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Abstract
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BOOK REVIEW

'A PHILOSOPHY OF INTELLECTUAL PROPERTY'
by Peter Drahos

APPLIED LEGAL PHILOSOPHY SERIES, DARTMOUTH, 1996,
257 pages.

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This long awaited book by Peter Drahos is quite deliberately entitled *a* philosophy of intellectual property. It is not simply a history of the philosophy of intellectual property, but presents Drahos' own understanding and model of an underlying philosophical framework. However, Drahos' method is one of frequent reference to, and interaction with, historical schools of thought: his own philosophical contribution is thoroughly contextualised.

The book begins with an 'Introduction' and then a chapter entitled 'Justifying intellectual property: Back to the beginnings'. The latter contains a historical account of the concept of intellectual property law, as rights in *abstract objects*, beginning with Roman law and through to theories surrounding the notion of choses in action in English law. Unfortunately, this chapter unavoidably struggles with two problems: the breadth and length (in time) of its subject matter; and some assumptions as to the historical continuity of notions of non-real property that, within the scope of the work, could not be sufficiently explored. Much of the historical evidence is difficult to interpret, and there is simply not the room to do it justice. This difficulty does not reoccur in the book: other chapters are sharply delineated, focused and serve a more clearly identifiable purpose in the overall narrative of the book.

In Chapter 3 'Locke, Labour and the Intellectual Commons' Drahos' training in philosophy is clearly reflected in his exceptionally lucid account of Locke's *theorem*: labour + nature = property. Although Locke was concerned with the notion of property and paid scant attention to

1 For that reason intellectual property laws protect rights for far longer than necessary to fulfil an incentive function, but also to permit the organisational function to be fulfilled.

intellectual property, his general theory has been of such overwhelming importance that it is an appropriate starting point for Drahos' analysis of modern theories of property *and* intellectual property. Drahos uses, in the typically well-executed fashion of this book, the debate concerning Locke to introduce some of his own key philosophical concepts in intellectual property law: the relationship between property rights and the intellectual commons, the notion of positive community (free for all to use) and negative community (free for all to take), and the dangers inherent in the latter notion.

In the next chapter, 'Hegel: The spirit of intellectual property', some of the most brilliant passages of the work are to be found. Drahos' profound understanding, his mental reference to primary source materials with which he is obviously very familiar, and the clarity of his exposé attest to excellent scholarship. Anyone who has struggled to understand Hegel's theories and relevance will find this chapter extremely helpful. The considerable importance of Hegel's theory of the will to intellectual property law becomes apparent. Hegel's instrumentalism, which sees property rights as enabling the exercise of subjective freedom, is close to Drahos' heart: in the concluding chapter of his book, he calls for an instrumentalist (property as tool) rather than proprietarian (property as right) approach to developing questions in intellectual property law.

In Chapter 5, where he considers 'Marx's story', Drahos again generates a dynamic dialogue: here between his own ideas about *intellectual* property and the general property theory of Karl Marx. The scant attention Marx paid to *intellectual* property is not a drawback, but offers Drahos a unique opportunity to generate ideas and expose Marx's undoubtable relevance to the philosophy of intellectual property. Again these passages are amongst the most fascinating and beautifully constructed of the book; Drahos makes a very valuable contribution. Through the analysis of Marx's ideas he clearly formulates the relationship between intellectual property and economic change in capitalist systems: capitalism is dynamically dependent on creative labour, and intellectual property law undertakes the task of integrating creative labour into its system of production. Drahos sees clearly that, therefore, in a capitalist system, intellectual property equals capital equals power. Old forms of inequality, Drahos points out, are, in an information society, patterned around the ownership of productive forces, of which intellectual property is one. Knowledge workers thus find themselves in conditions of alienated labour. Drahos uses Marxist analysis to contextualise his main argument that the excessive private accumulation of information through 'fuzzy' intellectual property law disempowers the mass of knowledge creating individuals, all the more so in a capitalist society inescapably dependent upon new knowledge generation.

In Chapter 6 'Property, opportunity and self-interest', Drahos relinquishes the technique employed in the previous chapters, no longer developing his ideas by means of a dialogue with history, but squarely

presenting his own thoughts. This chapter states the dangers inherent in the expansion of intellectual property rights in terms of the actions of self-interested actors in the market place: '[...] property rights in abstract objects offer these holders strategic opportunities within the market place. These act as a siren call to actors to think about the use and redesign of these rights to suit themselves. The result is that the collective interest and self-interest part ways'. (p.120). Further Drahos points out that intellectual property rights are paradoxical, in that the way they create an incentive to generate new information, the distribution of which is in the public interest, is by restricting access to the information created. It is thus essential to strike a fine balance between the incentive function and the distributive function of intellectual property laws, between the public and the private interest; capture of the process of formulating and reformulating intellectual property laws, by actors in possession of information, may lead to an unfortunate imbalance. Within a competitive market, where Drahos equates competition with imitation, naturally self-interested actors are attracted to strategies which will enable them to restrict imitation. Property in abstract objects, because of its 'fuzzy' edges, generates more opportunities to change the nature of the privilege. The risk that this will result in laws that on a macro analysis are detrimental to the public interest, must be guarded against.

This is the crux of Drahos' message, his philosophy. It is a philosophy that is not ontological, phenomenological, static or rights based, but that emphasises the dynamic nature of intellectual property law and identifies its normative risks. It thus goes beyond a theory of property, to construct, ingeniously and convincingly, a theory specific to *intellectual* property.

In Chapter 7 Drahos further expands his theoretical base. A link is forged with the chapter concerning Marx: abstract objects are a source of power because they are a form of capital. Abstract objects have a sovereignty effect in that they promote the concentration of power around individuals in a society, rather than its diffusion. If intellectual property rights are allowed in key resources (eg. genes), power will accumulate. Fuzziness of intellectual property laws will allow strong actors to influence rules to accumulate more power; uneven distribution of power creates or perpetuates a relationship of dependency.

In Chapter 8 Drahos addresses the same issue - the risks of excessive accumulation inherent in the fuzziness of intellectual property law - no longer in terms of power relationships, but in terms of (Rawlsian) justice. This amounts to a very ambitious project to develop a theory of *Information Justice*. Information is advanced as a primary good (it plays a crucial role in proceeding to a goal, or in satisfaction of want), and Drahos wants to outline what the relationship between property and information ought to be through the lens of a theory of contractarian justice; he argues for the distribution of information on the basis of justice. 'Parties in the original position [as

painted by Rawls in his theory of distributive justice], our argument suggests, would never agree to an arrangement under which some high level of this primary good, a good that mattered to them both politically and economically, fell into the orbit of private power' (p.193). This approach would compel the parties to think about intellectual property in an instrumentalist fashion, since under a contractarian and constructivist view of justice, property is not the basis for justice but an instrument of justice.

That instrumentalist view of intellectual property is expanded upon in Chapter 9. Drahos contends that talk about *rights* in intellectual property should be replaced by talk about *privileges*. Property rights should not be granted priority over other kinds of rights and interests; where proprietarianism assigns property rights a fundamental and entrenched status, it must be rejected, whether based on natural rights or some other theory. In specific areas of law we should reject arguments based on simple acceptance of a right to property in creations of all kinds, an argument that is in fact prevalent in various debates, of which Drahos provides examples. Instead we should think in terms of property as a mere tool. In this context Drahos clearly circumscribes the philosophy set out in this book: its primary focus is on behavioural aspects of property rather than on metaphysical, ethical and epistemological issues. Property is seen as an institutional mechanism. It is clear that, as Drahos himself points out, an instrumentalist philosophy of intellectual property is intimately related to economic approaches to law, and places great emphasis on the social cost of intellectual property law.

The instrumentalism the author contemplates is not simply means-to-an-end, but must serve moral values: 'Under our property instrumentalism, economists would need to take an interest in distributive theories, [..]. Once, for example, we are persuaded by a model of homogenous economic growth that human capital is more crucial than physical capital, a question arises 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'. At the end of this chapter, Drahos further states: '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'. These are his concluding words.

Drahos in effect discounts the continental European tradition that posits that intellectual property laws protect the natural rights of creators. He prefers an instrumentalist approach based on a largely economic analysis of the effects generated by intellectual property, but he argues for a humanist political economy. He also sees intellectual property as an inescapably political issue. The nature and extent of rights in information will affect the distribution of power in society: knowledge is power. However, information is also to be perceived in instrumental terms: it assists its possessors in generating maximum welfare. Information is not a goal in and of itself but a means to an end: it allows people to plan; it has an organisation effect. The author's emphasis is thus less on knowledge or art for its own sake: more about use of information, than about creative expression as an inherently human action.

Drahos builds his theory of information justice around this instrumental thinking, but this approach raises several questions. Is intellectual property law primarily concerned with information as such? And is distributing information on the basis of justice a meaningful project? One might argue that intellectual property is rather more narrowly concerned with *uses of* information; and is an instrument for the *selection of* information. Its principal function may be seen as the organisation of information streams and the selection of *relevant* information. Information that is of value to some may be entirely valueless to others. For information to have, and generate, value, efficient exchange is thus primordial. This is achieved by protecting it with exclusive rights: to make trading possible and thus maximise beneficial use or welfare, the user (the person who needs the information, to whom it has value) must be made aware of it in a manner which will *not destroy its trading value*: otherwise there would be no incentive to offer it for trade. The crucial question may thus be stated more precisely as, 'how can intellectual property laws be structured to maximise distribution of relevant information to those who need that information?' rather than 'how can information be justly distributed?'.[1] Intellectual property law thus primarily promotes efficient selection and distribution, without destruction of incentive to the provider of the information: this is the balancing question intellectual property law must address. This point illuminates a tension that is unresolved in Drahos' philosophy: to distribute information on the basis of justice or equality does not appear to be an *instrumental* approach but at least internally a substantive one. It may in

fact not be radical enough about the truly instrumental nature of intellectual property law.

One might also question the way in which Drahos, maybe because he so heavily discounts creativity, personality and an intimate relationship between creator and creation, appears to treat information as a pre-existing, static mass. He therefore criticises those who pursue the expansion of private rights at the expense of the intellectual commons; he sees it as an attempt to capture more of a limited and finite resource: information. But somehow this seems to discount the fact that, even in those extreme cases he mentions (eg. genetic information), the right-claimant is not taking from a pre-existing commons (unless, that is, Drahos' commons contains both existing (known) and potential (unknown) information), but adding to the intellectual commons through an individual effort supported by his own resources (because in one way or another intellectual property law mostly limits rights to the *new* or *different*); all that is claimed is a temporary restriction on some uses, before the information enters the commons (and what is the importance of 20 years, say, in the greater scheme of things?). Can it not, therefore, equally be argued that the best way to increase the size of the intellectual commons is to increase incentives to generate new information through allocation of new and broader rights?

Thus whether the mooted 'soft' expansion of rights at the behest of corporate sponsors is necessarily detrimental is difficult to determine. Presumably, if corporations are notional self interested parties they will recognise that extremely broad rights may harm their interests, recognising that imitation is still a main-stay (and probably unavoidably so) of their own ability to compete. Maybe the real danger in expanding the scope of rights lies in its organisational and transactional costs, and where such expansion of rights strangles rather than encourages creativity (in the sense of the creation of something new). From this perspective the dangers are far greater in copyright law than in patents law: the expansion of copyrights may threaten creative imitation, and the creation of an access right may limit the exchange of ideas that generates a truly creative artistic life. Dangers may also lie in attempts to use intellectual property law in ways it is not meant to be used, for instance to monopolise cultural heritage, or genetic natural resources, rather than in the expansion of individual rights. Patents law may well hold fewer dangers, although, surprisingly maybe, there is cause for concern when it comes to information flow and access in education. Drahos hints at the importance of education in the context of human capital (see the quote above) but elaborates the point little. If the effect of patents law is to put fetters on research at universities, i.e. research for education, this is a very dangerous development. The limits imposed on academic scientific publications by commercial patenting requirements are an example. If the purpose of combining research and teaching is to provide graduates with up-to-date knowledge that they will diffuse in industry, anything that results in limiting student access to the most recent breakthroughs etc ... must be counterproductive.

Drahos does well in establishing that intellectual property is not really property at all; but maybe he over estimates its instrumental character and discounts creativity and novelty too greatly. Some of his points require further clarification, such as whether intellectual property is really concerned with *information*, or something qualitatively more limited. He has made us aware in a very cogent fashion of the importance of intellectual property law, and the lack of inevitability in its development: in other words, that it can go wrong, and that our law reform mechanisms at the national and international level do not automatically result in a system of laws that maximises public welfare or the public interest. The price of good laws, one might say, is eternal vigilance. Above all, Drahos has provided a lucid, well argued trigger for further debate and thus made an invaluable contribution to both the global and municipal debate on one of the most important contemporary issues.