Is There a Human Right to Intellectual Property?

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In one sense, the answer to the titular question is obviously, "Yes." The Universal Declaration of Human Rights (UDHR) states that, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (Article 26(2)).[1] The question I want to ask here, however, is whether this right ought to have been included. In other words, is it a genuine human right? The answer to this question matters because, by giving authors and creators' rights over the use of their work, we give them the power to restrict expression and to limit access to information, products, and services. Intellectual Property (IP) laws can have significant negative impact on other human rights such as the rights to information, freedom of expression, privacy, education, health, and culture (all rights also listed in the UDHR) (Helfer, 2003). If IP rights are human rights, then other human rights must be balanced against the rights of creators in their works. If IP rights are, on the other hand, merely legal rights instituted to promote the public good, then they may be "trumped" (Dworkin, 1978) by the human rights to expression, information, and health.

In this paper I make two arguments against the claim that intellectual property rights are human rights. First, I show that a number of common defenses of IP rights are not capable of showing that it is a human right. In some cases the argument fails to provide sufficient grounds for the existence of a moral right to IP. In other cases, the argument succeeds only if one accepts certain premises about the nature of the relationship between persons and their works and inventions, but these premises are not capable of gaining a global overlapping consensus. Second, I show that a justification of human rights that avoids commitment to a comprehensive conception does not provide sufficient grounds for a human right to IP.[2]

I. Common Arguments for IP Rights

First, a couple of quick definitions: (1) Intellectual property refers to the intangible products of the human mind. Intellectual works include such things as songs, stories, computer programs, inventions, and art works.[3] While an intellectual work may currently be in a particular tangible form—a manuscript, building, or chemical composition—they may be embodied in a number of possible material forms. It is for this reason that the mere right to physical property is not sufficient for rights over intellectual property. (2) A "human right" as it will be used here, is a moral, but not necessarily a natural, right that all persons have regardless of their nationality, sex, religion, etc. Human rights establish baseline standards for the just treatment of all persons. Human rights obligate states to respect, protect, and fulfill the substance of the right (Eide, 1984; Shue, 1980).

So, when it is claimed that there is a human right to IP, what are rights are being claimed exactly?[4] Recall that the UDHR says that creators have both material and moral interests that deserve protection. According to the United Nations Human Rights Commission (UNHRC) the "material interests" of creators refers to the potential income from the sale of a creative work sufficient to enjoy an adequate standard of living (UNHRC, *General Comment 17*, §15).[5] "Moral interests" of creators according to the UN include the rights to be recognized as the author of a work and to reject to any distortion of the work that would "be prejudicial to the honour or reputation" of the author (UNHRC, *General Comment 17*, §13). In this section, I consider whether there is a sufficient justification to show that one or both of these interests rise to the level of human right by looking at three standard arguments for intellectual property rights, the consequentialist argument (or the "incentive theory"), the Lockean argument (or the "labor theory"), and the Hegelian argument (or the "personality theory").

In the United States and common law countries such as Great Britain, legal IP rights are justified using consequentialist reasoning. The U.S. constitution, for example, grants congress the power to give authors and inventors legal rights in their works for a limited time in order to promote progress in "science and the useful arts." Interestingly, the United Nations has explicitly rejected this justification of the human right to IP, stating that the "human rights of authors and creators" are different from intellectual property regimes that grant rights for a specific period in order to incentivize the production and dissemination of intellectual work.[6] Moral and material rights of creators are grounded in the dignity of the human person and, thus, are not time limited (UNHRC, *Comment 17*, §2).[7] While the UN's reasoning here is open to some objections, they are right that the consequentialist justification does not provide much support for a human right to IP. It is based on an empirical claim (IP rights incentivize production and distribution) that may be false, or, if true, may depend on particular circumstances. Indeed, there is currently a vigorous debate on the efficacy of IP in promoting the creation and distribution of arts and inventions (see e.g., Cammaerts, Mansell, and Meng, 2013).

A number of philosophers and legal theorists have suggested a Lockean justification of intellectual property (see e.g., Hughes, 1988; Moore, 1997), also called the "labor theory." On the Lockean justification of intellectual property we have a natural

right to our intellectual property on parallel reasoning with our natural right to physical property. We use the common resources of the culture—e.g., language, tropes, plot lines, scientific discoveries, and formulas—to create new intellectual works, be they plays, songs, pharmaceuticals, or computer programs. In the creation of said works we mix our intellectual labor with these common resources. This gives us a presumptive right to control those works and inventions. The Lockean argument fits well with the UN's reasoning, which grounds the material interests of authors and creators in the human right to own property (UDHR, Art. 17) and the rights of a worker to adequate pay (UDHR, Art. 11(1)) (UNHRC, *Comment 17*).

While the labor theory provides a justification for a right to the protection of the material interests of authors, it is not typically used to justify moral rights. For this we must look to the "personality theory." The personality theory is more familiar in the law and thought of continental Europe than in the Anglo-American tradition (Beitz, 2005). The *locus classicus* of the idea in its fullest expression is Hegel's *Elements of the Philosophy of Right*. According to Hegel, intellectual works are unique, because they are manifestations of our personalities in the world. On this view, respecting the dignity of the creator requires respecting the connection between the author and the work—i.e., respecting her "Moral Rights"[8] in her creation (UNHRC, *General Comment 17*, §14).[9]

I will not discuss the particular merits of either of these theories here;[10] rather, I simply want to note that both the labor theory and the personality theory rely on particular assumptions about the relationship between human beings, intangible cultural products, and the society at large. In short, they are based in distinct comprehensive conceptions. Given this, neither of these theories is a legitimate justification for a *human right* to intellectual property, because they fail the test of "justificatory minimalism" (Cohen, 2004). Justificatory minimalism, according to Joshua Cohen, requires that justifications for human rights not depend on particular comprehensive conceptions. Justifications of human rights should be minimalist in this sense, because of the fact of "reasonable pluralism" on questions such as the nature of the self or the ultimate ends of human existence. As John Rawls famously pointed out, reasonable persons may disagree on such questions (Rawls, 1987). Human rights are intended as universal norms that obligate all states. In order for something to be a human right in not just an abstract philosophical sense, but in the sense that it is legitimate to require all states to respect these rights, there must be reasons for it that can be accepted by reasonable people with a wide range of comprehensive views.

II. Standard Threats and the Sleeping Lion

Written in the shadow of the atrocities committed in the Second World War, most of the rights listed in the Universal Declaration were inspired by hopes to prevent similar atrocities in the future. This fact of history led to a list of human rights that avoided any single philosophical foundation. (Indeed, it was famously said by Jacques Maritain (1949) that, while everyone agreed on the rights, it was on the condition that no one asked why.) This does not mean that we must think of the list as utterly historically contingent and with no possible unifying conception. Here, I suggest we use Henry

Shue's notion of a human right as a protection against a *standard threat.* Standard threats are serious, pervasive, and remediable threats (Shue 1980, 185n) to our core interests. The standard threats approach has a number of advantages, among which is avoiding proliferating rights by seeing human rights as setting lower limits on tolerable conduct by states (Nickel, 2007). This conception of human rights passes the test of justificatory minimalism, because it explicitly avoids relying on any particular comprehensive conception. In the rest of the paper I consider whether human rights to IP can be justified on the standard threats conception of human rights.

If the core interests of persons are are not typically threatened by the failure of the state to protect their material and moral interests in their intellectual creations, then the case for a human right to protect these interests is undermined. So, what's the threat? In answering this question, it may be helpful to have an actual case in mind. The following is a famous case often cited as showing the importance of respecting the IP rights of creators. The South African Singer Solomon Linda was the originator of the song now known as "The Lion Sleeps Tonight" (also known as "Wimoweh," originally called "Mbube") (Dean, 2006). Linda was paid a small fee in return for the copyright in the song by a South African record company, but never saw any royalty money from the later success of the song in Africa and internationally. Furthermore, recording artists in the US, such as The Weavers and The Tokens, did not credit Linda with the song on their recordings. Disney later used the song in the animated film *The Lion King*, and again did not credit Linda or give his descendants any share in the profits from the sales of the song.[11]

One question is how frequently this sort of thing happens—viz.Is it a "standard" threat? Here I will focus only on the question of whether the threat is "serious." There definitely seems to be something unfair about what happened to Linda. Others were making large profits off of Linda's un-credited work, while he and his descendants lived in poverty. The question is whether this unfairness was because some putative human right to his moral and material interests in his Intellectual Property was not respected. Note that Linda was paid for the original copyright in the song (thus, his human right to be paid for his work was not violated). While it may not have been much, it may very well have been sufficient pay for the time and effort that went into the composition of the work. Wherein comes the intuition that Linda ought to have gotten a share of the profits later made by others from that work?

Compare the following. Suppose that I am quite poor, I work at a local store and in payment I am given a lottery ticket. Suppose that in order to get the prize from the lottery I have to wait a long time or, perhaps, travel a long way to pick up the money. You have more money than me and you are willing to pay me now for the lottery ticket. I need money now, so I sell the ticket to you. Later, it turns out that it was a winning lottery ticket. Now you are a millionaire and I am still very poor. In this case it does seem in some way unfair that I get none of the money from the lottery. Indeed, many people would think that you ought to share at least some of the money with me. But, it is unclear what possible right I could have to the money. Furthermore, note that in the case of Linda, others only made the profits because there were copyright laws. If there were not copyrights at all, there would not be this uneven distribution of resources. Thus, such cases could be avoided by applying copyright laws fairly internationally or

by getting rid of copyright altogether.

Next, consider the moral rights in this case. Was there serious harm to Linda's core interests because he was not credited with the song in the later recordings? There does seem to be a sort of wrong here, but I think it comes from the violation of the cultural practice wherein we attach the name of the songwriter to the song. There have been times and places when there were no such practices and we could imagine very different practices. We could easily imagine cultures where a person's name is attached to not just songs and stories, but also to such things as dance moves, recipes, or fashion styles. The fact that we are deeply concerned about attribution in one case, but not in the others, seems entirely arbitrary. Of course, once there is such a practice of attribution, to fail to provide attribution is a to show lack of proper respect for that person.[12] So, as above, the problem is not that there are not laws requiring such practices, but that the practices when the existed, were not being applied fairly.

Admittedly, showing that this one case does not constitute a serious threat to a core interest, but, rather, a failure of fairness, does not show that there are no such threats. Nevertheless, I think it illustrates the difficulties facing anyone who wants to defend the human right to IP without appealing to a comprehensive conception. Absent the pre-existing belief that people have a basic right to the protection of their material and moral interests in their intellectual property, it is difficult to pinpoint what the core interest is that is threatened when these "rights" are not protected. In short, it is difficult to find a non-question begging, but minimal, justification of a human right to IP.

Conclusion

Intellectual property rights have been expanding and extending over the last half-century and this trend seems unlikely to change. If IP rights are accepted as human rights, there is a further justification for the extension and strengthening of IP rights. Thus, we should be concerned with whether or not the human right to IP is well justified. I have argued that the standard justifications for the right to IP are inadequate to the task, either because they cannot ground the right at all or because they rely on controversial comprehensive conceptions. To avoid commitments to any comprehensive conception, I suggested a minimalist conception of human rights as protections from standard threats to core interests. Using a commonly cited case, I illustrated the difficulty of justifying IP rights on this minimal conception.

Notes

1. Interestingly, the right to IP, but not to physical property (which is listed in the UDHR) is included in the binding International Covenant on Economic, Social, and Cultural Rights.

2. Admittedly, these arguments will not show that there is no other possible conception of human rights on which IP would be a human right, but the argument shifts the burden of proof to those who would defend it as a human right.

3. In what follows, I will call those who produce such works "creators." This should be understood to cover authors, music composers, visual artists, architects, and inventors of all types.

4. There is a minimal sense of an IP right, which is clearly a human right. Suppose that I

write a story. I do not wish to share this story with others, but someone uses some surreptitious means to copy my story. Such activity does seem to violate a human right and in this minimal sense, I clearly do have a right to my intellectual property. However, this violation is covered by rights to privacy and (non-intellectual) property and, thus, does not necessitate a special human right to IP.

5. It is a bit difficult to know exactly what to make of this. Is one entitled to make a living from one's intellectual creations even if no one wants them? Nor is it clear why any particular human activity must result in income. But I will not pursue this line of criticism here.

6. For a scholarly discussion of the incentive justification see e.g., Fisher, 2001, Hettinger, 1989, and Stadler, 2006.

7. Indeed, *Comment 17* is so concerned to distinguish the human rights of authors and creators on their works from the current intellectual property regimes that it eschews the term "intellectual property" altogether. This choice is not followed here; however, as the term intellectual property nicely captures what we are talking about. Still it should be kept in mind that there is a distinction between the general concept of intellectual property—as the right of authors and creators to control the access, distribution, and use of their intellectual works—and particular justifications for or legal formulation of such rights.

8. Note that "Moral Rights" in this sense are distinct from the philosopher's notion of a moral right. It refers to the author's non-pecuniary rights, such as the right to be recognized as the author of the work and the right that the work not be altered without permission.

9. Interestingly, while this would seem to hold true for inventions as well as works of creative expression, moral rights are exclusively claimed for authors of the later.

10. See Adam Moore's entry on Intellectual Property in the Stanford Encyclopedia for an overview of the debates on these two theories.

11. The story actually has a happy ending. Due to an obscure bit of the Imperial Copyright Act of 1911, Solomon Linda's family was able to regain copyright in the work 25 years after his death.

12. Admittedly, in the experience of Indigenous Peoples their core interests have been standardly threatened due to a lack to respect the moral and material interests in their cultural property. This does not give us a reason to support a general human right to IP, however. It has been recognized that the unique situation of Indigenous Peoples has necessitated a separate statement of their rights in the Declaration of the Rights of Indigenous Peoples. That declaration has specific protections for the cultural products of Indigenous peoples, given the fact of a persistent history of serious threats to their culture and survival (Mathiesen, 2012).

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