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The Incentives Argument for Intellectual Property Protection¹

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The incentives argument for intellectual property contends that intellectual property protections must be given to creators in order to give them the incentive to create their works. The incentives argument for intellectual property differs from other incentives arguments because the intellectual property incentive works in a distinctive way, by offering a form of monopoly control as the incentive. In theory, that incentive operates to stimulate creation of some work by promising the power to prevent other, similar works from being produced or distributed. I will argue that by enabling creators to prevent the creation or dissemination of other, similar works, the incentives argument for intellectual property is prey to unique philosophical difficulties that do not arise for other incentive arguments, or at least not to the same degree.

To situate the issues I raise, I first comment on some arguments I wish to distinguish and set aside, namely Lockean natural rights arguments for intellectual property. In earlier work I have argued against interpreting the Lockean tradition to support strong individual natural rights to intellectual property, including rights to forbid others' use or consumption of materials, as well as the right to prohibit the production of derivative works (see Shiffrin, 2001; 2007, pp. 653–68). Despite its frequent invocation in support of strong intellectual property rights, the Lockean tradition, as I understand it, is suspicious of such rights. This tradition begins with the idea that we own the world in common, and then directs that property be allocated in such a way as to promote its full and effective use. It is only when exclusive use is necessary for full and effective use that a Lockean natural individual right to the exclusive use of property should be acknowledged.

Although Locke argues that the full and effective use of real property requires certain forms of exclusive control and direction, it is much

harder to extend that claim to intellectual property. Generally, full and effective use of intellectual property does not depend on its exclusive use. On the contrary, typically, intellectual property can be used by many people simultaneously and to different ends without frustrating or impeding others' use.

From a number of philosophical perspectives, whether Lockean or not, this feature of intellectual property – its capacity to be used simultaneously by an indefinite number of people – makes arguments for its exclusive control by private agents suspect. With respect to copyright, this suspicion is justifiably heightened within legal and cultural contexts, such as the United States, that prize uninhibited freedom of expression.²

The problems with natural rights arguments, as well as our continued affirmation of the value of uninhibited expression, have focused recent legal and philosophical attention on a different kind of justification for our private intellectual property regime: namely, the claim that rights of exclusive use and control for a limited duration must be granted because they provide the necessary incentives for the creation of useful inventions and expressive works, works that contribute to a robust speech culture.³ Despite the frequent invocation of the incentives argument, it is surprising how little attention and research has been devoted to assessing the claim that copyright and patent terms of the sort we have are in fact *necessary* to incent creative production.⁴ Whether such terms do provide necessary incentives is a difficult and more complex question than is usually acknowledged. Here, I will set out a few philosophical problems associated with understanding and justifying the incentives argument and the uses to which it is put. I will focus on difficulties with the argument for strong forms of intellectual property protection. These include a fairly long-term ability to control who uses a product, how it is used and, most important, whether similar products may be generated and distributed.

The diverse array of persons who create, produce and distribute intellectual products poses difficulties for making the general incentives claims about them all. Take the claim that strong copyright terms are necessary to provide creators (as distinguished from publishers or distributors) with an incentive to create because such terms offer the greatest leverage for obtaining pecuniary rewards in exchange for production. For many artists, although there is a need to recoup labour and production costs, their primary motivation to create does not hinge on whether substantial pecuniary rewards are offered and does not increase when higher rewards are offered. Their primary interest is often just in

their art and in the process of creation, and for many in its wide dissemination to others. There is some experimental evidence that high levels of reward may deter some creative artists rather than act as an incentive.⁵ Notwithstanding the cynical speculations of a culture permeated by simplistic models of greed and self-interest, many medical researchers' primary motivation is to create products that will cure diseases and promote health. Most academics, as we know, work from these sorts of motives as well as from interests in gaining status and earning a reputation.

To justify anything like our current intellectual property regime, the incentives argument must advance beyond the modest claim that creators need funding to recoup creation and labour costs; and that given the ability of competitors to make cheap copies, the funds creators need may exceed what would be available through the unprotected release of their products and creations on the market. Those considerations do not justify strong schemes of copyright, including the wide sweep of derivative work protection as well as injunctions and criminal penalties. Creators' expenses could be adequately covered through salaries, stipends, compulsory licensing schemes, simple restrictions on direct copying or other schemes, without ceding the full panoply of rights of exclusive use and control over the work and its derivatives. We must distinguish between those situations in which the prospect of control over a work directly or indirectly (as leverage for indefinite amounts of financial gain) operates as a motivation for creation and those situations in which some funding and control over the work during creation may be necessary to make creation feasible. In the latter case, control and funding only facilitate the creation, but their prospect is not the aim of creation. I do not know of any evidence that strong copyright or strong patent protection is the *only* way to facilitate creation in situations of the latter kind. Thus, to justify strong intellectual property protection with an incentives argument, the argument must begin with the strong claim the prospect of strong copyright protection over works (and their derivatives) is itself a necessary motivation for creation, or offers the prospect of significant financial leverage in future bargaining, which is a necessary motivation for creation. It is this argument I address here.

There are difficulties I will set aside about how we could ascertain the optimal incentive level, the least we need to offer in order to motivate creators to produce.⁶ Assuming that we know that strong intellectual property protection is necessary to motivate some creators, there are two other, more philosophical problems about incentives that run deep. One concerns the evaluation conditions of the claim that strong intellectual

property protection is a necessary incentive for creation; the other concerns the justification conditions for the claim that we should provide such protection if necessary.

I will focus on the argument that a derivative works protection of the sort the US copyright regime provides is a necessary incentive for production and creation and is justified where necessary.⁷ (Although my focus is on copyright, many of these arguments apply also to a patent scheme that offers long terms of exclusive use and control over an invention, even to preclude the release of independently invented infringing works.) If these incentives work, they do so by providing a monopoly for a producer of a given work of a particular sort. The producer's work will not have to compete with related versions or derivatives that might otherwise be created. As Rebecca Tushnet put it, copyright law suppresses some speech in order to make other speech more likely (2000, p. 3). Suppose it is true that the derivative works protection provides some incentives for creators to make derivative works of their own, or even to make primary works that they would not otherwise create. Even if this is true to a significant degree, it should not be assumed that for the production of *all* original creative works it is absolutely necessary that there be protection for derivative works.

There is some historical evidence for my scepticism. Wide control over derivative works is a relatively recent component of copyright protection (Goldstein, 1983, p. 209). Books, artworks and other creative works were certainly produced before the introduction of derivative works protection. Nonetheless, even creators who would create without derivative works protection may nonetheless wield that protection to penalise infringers. Legally, they are permitted to do so; they may elect to do so for financial gain even if they did not need this power as a prerequisite for production. Those who want to create derivative works will be deterred by the prospect of liability and criminal prosecution. So, what will be deterred by strong copyright protection includes both derivative works of original works that themselves would not have been created but for the monopoly right as well as derivative works of original works that *would* have been created absent the granting of the monopoly right.

The uncertain net effect of derivative works protection

The justificatory problem is as follows: how can we know and assert with confidence that the works incited through the derivative works protection are superior in some relevant respect (quality? quantity?) to

the works whose production is deterred by this form of copyright protection? How *could* we know this? We are comparing works that now exist with works that have been legally precluded from being created or disseminated. Even if we had examples, how could we generalise from them?

If no creative original work at all were produced absent the derivative works protection, then this justificatory problem would dissolve. If that were the case, all precluded derivative works would depend on the existence of primary works that would not be created without the derivative works protection. If creation entirely ceased without derivative works protection, there would be nothing to compare. But the historical evidence, as well as our knowledge of the motivations of at least some creators, strongly suggests that this is not the case. Some primary works will be created regardless of derivative works protection. An artist may be motivated to produce for other reasons – for instance, a sufficiently powerful interest in writing, painting or sculpting, possibly coupled with a satisfaction with whatever compensation is available for producing the primary work. If some primary works will be created without a derivative works protection, then the question that we face with regard to the incentive provided by derivative works protection becomes far more complicated. The question then becomes whether the quantity or quality of work that we believe derivative works protection incents is superior in either quantity or quality to the precluded work that infringing creators would produce absent such protection.

Suppose that we could run cross-cultural experiments to show that societies offering derivative works protection have one type of culture and societies lacking derivative works protection have another. Even if these cultures were otherwise comparable, and even if we could identify the effects of the derivative works protection (or any other form of copyright incentive), to make sense of the derivative works argument, it would still be necessary to evaluate these cultures and assess which culture is superior. This might prove rather difficult. We would confront hard questions, including how to assess the qualitative merits of the different cultural outputs; how qualitative considerations should weigh against considerations of quantity; how these factors relate to the value of easy, inexpensive public access to creative works; whether it is better for a wide or narrow range of the population to participate in creative activity; how simple and inexpensive consumer access to interesting forms of expression should be; and how these factors interrelate.

We cannot say with any confidence that we have even begun to think about how difficult these questions are, much less approximate an

answer to them. Rather, we have ducked them. I do not know whether this is deliberate or whether, implicitly, we are appealing to the kinds of natural rights considerations that favour the first creator but that, properly understood, do not have a firm foothold in the area of intellectual property.

There is an argument for moving in the opposite direction from what appears to be the default presumption of many that accords strong intellectual property protections to the first creator. Our free speech commitments are to robust, open and widespread public production and consumption of intellectual materials. When we find ourselves in the condition of profound uncertainty I have just articulated (uncertainty about whether copyright protections are in fact necessary incentives for the kind of culture we aim to nurture and uncertainty about whether the work incited by prohibiting the creation of other work is superior to that which we suppress), our free speech commitments should incline us against the deliberate suppression of speech. This is a minimal principle: we should not actively suppress speech on the grounds that suppression will incite better or more speech than is suppressed unless, at the least, we have strong grounds for believing that the speech that is suppressed is on some significant dimension worse.

The problem that I have articulated concerns the evaluation and assessment of the claim that copyright protections provide necessary incentives for optimal cultural production. To rely on this claim, we must be able to articulate criteria for assessing the success of such incentives, but we lack the knowledge of what those criteria are and we lack the information necessary to apply them.

Fair and unfair demands for incentives

Even if the incentives claim could be evaluated, there is another problem with the incentives argument, namely whether it is justified to act on the idea that such incentives are necessary to promote optimal cultural production. Over the last decade, there has been much work done in political philosophy about incentives in a different context.⁸ Although this work has not been applied to intellectual property, it is worth considering what light it casts on the role of and need for incentives in copyright law.

The incentives argument for strong copyright protections bears similarity to a familiar incentives argument in contemporary political philosophy. John Rawls famously argued that in a just society the basic structure would aim to distribute social primary goods equally unless

an unequal distribution would be to the maximal advantage of the least well-off. If those enjoying the smallest allotment of social primary goods under an unequal distribution would be better off than they would be under an equal distribution, Rawls argued that it may be justified, even required, to distribute resources unequally.

When would these conditions hold? Rawls hypothesised that there may be conditions under which the promise of higher salaries or rewards would operate as an incentive to those positioned by talent or social position to be extraordinarily productive (Rawls, 1971, p. 151). So long as a distributive scheme were structured so as to share as much surplus production as possible so that everyone in society would benefit from it – in particular those who end up at the bottom of an unequal distribution – then such incentives, as well as the inequalities they engender, would be justified.

The incentives argument for copyright could be viewed as having an analogous structure. Our society's commitment to freedom of speech creates a presumption of free and equal access to, and use of, expressive materials. The incentives argument suggests the following. If unequal access to cultural materials produces a richer array of such materials that benefit everyone, particularly those whose use is more restricted, then restrictions on speech necessary for such incentives may be justified.

G. A. Cohen's work, in what I think of as the virtue theory of political philosophy, has suggested that the justification for the incentives arguments in Rawls' work has to be made more complex than its standard presentations. As Cohen argues, the mere fact that an incentive is required for production does not necessarily mean that its provision is justified or that the conditions that make it requisite are justified. We should ask why the incentive is required instead of taking it as a given. If the incentive is required because the extra production is especially taxing or time-consuming, that would be one thing. It would be quite another if the incentive is required because talented people ransom their talents, withholding their creative products in order to demand greater compensation. In the latter case, the talented person's motives are inconsistent with the motives of a just person. Cohen argues that such motives are inconsistent with the idea that inequalities are justified only if they are to benefit the worst off, because such a person would be creating an inequality for her own gain. She could be just as productive and accept an equal share of the surplus.

I might put the argument differently, though to the same end. In a Rawlsian just society, a just citizen accepts both the theory of justice and

its justification. So a just citizen accepts that social and natural talents as well as one's market position are arbitrary from a moral point of view. One could not accept these tenets and also use one's happenstance command over socially useful talents for private advantage by demanding premiums for an especially productive work. This would be to treat one's talents and market position as morally relevant, which is inconsistent with believing they are morally arbitrary.⁹ When people demand incentives, one might think that they are acting in an unjustified way; so one might also think that responding to these incentives raises new questions of justice, namely whether one is acquiescing in, endorsing or encouraging injustice. The lesson of this argument is that it is not sufficient to assert that an incentive is required for production; rather, one might want to inquire as to the reason the incentive is required and as to the motives of those who demand the incentive.

I outline this argument not to endorse Rawls' theory in general, or to endorse Cohen's position. Instead, I raise it because there is a parallel to copyright that has not yet been articulated.

The parallel argument about copyright goes something like this. One may ask whether creators who demand incentives are operating from motives that are consistent with their accepting free speech protections and their underlying justifications. We might imagine a range of motives underlying why creators need exceptional incentives for production. If a limited monopoly were necessary to recoup the costs of production, as well as to allow for sufficient resources to ensure producers an adequate livelihood, that would provide strong justification for limited terms of copyright over direct copies of primary works. But, as I suggested earlier, it is hard to believe (and there is no strong empirical support) that the stronger rights of our copyright regime are the minimum necessary to recoup labour and material costs.

There are other reasons for demanding incentives that would be more suspect. For instance, some might be motivated by the idea that copyright protection focuses cultural attention on the creator, by deterring competing or similar types of work. Others may be motivated by the power that strong copyright protection affords the creator to police the quality of derivative works. Some may regard copyright protection as desirable because it gives creators the tools to fend off certain forms of criticism or what they may regard as inferior forms of parroting and endorsement or affiliation. Some seek copyright protection because the limited monopoly allows for more profit than is necessary for an adequate livelihood. Although the first motive, simply aiming to recoup one's costs of production and have an adequate livelihood, is perfectly

consistent with free speech values, the consistency of these other four with such values is doubtful. A person who claims to be in favour of free, robust and open discussion, uninhibited self-expression and a sincere exchange and evaluation of ideas, but who seeks copyright protection in order to try to limit criticism, to suppress disagreement or to stifle creative reaction and mimicry, would seem to be acting from inconsistent motives.

In the United States, private citizens are not constrained directly by the First Amendment which codifies the US constitutional commitment to freedom of speech. Their motives need not comport with its values. But, morally, private citizens are constrained as virtuous democratic citizens. The First Amendment is not merely a constraint on government activity; it represents a public commitment to a free speech culture. Our community must decide how it wants to respond to those who act from motives that are inconsistent with endorsement of the First Amendment. Whether or not it is justified to suppress speech in order to incite more or better speech is already a vexed question. Whether we should do so to indulge motives that are fundamentally at odds with the motives necessary for a well-operating free speech culture poses an even greater challenge.

These difficulties suggest that we should question the structure and empirical basis of the incentives argument in greater depth. Further, we should inquire what motives make it necessary (if this is true) to provide monopoly incentives for creative production, and then ask whether, given our free speech commitments, we should acquiesce in such motivations.

Notes

1. This is an edited and footnoted transcript of remarks made on the 'Philosophical Perspectives' Panel of the Symposium on the Rule of Law in the Information Age at The Catholic University of America, 10 October 2002. A shorter version of some of the points appears in Shiffrin (2007, pp. 653–68). I am grateful to William Wagner, Susanna Fischer, C. Ed Baker, David Goldman, Lisa Lucas and Collin O'Neil for helpful comments.
2. Others have explored the First Amendment/copyright tension in depth. See, Baker (2002, p. 891); Benkler (1999, p. 354); Gordon (1989, pp. 1435–65; 1992, p. 149; 1993, pp. 1533–40); Lemley and Volokh (1998, p. 147); Lessig (2001, p. 1057); Nimmer (1970, p. 1180); Litman (1990, pp. 965–1063); Netanel (1996, p. 283; 2001, p. 1).
3. This is the justification articulated in the US Constitution (Article 1, §8, clause 8).

4. For a broader examination of incentives (and where we lack information about them) in the creation and exploitation of intellectual property, see Landes and Posner (2003, pp. 9–10): '[T]he economic arguments we make for intellectual property protection are not based primarily on a belief that without legal protection the incentives to create such property would be inadequate. That belief cannot be defended confidently on the basis of current knowledge.'
5. See Amabile (1996); Hennessey and Amabile (1998, pp. 674–5). Of course, artists are not the only players in this field. Many of the actors are not creative people, but rather distributors or publishers whose motives may differ substantially from those of creators.
6. For those artists who do meet the motivation profile presupposed by the argument, those who require significant financial incentives to produce, the problem is to understand and develop an independent criterion for what the least necessary incentive would be, as opposed to the price the creator would most prefer. In some cases there may be close rivals or substitutes, but in other cases, there may not be: the works may be unique and this may form some of the motivation for wishing in particular to incite them. For some sorts of work, creators often have, or, depending on your point of view, necessarily have, an exclusive relation to the material that they produce. Hence, it is difficult to develop arguments about the ceiling for an incentive that would have a source independent of the testimony of the person who demands it. Unlike other kinds of markets, there are no other possible providers. One cannot claim that one could obtain the same material more cheaply and thus have an independent criterion for the ceiling for these incentives. Where there are no close substitutes or rivals, there may be situations in which the creator is willing to call our bluff merely for the sake of establishing a strong bargaining position now or for the future. She may hold out for what she asks because the possibility is open that holding out will get her what she wants. Were there no such potential, she would create for a lower reward and would prefer those terms to not creating at all. In such cases, what appears to be a 'necessary' incentive could represent a higher level than is in fact necessary. See also Shavell and Ypersele (2001, p. 525), who argue that even where maximal reward is the incentive of the creator, reward systems may be comparable to or better than intellectual property systems and may avoid the social costs associated with monopoly pricing.
7. The Copyright Act defines a 'derivative work' as 'a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work"' (17 USC §101). The right to prepare derivative works is reserved to the owner of a copyright (17 USC §106(2)). For an attempt to determine the optimal scope of copyright with a focus on derivative works protection as an incentive, see Lunney (1996, p. 483).
8. G. Cohen (1995a, pp. 160–85; 1995b; 1997, pp. 3–30; 2000); J. Cohen (2001, p. 363); Estlund (1998, p. 99); Williams (1998, p. 225).

9. This form of the argument requires citizens to know and accept the justificatory basis behind the principles of justice. In that sense, it rests on a stronger premise than Cohen's. But this formulation avoids the controversial claim that the principles of justice that regulate the social structure should also serve directly to regulate individuals within the structure.

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