

**PANEL 7**  
**ON THE VALUE OF THE INTELLECTUAL COMMONS**

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## 1. INTRODUCTION

When a resource is owned privately, its owner has the right to exclude others from various types of use of it. You may not drive my car, nor eat my food without my permission. However, where a resource is held in common, then it can be used freely by everyone.<sup>1</sup>

The most salient fact about the regulation of intellectual property (IP) is that – over the past 150 years – the intellectual commons has greatly diminished, whilst the realm of privately owned ideas has greatly increased. Intellectual property regulations have been progressively tightened, with the effect that more items have become capable of private ownership, and the lengths of time that such items can be privately owned have increased. These changes have in turn made intellectual property increasingly lucrative, and have increased the incentives for large companies to lobby to further tighten IP regulations. This is a paper in philosophy rather than law, and I am more interested in moral principles than in documenting the precise details of what has shifted when. I shall merely give an indicative example of the kind of changes I am talking about here. Over the past 150 years, copyright restrictions have gradually expanded from a very minimal conception which ruled out only directly copying the work in question and did not even cover translations of the work, to a conception which covers much broader areas such as the “look and feel” of a computer program. At the same time, copyright has been extended from 28 years (in the reign of Queen Anne) to the current 70 years after the author’s death, and there is now a serious movement to make copyright perpetual.<sup>2</sup> Moreover the WTO Trade Related Aspects of Intellectual Property (TRIPs) agreement, saw a global consolidation of IP regulation. IP regulations were harmonised across the world, and these restrictions were been ‘levelled up’ to those

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<sup>1</sup> As we shall see below, there are different ways of understanding the commons: a resource may be open to *any* use by everyone, or more commonly, it can be available to a range of uses by everyone. What makes it common is the fact that the *same* freedoms are available to everyone.

<sup>2</sup> For a good overview of some of these changes, see Fisher (1999).

prevailing in the wealthy developed economies.

Because of these changes, it seems timely to examine what values will typically be threatened by the reduction in the scale of the intellectual commons, and to think about how we should weigh the advantages that privatisation of ideas can bring (such as greater incentives to invest) against these disadvantages.

The paper begins by making some distinctions and clarifications with regard to the concepts of intellectual property, the commons, and the intellectual commons. Section 2 examines the idea of private ownership of ideas in general. I argue that there cannot be moral rights to own intellectual property; and so no individual would have a strong complaint were a society to decide not to implement a system of private intellectual property. Second, I argue that it is false to think that because creative people bring to birth new ideas which were previously not present, no one can possibly be wronged by being excluded from such goods.

Sections 3 and 4 put forward an admittedly quite sketchy model for the normative regulation of the intellectual commons. Section 3 argues first that not all freedoms within the intellectual commons are equally important, and that regulation should take into account the strength of the complaints that those who are excluded from using the ideas would have.<sup>3</sup> Second, it argues that the two most important variables which determine the strength of the complaint at being excluded are (a) the importance of the good for the excluded person's life; and (b) the ease with which the good could be replaced with one from the commons. Where a good is both important, and difficult to replace, then the case for ensuring common access to it is strongest. Section 4 gives some very brief suggestions about the goals at which intellectual property policy should aim.

Section 5 attempts to go from the field of ethical argument towards public policy. I argue for two main conclusions. First, where commons-based production strategies can produce an adequate supply of intellectual property goods, it is difficult to justify instituting or extending private intellectual property regulations. Second, where commons-based production strategies cannot produce an adequate supply of intellectual property goods, there is a prima facie case for private intellectual property. However such a case can be defeated both by efficiency based problems caused by IP regulations ('the tragedy of the anticommons') and by rights-based complaints, where the good to be made private is both important and non substitutable for one which exists in the commons.

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<sup>3</sup> Given that (as I argue in section 2.1) creating a new intellectual property good does not give you a right to exclude others from using it, the complaints of creators to open access to their works will be relatively weak.

## 1.1 The Overall Idea of Intellectual Property

Intellectual property is a catchall term that covers all the different ways in which ideas can be owned under the law. Intellectual property includes (amongst other things) copyrights, patents, design rights, trademarks, database rights, trade secrets and plant breeders' rights. And clearly there are morally significant differences between the ways in which these operate: patents only hold for twenty years, copyright lasts for the author's death plus 70 years, whilst trademarks such as the Nike swoosh or the McDonald's "Golden Arches" can be continually renewed, and so effectively last forever. Moreover, what it is that the possession of the intellectual property right entitles you to also differs: a trademark confers a right to prevent other traders from using the same or similar signs on their goods. Copyright confers a right on creators of original works to prevent others from copying the expression of ideas in a work. But copyright does nothing to prevent someone from publishing a work that is very similar to one that is already existing, so long as they were not influenced by this work. Patents on the other hand offer a much wider protection: patents cover most commercial uses of the patented invention, and having stumbled upon the invention separately is no excuse.

These differences between types of intellectual property will be morally (and philosophically) significant in many contexts, however for the purposes of this article, I'll pretty much abstract away from these differences, save for in section 5 where I argue that patents are more likely to create legitimate complaints to private ownership than other forms of IP.

## 1.2 The Idea of Commons in General

The commons, as I shall use it in this article, refers to a particular type of model for use, access and control of resources. In Benkler's words,

[Commons] is the opposite of "property" in the following sense: With property, law determines one particular person who has the authority to decide how the resource will be used... The salient characteristic of commons, as opposed to property, is that no single person has exclusive control over the use and disposition of any particular resource in the commons. Instead, resources governed by commons may be used or disposed of by anyone among some (more or less well-defined) number of persons, under rules that may range from "anything goes" to quite crisply articulated formal rules that are effectively

enforced.<sup>4</sup> (Benkler 2006, pp.60-1)

Hence the chief idea which defines private property is asymmetry of rights: the owner has rights of exclusion against the rest of humanity, and has far greater rights to use, modify and destroy the good in question than anyone else.<sup>5</sup> Common ownership, on the other hand is marked by a symmetry of ownership: all those who hold the resource in common have *the same* bundle of rights, and these rights are at least a large subset of those which are involved in private ownership (though with the obvious lack of an ability to exclude other commoners from the use of the item).

We can make two distinctions within the type of common ownership. The first distinction is between common ownership regimes which allow *everyone* to use the goods in question (which Benkler calls “open commons”), and those which allow only some relatively defined group or sub-group to use the resource (which Benkler calls “closed commons”). Examples of open commons would be the English language, or mathematical ideas – ideas which everyone have access to. Examples of closed commons would include a field which may be used openly by all members of a village, but may not be used by anyone from outside the village. Such closed commons “behave as property vis-a-vis the entire world except members of the group who together hold them in common” (Benkler 2006, p.61) My interest here is in open commons.

Second, commons can be either regulated or unregulated. Artistic works which exist in the public domain are examples of open commons which are completely unregulated: for instance, anyone can do what they like with Shakespeare’s work – adapt it, publish it, bowdlerise it and so forth. There are many examples of regulated commons: “The most successful and obvious regulated commons in contemporary landscapes are the sidewalks, streets, roads and highways that cover our land and regulate the material foundation of our ability to move from one place to another” (Benkler, 2006, p.61) Within the realm of ideas, ‘copyleft’ licenses such as the GNU GPL provide salient examples of regulated commons.<sup>6</sup>

There are good reasons for thinking that where a commons is unregulated, and the resources which are held in common are susceptible to degradation, the resources will

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<sup>4</sup> Lessig (2002) gives a very similar account: “The essence [of the commons] is that no one exercises the core of a property right with respect to these resources – the exclusive right to choose whether the resource is made available to others”

<sup>5</sup> Of course we often do not have complete freedom to do what we would like with our property. The fact that I own my car does not entitle me to drive it at whatever speed I want on the public highway; but the freedoms I do have are asymmetrically granted to me.

<sup>6</sup> See <http://www.gnu.org/copyleft/gpl.html>. Such licences are constructed in such a way that they ensure that any computer programs which are derived from the source code of a copylefted program must also be made part of the intellectual commons on the same basis.

degrade over time. In Hardin's classic example, if we have a field which is held in common, then people will tend to over-graze it. (Hardin, 1968) For it is in the interest of each shepherd to ensure that they have as many sheep as possible, and that each of their sheep are well-grazed; however if all (or most) shepherds behave in this way, then the commons will get overgrazed, and its ability to support sheep will soon be destroyed.

However, it is important to note that worries of this kind cannot apply to ideas. This is because ideas are nonrival: one person's use of them does not interfere with anyone else's. For instance, as many people as want can sing Happy Birthday as often as they like without the song in any way wearing out.<sup>7</sup> So whilst economic arguments have about the degradation of the commons have frequently been used as arguments in favour of regimes of private ownership of real property, the same arguments cannot support private ownership of ideas. Insofar as there are sound economic arguments for intellectual property they will have to focus on the importance of incentivising the *production* of such goods, not the fear that they will otherwise be used up.<sup>8</sup>

### 1.3 The Intellectual Commons

By the intellectual commons, I shall mean the sum of all the ideas, theories and mental constructs which are open to all to use.<sup>9</sup> As I shall use the term, the intellectual commons encompasses both ideas whose use is totally unregulated and those which are regulated; as I argued above, the essential element in a commons is that people have symmetrical freedoms, not that these freedoms are total.

The intellectual commons excludes all ideas which are subject to private intellectual property. It includes any ideas which are (a) currently deemed inadmissible for intellectual property protection (such as mathematical algorithms, scientific theories, natural languages); (b) those ideas which are potentially admissible for intellectual property protection, but which have not yet been claimed as private property; and (c) ideas which were subject to intellectual property protection but which no longer are because the maximum term of intellectual

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<sup>7</sup> There may be some exceptional cases where the value of certain ideas (if not the ideas themselves) can be diminished through overuse. Landes and Posner (2003) have argued that works released into the public domain may suffer from congestion externalities, and that if so, the value of the underlying work may be better husbanded by restricting access to it rather than allowing free access. Their examples involve cases where a trademark (such as Mickey Mouse) could reduce in value because of brand dilution.

<sup>8</sup> It is worth pointing out – as Ostrom (1991) and others have argued – that even where rival goods are held in common, the tendency towards a tragedy of the commons is by no means inevitable; rather there are various ways of regulating the commons which can successfully protect and sustain it.

<sup>9</sup> Henceforth, I shall use the word 'ideas' to refer to this broad category.

property protection for them has expired (such as Dickens' novels).

## 2. PRIVATE INTELLECTUAL PROPERTY AND MORAL RIGHTS

The most basic distinction we must make is between *legal* and *moral* rights. Legal rights are those rights that exist under a given legal system, whilst moral rights are those rights that morality requires us to recognize. We are interested in this section in whether there is a *moral* right to own intellectual property (clearly there is a *legal* right to hold a copyright on a book, or to hold a patent); and we are also interested in whether legal rights to own intellectual property of the sort we currently have under TRIPs might violate *other* moral rights such as the right to healthcare or the right to life.<sup>10</sup>

I'm going to assume without argument that the concept of moral rights commits us to the claim that moral rights in enjoy some sort of (possibly defeasible) priority over non rights based claims. Hence I leave open the possibility that non-right based claims may legitimately override right based claims, when they go beyond a certain threshold. The important claim that I shall be assuming is that *if A has a moral right to X, this right will, barring special circumstances, enjoy a priority over any non-right based claims.*<sup>11</sup> Of course this is not the only way we can coherently think about rights. Whilst this 'rights as trumps' view can be disputed in as much as many of the legal rights we do recognise are not particularly morally weighty, I shall not enter into the murky waters of the conceptual analysis of rights here. This is because the basic normative claims could be made without reference to rights: those who are worried by the idea of rights as trumps should be able to replace references to rights with the idea of *morally important claims of individuals which ground at least reasonably stringent duties to those individuals.*

There are four different permutations with regard to the rights of those who would create intellectual property, and those who would use it. (I shall use "the inventor" to refer to the person who creates a piece of IP, and "the user" to refer to the person who wants to make

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<sup>10</sup> When discussing intellectual property, the term "moral rights" is ambiguous between (a) rights which have a moral as opposed to a merely legal justification, and (b) rights which accrue particularly to authors, such as the right of attribution and the right not to have one's work bowdlerised. I reserve the term 'moral rights' for rights with a moral as opposed to a legal justification. I shall refer to rights of attribution and integrity as author's rights.

<sup>11</sup> Special circumstances may include (a) non-right based cases where it is legitimate to infringe a right to prevent non right based harm being done or do great non-right based good, (b) right-based cases where it is legitimate to infringe a right to prevent other rights violations from occurring, and (c) exceptions based on personal prerogatives or special duties (such as the bodyguard's permission to save the person he is guarding, rather than two others, other things being equal). For a good discussion of these kinds of cases, see Kamm (2002).

use of it).

### **1. Only inventor has moral right**

The *inventor has a moral right to own intellectual property, and the user does not have any moral rights* that are infringed if we allow extensive private ownership of intellectual property.

### **2. Neither has a moral right**

The *inventor does not have a moral right to own intellectual property, and the user does not have any moral rights* that are infringed if we allow extensive private ownership of intellectual property.

### **3. Both have moral rights**

The *inventor has a moral right to own IP, and the user also has some moral right or moral rights* which would be infringed if we allow extensive private ownership of intellectual property.

### **4. Only user has a moral right**

The *inventor does not have a moral right to own IP, and the user has some moral right or moral rights* which would be infringed if we allow extensive private ownership of intellectual property.

Bearing in mind the conception of rights we are presupposing, it follows that, in case (1) we would expect the inventor's right based claims to take precedence over the claims made by the users of the IP: the inventor's claims are claims of *rights*, whilst those of the users are of something less than rights. (Though there might be exceptional circumstances in which these claims will be defeasible).

If case (2) correctly described the situation with regard to IP, then we should see IP policy as a way of trying to reach towards certain yet to be specified socially valuable goals. Setting IP policy will be partly a normative question of deciding what sort of a society we should be aiming for, and partly a technical question about how best to get there.

If however case (3) obtained, we would have to think through IP policy through the lens of the philosophical discussion of conflicts of rights. (See for example Thomson 1990, Kamm 2002 on this).

However, in the rest of this section, I shall argue that none of these first three options

is correct: there is no moral right to own private intellectual property, but recognizing legal rights to own private intellectual property will in certain circumstances violate moral rights. I argue for this claim in two stages. First, I argue that there cannot be any intrinsic moral rights to own intellectual property. Second I argue that counter to the ‘no hardship’ argument, it is possible for private ownership of the intellectual commons to wrong people. The upshot is that whilst private ownership of intellectual property is never required in order to respect moral rights, stringent private intellectual property regimes may wrong people, if they prevent them from getting access to goods that they have a right to.

## 2.1 There Cannot Be a Moral Right To Own Intellectual Property

It is sometimes argued that, just as labouring on unowned physical property can give the labourer a moral right to own the object laboured on, so labouring on ideas which were previously part of the intellectual commons can give rise to a moral right to own the resulting ideas. For instance, it might be thought that in writing a novel, someone transforms elements which are part of the stock of the intellectual commons – such as archetypal plots and characters – and in transforming these materials creates something new which she has a natural right to exclude others from. If this thought were correct, then it would be wrongful to treat such a work as part of the commons without the author’s permission: doing so would breach her rights.

I have argued at length elsewhere that arguments of this kind for moral rights to own intellectual property are unconvincing; and that there cannot be any pre-legislative moral entitlements to own intellectual property.<sup>12</sup>

The essence of this argument is that we cannot simply multiply moral rights ad infinitum: we cannot claim that there is a moral right to X without providing a moral explanation or justification of *why* we should recognise such a right. All attempts to justify moral rights must be subjected to what I call the *Rights Justification Principle*.

Any justification of an intrinsic moral right must show that violating the right would typically result in either a wrongful harm or other significant wrong to the holder of the right, which is independent of the existence of the moral right we are trying to justify.

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<sup>12</sup> See Wilson (forthcoming, 2009)

The problem for any putative moral right to own intellectual property is that we do not seem to be able to explain how the author would be wrongfully harmed or otherwise wronged by unauthorised copying of her work unless we *already presuppose the existence of the very right we are trying to justify*. For there are only three plausible ways in which someone might be wronged by the unauthorised copying of their published work in a way that meets the criterion set down by the Rights Justification Principle:

1. The creator is wronged by being excluded from the use of what she has created.
2. The creator is wronged by being prevented from excluding others from what she has created.
3. The creator is wronged by others benefiting unfairly from her creative effort.

However, none of these putative justifications could plausibly ground a right to own intellectual property, for the following reasons.

(1) is unconvincing because usage of a nonrival good cannot deplete it or stop anyone else from using it. And so *a fortiori* unauthorised use of a nonrival good cannot prevent the author from using it. Therefore, merely making unauthorised use of the work cannot prevent her from using the work, and thus cannot be the basis for a claim that the author's intrinsic moral rights have been violated.

(2) is unconvincing because being prevented from making money by excluding others from access to one's work does not constitute a wrongful harm or other significant wrong which is independent of the (putative) intrinsic moral right to exclude others from access to one's work. It is only if we presuppose the right whose existence we are trying to justify that it seems plausible to claim that being prevented from charging others for access to one's creation is a wrong to the author.

(3) is unconvincing because – assuming there are no pre-existing agreements in place – benefiting from another's effort is unfair only where so benefiting imposes a cost on the person providing the benefit. Breaching economic rights cannot impose a cost on the person providing the good, and so is not unfair.

I conclude that none of 1-3 provide any justification for thinking that there is an intrinsic right to own intellectual property. Nor are there any other plausible wrongful harms or other wrongs caused merely by unauthorised copying which are independent of the

existence of the (putative) intrinsic moral right to exclude others from copying and use of one's creations.<sup>13</sup> It follows that the legal right to make money by excluding others from access to one's work cannot be an intrinsic moral right. As Jefferson put it, "Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody."<sup>14</sup> (Jefferson, 1813)

## 2.2 The "No Hardship" Argument

It is often argued from the side of intellectual property owners that we cannot wrong anyone by asserting private ownership of ideas which would not have existed but for the author. On this view, where someone has created something new out of goods which were in the commons (say by writing a novel, or creating a new drug), no one can claim to be wronged if the person keeps the new idea private and charges money for access to it. The basic thought is that in so doing the author leaves those excluded no worse off than they would otherwise have been, and so cannot wrong them. As Mill puts it, "It is no hardship to any one, to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all" (Mill 1848, ch. 2 section 6) Call this, following Waldron, the *no hardship* argument. I shall argue that this argument is not sound.

Take the following case:

Joshua lives in a poor country. He has a painful and debilitating condition. There is only one drug which could relieve his symptoms. The company which holds the patent on the drug charges a very high price for it, and so there is little prospect of him getting access to it. However, the company could make the IP on the drugs available to his government, which would then be able to make cheap generic versions of the drug in one of its factories. If the company were to do so, then there would be enough money for everyone to have the drug.

The no hardship argument seems to presuppose the claim that (a) Joshua is not harmed by not being able to access the medicine, as he is no worse off than he would otherwise have

<sup>13</sup> I allow that there may be reasons stemming from the importance of privacy to allow authors to prevent the *publication* of works that they do not want released to public scrutiny. But once an author has made a work public, she does not have a moral right to exclude others from the use of this idea.

<sup>14</sup> For the full version of this argument, with replies to objections see Wilson (forthcoming 2009), "Could there be a right to own intellectual property" – available from [www.ucl.ac.uk/~rehbjgs/](http://www.ucl.ac.uk/~rehbjgs/)

been had the medicine not been invented; and (b) given that he is not harmed, then he cannot be wronged by what the company does.

There are two distinct problems with the argument. First, in certain circumstances it appears to be possible to wrong someone even if one does not leave them worse off than they would otherwise be. Suppose that Jill is drowning, in an isolated location. Fred notices her out of the corner of his eye as he's zooming past in his speedboat. He does not turn around, reasoning that she's no worse off than she would have been if he hadn't stopped, *he* can't have wronged her. This seems monstrous.

It is an open question whether we should say that Fred *harms* Jill in this circumstance; but it seems overwhelmingly plausible to say that he wrongs her. So he either wrongs her without harming her, or wrongfully harms her despite the fact that she ends up no worse off than she would have been had he not been passing.<sup>15</sup> Similarly, if we think that Joshua has a right to access essential medicines, then the fact that he would be no worse off than if the company had not invented the drug, does not show that he is not wronged.

Second, there are egalitarian reasons to care about how well people are doing relative to how they might be doing, even leaving ideas of wrongful harm on one side.<sup>16</sup>

### **Conclusion from this section**

Whilst no author would have a strong complaint in a society which made all published ideas part of the intellectual commons, there are ways in which the would-be users of ideas can be wronged by private ownership of intellectual property.

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<sup>15</sup> The concept of harm is surprisingly slippery. Intuitively, A harms B if A makes B worse off than B would otherwise have been. But it is difficult to spell out what the standard is against which we should judge 'would otherwise have been'. There seem to be two basic kinds of answer: either we specify it in terms of a non-normative baseline, or we specify it in terms of a normative baseline. Both can cause problems, and it is far from clear that a single baseline (whether normative or non-normative) can capture all of our intuitive judgements about when one person harms another. For a helpful discussion, see Feinberg (1984) and Wilkinson (2003, pp. 56-71).

<sup>16</sup> Waldron suggests we should be asking the following questions: "Does deprivation take on a different character, objectively or subjectively, depending on the counterfactuals implicit in the "no hardship" argument? Are humans the sort of creatures who are constantly able to refer their suffering to the existence of such baselines, so that they take comfort in the fact that they are no worse off than they would be under some alternative scenario? Does this affect how certain deprivations are experienced, and how easy it is to endure them? Does it alter the impact of a given deprivation on self-esteem?" (Waldron 1993, p.867)

### 3. INDIVIDUAL COMPLAINTS AND IP RESTRICTIONS

Designing an appropriate normative regulatory model for any sphere of activity is complex. What we want is to have a model which is rich enough to take into account all the relevant considerations for regulating that type of good or activity, but which also is determinate enough to be able to guide practice and is robust to the non-ideal conditions of the world.<sup>17</sup>

There are two classes of values which we need to take account of in constructing normative regulatory models: rights and goals. Goals give us general directions for policy, but they do not require us to guarantee *to each individual* any particular freedom or resource. So long as a government is pursuing a goal diligently and fairly, no citizen has a legitimate individualised complaint about not being supplied with the good at which the policy aims. Rights are essentially about securing some particular freedom or resource *for each individual to whom the right applies*. Where there is a right, it is not enough for a government to say that the general tendency has been that more people can access these particular freedoms or resources: those who are deprived then still have their rights violated. Moreover, rights are highly resistant to aggregation: the fact that many people have their rights fulfilled does nothing to reduce the claims of those who do not.<sup>18</sup>

The previous section argued that while there are no rights based complaints which arise from the goal of expansion of the commons – or from governments *not* creating IP regulations, there will in some circumstances be rights based objections to policies which allow privatisation of the intellectual commons. This section aims to explain the circumstances under which private ownership of intellectual property is most likely to violate rights.

The distinctive feature of the intellectual commons is equal liberty and equal access. It follows that there are two main types of reasons for holding goods in common. The first set of reasons are based on the idea of equal moral status. Common ownership speaks to our interest in equal moral status, and our thought that there are certain goods or types of goods which need to be provided to all in order for the person to be able to be treated as an equal to others. If we step back from ideas of property we find several instances of freedoms which it is plausible to think that a decent society should ensure equally for each citizen: think, for

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<sup>17</sup> I have written more about the design of normative frameworks in Wilson, “Towards a Normative Framework For Public Health Ethics and Policy” (in press).

<sup>18</sup> This way of putting the point presupposes a specific view of rights. But as I argued earlier, the same basic distinction could be made using other language too.

instance of Rawls's argument from the importance of self-respect to the priority of the liberty and opportunity principles over the difference principle.<sup>19</sup>

Second, there are sufficientarian reasons: we may think that amongst the goods that someone needs to live a minimally flourishing life are access to a particular idea or set of ideas. Treating such ideas as common is a good way (or perhaps the best way) to ensuring such access for all.

Both these two justifications for providing equal access to particular goods come together in cases such as the liberty to hold public office, where a sufficiency of liberty just is the status of equality with others. However, intellectual goods do not as such engage such sufficientarian or egalitarian concerns. For instance, where a particular pop song is subject to private ownership, it is hard to feel that anyone has been wronged.<sup>20</sup>

I suggest that we should measure the strength of the individual's complaint at being excluded from the use of a particular intellectual property good along two axes. The runs from completely fungible to unique. A good is completely fungible if it can be replaced by another without any form of loss: for example, a £10 note is completely fungible with two £5 notes. Some ideas are highly fungible: for instance two different but equally efficient algorithms for solving a particular class of problem, or two recipes which create an equally tasty carrot cake. Where two goods are highly fungible, and one of them is in the intellectual commons, it is implausible to think that anyone is deprived of anything very significant by the other one being privately owned. If there is a common access to an equivalent good, then

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<sup>19</sup> See Rawls (1999), p. 477: "suppose that how one is valued by others did depend upon one's relative place in the distribution of income and wealth. In this case having a higher status implies having more material means than a larger fraction of society. Everyone cannot have the highest status, and to improve one person's position is to lower that of someone else... Clearly this situation is a great misfortune... It would tend to make the good of social union difficult if not impossible to achieve. The best solution is to support the primary good of self-respect as far as possible by the assignment of the basic liberties that can indeed be made equal, defining the same status for all".

<sup>20</sup> There are two other complaint-based arguments against private intellectual property which might provide a stronger reason for saying that even such apparently innocuous cases of private ownership of intellectual could be wrongful. First, there are libertarian arguments, based on the importance of the freedoms which people denied by IP regulation. On these kinds of arguments, the thought is that the liberties of individuals are so important, that it would be wrong to curtail them by having intellectual property regulations which allow the private ownership of ideas. On this line of thinking intellectual property regulations interfere with us being able to do what we like with our own physical property. (For instance if I have a blank CD, then I will not be allowed to do what I like with it, and copy some music onto it which is subject to copyright). A second line of worry would be that allowing private ownership is wrong because it prevents us from doing what is required to be morally virtuous citizens. The thought here is that having ideas in an intellectual commons allows the possibility of sharing, and various kinds of virtues of generosity. Conversely, private ownership impedes this. For this type of argument, see for instance Stallman (1992). Unfortunately I do not have the space to discuss either argument further here.

society has done enough.<sup>21</sup>

The second axis is that of the importance of the good. Clearly, where the good is one which would serve a basic need (as in the case of an essential medicine), this makes the claim to use the good stronger than where it merely serves a preference. Hence, putting the two axes together, the claim will be strongest where there is no other good which can substitute for it, and the good serves an important need; it will be weakest where there are other equivalent goods, and the good services only preferences rather than needs. What follows from this is that we should be much more worried about restrictions on essential medicines than on pop songs.

#### **4. GOALS AND INTELLECTUAL PROPERTY POLICY**

Given the wide differences in the importance of keeping different types of items open to common access, it is a mistake to think that there could be a simple answer to the question of how we should regulate the intellectual commons. We have so far looked at this from the perspective of rights; but an appropriate normative framework will also require us to clarify and to weigh the different goals which should be in play in intellectual property regulation.

I take it that the overarching goal of private intellectual property regimes must be to provide incentives to investment, and thereby overcome the public goods problem that intellectual property presents.

What the overarching goals for public policy in general should be are rather more difficult to state summarily. In what follows I shall assume that such goals should include at least some defeasible priority to the worst off; and a general preference for equal and symmetrical access to goods where this is no less efficient than private ownership of them.

#### **5. FROM ETHICAL ARGUMENTS TO PUBLIC POLICY**

Given this analysis of the right and goals, I suggest that we should adopt the following principles in designing public policy. First, where we could procure an adequate amount of the intellectual property goods in question without allowing intellectual property restrictions, there is no need for private intellectual property. This is because commons based approaches have the obvious egalitarian advantage that everyone – even the most disadvantaged – has

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<sup>21</sup> As an aside, I should also point out that there are good economic reasons for thinking that it will be difficult to sustain a high price in the marketplace where a highly equivalent good is available for free.

access to the ideas on the same basis. And where there is already an adequate supply of a particular intellectual good being produced, there is no call to extend or strengthen IP rights in this area. This is because in such a case, we would be introducing the deadweight loss and the moral problems of exclusion without there being a sufficient countervailing advantage.<sup>22</sup>

In cases where it is reasonable to think that we will not be able to procure an adequate supply of the good in question without IP regulation, then there is a prima facie case for IP regulation. In such cases, the permissibility and advisability of IP regulation depends on the following two factors:

1. The production of the goods in question will, all things considered, go more quickly with private intellectual property.
2. Accelerating the production of these goods by allowing private intellectual property (a) does not give rise to any rights based complaints which outweigh the advantages of accelerating the production of these goods, and (b) would not disproportionately undermine the pursuit of other worthwhile goals.

I take it that where private intellectual property is justified it is because these conditions hold, and that where it is not justified it is because one or more of these conditions does not hold. I shall consider each in turn.

### **5.1 The Tragedy of the Anticommons**

It is too hasty to assume that just because the prospect of a private intellectual property will act as an incentive to an individual agent to do more more work to create such an item, that therefore granting private intellectual property rights will lead to more new and useful products being produced. All forms of creativity and research require a commons. Private intellectual property rights by their very nature reduce the pool of ideas that others can freely draw on freely in making their own inventions and doing their own research. Thus

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<sup>22</sup> This line has been strongly argued by the opponents of software patents in Europe, given that the software industry has thus far thrived without patent protection. Note that an adequate supply of a given public good is not a maximal supply: an adequate supply is one that meets social needs. For example, it might be the case that allowing the patenting of sports maneuvers would lead to more sports innovations such as the Fosbury Flop in high jumping. But few would find it plausible to claim that there is an unmet social need for more new sporting techniques, which we should ease by providing the incentive of patents: hence given this, we are likely to focus more heavily on the negatives of such patents – the effect they would have on our conceptions of fairness in athletic competition, for instance; and hence we would judge them to be ethically illegitimate. (For more on the question of patenting sports maneuvers, see Fisher, 1999).

if a private intellectual property has already been granted that covers X (or part of X), then this operates as a disincentive to do research and development on X.

It will be a matter for empirical research to determine whether, and in what types of situations, private intellectual property will create a tragedy of the anti-commons: that is, a situation where private intellectual property will become counterproductive, in that the difficulty of navigating the thicket of existing privately owned intellectual property will become so great as to outweigh the positive effects of providing IP incentives.<sup>23</sup>

Cases such as that of Golden Rice have suggested to many that the tragedy of the anticommons is a real worry with current patents in the biomedical sphere.<sup>24</sup> Research on Golden Rice was funded non-commercially, with the humanitarian aim of helping those worst off. When their funder, the Rockefeller Foundation commissioned an audit of the patents and technical property rights they would have to license in order to establish a “freedom to operate,” they discovered 70 patents that would need to be licensed, and 15 technical property components; and the researchers decided that the only way to bring the product to market would be to transfer the intellectual property rights to AstraZeneca.

But it is difficult to know how strong a conclusion we should draw from this one case. For example, Golden Rice’s inventor has argued that it was only as a result of patents that the information that he needed to license was made public, and so the research would not have been possible at all without patents. (Potrykus, 2001) The key problem, as Streiffer (2006) argues, is that we simply do not have the data that would decide this issue.<sup>25</sup> It is important to note that, insofar as this uncertainty is merely an empirical one as to which way will be the most effective way of delivering new inventions, there are reasons to favour a commons-based approach. For if we were able to procure the same amount of innovation in two ways, the first with private intellectual property, and the second without, there is reason to think that the commons-based approach would be superior on grounds of justice. This is because a commons-based approach will allow each person to make use of a given resource, regardless

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<sup>23</sup> The term “tragedy of the anticommons” originates with Heller, 1998.

<sup>24</sup> Golden Rice was supposed to be a GM crop that would be of benefit to those in Asia who suffer blindness as a result of vitamin A deficiency from eating a diet consisting mainly of rice. Golden rice was supposed to prevent this, by allowing the body to convert the beta-carotene that had been genetically engineered into the rice into vitamin A.

<sup>25</sup> In default of such evidence, the most we can do is to point out the structural issue that makes it more plausible to be worried about the tragedy of the anticommons in some cases such as GM crop patents, than in patents on other items. This is the number of existing patents the average new invention in a particular area will have to take into account, either by licensing or inventing around them. The fewer and the narrower the scope of such patents, the easier it will be to avoid the tragedy of the anticommons. Conversely, the greater the number and the broader such patents are, the more difficult it will be to avoid the tragedy of the anticommons. Cases like Golden Rice suggest that the number of patents that will need to be licensed to bring a GM crop to market is likely to be much higher than, say to bring a new paperclip or icecube maker to market.

of their personal circumstances, whilst a private intellectual property approach will restrict access to the good to those who are able to pay. And assuming that wealth is not spread equitably around the global economy,

...the market is a poor measure of comparative welfare. A system that signals what innovations are most desirable and rations access to these innovations based on ability, as well as willingness, to pay, over-represents welfare gains of the wealthy and underrepresents welfare gains of the poor. ... [It] is unjust because it is geared toward serving small welfare increases for people who can pay a lot for incremental improvements in welfare, and against providing large welfare increases for people who cannot pay for what they need. (Benkler, 2006, p. 303)

Hence if we were genuinely uncertain whether or not patents would increase the number of inventions of a given type, then considerations of justice would tip the scales against allowing patents, even if we were to think justice only of minor importance.

## **5.2 Private Intellectual Property with Ethically Unacceptable Side Effects**

Private intellectual property can be unjustified even if it would be successful at producing more research and more products in a particular field, for two types of cases. First, where the enclosure of ideas required could meet with strong individualised complaint from those excluded and second, where allowing private ownership of the ideas in question would undermine other goals which we have reason to value more highly than an increased production of the good in question.

A good example of a type of private intellectual property which would plausibly fall foul of both requirements would be patents on surgical and veterinary treatments.<sup>26</sup> While it is plausible to think that more (and better) methods of surgical treatments would be produced if we were to allow their inventors to collect money by excluding other doctors from making use of them, doing so would seem to many to have unacceptable side-effects. In particular, it would risk a corrupting effect on the practice of medicine (thus undermining broader worthwhile social goals), and also would involve a potential denial of life saving techniques to those who need them. It is difficult to defend giving someone a license to make money by excluding others from having their basic human needs met, where those needs could be met

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<sup>26</sup> It is interesting to note that many (around 80) countries do not allow such patents; and some of those that do make them nonenforceable.

without any cost to the person excluding. And any legal system which allows this invites the charge that it is allowing the violation of the rights of those who are excluded.

It seems that similar concerns will generalise to patents on GM crops. Some patents on GM crops, where they are applied in the developing world, will involve excluding subsistence farmers from access to a technology that could be vital for meeting their basic needs, where these needs could be met without cost to the company. So insofar as it is wrong to give someone a license to make money by excluding others from having their basic human needs met, where those needs could be met without any cost to the person excluding, this militates against patents on GM crops that are necessary for food security just as strongly (perhaps even more strongly) than it does against patents on surgical and veterinary treatments.<sup>27</sup>

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<sup>27</sup> Someone might attempt to draw the opposite conclusion: namely that given we think it acceptable to have patents on essential medicines despite their obvious incompatibility with this principle, there must be something wrong with the principle. However, I do not see that widespread nonadherence to a proposed moral principle serves to refute it. Rather, in order to refute the principle, someone would need to produce a counterexample – a case where it is morally legitimate to exclude another from meeting their basic human needs, even though their meeting their needs would not cost you anything. I suspect that it will prove difficult to do so, given that such behavior will always involve treating the other as a mere means to our end. (This suggests that pharmaceutical patents may be more difficult to justify than is usually thought. See Pogge, 2006).

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