On the follies of the so-called Intellectual Property

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Foreword

> *Sometimes we discover unpleasant truths. Whenever we do so, we are in difficulties: suppressing them is scientifically dishonest, so we must tell them, but telling them, however, will fire back on us.*
>
> EDSGER W. DIJKSTRA [4]

The present essay was written as part of an assignment in one of the PhD classes the author was enrolled in. In that particular class, a range of "extra-curricular" topics were covered, and one of those was—you've guessed it—"intellectual property (IP) rights". The assessment consisted in writing about those topics—and I thought it an excellent opportunity to put forth some of my qualms regarding this immaterial and ostensive form of property. This resulted in an essay, a couple of pages of which are devoted to a critique of IP. That part is reproduced (with minor editing) in the next section; the remaining of this one offers a bit of context, explaining how I got to be so big a critic of that notion (also taken from the original essay, but with slightly more editing, to adapt it to this new venue).

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During my undergrad years, I saw the trend of bankrupting ordinary people, often side-stepping the judicial system, just to try to scare other ordinary people into refraining from "piracy", become ever more common. Back then, I still believed intellectual property was a legitimate form of property, although such actions seemed clearly disproportioned. But informatics was my field of study, and because the massive levels of "piracy" were only possible due to cheap digital hardware on the one hand, and internet connections with ever-increasing throughput on the other, I thought those of us working the field should have a say in the matter.

It was that reason that prompted me to begin researching this elusive form of property. The result was tremendous: my views on IP changed almost diametrically, the same being true of "piracy"; it also shifted my political views, aligning them with

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eponymous political movements, of which I am a part to this day. Hence I could not just write about intellectual property, without also levelling against it (at least part of) the criticism that I think it warrants—which is laid down hereinafter.

Intellectual "Property"

> *Part of what academics do is generate ideas and teach. The other, perhaps more important part, is to play the role of "the Bu*l*hit Police." [sic]*
>
> MARK BLYTH [1]

Scottish economist Mark Blyth wrote the above pair of phrases when talking about austerity, an idea that has plagued mainstream European politics for more than half of a decade—and of which he is a fierce critic. I believe however, that the second role he envisages for academics applies way beyond the realm of economics. In particular, when those who work on more technical fields finally (re-)discover that part of their job is *«to look at the ideas and plans interested parties put forward to solve our collective problems and see whether or not they pass the sniff test»*[1]—then, I am convinced that the notion of intellectual property will be quickly ruled unsound. This text offers a brief glimpse at the reasons underscoring that belief.

Perhaps the simplest thing than can be shown about intellectual property is that it is a *redundant* concept, in the sense that everything that can be done with it, can also be done without it. To see why, consider how, for instance, the (aptly named…) World Intellectual Property Organization defines its implementation: *«IP is protected in law by, for example, patents, copyright and trademarks»* [11]. To notice how this makes the concept of IP redundant, consider the question: what would be the "creation of the mind", to use the parlance of WIPO et al., that cannot be "protected" by either copyright, patents, trademarks, or a combination of them, but can be so by IP law? If the reader can come up with such an example, I would be genuinely interested in hearing about it. But in the meantime, I am led to conclude that intellectual property is nothing more than an umbrella term, which lumps together and conflates three distinct legal mechanisms, under a common layer of legal jargon. This serves no purpose, other than perhaps to increase the employment chances of IP lawyers—who have to, *literally*, untangle that which has been artificially mixed together. But I digress: the point is the concept of IP is redundant.

However, while true, that last phrase does not encompass the *whole* truth: as if redundancy was not bad enough, the notion of intellectual property is also downright *misleading*. To understand why, we must take a step back, drop the adjective, and consider the concept of "property" alone. The first thing to realise is that what works to treat as property, *changes* according to circumstances. Paul Graham, a venture capitalist no less, gives a good example: treating smells as property on Earth makes no sense—but it would work on the Moon, where each one must carry his own oxygen bottle [7]. So it stands to reason that what works to treat as property of the intellectual variety would also be subject to change. However what makes IP misleading is a deeper flaw, and to properly understand it we must ask: what does it mean to "treat something as property"?

[1] *Ibid.*, phrase following the quotation in the epigraph.

A rigorous response would take us far beyond the scope of this document; but for the current purpose, it suffices to say that something is endowed with property rights if it can be assigned an *owner*, and he can exercise over it the same power that one usually exercises over regular brick-and-mortar possessions, e.g. cars, tables, houses, etc. Now, these property rights do not spring into existence from thin air; rather they result from massive State action, as even Adam Smith, the father of capitalism, was perfectly aware, more than two centuries ago.[2] And although property rights are enacted for more fundamental reasons beyond merely making markets possible, they are clearly *necessary* for said markets to exist. However, they are not the only way States can regulate economic behaviour; they can (among other things) also use their power of coercion to enforce monopolies, or otherwise protect certain sectors of the economy—i.e. beyond property rights, States can also enforce *market regulations*. I argue that i) IP "rights" are measures of this second kind, and not property rights *per se*; and ii) even if such protective measures were at one time necessary to, as the U.S. Constitution puts it, *«promote the Progress of Science and useful Arts»* [3], that that time is long gone. Unfortunately effectively arguing in favour of ii) is out of the scope of this document; I can only provide references for further reading, which I will do at the end of this section.

About contention i), perhaps the easiest way to show it is to consider *time*: "regular" property rights are *not* time limited. This is in *glaring* contradiction with both copyrights and patents, which have an expiration date from the onset. The error that is made when treating copyright and/or patents as a form of property becomes clearer when one reasons as follows: if the legislators that first enacted copyright and patent law had intended for copyrights and patents to be construed as a form of property, then they would have had no reason at all to put in place time limits for either of them. Taking the contrapositive, and given that said time limits are in fact codified into law, one must then conclude that they could not possibly have thought of either copyright or patent law as being somehow analogous to *bona fide* property rights. On the contrary, both copyright and patents are market incentives to help increase the production of useful inventions and cultural works—the "property" label just gets added afterwords; I will get to that momentarily. And even trademarks, although not set with a time limit, they are nonetheless—and unlike the more general property rights—set for a specific purpose. Namely, as a *consumer protection* mechanism, that is, to give to the consumer stronger guarantees of what he is actually buying. In this light, trademarks are also more accurately thought of as a market regulatory mechanism, which is closer to copyright and patents than to regular property rights.

[2] Cf. Wealth of Nations, Book V, Chapter I, Part II – On the Expense of Justice: *«Wherever there is great property there is great inequality. For one very rich man there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many. The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary»* The book is in the public domain, so no specific edition is given—the text can easily be found online.

So the "property" in intellectual property is probably not the best choice of a word, but why do I go even further and characterise the whole notion of IP as misleading? Because by re-interpreting the referred market protection schemes as being related to the protection of property (in the brick-and-mortar sense), the middlemen of culture changed the context of the discussion, making it easier to convince lawmakers and courts to extend the expiration limits, of both copyright and patents, time and again and again. Tacitly, the discussion was no longer about promoting culture, artists, etc., but rather about enforcing property rights, which made State authorities naturally more amenable—property rights being the main *raison d'être* of the State, as mentioned above. This leads to, in the case of copyright, seemingly never-ending extensions of its expiration deadline—that can even go, jaw-droppingly, *beyond the author's death* (to "protect" the intellectual life beyond the grave, no doubt…); and in the case of patents to a practice known as *evergreening*: making a small change to a product or invention covered by a patent that is about to expire, and then applying for the patent again, for the new "invention".

Examples of this are, for instance, the egregious case of *Steamboat Willie*, Mickey Mouse's first appearance (*in 1928!!*), that should have been elevated to the public domain ages ago, but that due to successive extensions of the copyright term, is still bound by its chains [5]. Or the case of Novartis, that tried to pull the latter trick (evergreening) in India, with a drug which patent was about to expire. In a display of wisdom not often shown by its Western counterparts, the Supreme Court a few years ago threw out the case [12]. Had patents been seen as an agreement between society and in this case Novartis—you make a new drug for us, and we will let you profit of it for 20 years—such dodgy moves as evergreening would have no chance of succeeding. But because they are instead thought of as property, an apparently strong case is then made: that Novartis is just trying to (legitimately) protect what it owns—creating a conundrum that took years of litigation to solve. A very similar reasoning applies to copyright term extensions, especially when they stretch *post-mortem*: in the property mindset, the extensions are simply a guarantee that the copyright can pass from its owner to his heirs—but this is nonsensical for a market regulation! *This* is why I qualify the concept of intellectual property as misleading—and that is probably quite the understatement!

The reasons I posit the understatement possibility are illustrated by the following two examples (I could have chosen many others). The first one is about how in the Netherlands, a group of film makers and distributors decided to sue the government, for *«not doing enough to enforce the ban on unauthorized file-sharing»* [6]. This would be a legitimate course of action if copyright indeed constituted property, and the failure to enforce the respective rights would make the Dutch government liable for serious dereliction of its obligations. But from the perspective of copyright as a market regulation, this is pure nonsense: in fact I can think of no other sector of the economy, even ones where State protection can arguably be justified, where the relevant economic actors would even dream of *suing the State* to get it! In other words that ill-devised course of action was likely only seen as legitimate because copyright was being thought of as genuine property—which I have argued above to not be the case. The second example is taken directly from the Portuguese Copyright Code ("Código de Direitos de Autor e Direitos Conexos" in the original Portuguese, often shortened to CDADC). Article 68, number 2, paragraph f) provides (my translation and emphasis): *«The author has the exclusive right of exercising, or authorising to be*

exercised [...] any form of distribution of the original or of copies of the original Work, such as sale, rental ***or lending***» [2].[3] Infringers can be sentenced to up to *three years* (!!) of imprisonment (*ibid.*, Art. 197)—i.e. you are liable for prison time for (e.g.) the culture-destroying crime of *lending books*! The same pattern emerges yet again: while plausible in the usual property rights scenario—it would just be an assertion that an author is allowed to control his property—it becomes indefensible when copyright is seen as a market mechanism, because to properly enforce it would require for *every* author to be able to control the actions of everyone else, including in transactions *where he is not involved* (but which might involve copies of his work). Clearly no market, free or otherwise, can exist in such a scenario. To say nothing of the more fundamental rights that would have to be disregarded were this law to be effectively enforced…

In light of these facts, one might be justified in stating that labeling IP as merely "misleading", is indeed understating the issue. Given all the above, is it really so outlandish to suggest that maybe what should be done is to abandon the notion of intellectual property altogether?

Regarding contention ii), first of all, a correction is in order: although I stated that "IP rights" were no longer necessary, what I meant to refer to was copyright and patents—but *not* trademarks! Yet another example of the confusion that can be created by using the redundant and misleading intellectual property concept… Trademarks seem to me as being still very much necessary, as a way to help consumers make better informed choices.

I claim then, that neither copyright nor patents are really necessary for the progress of culture and innovation. This is a very strong claim, about which entire new articles could be written—here however, I shall just give two references for further reading. First, an article that shows that in mid nineteen century Germany—a time when copyright was *supposedly* most necessary, due to the high costs of the publishing process—the benefits and rewards, *for both authors and society*, were at their highest when copyright law either did not exist, or was weakly enforced [13].[4] Note that this immediately implies, *a fortiori*, that with today's much cheaper publication mechanisms, copyright is at best an unnecessary incentive (and at worst a hindrance). And second, an article that argues, based on extensive empiric evidence, that while a *weak* patent system might actually encourage innovation, such a system will *always* tend to evolve into a stronger "protection" scheme, that is actually harmful—and thus the best solution is to get rid of the patent system altogether [14].

[3] I owe knowledge of this to Prof. Ludwig Krippahl [8] (Portuguese only). For completeness, here is the quote from the original in Portuguese (with the same added emphasis): *«Assiste ao autor, entre outros, o direito exclusivo de fazer ou autorizar, por si ou pelos seus representantes: [...] Qualquer forma de distribuição do original ou de cópias da obra, tal como venda, aluguer* ***ou comodato;****»*.

[4] I again owe this reference to Prof. Krippahl's excellent blog [9] (again, Portuguese only).

Epilogue

> *The author would like to thank those keen to act as modern-day Inquisitors for no longer playing with fire.*
>
> JOÃO MAGUEIJO [10]

One thing I have not stated explicitly, but that I think is nonetheless conveyed by the previous pages, is that my criticism of intellectual property does not stem from some pre-existing ideologic bias. On the contrary, it is the result of the massive accumulation of contradicting evidence, of which I have presented only a fraction. Nevertheless I am aware that the hypothesis I have advocated is still very much contentious. I ask only whomever detracts from it—i.e. to those who state that it is perfectly correct and legitimate to treat intellectual property in the same manner of regular brick-and-mortar property—that I be shown the accompanying evidence. I have asked for this many times; the answer has so far failed to arrive.

References

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[12] Smedley, Tim. *Patent wars: has India taken on Big Pharma and won?* Last accessed: Feb 04, 2016. URL: http://www.theguardian.com/sustainable-business/patent-wars-india-takes-on-big-pharma (cit. on p. 4).

[13] Thadeusz, Frank. *No Copyright Law: The Real Reason for Germany's Industrial Expansion?* Last accessed: Feb 09, 2016. URL: http://www.spiegel.de/international/zeitgeist/no-copyright-law-the-real-reason-for-germany-s-industrial-expansion-a-710976.html (cit. on p. 5).

[14] Weissmann, Jordan. *The Case for Abolishing Patents (Yes, All of Them)*. Last accessed: Feb 09, 2016. URL: http://www.theatlantic.com/business/archive/2012/09/the-case-for-abolishing-patents-yes-all-of-them/262913/ (cit. on p. 5).