoly privilege.

The supposed benefit of having the patent system – namely, incentive to innovation – will vary considerably along with the nature of the technology.

There are areas in which significant research and development can be meaningfully undertaken by relatively new and smaller firms. Failure to provide some measure of exclusivity to their accomplishments may only ensure that such firms have little chance of surviving, no matter how innovative they are. Without such protection, the Goliaths of the industry could readily assimilate any commercially viable innovations and bring them to market at prices that are smaller firms cannot match.

### **The appeal to fairness**

It might be thought that what fairness requires is not that inventors be compensated for their efforts but rewarded in proportion to the value of the contribution those efforts have made to the well-being of others.