Intellectual Property and the Right to Private Property

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Over the years there has been a debate among supporters of the free market concerning whether so called intellectual property is something to which one may have a private property right. One central element of the case, as advanced by some, is that because intellectual property is intangible, and tangibility makes what is owned rather easy to identify, intellectual "stuff," such as a novel, poem, musical composition, or screenplay cannot be owned.

This is not just some abstract exercise without concrete implications and applications. In early 2002 a Congressional debate took place in which Disney's Michael Eisner squared off with Intel's Leslie L. Vadasz, both claiming that the concept of private property rights supported their conflicting positions about whether Congress should regulate the digital technology industry. Eisner claimed that common standards are needed to give protection to the rights of those who provide the content for digital products that can easily be pirated via the Internet. Vadasz argued, in contrast, that he supports the property rights of consumers to purchase and use whatever equipment might be available in the market place for use as copying devices, such as DVD or CD burners.

What makes this contrite debate especially interesting is that both sides invoke the right to private property and advocate that it be vigorously protected. Eisner thinks such protection must involve establishing common standards for reproducing intellectual property, while Vadasz believes that the protection should involve rejecting any requirement for such common standards.

There is certainly something at least initially plausible about both views. Creators of music, poems, movies, and other “intellectual” stuff have produced something over which they rightly insist they must have control. It is, after all, *their* work, so just as a person who enters the labor market has the right to set the terms under which he or she will exchange his time and skills for wages and salaries, so those who create intellectual content should have this right, as well, as the right to obtain protection for them from the legal authorities. (And it doesn’t matter that a person’s body originates with parents, with food others have produced, and with various natural and artificial processes that are not of that person’s creation.)

Those who produce devices that enable people to make use of creative stuff that is accessible via, say, the Internet or television, such as, say, TiVo receives, also have the right to private property and should not be interfered with. So when others try to bar them from using their devices, arguably this should also be prevented.

Just exactly how to navigate this terrain is something being worked out via the thinking and creative imaginings of innumerable scholars, legal theorists and philosophers of property. The attempt, in the meanwhile, to defend the case for treating intellectual property differently from other kinds by reference to its intangible character has some difficulties.

Sure, what is tangible is more subject to delimitation and capable of being controlled by an owner than something that is intangible. A car or dresser is such a tangible item of property, whereas a novel or musical composition tends to be fuzzy or less than distinct. One cannot grab a hold of a portion of a novel, such as one of its characters, as one can a portion of a house, say a dresser.

Yet intellectual property isn't entirely intangible, either. Consider that a musical composition, on its face, fits the bill of being intangible, yet as it appears, mainly in a performance or on record, it takes on tangible form—meaning it is something perceivable by human senses. The sounds comprising it are in this sense tangible—at least perceivable. Consider, also, a design, say of an Omega watch. It is manifest as the watch's shape, color, and so on. Or, again, how about a poem or musical arrangement? Both usually make their appearance in tangible form, such as the marks in a book or the distinctive style of the sounds made by a band. These may be different from a rock, dresser, top soil or building but they aren't exactly ghosts or spirits, either.

The tangible-intangible distinction is not a good one for what can and cannot be owned and, thus, treated as distinctive enough to be related to owners. Indeed, the distinction seems to derive from a more fundamental one, in the realm of philosophy and its basic branch, metaphysics.

In a dualist world, reality would come in either a material or a spiritual rendition. Our bodies, for example, are material objects, whereas our minds or souls are spiritual or at least immaterial ones. This goes back to a certain renditions of Plato's division of reality into the two realms, actual and ideal, although in Plato particular instances of poems or novels belong to the actual realm. A less sophisticated version of dualism, however, suggests the kind of division that's hinted at through the tangible-intangible distinction. In nature we may have physical things as well as stuff that lacks any physical component, say our minds or ideas. Yet much that isn't strictly and simply physical is intimately connected with what is, such as our minds (to our brains) and ideas (to the medium in which they are expressed).

It might also appear that the theological division between the natural and supernatural mirrors the tangible-intangible division but that, too, is misleading since no one who embraces that division would

classify a poem or novel as supernatural. Thus it seems that there isn't much hope in the distinction some critics of intellectual property invoke. The tangible-intangible distinction seems to be independent of the usual types of ontological dualism and so the case against intellectual property based on it, then, seems unfounded. If there is such a distinction, between ordinary and intellectual property, it would need to be made in terms of distinctions that occur in nature, without recourse to anything like the supernatural realm. Supposedly, then, in nature itself there are two fundamentally different types of beings, tangible and intangible ones. Is this right?

Again, it may seem at first inspection that it is. We have, say, a brick, on the one hand, and a poem, on the other. But we also have something very unlike a brick, for example, smoke or vapor or clouds. In either case it's not a problem to identify and control the former, while the latter tend to be defuse and allusive. We also have liquids, which are not so easy to identify and control as bricks but more so than gases. Indeed, *it seems that there is a continuum of kinds of beings, from the very dense ones to the more and more defuse ones, leading all the way to what appear to be pure ideas, such as poems or theater set designs.*

So, when we consider the matter apart from some alleged basic distinction between tangible and intangible stuff, one that seems to rest on certain problematic philosophical theories, there does not appear to be any good reason to divide the world into tangible versus intangible things. Differentiation seems to be possible in numerous ways, on a continuum, not into two exclusive categories. Nor, again, does it seem to be the case that there is anything particularly intellectual about, say, cigarette smoke or pollutants, albeit they are very difficult to identify and control. They are, in other words, not intellectual beings, whatever those may be, yet neither are they straightforwardly tangible.

I would like to explore the possibility of a very different distinction, namely, one between what is untouched by human meaning and whatever is subject to it. For example, there would be no poems without intentions, decisions, deliberations and so forth. There would, however, be trees, rocks, fish or lakes and laws of physics or biology. Is it the point of those who deny that rights to intellectual property are possible that when people produce their intentional or deliberate objects, such as poems, novels, names, screenplays, designs, compositions, or arrangements, these things cannot be owned? But this is quite paradoxical.

The very idea of the right to private property is tied, in at least one school of the classical liberal tradition—starting with William of Ockham, to John Locke, and Ayn Rand—to human intention. It is the

decision “to mix one's labor” with a portion of nature that serves for Locke as the basis for just acquisition. In the case of such current champions of this basic individual right, such as James Sadowsky and Israel Kirzner, it is the first *judgment* made by someone, to invest something with value, that serves to make something an item of private property. Something similar appears to be at work in Rand’s version of how private property is acquired. (This is a different issue from what justifies the institution of private property rights as part of a legal infrastructure. On that issue, see Tibor R. Machan, *The Right to Private Property* [Stanford, CA: Hoover Institution Pres, 2002].)

However all of this comes out in the end, one thing is certain: the status of something as private property appears to hinge on its being in significant measure an *intentional* object—its status as a private owned entity has to do with in what mental relation is stands with an agent. But then it would seem that so called intellectual stuff is an even better candidate for qualifying as private property than is, say, a tree or mountain. Both of the latter only come to be related to human intentions, whereas a poem or novel cannot have their essential identity without having been intended (mentally created) by human beings.

I am not certain what the outcome should be from these and related considerations. They do suggest something that is part of both the ordinary and the so called "intellectual" property traditions, namely, that *when human beings are agents of creation, when they make something on their own initiative—when they invest the world with their distinctive effort, they gain just or rightful (justified) possession of what they have produced*. That is to say, they have exercised their right to private property and become owners of such creations/productions. And if there is anything that they produce more completely than such items as poems or computer games, I do not know what it might be.

So quite apart from the often mentioned utilitarian, public policy defense of copyrights or intellectual property, there is what I take to be the more fundamental and pre-legal issue of when is someone or how does one get to be the owner of something. If there is such a way, then whether this issues in incentives or such is secondary at most. The central issue is, instead, whether when someone produces or creates a work—poem, novel, song, arrangement, computer program, game, or the like (excluding all discoveries)—he or she may be deprived of these without permission? I think not.

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