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Intellectual Property: For Instrumentalism, Against Proprietarianism

Attitudes influence approaches. This last chapter argues that in approaching issues and theories related to the justification, formation, extension and enforcement of intellectual property rights we should have an instrumental attitude rather than a proprietarian one.

No attempt is made to propose a general theory of intellectual property. Such a theory would belong to a number of disciplines because intellectual property deals with information, rights, economic growth and power, not to mention the many subplots which are part of the whole story of intellectual property. This makes it a natural target for theorising within ethics, political philosophy, economics, sociology and legal theory. Elaborating a satisfactorily integrated multidimensional theory of intellectual property is a big job. And, in any case, the goal of attempting to theorise a super-theory of intellectual property might be questioned. Post-modernists might see in such a theory a futile attempt to deliver the undeliverable about property – objective truths and relations. Property, they might say, is like an institutional shell which is used to cover a set of relations that are historically and culturally contingent and which over time are being continually reconfigured. The truth, they might say, is that there is no essentialist truth about property.

This kind of scepticism does threaten gloom for those in the business of normative theory and policy development, as well as for those who would like to end a book on a positive note about the way in which theory development in intellectual property should be taken. Bearing in mind this post-modernist scepticism, we shall suggest some directions in which theory building in intellectual property should be taken. We begin by stating a negative case. One way in which the theory of intellectual property should not be developed is to underpin it with proprietorism. The dangers of this approach are heightened when it is combined with a system of law that operates in a mode of formal rationality. The positive case begins by arguing that an instrumental attitude should to be taken towards intellectual property. Roughly the idea is that talk about rights in intellectual property should be replaced by talk about privilege. Intellectual property privileges, it will be argued, are necessarily accompanied by duties that circumscribe the exercise of the privilege.

The Proprietarian Creed

Proprietarianism is sometimes used to refer to those theories of justice which make natural rights their centrepiece.¹ Locke, we saw in Chapter 3, is one older exemplar of this tradition and in recent times Nozick is another. There are two striking features of theories that claim naturalness for rights. First, these rights are said to have a presocietal and pre-institutional existence. Precise detail over their ontological status varies, depending on whether the accompanying metaphysic is, for example, theological or non-theological. A second critical feature is that these rights function in Nozick's words as constraints on decision making. This means that such rights set permanent limits on what is morally permissible. On this view rights are like fixtures. They cannot be moved because some better result might be obtained by doing so. So, to take a standard example, the liberty of an innocent individual cannot be infringed simply because this would make a populace happier.

1 P. Pettit, *Judging Justice* (London, 1980), 75.

This natural rights-based proprietorship is not the target of analysis in this chapter. Proprietorship for us has a broader meaning. Its chief characteristic is that it assigns to property rights a fundamental and entrenched status. Property rights are given a priority ranking over other kinds of rights and interests. The arguments that are used to justify this fundamental and entrenched status for property rights vary. In rights-based versions of proprietorship, appeals are made to natural rights or some notion of property being a fundamental background right.² But equally proprietorship can be supported within a consequentialist framework. Proprietorship is a view that can be upheld within the context of very different moral theories. Bentham's views on property provide a useful illustration of this analytical point. Like any consistent utilitarian, he rejects the idea of natural rights and so therefore the idea of natural property rights. And yet he believes that 'a state cannot grow rich except by an inviolable respect for property'.³

Bentham has good reasons for assigning a fundamental respect to property rights within his utilitarian framework. He sees clearly that those who are guided by the principle of utility might think that it is justifiable to invade property rights of wealthy individuals for distributional purposes if this results in an overall increase in happiness. The purpose behind the invasion of property rights need not even be a noble one. Looting probably creates a great deal of temporary happiness if a majority of a population engage in it. Clearly a normative theory which legitimates this kind of behaviour could hardly be expected to be taken seriously. The way in which Bentham seeks to avoid destabilising property rights is to argue that the ideal legislator should elevate the goals of subsistence and security above those of abundance and equality. Security for Bentham means that, for the most part, expectations which individuals have about the conduct of others in normal social interaction will be met. His discussion of security and law sees the law being assigned a dual role: first, expectations are created through the law and, second, law stabilises these expectations and protects them. Property is exclusively the work of law for Bentham: 'Property and law are born together,

2 On the distinction between background rights and institutional rights, see R. Dworkin, *Taking Rights Seriously* (London, 4th impression, 1984), 93.

3 J. Bentham, 'The Theory of Legislation', in C.B. Macpherson (ed.), *Property* (Toronto, 1978), 41–48, 55.

and die together.’⁴ The expectations it establishes and institutionalises are vital for the happiness of society because these expectations provide individuals with reasons to labour. Like Locke, Bentham thinks that individuals have to be driven to labour: property rights are needed to vanquish ‘the natural aversion to labour’.⁵ With property rights people have an incentive to labour and industry will prosper. Without property rights there will be a ‘deadening of industry’.⁶ Hence his conclusion that property deserves an inviolable respect. Linking property rights and inviolability is a move any proprietorian would be happy with. It is an entrenching move that ensures that property rights are ranked higher than other rights or interests.

Proprietarianism in the way that we have described it is not really a theory of property. Rather it is a creed and an attitude which inclines its holders towards a property fundamentalism. The consequence within normative theory is that property interests are continuously given a moral primacy. Its impact in intellectual property law is the subject of the next section, but first we need to mention two other features of our brand of proprietorianism. Proprietarianism also advocates in some form or another a first connection thesis about property rights. A general formulation of the first connection thesis is this. A person who is first connected to an object that has economic value or with an activity that produces economic value is entitled to a property right in that object or activity. The property right can be thought of as an extraction right. It is a right to extract or appropriate economic value. The nature of this first connection must take the form of some personal act of demarcation. There must be in terms of Locke’s metaphor some individual act of mixing one’s labour that establishes the first connection to the object of the property right. Borrowing from Hegel, one might say that the first connection thesis is the requirement that personality in some fashion first imprints itself upon the object of proprietorial desire. Less metaphorically, the first connection thesis requires some act of control. The most usual way in which this occurs is through an act of first possession. The trapping of animals, the spearing of whales, finding a plant variety, the mining of the sea-bed, discovering land or resources in it, placing a satellite in

4 Id., 52.

5 Id., 53.

6 Id., 55.

orbit, synthesising derivatives of penicillin, locating a gene and using the electromagnetic spectrum are all examples of acts of control that may give rise to property rights under first possession rules.

The last defining feature of proprietorship is a belief in negative community. Drawing on our discussion from Locke, we can stipulate that this means that the proprietor takes the stance that things at first instance exist in a state of negative commons. They are not owned, but their ownership is open to any one individual. We can sum up our conceptualisation of proprietorship as follows. Proprietorship consists of three core beliefs: a belief in the moral priority of property rights over other rights and interests, a belief in the first connection thesis and the existence of a negative commons. A proprietor is one who believes that activities that first give rise to economic value also necessarily create property rights and that there is no limit to the things in the world at which such activities may be aimed. Proprietorship is a creed which says that the possessor should take all, that ownership privileges should trump community interests and that the world and its contents are open to ownership. This is proprietorship in its strongest sense. It is not tied to any specific moral theory, at least within liberalism. We have suggested that it can be accommodated within consequentialist and non-consequentialist frameworks. Probably, although we shall not pursue the matter here, it has strong links with individualism.

At the philosophical level it is hard to find proponents of the kind of strong proprietorship we have just described. Whether Locke is an example depends on the interpretation of his work. Tully's claim (discussed in Chapter 3) that Locke was a supporter of the positive commons disqualifies Locke from membership of the strong proprietorship creed. But Locke clearly was a supporter of the first connection thesis and so a proprietor in some weaker sense of the concept. In any case our purpose is not to filter various historical figures through our definition of proprietorship. Our claim is that proprietorship has infiltrated the development and direction of intellectual property law and policy. This charge of infiltration calls for some illustrations and it is this call that the next section attempts to answer.

A last point which concerns the link between proprietarianism and the ideology of capitalism needs to be made. The claim that proprietarianism is becoming the main influence upon intellectual property gives rise to some other questions. Why is proprietarianism in the ascendancy? Whose interests does it serve? These are important questions, but they are outside the scope of the present inquiry. The answer they require is of a causal and explanatory kind. One style of answer is to make use of ideology theory, but this is in an unsatisfactory state.⁷ This chapter does not offer causal explanations for the rise of proprietarianism. That is an issue that clearly requires a separate treatment. The question we address here is the normative one. Should we defend proprietarianism in intellectual property or should we replace it with something else? Our suggested replacement, we shall see, is instrumentalism. But first we need to provide some examples of proprietarianism in action.

Proprietarianism in Action

Showing that proprietarianism is the dominant normative influence on intellectual property law and policy in the world is an empirical claim and rather a large one. To confirm the claim would involve a massive comparative law exercise. This is not going to be done here. This section simply offers some examples of proprietarianism in action in the law of intellectual property. These examples are not intended to be a substitute for the broader comparative work which would have to be done in order to verify the proposition being put.

There is another qualification to make. Proprietarianism is a creed on the move. This means that it does not yet hold sway in all parts of intellectual property. It is, however, in the process of gaining a juristic and ideological ascendancy within thinking about the production of intellectual property. By focusing on the idea of a core of distinctive normative beliefs which we have labelled proprietarianism, it is possible to see a pattern in the various changes in the different parts of intellectual property. The beliefs we have identified as characterising proprietarianism are deeply involved in a complex causal process that results in a pattern of increasing individual ownership of

7 See J. Elster, *Making Sense of Marx* (Cambridge, 1985), chapter 8.

abstract objects. This pattern is not complete and in places is fuzzy. Proprietarian beliefs do not explain all current decision making within intellectual property. We will see a little later that some judges have come out against proprietarianism. It is hardly surprising that some individuals should resist endorsing it. Intellectual fashions, like other fashions, are not chosen by everybody. But the fact that there are fashion resisters has not stopped the proprietarian tide. Nor should we expect it to. Proprietarianism has deeper roots in the nature of international capitalism, the evolution of that capitalism under conditions of competition, the uncertainty that such competition promotes and finally the desire for hegemonic status by some nation states.

Trademark law, patents and copyright all provide examples of proprietarian beliefs in action. Within trademark law proprietarian beliefs manifest themselves in an expanded view of what may be used as a trademark. More things in the negative commons are now capable of serving the trademark proprietor. Under old trademark legislation, only visible marks of some kind were eligible for registration.⁸ Modern trademark law admits colour, sounds, smells and tastes to the category of trademark signs.⁹ Harley Davidson can now seek registration for the sound of their motor bikes and BP for their colour green.

Trademark proprietarianism surfaces in other ways. It does so in a clear way in the debates over the function of trademarks.¹⁰ Advocates of proprietarianism tend to couch their arguments in terms of making trademark law relevant to the needs of the market. Their legitimating

8 See, for instance, *Trade Mark Act, 1905* (UK), section 3. Mark is there defined to include 'device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof'.

9 At an international level the scope of sign has been progressively expanded. The First Council Directive of 21 December 1988 to Approximate the Laws of the Member States relating to Trademarks (OJ L 040 11.02.89 p. 1 in article 2) states that a trademark may consist of any sign capable of being represented graphically. See also Article 15 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). For an example of the domestic implementation of the TRIPS definition, see the definition of sign in section 6 of the *Trade Marks Act 1995* (Australia).

10 See F.I. Schechter, 'The Rational Basis of Trademark Protection', 40 *Harvard Law Review*, 813 (1927); R.S. Brown, Jr, 'Advertising and the Public Interest: Legal Protection of Trade Symbols', 57 *Yale Law Journal*, 1165 (1948); L.N. Klar, 'An Argument for the Restructuring of the Law of Trade Marks', 12 *Osgoode Hall Law Journal*, 223 (1974); T. Martino and W. Ullah, 'The Quality Guarantee Function of Trade Marks: An Economic Viewpoint' [1989] 8 *European Intellectual Property Review*, 267; S.L. Carter, 'The Trouble with Trademarks', 99 *Yale Law Journal*, 759 (1990).

themes are those of modernisation and the needs of commerce. The consequence of accepting these arguments is that trademarks become tradeable entities in their own right that serve the interests of their owners. The importance of consumer and public interests in trademark law, which was recognised in early trademark thinking, quietly slips from view.

Telling this story would require much more space than we have here, but we can add a little more detail. In 19th-century English law the essence of a trademark was thought to be that it served to distinguish the goods of one trader from those of another: 'The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory the article to which it is affixed was manufactured.'¹¹ Trade marks were symbols that indicated to persons understanding the symbol the trade origins of the particular goods (later this came to include services).¹² Trademarks were in a sense highly derivative forms of intellectual property. The exclusive use of the mark related only to its use in connection with articles to which it had been applied. A trademark, judges made clear, could not be protected as an entity in its own right.

Information about origin was not then and is not now the only function of a trademark. Consumers have a primary interest in knowing something about the quality of the goods rather than simply where they hail from. Once consumers have experience with a particular trademarked good, the meaning of the trademark expands to convey information about quality of the good or other types of goods made by the manufacturer. The trademark comes to mediate the reputation of those making the goods.

The origin, quality and goodwill functions of trademarks can be aggregated into a general communication function. Trademarks might be said to have the broad function of communicating the origin and properties of goods. Clearly there are some advantages that flow from this kind of communication. Consumers can rely on a trademark as

11 *The Leather Cloth Company v. The American Leather Cloth Company* (1865) 11 H.L.C. 523, 533–534. See also James LJ in *Massam v. Thorley's Cattle Food Co.* (1880) 14 Ch.D. 748, 755; Rigby LJ in *In re Magnolia Metal Company's Trademarks* [1897] 2 Ch., 371, 390. This position was carried over into the 20th century. See *Aristoc Ltd. v. Rysta Ltd.* [1945] A.C. 68, 96.

12 See S. Ricketson, *The Law of Intellectual Property* (Sydney, 1984), 603; W.R. Cornish, *Intellectual Property* (2nd edn, London, 1989), 399.

a form of shorthand for information that would otherwise be time consuming and costly to ascertain. In economic terms, trademarks lower the search costs of consumers.¹³ Traders gain in that they know that the trademarks they use will become in the consumer market the faithful transmitters of information about the products they make. This provides traders with one kind of incentive to maintain or raise standards.

The early judicial development of trademark law in England took seriously the idea that trademarks served consumer and public interests.¹⁴ Distinctiveness, perhaps the foundational concept of trademark law, was explicated in terms of the probability that others would want to make a legitimate use of those same symbols.¹⁵ There was 'no absolute right to register any trade mark'.¹⁶ Trademark registration was a privilege, not a right. Practices which may have been customary in the relevant trade, like letting other traders make use of the mark, were not the basis upon which judgements of validity concerning the mark were made. The crucial factor was whether the practice in question deceived the public.¹⁷ This emphasis of the common law upon the public nature of trademarks is readily understandable. A trademark only comes into existence on a commercial plane when consumers in the market invest the mark with meaning and recognition. Trademarks begin their commercial life through an iterated series of acts of recognition by members of the consuming public. At the same time as this happens the trader acquires an abstract object that can, at least potentially, be exploited independently of the goods and services to which the mark relates. Roughly speaking, the common law and the legislature took the view that any independent exploitation of the mark had to be consistent

13 For discussions of the economics of trademarks, see W.R. Cornish and J. Phillips, 'The Economic Function of Trade Marks: An Analysis with Special Reference to Developing Countries', 13 *International Review of Industrial Property and Copyright Law*, 41 (1982); W.M. Landes and R.A. Posner, 'Trademark Law: An Economic Perspective', 30 *The Journal of Law and Economics*, 265 (1987).

14 Judges still see that a fundamental purpose of trademark law is to protect consumers from deception. See the judgement of McHugh J in *New South Wales Dairy Corporation v. Murray Goulburn Co-operative Co. Ltd.* (1991) 171 CLR 363, 414. For a brief discussion of the common law of trademarks and the accommodation that was worked out by the courts between the interests of traders and consumers, see Lord Diplock in *GE Trade Mark* [1973] R.P.C. 297, 325–327.

15 See Lord Parker, *Registrar of Trade Marks v. W. & G. Du Cros, Ltd.* [1913] A.C. 624, 635.

16 *In re Applications of W. & G. Du Cros, Ltd.* [1912] 1 Ch. 644, 660.

17 For a case which is emblematic of this approach, see *Wood v. Butler* (1886) 3 R.P.C. 81.

with those acts of recognition by the consuming public which had first breathed commercial life into the mark. Marks that had become valuable through the grant of a statutory privilege and public use could not simply be turned over to their individual proprietors for their unrestricted use. Trademark legislation placed restrictions on what trademark owners could do with their trademarks by way of licensing and assignment.¹⁸ Much of the spirit of this approach is captured in the following passage from *Bowden Wire Ld. v. Bowden Brake Co Ld.*¹⁹

The object of the law is to preserve for a trader the reputation he has made for himself, not to help him in disposing of that reputation as of itself a marketable commodity, independent of his goodwill, to some other trader. If that were allowed, the public would be misled, because they might buy something in the belief that it was the make of a man whose reputation they knew, whereas it was the make of someone else.

The expansion of the meaning of sign to include sounds, scents, colours, shapes, the relaxing of the restrictions on trafficking in trademarks and allowing trademarks to be used to divide territorially markets when there is no consumer benefit in doing so point to a trademark law that is increasingly shifting towards proprietorism.²⁰ Under the influence of proprietorism the dominant purpose of trademark law comes to be the protection of the interests of traders. The description of trademarks in terms of privilege and monopoly falls into disuse. This language is replaced by the more generic and therefore ambiguous language of property. The effect is that the development of trademark law is more and more dictated by the needs of trademark owners with consumer interests now relegated to some other part of the law. Structurally speaking, this relegation

18 So, for example, trademark statutes typically prohibited the practice of trademark trafficking. See *Re 12 Applications by American Greetings Corporation to Register the Trade Mark 'Holly Hobbie'* (1984) 1 IPR 486. The common law took the view that trademarks were assignable but only if the business goodwill was also transferred. See *GE Trade Mark* [1973] R.P.C., 297, 326.

19 (1914) 31 R.P.C. 385, 392. The Bowden decision has become increasingly less relevant to modern trademark law. For a discussion, see W.R. Cornish, *Intellectual Property* (2nd edn, London, 1989), 470–471.

20 The use of trademarks to divide markets territorially is a complex matter about which it is hard to generalise. For an excellent discussion of the law, see W.A. Rothnie, *Parallel Imports* (London, 1993), chapter 2. For a discussion of attempts to segment markets in the European context using trademarks, see W.R. Cornish, *Intellectual Property* (2nd edn, London, 1989), 481–489.

is dangerous. For, so long as the protection of consumer interests remained a dominant purpose of trademark law, the private uses of a publicly granted monopoly privilege had to remain consistent with that purpose. This placed a constraint on the development of trademark law to resist the purposes of opportunistic actors. Once the linkage between trademark law and the interests of the consumer market is severed then, somewhat predictably, there follows an expansion of the narrow statutory privilege granted to traders.²¹ Traders no longer have to show a convergence of their interests and the interests of consumers. The statutory privilege now comes to serve private interests and private use. Trademark law, like other areas of intellectual property law, slowly shifts to accommodate the desires of rent seekers.

A spectacular example of proprietarian thinking in action is to be found in the history of US copyright law in the form of the 'sweat of the brow' doctrine. The case of *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.* provides an illustration.²² The plaintiff had compiled a directory of trademarks related to the jewellery trade. The defendant had brought out a similar directory, which was double the length of the plaintiff's, but which the plaintiff claimed was based on its directory. The defendant lost. In an important passage the court hoisted the proprietarian flag:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.²³

21 Another example of the change that proprietarianism brings can be seen in the way in which the requirement for the public use of the trademark has changed. Under the common law, title to a trademark was established on the basis of public use. Compare this with articles 15 and 19 of the TRIPS Agreement which do not require use either as a condition of registrability or for the maintenance of registration.

22 281 F 83 (CA2 1922).

23 281 F 83, 88 (CA2 1922).

In *Jeweler's*, as in the English directory cases upon which the decision was based, the fundamental premise upon which the court based its reasoning is that no one has, in the context of market relations, the right to appropriate the results of the labour of another. The court was careful not to omit the connection between copyright and the existence of a public domain. It pointed out that nothing prevents other individuals from going to original sources in order to create their own compilation.²⁴ This means that subsequent compilers 'must count the milestones' for themselves and, in the case of maps, 'go through the whole process of triangulation'.²⁵

The *Jeweler's* case and others like it conceive of the public domain somewhat narrowly. The public domain is assumed to consist of pre-existing facts, but actually the public domain consists of reports of facts. Reports of facts which make up the public domain of facts are always reports in some language or another of events and objects in the world. Most of the time most people rely on reported facts rather than facts that they have directly verified themselves. Copyright proprietarianism in the form of the 'sweat of the brow' doctrine potentially transfers these public domain reports into private hands. The result of this is that the proliferation of reported knowledge or facts, reports which serve as access points to verifiable public domain knowledge, comes to depend upon the licensing activities of copyright owners.

Showing this in detail would involve, amongst other things, an extended discussion of the requirement of originality in copyright law. But we can provide a short version of the argument. Generally speaking, before an author can acquire copyright in a work he or she must satisfy the requirement of originality. This does not mean that the work must be original in some ultimate sense of 'never ever having been written about before', but something less than that. The problem has been in deciding on how much less than that ultimate standard is sufficient to qualify a work for copyright protection. Predictably, problems have arisen where authors have assembled, selected, ordered, arranged and so on pre-existing facts and material and claimed to have

24 281 F 83, 91 (CA2 1922).

25 *Kelly v. Morris* (1866) L.R. 1 Eq. 697, 701–702 and approved by *Jeweler's* at 281 F 83, 91.

produced a work in which copyright subsists.²⁶ Courts have sometimes set the standard of originality quite low, allowing, for example, football betting coupons to get over the copyright line.²⁷

The purpose of the originality requirement in copyright is clear enough. It obliges the author to engage in some independent creative effort before he or she can claim the benefits of copyright protection. This creative effort eventually finds its way into the intellectual commons, because copyright is limited in duration. One way in which to understand the originality requirement is to say that it helps to constitute the intellectual commons. It helps to keep certain information out of the reach of copyright ownership. And drawing upon our discussion of Locke in Chapter 3, we might say that copyright helps in this way to constitute a condition of positive community when it comes to facts. Facts (which are always reports) are not, as they would be in negative community, open to copyright ownership.

When the originality requirement is set very low or dispensed with altogether, facts and information of all kinds can be recycled as copyright works. Copyright now helps to constitute negative community. In this negative community many more information exchanges which involve facts become the object of copyright surveillance and enforcement. Copyright comes to function as a private tax on basic information exchanges.

The story of the 'sweat of the brow' doctrine in US copyright law has a sad ending from the proprietarian perspective. In *Feist Publications, Inc v. Rural Telephone Service Co Inc*, a case in which copyright is denied to a white pages directory, the US Supreme Court does its best to eliminate the doctrine from copyright law.²⁸ It proceeds by refocusing attention on the constitutionally stated goal of copyright

26 This area of copyright law has attracted considerable academic discussion. See, for example, R.A. Gorman, 'Copyright Protection for the Collection and Representation of Facts', 76 *Harvard Law Review*, 1569 (1963); L.R. Patterson and C. Joyce, 'Monopolising the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations', 36 *UCLA Law Review*, 719 (1989); J.C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', 90 *Columbia Law Review*, 1865 (1990); S. Ricketson, 'The Concept of Originality in Anglo-Australian Copyright Law', 39 *The Journal of the Copyright Society of the USA*, 265 (1992); T. Dreier and G.W.G. Karnell, 'Originality of the Copyrighted Work: A European Perspective', 39 *The Journal of the Copyright Society of the USA*, 289 (1992).

27 *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.* [1964] 1 All E.R., 465.

28 111 S. Ct. 1282 (1991).

law which is 'to promote the Progress of Science and useful Arts'.²⁹ Copyright aids this goal by helping to create a public domain with respect to facts, a domain in which all individuals have user rights. While the decision has been criticised, primarily it seems because of its supposed effects on the data base industry, the decision remains fundamentally correct.³⁰ One final observation before we leave this example: the demise of the 'sweat of the brow' doctrine does not mean that proprietorism's march towards the ownership of facts has been defeated. Many of the initiatives taking place to provide special protection for data bases and their contents are arguably a reinvention of the 'sweat of the brow' doctrine in *sui generis* form.³¹

The third and final example of proprietorism in action comes from patent law. One important distinction in patent law is between discovery and invention. Traditionally, the position has been that discoveries *per se* are not patentable.³² Inventions, provided they satisfy various statutory criteria, are patentable. The distinction between discovery and invention in English law lies in the idea that discovery involves an act in which something of the world is revealed. It is, as it were, 'a lifting of the veil'.³³ Invention is a process in which the act of discovery is taken and joined to some process or object which itself can act upon the world. In an oft-quoted passage, Lindley LJ in *Lane Fox v. Kensington and Knightsbridge Electric Lighting Co* gives an

29 US Constitution, article I, § 8, cl. 8.

30 See, for example, J.C. Ginsberg, 'No "Sweat"? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*', 92 *Columbia Law Review*, 338 (1992); A.C. Yen, 'The Legacy of *Feist*: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods', 52 *Ohio State Law Journal*, 1343 (1991).

31 See European Commission, *Amended proposal for a Council Directive on the legal protection of databases*, OJ 1993 C308/1, 15 November 1993; see also J. Morton, 'Draft EC Directive on the Protection of Electronic Databases: Comfort after *Feist*', 8(2) *Computer Law and Practice*, 38 (1992).

32 See *Harwood v. Great Northern Railway Co.* (1865) 11 H.L. C. 654; Lindley LJ in *Lane Fox v. Kensington and Knightsbridge Electric Lighting Co.* [1892] 3 Ch. 424, 428; Buckley J in *Case v. Cressy* (1900) 17 R.P.C. 255, 261.

33 See Buckley J in *Reynolds v. Herbert Smith & Co.* (1903) 20 R.P.C., 123 at 126. Approved in the High Court of Australia by Isaacs J in *Neilson v. The Minister of Public Works for New South Wales* (1914) 18 C.L.R. 423 at 429–430. See also *Moore and Hesketh v. Phillips* (1907) 4 CLR 1411 at 1425–1426. In the United Kingdom, section 1(2)(a) of the *Patents Act 1977* expressly excludes discoveries from invention. In the United States the case of *Funk Brothers Seed Co. v. Kalo Inoculant Co.* 333 U.S. 127 (1948) is one important case that makes it clear that products of nature are not patentable.

example of discovery: ‘When *Volta* discovered the effect of an electric current from his battery on a frog’s leg he made a great discovery but no patentable invention.’³⁴

The common law’s insistence upon the distinction between discovery and invention is readily understandable in light of the purpose of the patent system. We saw in Chapter 2 that this purpose was to encourage the build-up in England of skills relating to the industrial arts or trade. The patent system was intended to help expand and improve skills in existing trades or help form new trades. Clearly this practical objective could not be met through the mere discovery of knowledge. Those working in trades had to have tools, machines and processes to work with. The abstract object had in other words to take on a corporeal application before it could be the subject of a patent privilege. Importantly the distinction between discovery and invention ensured that certain abstract objects remained in the intellectual commons for all to use. Like the originality requirement in copyright law, the discovery/invention distinction helped to constitute the intellectual commons under the condition of positive community.

The Australian High Court in an influential decision suggested that the distinction between discovery and invention was not precise enough to be of much use.³⁵ What concerned the High Court was the fact that all inventions have an ideas component.³⁶ A strict parsing of inventions, particularly process inventions, into the categories of discovery and invention would see many patent claims defeated on the grounds that the idea amounted to a discovery and that there was no inventive merit in the implementation of that idea.

Judicial reservations about the clarity of the discovery/invention distinction stem from the worry that, applied badly, the distinction might defeat the traditional goal of the patent system. Proprietarianism attacks the discovery/invention distinction for different reasons. Under proprietarianism nothing of legal significance should hang on this distinction because discoveries, just like inventions, can be costly,

34 [1892] 3 Ch. 424, 428.

35 *National Research Development Corp. v. Commissioner of Patents* (1959) 102 C.L.R. 252.

36 Patent specifications in fact disclose an idea. See Dixon J in *Radiation Ltd. v. Galliers & Klaerr Pty Ltd.* (1938) 60 C.L.R. 36, 51.

labour-intensive and economically valuable.³⁷ The first connection thesis, negative community and the fundamental nature of property rights all combine to produce the conclusion that abstract information, whether in the form of a discovery or of an invention, should be the subject of a patent right. Nothing is said about the impact of this on community and creativity (see Chapter 3), on power relations (see Chapter 7), the distribution and access to important knowledge (see Chapter 8) or even the costs of the opportunistic behaviour (see Chapter 6) that such a development will bring with it.

The longer-term effect of proprietorism in patent law will be that all kinds of abstract information previously in the public domain will fall into private ownership. While the patent system has always allowed for the temporary private ownership of ideas, these ideas have had to be expressed in an inventive form, a form that had utility in the industrial arts. One objection to the proprietarian demolition of the discovery/invention distinction is that useful abstract information will fall into private hands without there necessarily being in existence some corresponding useful industrial application of that idea. A danger of proprietorism lies, in other words, in switching the patent system to protect useful ideas rather than ideas that exist in the form of useful effects.³⁸

Some of the best examples of patent proprietorism in action are to be found in the area of property rights in plant, animal and human genes and microbiological organisms. When in 1980 the US Supreme Court in *Diamond v. Chakrabarty* approved the view that Congress intended patentable subject matter to 'include anything under the sun that is made by man' it was in many respects a ringing endorsement of negative community – a world in which patents could single out anything at all for appropriation.³⁹ Moreover even at that time 'made' in reality included 'found', for there was already a body of US cases that had allowed patents on purified versions of naturally occurring

37 For an example of where this was argued unsuccessfully in relation to a well-organised research programme that resulted in the discovery of a naturally occurring biological substance, see *Genentech Inc. v. Wellcome Foundation Ltd.* [1989] R.P.C. 147.

38 The High Court in *National Research Development Corp. v. Commissioner of Patents* (1959) 102 C.L.R. 252 thought that the patent system had as its main purpose the production of economically useful effects.

39 447 US 303, 309 (1980).

substances.⁴⁰ If invention merely involves 'cleaning up' a substance one may well ask whether the discovery/invention distinction? Since *Chakrabarty* and even before it patent law has evolved in a way consistent with the influence of proprietorship. While the rhetoric of the discovery/invention distinction remains there is a growing convergence around the view that biological materials (including genes) which are found in nature are patentable.⁴¹ In related areas of law such as plant breeders' rights the distinction has vanished. Multinationals in the plant-breeding business may claim property rights in plant varieties that they have discovered as well as those that they may have bred.⁴² The claims which accompany patent applications in the biotechnology area are characterised by the broadness of their reach over the intellectual commons.⁴³ Apart from its descent into molecular biology, the patent system has begun to ascend the evolutionary ladder in terms of its subject-matter. Animal patents, despite the ethical concerns of many, have been granted in the US and other jurisdictions.⁴⁴

Against Proprietorship

In Chapter 7 we argued that property rights in abstract objects give rise to dangerous levels of threat power. In passing we suggested that this would be of concern to those political traditions that value and defend negative liberty. The previous section gave some examples of the way in which the influence of proprietorship thinking in

40 See R.S. Eisenberg, 'Patenting the Human Genome', 39 *Emory Law Journal*, 721, 727–729 (1990).

41 C. Correa, 'Biological Resources and Intellectual Property Rights' [1992], 5 *European Intellectual Property Review*, 154, 155. For a discussion of the European and US positions concerning gene patents, see B. Looney, 'Should Genes Be Patented? The Gene Patenting Controversy: Legal, Ethical, and Policy Foundations of an International Agreement', 26 *Law and Policy in International Business*, 231 (1994).

42 See the definition of 'breeder' in article 1 of the *International Convention for the Protection of New Varieties of Plants* of 2 December 1961, as revised at Geneva on 10 November 1972, on 23 October 1978, and on 19 March 1991. For an example of the domestic implementation of that obligation, see *Plant Breeder's Rights Act 1994* (Aus.) section 5.

43 See T. Roberts, 'Broad Claims for Biotechnological Inventions' [1994], 9 *European Intellectual Property Review*, 373; R.S. Crespi, 'Biotechnology, Broad Claims and the EPC' [1995], 6 *European Intellectual Property Review*, 267.

44 D. Manspeizer, 'The Cheshire Cat, the March Hare, and the Harvard Mouse: Animal Patents Open Up a New, Genetically-Engineered Wonderland', 43 *Rutgers Law Review*, 417 (1991); L. Maher, 'The Patent Environment: Domestic and European Community Frameworks for Biotechnology', 33 *Jurimetrics Journal*, 67 (1992).

intellectual property is increasing the scope of private ownership of abstract objects. Proprietarian sentiments lie behind the expansion of intellectual property rights.⁴⁵ This expansion threatens the core value of negative liberty. The remainder of this section develops this idea.

A list of rights defended by classical liberals like Locke include at least the rights of life, liberty and property. These rights we can think of as negative rights.⁴⁶ They imply that others owe the right bearer an obligation not to interfere by killing him, depriving him of his freedom or taking his property. Negative liberty in its classical form involves the idea that there are actions of individuals that should not be obstructed. Hobbes, for example, states the idea in this way: 'Liberty, or Freedome, signifieth ... the absence of Opposition ... A free man, is he, that ... is not hindered to doe what he has a will to.'⁴⁷ In Hohfeld's jural scheme these classical rights are claim rights – they have, as their correlatives, duties. Property rights are one form of negative right. A right of property that relates to land is a right amongst other things to prevent others from entering that land, selling it or interfering in some other way that is inconsistent with the property right. A right of copyright in a book is the right to prevent others from copying, translating or publishing the book.⁴⁸ Whether the right of property relates to a book, an invention, land or a car, the right is a right to stop others from interfering in a way determined by the content of the right.

While intellectual property rights are, like other kinds of property rights, negative rights, there are also important differences which flow from the connection between intellectual property rights and abstract objects. Abstract objects by their nature are capable of universal accessibility. In theory at least every person on the planet could simultaneously use the same algorithm. That could not be said of a

45 For a discussion of the way in which new rights are created, see W.R. Cornish, 'The International Relations of Intellectual Property', 52 *Cambridge Law Journal*, 46, 54–63 (1993).

46 Positive liberty centres around the desire of individuals to be in control, to be self-directed rather than just unobstructed. See I. Berlin, *Four Essays on Liberty* (London, 1969), 123; T. Campbell, *The Left and Rights* (London, 1983), 29–30; Q. Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives', in R. Rorty, J.B. Schneewind and Q. Skinner (eds), *Philosophy in History* (Cambridge, 1984), 193.

47 T. Hobbes, *Leviathan* (1651; C.B. Macpherson ed., Harmondsworth, 1968), 261–262.

48 Hence the description in *Corelli v. Grey* (1913) 29 T.L. R. 570 of copyright as a negative right.

block of land or a car. One consequence of this is that the pattern of interference that intellectual property rights set up in the lives of others is far greater than in the case of other kinds of rights. Rights of all kinds create patterns of interference. The fact that all individuals within a group have rights necessarily means that the action of any one individual is limited by the presence of other individuals with rights. Rights create zones of freedom by establishing a social basis on which to prevent freedom-threatening action by others. Preventing others from acting can be seen as a form of interference in the freedom of others. X's ownership of a block of land prevents others from owning it (assuming X does not want to sell it). But the limitations that negative rights place on freedom is a price that X and others are willing to pay for roughly the kinds of reasons that Hobbes identifies. The alternative to a stable rule-governed association is, at least on Hobbes' account, one in which all have privileges to do what they like. The price for this anarchy of privilege is that its exercise is contingent upon the desires and powers of others. And, as Hobbes argues, no one wants to pay this price. The Leviathan is a preferable alternative. Individuals, we might say, are prepared to tolerate the existence of negative rights for others because those rights operate in a reciprocal way to make coexistence possible.

Intellectual property rights create large patterns of interference in the freedom of others because abstract objects are a crucial kind of resource. We saw in Chapter 7 that they are a form of capital and a gateway to other kinds of capital. Abstract objects are vital to all kinds of social, cultural and economic projects. Property in such objects creates person-dependency relationships. Intellectual property rights differ in the reach of the pattern of interference they set up. The analogy between intellectual property rights and other kinds of property rights is only superficial. It is true that they both remain negative rights and so can be said to confer a right to prevent other persons from doing things, but this analysis of intellectual property rights remains incomplete because it does not take into account the systemic effects that occur because of the nature of the object to which the rights relate. Property rights in abstract objects have a dual character. They are negative rights, but they are also rights to interfere in the activities of others. The claim we are making can best be illustrated by an analogy between abstract objects and the ownership of all the land of a state by one individual. English feudalism

is probably the best example of a situation where, through the system of tenures, one individual, the king, was the ultimate owner of all the land. One might say of such a situation that the king enjoyed a right of property, a right not to be interfered with. But clearly such a characterisation would hardly capture the extent to which the king could, on the basis of his ownership of the land and the complex social structure that such ownership supported, interfere in the lives of all those who were connected with the system of land tenure. Drawing an analogy between the ownership of the abstract object and a king's feudal holdings is appropriate because in both cases the owner has control over a form of capital on which many others inescapably depend. In the case of the abstract object, that dependence may be global rather than just territorial.

This added quality of intellectual property rights that sets them apart from other negative rights can best be described as a capability-inhibiting quality. Intellectual property rights regulate access to knowledge and other kinds of capital which are foundational to the development of the capabilities of individuals. One important way in which individuals improve their capability is through investment in their stock of human capital. We suggested in Chapter 8 that intellectual property can adversely affect the use and build-up of human capital. It is precisely because of the fact that owners of abstract objects can, by virtue of that ownership, make decisions about whether or not other people will be allowed to conduct themselves in certain ways that intellectual property rights were historically thought of, and described, as privileges. The privilege that lies at the heart of all intellectual property is a state-based, rule-governed privilege to interfere in the negative liberties of others. We might call intellectual property rights liberty-inhibiting privileges, but there are also other kinds. Some privileges are created through the grant of an *exemption* from a common disadvantage. Tax exemptions are an example of this type. A third kind of privilege is based on the grant of a status *beyond* the common advantage of others. So, while all citizens may enjoy the freedom of communication, those with the status of parliamentarians are usually given an additional (often absolute) privilege when it comes to freedom of communication.

Intellectual property rights are a distinctive form of privilege that rely on the *creation* of a common disadvantage. The brief historical discussion of patents in Chapter 2 illustrated this. The history of

monopolies, particularly in the first part of the 17th century, reveals clearly that these prerogative-based privileges had the feature of creating a common disadvantage so that the holder of the privilege could benefit.⁴⁹ It was because these privileges constituted such a profound interference in the negative liberties of the king's subjects, particularly economic liberties, that they incurred such deep opposition. Eventually their creation came to be a matter of public regulation.⁵⁰

One of the reasons why intellectual property rights are no longer thought of in this way is that they are continually referred to by the aggregated term of rights. Through that process of reference they have become deeply entrenched in the discourse of private property rights. Their relocation in the language of private property has obscured their origins in public privilege.

Towards Instrumentalism

Our attention now turns to arguing for an instrumental attitude to intellectual property rights. Instrumentalism is a term that has different meanings. Within the philosophy of science it is the view that theories are a practical means of organising observation statements in order to derive predictions and conclusions.⁵¹ Theories are procedurally useful, but not true or false. Instrumentalism is also sometimes used to refer to the philosophy of pragmatism.⁵² When used in connection with law, instrumentalism refers to the idea that law is a tool.⁵³ The instrumentalist attitude, which we argue should form the basis of an approach to property, is distinct from the specialised meanings of instrumentalism we have just mentioned.

49 On the history of monopolies, see E.F. Churchill, 'Monopolies', 41 *The Law Quarterly Review*, 275 (1925); W.H. Price, *The English Patents of Monopoly* (Cambridge, Mass., 1913).

50 *Statute of Monopolies of 1623*.

51 See E. Nagel, *The Structure of Science* (London, 1961), 129.

52 John Dewey uses the term to refer to pragmatism. See J. Dewey, *Philosophy and Civilization* (New York, 1931), 26. For an excellent discussion of the philosophy of pragmatism and its history, see H.S. Thayer, *Meaning and Action* (Indianapolis, New York, 1968). See also M.G. White, *The Origin of Dewey's Instrumentalism* (New York: Morningside Heights, 1943).

53 For a discussion of instrumentalism in law and its links to pragmatism and American Legal Realism, see R.S. Summers, *Instrumentalism and American Legal Theory* (Ithaca and London, 1982).

Perhaps the first thing to say about an instrumentalism of property is that its primary focus is more on the behavioural aspects of property than on the metaphysical, ethical and epistemological issues that have characterised philosophical investigations of property. An instrumentalism of property does not aspire to reveal the deep structures of property or its essential nature. Its push to uncover the nature of property stops at the point at which property is seen as an institutional mechanism, a mechanism which in Chapter 7 we said can have sovereignty effects. Having arrived at that point, instrumentalism begins to investigate the contingent connections and processes that exist between property and individual behaviour and choice, between property and the formation of groups and factions, between property and power, between property and patterns of economic growth and development, and between property and the social patterns and organisations it gives rise to as well as the way in which property comes to be patterned and shaped by social organisations. Here there is already much good work to draw upon. The old and new institutionalism in economics is an example, as is the work being done on institutional theory and design.⁵⁴

The instrumental attitude to property also draws on economic approaches to law. It endorses an approach that calculates the social costs of intellectual property protection. Economic approaches also have the merit that they make the distributive consequences of changes in property arrangements more transparent. But the instrumentalism we have in mind amounts to more than just a cost–benefit analysis, or asking the economic efficiency question or a simple means-to-an-end approach. Cost–benefit analyses have technical problems.⁵⁵ They should also be driven and limited by moral feeling rather than driving out moral values.⁵⁶ Similarly the view that property is simply a means to some predetermined end assumes that means and ends can be easily divided. But as Lon Fuller has argued, the relationship between

54 For an overview of this literature, see R.E. Goodin, 'Institutions and Their Design', in R.E. Goodin (ed.), *The Theory of Institutional Design* (Cambridge, 1996), 1.

55 For a discussion, see A.K. Dasgupta and D.W. Pearce, *Cost Benefit Analysis: Theory and Practice* (London, 1972).

56 See S. Hampshire, 'Morality and Pessimism', in S. Hampshire (ed.), *Morality and Conflict* (Oxford, 1983), 82.

means and ends is far from simple.⁵⁷ Institutions rarely serve one end. Our own discussion of the different functions of property makes this clear. Ends are conditioned by means and the other way around.

The property instrumentalism that we have in mind must serve moral values. There is a single and obvious qualification to this. Property cannot, in an instrumentalist theory of property, operate as a fundamental value or right, for this would be to push the theory in proprietarian directions. Property, the instrumentalist attitude says, serves moral values, but is not the basis of moral value. A natural question to ask is, which values? This we suggest is fundamentally a matter of choice. An instrumentalism of property does not commit its holder to any specific moral theory or values. It only rules out of contention the idea of property as a natural right, but not the idea of natural rights. It also might be said to have a humanist orientation. This means that explanations (analyses and justifications for property have in some way to contribute to an understanding or improvement of human experience. Clearly humanism articulated in this way permits property instrumentalism to be tied to very different moral theories.⁵⁸ Perhaps if we had to describe an instrumentalism of property in terms of labels we might say that it is a humanistic and naturalistic form of empiricism about property.

The requirement that an instrumentalism of property be humanist is a minimal one, but it does push theory development in intellectual property away from the narrow and technical into the wider and evaluative. An example of what we mean can be drawn from our discussion of human capital and the justice of information. That discussion suggested that intellectual property rules might adversely affect the formation of human capital and therefore have implications for economic growth. Under our property instrumentalism, economists would need to take an interest in distributive theories, for these theories are relevant to just those institutions which the economic model implicates as crucial in economic growth. Once, for example, we are persuaded by a model of endogenous economic growth that human capital is more crucial than physical capital, a question arises

57 L.L. Fuller, 'Means and Ends', in K.I. Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, N.C. 1981), 48.

58 On the relationship between moral theory and the principle of humanism, see J. Raz, *The Morality of Freedom* (Oxford, 1986), 194.

about the institutional design response to that finding. This inevitably leads the economist into just those institutions which the distributive theorist has to consider. In the case of human capital it is fundamental institutions like the family and education that are relevant to the economist and the theorist of justice alike. The principles of equality of opportunity and access to education, which may be prescribed by a theory of justice, may also matter to a long-run economic growth theory. It may be that such principles maximise the build-up of human capital because all parents will have an incentive to invest in their children's education. Equally theorists of justice need to think (at least at the level of non-ideal theory) about the link between economic growth and the major social institutions which operate distributively within a society, for it is the arrangement of those institutions which will have an impact on economic growth and thus place limits on what is distributively feasible. An instrumentalism of property would require this cross-pollination between economic theories of growth and distributive theories because property is a foundational institution in both and because the humanist principle in such an instrumentalism would require theory development to have, as its minimal goal, the improvement of human conditions and experience. Of course what would count as an improvement would itself be determined by moral theory. And, as we have seen, an instrumentalism of property is not committed to any specific moral theory.

The property instrumentalism we are developing proposes a limited negative metaphysical thesis: there are no natural rights of property. This thesis has a corollary. Property instrumentalism embraces a radical scepticism about the nature of property.⁵⁹ In particular it is sceptical about any theory of property that is based on the idea that property is a subjective right. The radical scepticism we have in mind can best be illustrated by making use of some of Kelsen's observations about property. As it happens, a radical instrumentalism about property rights is one of the consequences of Kelsen's pure positivism.⁶⁰

59 Examples of good sceptical approaches to intellectual property are A. Plant, 'The Economic Theory Concerning Patents for Inventions', 1 *Economica* (new series), 30 (1934); A. Plant, 'The Economic Aspects of Copyright in Books', 1 *Economica* (new series), 167 (1934); S. Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs', 84 *Harvard Law Review*, 281 (1970).

60 I am indebted to Stanley Paulson for bringing Kelsen on property to my attention.

Kelsen's radical instrumentalism about property rights stems from his rejection of the dualism that had characterised 19th-century positivism.⁶¹ The legacy of natural law had found its way into this positivism through the dichotomies that had been created between objective and subjective law or right, and public and private law. Subjective right in this kind of positivism involved the idea that there were independently existing rights that objective law served in some way. Property, argues Kelsen, is 'the prototype of the subjective right'.⁶² Subjective right has, for Kelsen, a clear ideological function. This function stems from the realisation that with a positivistic conception of law the state is free to chart its own destiny. The content of its legal order is to be determined only by the legal order, that is to say, the state. Within democratic societies particularly, the content of law acquires a previously undreamt of contingency. If they so choose, legal orders can remake themselves in fundamental ways. Monarchies can become republics. Against this backdrop of a positivism limited only by will, the notion of private property (subjective right) becomes a means to setting limits on what the legal order may do to property interests. Kelsen, describing the ideological function of subjective right, puts it thus: 'subjective right, which really means private property, is a category transcending the objective law, it is an institution putting unavoidable constraints on the shaping of the content of the legal system'.⁶³ This claim of Kelsen's is an important part of his larger mission, which is to deliver a positivist theory of law that is an ideological theory of law in the sense that it remains a normative theory, but is anti-ideological in the sense that special interests and pleadings do not form part of the normative character of law. The Pure Theory of Law proposed by Kelsen eliminates subjective right. Subjective right and objective law become one.

One immediate reaction to the proposal to reduce all manifestations of subjective right to objective law is to say this has serious and negative implications for individual liberty. Subjective right, it might

61 Places in which Kelsen discusses this include H. Kelsen, *Introduction to the Problems of Legal Theory* (1934; B. Paulson and S.L. Paulson (trs.), Oxford, 1992), chapter 4; H. Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 55 *Harvard Law Review*, 44 (1941); H. Kelsen, 'Law, State and Justice in the Pure Theory of Law', 57 *Yale Law Journal*, 377 (1948); H. Kelsen, 'Foundations of Democracy', LXV *Ethics*, 68 (1955).

62 H. Kelsen, *Introduction to the Problems of Legal Theory* (1934; B. Paulson and S.L. Paulson (trs.), Oxford, 1992), 38.

63 *Id.*, 40–41.

be said, is the last philosophical bulwark against a liberty-robbing state. This kind of response, however, does not take seriously the radical scepticism and instrumentalism we are advocating for a treatment of property. First, under instrumentalism the question of the effects of subjective right on patterns of liberty is not a question that could be settled exclusively through *a priori* philosophical techniques any more than one could come to a serious conclusion about the pattern of liberty in a country by reading its constitution: the Soviet constitution, for example, read well. Patterns of liberty depend ultimately on the way given concrete rights evolve and operate in the context of social systems that have particular distributions of wealth, resources and institutional structures. There is, in other words, a much higher synthetic component in the debates over property and liberty than is commonly realised.

A radical scepticism about property would remain open to the possibility that property, as subjective right, might, somewhat counterintuitively, have under certain circumstances an adverse impact on the liberty of citizens. We can sketch such a possibility. The essence of Kelsen's analysis of property is that the functional role of subjective property rights is to place a restraint on a potentially hostile objective legal order. In those social systems where there are significant inequalities in the distribution of wealth and power the capacity of some to utilise the ideological function of property as subjective right will be much greater than that of others. Subjective property becomes a subtle tool which the well resourced may use for resisting the changes the objective legal order may wish to make to the norms of property. The dangers of aligning subjective property with intellectual property are high. Intellectual property, we have argued, takes the form of liberty-inhibiting privileges. Also, for the reasons we gave in Chapter 7, it creates private forms of sovereignty within a society. Those that possess such privileges are inclined, for the reasons we outlined in Chapter 6, to seek their extension. The notion of subjective right when linked to intellectual property offers privilege seekers opportunities to extend and create privileges that endanger the liberties of others. When the notion of subjective right is linked to intellectual property it functions to entrench the special interests of privilege holders. Privilege holders, for reasons of rational self-interest, campaign for greater privileges. Their outlook does not take account of the social cost of such privileges, their possible injustice

or the threat that the power of such privileges poses to fundamental democratic institutions. Under the guise of subjective right intellectual property rights are treated like any other form of property. Their distinct character and the threats they pose are clouded by a rhetoric of private property in which a universal subjective will is mobilised to defend the special interests of privilege seekers. The developmental costs of this to others is steadfastly ignored.

One worry about adopting a sceptical instrumentalism of property might be this: such an instrumentalism locates the genesis of property rights in positive law; it might be argued that individual property rights are an essential part of what is needed to make individual liberty secure and the notion of subjective right in turn makes property rights secure. On an instrumental approach to property, property rights are seemingly at the mercy of the state. Such rights become too fragile. Another reason for not endorsing an instrumentalism of property is the adverse effect that such an instrumentalism might have on the fundamental values that cluster around the notion of property as a subjective right. Here the idea is that property is inseparably linked with freedom, with the protection of individual personality and privacy. The problem with sceptical instrumentalism, it might be argued, is that in the final analysis it amounts to a procedure that costs such rights according to some narrow economic metric. As it happens, because of the overtly economic character of most intellectual property rights (such as copyright in sound recordings and published editions, or plant variety rights), employing an economic metric to judge such rights is appropriate. Nevertheless there are some kinds of rights to be found in intellectual property that institutionalise values which individuals as a social group hold to be important and meaningful in a way that transcends any conclusion that might be reached about their usefulness on the basis of cost. They are, as it were, cost-transcending rights. By running such rights through a sceptical instrumentalist mill, the cultural or symbolic value these rights derive from their link with fundamental values would be missed. The right of an author to be acknowledged as the author of the work or the right of an author to prevent the destruction of his work might be examples of such rights. Such rights might not be economically efficient because they inhibit trade in artistic goods. Even if this were the case, the rights could be defended on other grounds. The existence of works of art might be thought to be

intrinsically valuable.⁶⁴ Rights which promoted or preserved artistic works could be justified on the ground that they helped to promote an intrinsic good. This is still an instrumental style of justification, but one which is no longer influenced by some procedure of costing the right.

These two misgivings about a sceptical instrumentalism are misplaced. The first suggested that property rights were too important to individual liberty to risk breaking the linkage between subjective right and property. This does not amount to an objection against our sceptical instrumentalism. It does show that a sceptical instrumentalism of property needs to be entrenched in a broader account of what constitutes individual freedom. Under an instrumentalism of property it is crucial that this account be developed independently of the property relation. It is a mistake, in other words, to identify the nature of individual freedom with a treatment of the property relation in such a way that that treatment becomes the inductive basis upon which conclusions about individual freedom in the broad are reached. So, by way of example, for liberals a sceptical instrumentalism about property means asking about the effects of property norms on negative liberty rather than using property rights as the paradigmatic instance of negative liberty. By not asking the instrumentalist question about property, liberals open themselves up to the possibility that they will in the case of intellectual property endorse a liberty-inhibiting system of privilege.

The second misgiving about instrumentalism invoked the idea of cost-transcending rights. This kind of misgiving is not well founded. First we need to be clear that the real-world costs of property rights matter morally. The presence of costs means that resources are being used that could have been used otherwise. This matters morally as well as economically. The fact that resources within a given society are being transferred to meet the cost of a given system has implications for the developmental capacities of individuals within a given society. Rwanda has a patent system which, like all patent systems, generates costs. Should a country like Rwanda use precious resources in creating, maintaining and enforcing a patent system? A sceptical instrumentalism about property encourages this kind of question.

64 J. Raz, *The Morality of Freedom* (Oxford, 1986), 201.

And it is a question which is perfectly consistent with a defence of fundamental values like autonomy and self-determination. An attempt to trump an instrumentalism of property through some form of moral fundamentalism ignores the fact that the defence of one fundamental value often occurs at the expense of others.

Under a sceptical instrumentalism it does not follow that no property rights will survive. What follows is that the generic term 'right' will be disaggregated into its constituent parts. The shape of this disaggregation will be determined by the relevant deontic logic that is chosen to do the job. Some species of property rights will end up being classified as claim rights. Others, like intellectual property, will end up having the status of privileges. Depending on the moral theory used to accommodate the sceptical instrumentalism, some property rights in certain kinds of objects may end up being plausibly defended as important claim rights.⁶⁵ In short, a sceptical instrumentalism would seek to avoid the tendency, which Bentham observed, for individuals to describe every benefit or advantage conferred upon them by law as their property.⁶⁶

This completes our outline of a sceptical instrumentalism of property. Before concluding there is one short task that needs to be done. This is to show that an instrumentalist theory of intellectual property is also committed to instrumentalist duties.

65 It would seem that this is even possible under consequentialism, albeit of a modified kind. An example of such an approach is to be found in the goal rights system proposed by Sen. See A. Sen, 'Rights and Agency', 11 *Philosophy and Public Affairs*, 3 (1982). See also P. Pettit, 'The Consequentialist Can Recognise Rights', 38 *The Philosophical Quarterly*, 42 (1988). These approaches deal with the following problem of rights. Deontological views of rights do not allow one to solve complex interdependency problems by having regard to the consequences of those rights. Consequentialist approaches of the welfarist kind are good at dealing with interdependencies in that they link individuals by counting all relevant individual preferences in a given situation. But they miss out on the fact that there are aspects of social and moral life that are not amenable to resolution simply through a calculation based on utility information. The advantages of a hybrid approach like Sen's is that it allows the radical instrumentalist about property to evaluate rights (such as moral rights in copyright) consequentially, while recognising that the consequences that matter lie well beyond those that welfare consequentialism recognises.

66 J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1780; J.H. Burns and H.L.A. Hart, London, 1970), 211.

The Duties of Privilege

There are two questions that this section endeavours to answer. How are instrumental duties to be derived from privileges? What kind of duties can be derived? Some examples drawn from cases are used to illustrate the answer to the second question. A word of caution is needed here. An instrumentalist theory of intellectual property would be a normative theory. It could serve in the role of legal exegesis and casuistry. The practical import of the theory would be that the interpretation of intellectual property law would be driven in a systematic fashion by the purpose of that law rather than more diffuse moral notions about the need to protect pre-legal expectations based on the exercise of labour and the creation of value. It would, in other words, be a counter to proprietarianism. The examples which we discuss are intended to illustrate the kinds of duties that can be derived from instrumentalist axioms. We are not claiming that the courts in these instances were in fact working with an instrumentalist theory of the kind we outlined in the previous section.

Intellectual property rights are liberty-inhibiting privileges. Our claim is that instrumentally based privileges are accompanied by duties that fall on the holder of the privilege. If the purpose in creating the privilege is to fulfil some approved goal then it should also follow that the privilege holder is subject to duties not to exercise the privilege in a way that defeats the purpose for which the privilege was granted in the first place. The idea of linking a set of duties to promote the end for which the privilege was designed has some analogies with the conception of government put forward by earlier philosophies of democratic radicalism. Locke, in developing a model of government, made constant use of the concept of a trust in order to establish that the powers of government were circumscribed in various ways by the obligations it had to the people. Referring to the legislature as a 'Fiduciary Power' Locke goes on to say: '*For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited.*'⁶⁷

67 John Locke, *Two Treatises of Government* (1690; P. Laslett ed., Cambridge, 1988), Book II, para 149.

The intuitive idea is that the holder of power has that power limited in ways that are consistent with the object for which that power was given. In the case of property privileges we want to argue that the limitation on the scope of the privilege takes the form of duties. This leads to the question with which we began this section. How are instrumental duties to be derived from the privileges? The answer is that the derivation of such duties is, like the creation of the initial privilege, instrumentally based. More formally, we can say that holders of intellectual property privileges are subject to those duties that maximise the probability that the purpose for which the privilege was first created is achieved. The duties exist as a means to promote the satisfaction of the goal that is the target of the privilege. Without the existence of such duties the grant of the privilege would be self-defeating and the failure to create them would be irrational.

There might also be a non-instrumental way of establishing the existence of the duties we are considering here. Showing this would be harder than the instrumental method we have employed. Briefly the non-instrumental route would involve linking duties to the existence of power. Intellectual property is a sovereignty mechanism. The holder of intellectual property occupies a station of power. Connected to this station are a set of duties that dictate that the power be exercised in a responsible way.⁶⁸ This way of proceeding is different from the instrumentalist derivation we have just discussed. The instrumentalist derivation is based on a means-ends rationality which, amongst other things, counsels us not to act in self-defeating ways. The instrumentalist derivation selects duties on the basis of their goal-promoting utility. The non-instrumental justification we are venturing here proceeds on the assumption that necessarily tied to stations of power are duties. These duties exist irrespective of whether they are needed to satisfy the goal that is the object of the privilege. That may be a consequence of the duties, but not the reason for their existence. These duties may in fact qualify as intrinsic duties. These are duties that do not exhibit a correlative dependency upon the rights of others, but instead exist independently of rights. An example, one which Raz develops, is the duty that the first friend has to the second friend to compensate her for harm done to her even where the

68 The language of station and duties comes from the essay, 'My Station and Its Duties' by F.H. Bradley in *Ethical Studies* (2nd edn, Oxford, 1927), 160.

actions of the first friend that caused the harm were not blameworthy in any sense.⁶⁹ The source of the duty lies in what is entailed by the nature of friendship. The core argument is that certain actions are the subject of intrinsic duties because of a shared conception of what is fundamentally valuable. A respect for the love of children might be an example of another source of intrinsic duties.

By combining the idea that certain duties follow stations of power with the concept of intrinsic duties, it may be possible to prove the existence of duties of privilege in a non-instrumental way. Such a line of argument may have advantages over the instrumentalist justification. There may be occasions where one is concerned not just with the narrower question of how the goal of the privilege is best implemented but rather with the responsible exercise of the power that the privilege confers. For example, intellectual property owners can enforce their privileges through litigation. While there is no question about the existence of this right to enforce, one might also want to argue that there are duties on the holder of the privilege to exercise the right of enforcement in responsible ways. The common law recognised, for example, that a person relying on an *invalid* patent could nevertheless make threats of litigation that were calculated to destroy the business of others:

Many persons would immediately cease selling an alleged patented article rather than run the risk of being drawn into a litigation which might be of a very formidable character. And the utmost danger might be occasioned to the public if a man were to take out a patent for a thing notoriously of great antiquity, and by issuing circulars to monopolise a very large trade and destroy the trade of others.⁷⁰

69 For a general discussion of intrinsic duties, see J. Raz, *The Morality of Freedom* (Oxford, 1986), 210–213.

70 *Axmann v. Lund* (1874) L.R. 18 Eq. 330, 336.

In those cases where the threats were without basis, the English law gave the person who was threatened a remedy.⁷¹ The basis of the duty on intellectual property owners not to threaten litigation in certain circumstances might be grounded not, as a matter of normative theory, in the rights of other traders (for that would lead back to instrumentalism) but rather in a shared conception about the nature of the power of privilege in a democratic and just society. Showing that the duties of privilege can in the case of the privileges of intellectual property be derived non-instrumentally is, as we said earlier, going to be difficult. We have not inspected this possibility in any detail, but have merely shown how it might be made plausible.

It only remains to make some general comments about the kinds of instrumental duties one might derive from intellectual property privileges. Clearly, because the duties would have the instrumental purpose of helping to bring about the goal that the privilege itself was designed to serve, the relevant duties would have to be strongly connected to that goal. The kind of instrumental duties that would exist would depend on the way the goal of the relevant privilege was characterised, as well as the behavioural effects it was thought that the privilege would have. So, for example, if the goal of the patent system was stipulated to be simply the production of wealth *and* it was thought that the more of a reward the patent privilege constituted the more wealth would be produced, the instrumental duties needed to support the achievement of the goal might turn out to be few in number, the reason being that it might be argued that, the fewer the restrictions placed on the patentee, the greater the reward the privilege would turn out to be. This argument would only be defensible under an instrumental approach to intellectual property if it turned out to be empirically the case that patent privileges did play a significant role in wealth creation and that minimal duties on the privilege holder had a significant incentive effect.

71 Section 32 of the *Patents, Designs, and Trade-Marks Act*, 1883 dealt with the problem of unfounded threats of patent litigation. See *Driffield and East Riding Pure Linseed Cake Company v. Waterloo Mills Cake and Warehousing Company* (1886) 31 Ch.D. 638 for an instance of its application. Prior to the 1883 Act courts had recognised that a person was liable to an action if he made threats of litigation on the basis of a patent he knew to be invalid. See *Halsey v. Brotherhood* (1880) 15 Ch.D. 514, 518. The equitable principle, that groundless threats of litigation could not be used to harm the trade interests of others, was also recognised in the US. See *Emack v. Kane* 34 Fed. R. 46 (1888).

Other characterisations of the goal of the patent system would produce a different or expanded set of duties. The history of the patent system is instructive in this regard. One historically important goal of the English patent system, as we have seen, was to help create certain trades or industries thought to be vital to the needs of the country. So one finds early on in the evolution of patent law the view that patentees had a duty to work the patent in the realm so that relevant industrial expertise was made accessible to all. Various English patent statutes contained provisions prohibiting the abuse of patent rights. A reading of these provisions shows that their purpose was to facilitate the transfer or circulation of the patented knowledge in the United Kingdom.⁷² The English courts in fact went a long way towards imposing instrumental duties on the patentee in order to ensure that this particular goal of the patent system was met. One case laid down that patentees had to attempt to create a demand.⁷³ Compulsory licensing in part can be seen as the remedy for the failure by the patentee to abide by the instrumental duty of diffusing knowledge.⁷⁴ Another example of what we would term 'instrumental duties' is to be found in US court discussions of the existence of the misuse of copyright defence and the misuse of patent defence. The misuse defence bars a plaintiff from succeeding in an action for the infringement of a copyright or patent in those cases where the plaintiff uses the privilege in a way which is inconsistent with the public policy that lies behind the grant of the privilege.⁷⁵ The misuse doctrine is itself an example of a privilege-related duty that might be naturally deduced under instrumentalist axioms about intellectual property. In passing we might observe that, under an instrumentalist

72 See, for instance, section 27 of the *Patents and Designs Act*, 1907 (allowing for the revocation of patents that were mainly or exclusively worked outside the UK).

73 See *Boult's Patent* (1909) 26 R.P.C. 383, 387. See also *Kent's Patent* (1909), 26 R.P.C. 666; *In the Matter of Johnson's Patent* (1908), 25 R.P.C. 709, 727.

74 For an elaboration of the motives for compulsory licensing in the United Kingdom, see W.R. Cornish, *Intellectual Property* (2nd edn, London, 1989), 206–208.

75 For a formulation of the defence as a principle of equity, see *Morton Salt Co. v. G.S. Suppiger* 314 US 488 (1942). For an application of the defence in copyright law, see *Lasercomb America, Inc v. Job Reynolds* 911 F.2d 970 (4th Cir. 1990). The defendants had bought some software from the plaintiff, made some infringing copies and then released a version of the software that turned out to be almost identical to that of the plaintiff's. Despite their conduct the defendants were able to plead successfully the misuse of copyright defence. The plaintiff had inserted provisions in their licensing agreement that obliged any licensee not to develop software similar to the plaintiff's. The purpose of the plaintiff was clear. They were trying to use copyright to monopolise the idea of computer-assisted die manufacture. The attempt to use copyright to gain control of an idea amounted to a misuse of copyright (see 911 F.2d at 979).

theory, the duty not to misuse intellectual property would be a duty that existed independently of the effect of the defendant's conduct on the plaintiff.

Conclusion

The overall direction in which the instrumentalist attitude would take intellectual property should now be evident. It would aspire to be a replacement for proprietarianism. Instrumentalism would require a strongly articulated conception of the public purpose and role of intellectual property. The juristic development of intellectual property law would have to adhere rigidly to that purpose. Instrumentalism would require an old-fashioned way of talking: the language of property rights would be replaced by the language of monopoly privileges. The grant of these monopolies would be tied to the idea of duty. Duty-bearing privileges would form the heart of an instrumentalism of intellectual property. Under instrumentalism intellectual property would be located in the context of some broader moral theory and set of values. Property rights would be morality's servants and not its drivers. Finally, an instrumentalist theory of intellectual property would rest upon a naturalistic empiricism. Legislative experiments with these rights would be driven by information about their real-world costs and abuses.

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