

Proceedings of the 8th International Conference on Human Rights

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Conference on Human Rights:
The Rights to Knowledge and Information
in a Heterogenic Society

Edited by

Bronisław Sitek, Jakub J. Szczerbowski,
Aleksander W. Bauknecht
and Anna Kaczyńska

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P U B L I S H I N G

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INTRODUCTION

One of the foundations of the modern European society are human rights. Although the concept developed in the Age of Enlightenment, the anthropocentrism of European culture, without a doubt, is deeply grounded in the mainstream of Greek philosophy, Roman law and Christian theology. The technological development in the twentieth century and gaining new legal, political, economic, migration, historical and demographic experiences brought problems which require multifaceted and interdisciplinary research on the place of human in the modern world. The process of globalization raises the necessity of continued confrontation of scientists' and thinkers' views from the perspective of the developing multicultural society.

The material contained in this publication is the outcome of the 8th International Conference on Human Rights, organized by the Faculty of Law and Administration in the University of Warmia and Mazury in Olsztyn (Poland), in cooperation with the Faculty of Law in the University of Bari (Italy), which took place on 30-31 May 2008 in Olsztyn. The idea which prevailed on the conference "Rights to knowledge and information in a heterogenic society" was giving human rights a central role in the set of rules governing societies.

The selection of issues in no respect can be called accidental. The summit of the European Council in Lisbon in March 2000 created foundations for creating society based on knowledge that is conscious in gaining information and equal access to knowledge. Individual actions of individual countries should aim at creating a human-friendly "information society" which allows creation of new working places and developing information and telecommunication technologies.

To achieve these objectives, according to industrial policies pursued by the European Union development, distribution, and assimilation of knowledge and technology is necessary. The particular importance to EU policy related with the protection of health, agriculture, fisheries, industry and environmental protection has the dissemination of information relating to the living world and the ecosystem.

2 Introduction

The meeting in Lisbon led to the designation of general objectives of European countries, according to which up to 2010 Europe has to become the world's most competitive knowledge-based economy. The conference in Olsztyn is therefore, in a sense, a summary of the assumptions made in Lisbon.

The Earth, through universal access to scientific research, has become a global village. The flow of information circulating in the world is immediate and rapid. However, the unquestionable advantages and benefits, at the same time bring some negative aspects. Information may be incomplete, false, misleading the receiver and can also be used for purposes not related to morality. Nowadays a lot of controversy raises the popularization of facts for which no one wants to take responsibility. Scientific discussions about human rights to participate in the information society are necessary, which particularly concerns the issue of the right to privacy, the right to information and equal access to knowledge.

This broad spectrum of problems which were the subject of the conference, interests not only Polish researchers but also scientists from countries like Italy, Spain, Ukraine, the United States of America, United Kingdom and South Korea. They represent various cultures, which implies differences of opinion on many issues related to human rights.

Publications included in this collective work are the reflection of freedom to express thoughts on difficult topics, which are important for all though. We hope that published works will not only give the readers the possibility of broadening knowledge, but also a better understanding the problems associated with access to information, knowledge, the formation of information society.

INTRODUCTORY PAPERS

LIBRARIES AND INTELLECTUAL FREEDOM

PAUL STURGES

Introduction

The connection between libraries and intellectual freedom may seem obvious but trivial. Libraries as repositories of books and other documents naturally make some kind of contribution to intellectual freedom: but is this contribution worth talking about? Today librarians worldwide would probably argue that it is worth talking about in a way that they would not have done ten or twenty years ago. There are two types of reason why they might do this. The first is the recognition that libraries are taking on a different role: that of providers of access to electronic resources, chiefly via the Internet. This obliges them, whether librarians like it or not, to get involved in the global politics of information in a way that their traditional role generally did not. The second type of reason can be traced to the emergence of a more mature phase of the development of the library profession. Librarians are less inclined to regard themselves as technicians in the acquisition and provision of documents, and more of active managers of information. In the past librarians seldom queried their role in any depth. They took the case for libraries as given, regarded printed documents as their raw material, and cataloguing as their main mission. They were largely untroubled by broader concerns. Today they know that they need to have more clearly articulated views on the ethical dimensions of what they do.

Libraries and Article 19

With the greater demands on the profession that electronic access creates, and the emergence of a comparatively politicised profession, it has become more common to justify libraries in terms of intellectual freedom. In looking for a more formal expression of this, librarians have turned to Article 19 of the United Nations Universal declaration on Human Rights. This states that:

Everyone has the right to freedom of expression; this right includes freedom to hold opinions without interference and to seek receive and impart information and ideas through any media and regardless of frontiers.

This is not merely a statement of principle, but the wording is pregnant with relevant significance. The terms “seek, receive and impart” are, of course intended to apply to any human being, but for the librarian they can be seen as a rather precise description of their professional activity. The reference to ‘any media and regardless of frontiers’ obviously had considerable resonance in the 1940s when they were written, but today they seem like a specific reference to the global information society of the Internet age.

An inference that a modern reader might draw from Article 19 is that, without saying so directly, it calls for the state to give it solid meaning, not just by avoiding interference (censorship and other forms of suppression) in freedom of expression, but by creating and fostering public forums for the exchange of information and ideas. This is certainly the implication drawn by the philosopher Habermas (1991) in his discussion of the public sphere. It also inspires the new Article 100 of the Norwegian Constitution on Freedom of Expression adopted in 2004. This has as its final paragraph:

The state authorities shall create conditions that facilitate open and enlightened public discourse. (Norway, 2005)

This is regarded by the Norwegian authorities not merely as a prohibition on interference in open public discourse, but as an “infrastructure requirement”. It creates a responsibility to provide the means by which individuals can develop a “reflexive identity” through encounters, dialogue and the exploration of alternative perspectives. Consequences include state structures to support the freedom to hold meetings, and to form societies and political parties. It demands measures and institutions to provide the conditions for open and free media. Support programmes for the most extensive and unhindered public access to the Internet, in schools, universities, community centres (and libraries) also follow logically and naturally.

These are clear implications for cultural institutions and the schooling system, but it is the rationale that such statements on intellectual freedom provide for the existence and functioning of libraries that is significant here. Turning again to “seek, receive and impart”, we find here a set of ideas that can be unpacked to very good effect. Libraries provide bibliographical facilities, documents and electronic access for the seeker of

information. At the same time, librarians themselves operate as seekers on behalf of their user population, identifying content either in anticipation of use, or in direct response to demand. Identifying and locating content is, however, only a preliminary to ensuring that the library receives the content on behalf of the user. Finally, the library must be able to impart this content, so that the user is as fully as possible in receipt of what has been required. The process is complete if the user then is placed in a position to impart the information further by any means, including publication of any type that is appropriate.

IFLA and Intellectual Freedom

An enquiry as to IFLA's chief achievements from earlier decades would probably have brought answers referring to, amongst other things, the development of high quality modern cataloguing rules, technical contributions to programmes for the preservation and conservation of library materials, and the promotion of schemes to ensure universal availability of publications. Without wishing to devalue this work in any way, the twenty first century orientation of IFLA adds a major dimension to this. Armed with a rationale based in Article 19, IFLA has adopted positive positions on libraries and intellectual freedom since the 1990s. It has done this mainly, though certainly not exclusively, through its Freedom of Access to Information and Freedom of Expression (FAIFE) core activity. The FAIFE Committee was set up in 1997 and funding was obtained from a number of Scandinavian organisations to support and staff a FAIFE Office in Copenhagen. The Office opened in 1998 and the funding lasted until 2006, at which point its functions were transferred to IFLA's Headquarters in The Hague. In its early years FAIFE has had continuity of direction from its first two Chairs, Alex Byrne from Australia (1997-2003) and Paul Sturges from the UK (2003-2009). Subsequent funding from the Swedish development agency, Sida, for project activity, and the Bill and Melinda Gates Foundation, for IFLA policy work, including FAIFE, has ensured high levels of activity.

The input of FAIFE to IFLA policy has been transforming, but there are still debates to be won. Fairly recently a critic, contributing to an email discussion, dismissed IFLA's emphasis on intellectual freedom as a 'complete and utter irrelevance'. This came not from an old style supporter of librarianship as a technical activity based on organising collections of

books, but from someone with a very public commitment to the greater social involvement of libraries. The potential contradictions of these two positions are not important here and were actually a product of the mental gymnastics required to support information suppression in the People's Republic of China. There is actually a valid point lurking in the criticism, because the critic went on to say that more fundamental rights were "food, shelter, education and health". This makes a perfectly reasonable distinction between primary and secondary rights, although it makes it badly. Food shelter and health [care] can be accepted as primary rights, but education is surely a secondary right if intellectual freedom (as defined in Article 19) is secondary. The separation of education into a primary group and intellectual freedom into a secondary group may well derive from a view of education as instruction in approved ideas and intellectual freedom as an additional luxury only. A more generous view might take both education and intellectual freedom as primary rights, and this is certainly what FAIFE would argue.

The supporting argument that justifies intellectual freedom as a primary human right would first of all identify the value of intellectual freedom to the individual. The free mind can be justified as a contributory factor to the development of resourceful and independent individuals. These individuals are more likely to be able to provide themselves and their families with food and shelter. They are in a strong position to make themselves aware of the lessons of nutrition and good health. The free mind is better equipped to obtain the fullest benefits from education and to flourish in the work environment and job market. This can then be extended to argue that a society in which intellectual freedom is encouraged is one in which the benefits of democracy are more likely to be obtainable. The effects of this on the primary human rights are potentially enormous. The economist Amartya Sen has argued that no independent and democratic country has ever experienced a major famine (Sen, 1981), for reasons that include the responsiveness of democratic governments and the resourcefulness of a free population. The same idea (that a society of resourceful individuals will solve economic problems) can be extended to suggest that an information society can only flourish fully and achieve sustainability in a condition of intellectual freedom. The creativity and enterprise on which an information society depends is hard to envisage in the context of the suppression of information and ideas.

The implications of Sen's assertion about the virtues of democracy, and its basis in intellectual freedom can be extended to the whole sphere of good governance. This argument is being elaborated by FAIFE in a way that will be explained in the next section. The argument suggests that genuinely legitimate government depends for its legitimacy on the consent of citizens who can read and understand policy. This suggests two levels of requirement, functional literacy as such, and a more developed "information literacy" that enables a reader to contextualise and interpret that which has been read. At another stage, there is a need for social groups and organisations that join individuals together to participate in the democratic process on the basis of a shared understanding of policy and its implementation. This, in turn, depends on flows of reliable information and comment from neutral sources, particularly journalists and broadcasters. These information flows likewise call for the existence of continuing scrutiny of the activities of officials and business entrepreneurs. The argument then goes on to suggest that a transparent and accountable society is one in which there are functions that the library can fulfil and processes to which it can contribute. However, such lines of argument may be pleasing to those who devise them, but what do they mean in practice for a global professional body such as IFLA?

The FAIFE programme

As mentioned earlier, IFLA looks to its FAIFE organisation to deliver activities that follow on from the intellectual freedom argument. FAIFE activity is usually described as having three aspects: education, advocacy and intervention. These categories still work reasonably well, but the separation between advocacy and education is not necessarily as apparent as it might have been a few years ago. An indication of what has been done under these three headings will be followed by a slightly more detailed account of FAIFE's 2008 advocacy and education work.

Under the heading of "education" the IFLA/FAIFE World Report Series is perhaps FAIFE's most visible activity and its most lasting contribution to the promotion of intellectual freedom. The Series consists of two publications, which have appeared in alternate years, the IFLA/FAIFE World Report and the IFLA/FAIFE Theme Report. The World Reports are built around a survey of freedom of access to information in IFLA's member countries. An increasing number of countries have submitted responses to

the surveys (over 100 in 2008), making the series an increasingly valuable information resource. The Theme Reports consist of a group of specially commissioned articles on a relevant theme. Also under this heading, presentations at conferences, workshops and seminars on FAIFE themes are made as frequently as opportunities and funds allow. This paper itself represents the content of one such presentation. In recent years, presentations have been made in a number of countries in Europe, North and South America, Africa, and Asia. Recent examples are presentations by the Chair of FAIFE, Paul Sturges entitled “Why Intellectual Freedom Matters”, at the BOBCATSSS Conference in Tallinn, Estonia, January 2006, and “Reading as a Dangerous Activity” at the Conference on Reading Promotion, organised by the National Academic Library, Astana, Kazakhstan, April 2007. Published versions of some of these presentations have appeared in journals, and the texts of others appear on FAIFE’s webpages (<http://www.ifla.org/faife/index.htm>).

Under “advocacy” FAIFE has contributed to the development of IFLA policy development in various ways, including a series of formal statements, such as the

IFLA Statement on Libraries and Intellectual Freedom <http://www.ifla.org/faife/policy/iflastat/iflastat.htm>, which has been translated into 33 different languages. A Statement on Terrorism, the Internet and Free Access to Information <http://www.ifla.org/V/press/terrorism.htm>, was issued in October 2001 as a result of global tendencies to restrict freedom of access to information on the Internet. Then in 2002, much of the thinking behind the earlier statements was rolled into The IFLA/UNESCO Internet Manifesto <http://www.ifla.org/III/misc/im-e.htm>. This calls for free and equal access to online information and has been translated into 14 languages, and formally adopted by many. The manifesto is now supported by a set of Guidelines on freedom of access to the Internet (created during 2006) which expand on the theme for the benefit of individual readers and professional organisations. Current policy-making will be discussed at the end of this section.

The “intervention” aspect of FAIFE’s work for IFLA is the most problematic. Responding to reported incidents of the violation of intellectual freedom connected with libraries invariably requires diplomatic handling. There are possible issues concerning confidentiality because of the danger of reprisals towards complainants. By getting involved in controversial incidents or areas of dispute there is risk to the authority and reputation of

IFLA. In responding to incidents and violations of the right to access information freely, FAIFE takes care to show that IFLA operates independently and does not support any specific political, economic or other special interest other than the promotion and defence of intellectual freedom. This is not an easy line to follow and only the Chair of FAIFE and the Secretary General of IFLA are authorised to take action. There is a practice of close consultations between those two and the President of IFLA before responses to incidents and violations are drawn up. Responses to incidents and violations fall in categories such as: letters to governments, press releases, IFLA statements adopted by the Council of IFLA, and missions to specific countries to investigate the state of affairs. Over the years, FAIFE has responded to about 40 incidents and violations, undertaken missions to Kosovo and Cuba, and successfully carried out a mission to Israel and Palestine in April 2007.

Currently, the main focus of FAIFE activity is developing a Workshop programme (funded by the Swedish development agency Sida), with learning materials that can be used by local presenters throughout the world. The first of these took the IFLA/UNESCO Internet Manifesto guidelines (mentioned earlier) and created learning materials from them. These have been successfully piloted in 2007 and are in full use in 2008. A second such set of learning materials has been developed on the basis that HIV/AIDS is first of all a problem of knowledge and secondly a matter of infection and treatment. This was introduced as a general theme for IFLA in 2003. Its implications for FAIFE were clear. In many parts of world open discussion of sexually-related matters is not socially accepted and thus it was possible for millions of people to contract HIV/AIDS without any idea of its sexual transmission. FAIFE's Workshop package on "Access to HIV/AIDS Information" is already being welcomed by librarians in developing countries during 2008. The next package to be developed, in late 2008, will be directed at mobilising the library profession and utilising the resources of libraries in the struggle against corruption. Key aspects of this will alert librarians to the dangers of corruption in the profession itself, chiefly through the over-close relations between prosperous corporations on the one hand, and underpaid librarians on the other.

The basis for this package is a new IFLA policy on "Transparency, Good Governance and the Struggle against Corruption" (accepted at the Governing Board meeting in April 2008). This was drafted by FAIFE on the basis of a thorough consultative process that included conferences in Zagreb

(December 2006) and Johannesburg (August 2007). The policy has 10 clauses : the first three are concerned with eliminating corruption in the management of libraries; the fourth and fifth support the passing or effective administration of Freedom of Information legislation; the sixth, seventh and eight propose ways in which libraries can be focal points for freedom of information-related activity; and nine and ten support librarians in entering partnerships with civil society organisations to campaign for freedom of information provision and development. This promises to be by far the most difficult area that FAIFE has entered. It is quite obvious that for librarians in highly corrupt and repressive states, the policy and the workshops that can be held on the basis of the policy represent dangerous aspirations rather than immediate possibilities for achievement. However, in other countries FAIFE is convinced that the policy and the learning materials will be of immediate use.

Conclusion

What might have seemed a rather tenuous connection between libraries and intellectual freedom has been explained here both in terms of an argument derived from Article 19, and a programme of activity led by IFLA FAIFE. The library profession is changing. Its image has traditionally been negative or neutral and recent developments will not change this particularly swiftly. However, there is sufficient evidence to support the contention that there is a new information profession growing out of librarianship. Conceptions of intellectual freedom play a major role in this process and serve to make librarianship not merely a rather more attractive profession, but even a somewhat risky one. Intellectual freedom, as codified in Article 19 of the Universal Declaration, is likely to remain a central concern of the library world for the foreseeable future.

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12 Paul Sturges, *Libraries and Intellectual Freedom*

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MAXIMIZING SOCIAL MINIMUMS: POLITICAL LIBERALISM, PROPERTY RIGHTS AND INTERNATIONAL DRUG PATENTS

MITCH AVILA

Introduction: Intellectual Property as a Human Rights

Consideration

In keeping with the theme of the 8th International Human Rights Conference held at University of Warmia and Mazury in Olsztyn, Poland, May 2008 ('the right to knowledge and information as a human rights issue in global society'), this paper considers the question of how to conceptualize information property rights on an international or global level. This is a clear human rights issue given incontrovertible evidence that international trade agreements designed to protect intellectual property rights are preventing the world's poor from accessing life-saving and life-enhancing technological developments. For example and in particular, a global enforcement system regulating pharmaceutical patents has severely limited the ability of the world's poor to access life-saving medications at affordable prices. For some, this is a case of moral conflict: an unfortunate and irresolvable conflict between the natural right to property and the human right to health and medicine. In this paper I argue that this appearance of conflict is illusory and results from the failure to correctly theorize intellectual property rights. In my view, both libertarian and utilitarian (wealth-maximizing) defenses of intellectual property rights are inadequate and only partially correct. Instead, I argue that Political Liberalism—by which I mean any theory of political justice that values fairness and reciprocity in a context of personal liberty (and of which Rawls is the leading representative)—has a useful and theoretically defensible concept of property rights in general and of intellectual property rights in particular. While this paper pays close attention to drug patents in particular, my main claims are meant to be generalizable to intellectual property in all its social guises. As far as I am aware, while there are many libertarian and utilitarian defenses of intellectual property rights, no one has thus far attempted to demon-

strate the relevance of Political Liberalism to this debate. It is my position that Political Liberalism provides the only reasonable theory of political legitimacy, both domestically and internationally. As part of a larger project of showing the superiority of Political Liberalism to competing views, this paper attempts to show how Political Liberalism has sufficient conceptual resources, in this case, a nuanced conception of property rights, to provide a compelling and convincing resolution to a practical and urgent international moral problem. To anticipate my conclusion, I will argue below that citizens and corporations of wealthy, industrialized nations have no intellectual property rights *whatsoever* in poor, underdeveloped nations.

Background: Intellectual Property Rights as Ideology

As is widely known, since the mid-1990s, Western powers, most notably the United States, have used the authority and power of the WTO to implement the TRIPs Agreement (“Trade Related Aspects of Intellectual Property Rights,” as part of the Uruguay Round of negotiations that established the WTO).¹ This agreement requires uniform protection of patent rights by nations operating within the scope of the WTO including minimum standards for pharmaceutical patents. The net effect, not surprisingly, has been that pharmaceutical firms have had “greater scope for price discrimination, a rational move for profit-maximising firms, but exploitive to persons in developing countries.”² A good example of this is India. Prior to the TRIPs Agreement, Indian manufacturers were free to manufacture pharmaceutical products patented in other countries. The result was a competitive local industry: “Domestic producers, both private and public, could, then, supply their populations with basic medicines, at prices often considerably lower than those of the research-based pharmaceutical industry...”³ This

¹ A useful summary of the negotiations can be found in May, Christopher. “The Right to Property: Intellectual Property Rights as Human Rights,” in *The Essentials of Human Rights*, ed. Rhona K. M. Smith and Christien van der Anker (Hodder Arnold: 2005), p. 293ff.

² Cohen, Jillian Clare and Illingworth Patricia. “The Dilemma of Intellectual Property Rights for Pharmaceuticals: The Tension between Ensuring Access of the Poor to Medicines and Committing to International Agreements,” in *Developing World Business* (3:1, 2003), p. 32.

³ Cohen and Illingworth, p. 33.

possibility has now been effectively eliminated by the United States which used its considerable influence to guarantee India's compliance with the TRIPs Agreement.

It is now, I think, widely recognized that the neo-liberal ideology behind these trade agreements has had disastrous effects. Essentially these agreements "imposed on the entire world the dominant intellectual property regime in the United States and Europe, as it is today."⁴ But these legal conceptions of property are poorly suited for many developing countries, especially when it comes to creating fair access to a robust health care system. As Amartya Sen notes, while "We live in an age of science, technology, and economic affluence when... we can, for the first time in history, deal effectively with the diseases that ravage humanity," nonetheless "the reach of science and of globalization has stopped short of bringing reasonable opportunity for survival within the grasp of the deprived masses in our affluent world."⁵ The leading causes of death in the world are, after all, infectious diseases (TB, AIDS, diarrhea, and so forth) and we currently possess the necessary pharmaceuticals and knowledge to prevent the death of tens of millions of the world's poor each year.⁶ The global commodification of medicine achieved in part by intellectual property agreements, however well intentioned it may have been, has had a disastrous effect on the world's poor. As Paul Farmer plaintively remarks "Whether you are sitting in a clinic in rural Haiti, and thus witness to stupid deaths from infection, or sitting in an emergency room in a U.S. city, and thus the provider of first resort for forty million uninsured, you must acknowledge that the commodification of medicine invariably punishes the vulnerable."⁷

What makes this situation even more depressing and outrageous, however, is that it is hard to avoid the conclusion that neo-liberal attempts to impose a uniform market model were motivated, not by profit, but by ideology. Given that the bottom 20 percent of the world's poor represents only 1.3%

⁴ Stiglitz, Joseph E. *Making Globalization Work* (W.W. Norton and Company, 2007, paperback edition), p. 117.

⁵ Sen, Amartya. "Preface," in *Pathologies of Power: Health, Human Rights, and the New War on the Poor*, by Paul Farmer (University of California Press, 2005), p. xvii.

⁶ Farmer, Paul. *Infections and Inequalities* (University of California Press, 1999), p. 3ff.

⁷ Farmer, Paul. *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (University of California Press, 2005), p. 152.

of the world's income, a complete loss of this market to pharmaceutical companies would represent only a trivial loss in profit. Given that as of 1998, the ratio between the richest and poorest 20 percent has grown to 82:1, it is fantastic to suppose that life-saving technologies available in wealthy nations could be delivered to the world's poor through market schemes.⁸ It is difficult to see what precisely is at stake here other than ideology (unless it is simple mean-spiritedness or perhaps an abhorrent form of social Darwinism). One need not be a doctrinaire Marxist (and I trust there are few of these left) to recognize that the driving ideology behind contemporary conceptions of intellectual property rights is a simple and deeply regrettable example of Marx's dictum that "The ruling ideas are the ideas of the ruling class."

Conceptualizing Intellectual Property Rights

Our task is to avoid these crippling ideological conceptions of property. As I have stated previously, Political Liberalism in my view has a defensible theoretical conception of property. Political Liberalism rejects both libertarian and market-based conceptions of property rights and instead conceptualizes property rights within a framework provided by principles of justice designed to insure fairness and equality. The central innovation here is the claim that there are two distinct forms of property, each of which is associated with one of two principles of justice (see below). The first form is 'Personal Property', what Rawls calls a 'basic right' and a 'primary good'.

Among the basic rights is the right to hold and to have the exclusive use of personal property. One ground of this right is to allow a sufficient material basis for personal independence and a sense of self-respect, both of which are essential for the adequate development and exercise of the moral powers.⁹

⁸ This is put well by Dennis Ray and I have here merely updated his figures. Cf. Ray, Dennis M. "Let Them Eat (Genetically Re-engineered) Cake and the Little Purple Pill: A Rejoinder to Miles, Munilla and Covin" *Journal of Business Ethics* (57, 2005), p. 115.

⁹ Rawls, John. *Justice as Fairness: A Restatement*, ed. Erin Kelly (Belknap Press, 2001), p. 114.

Because ownership of property is necessary to advance personal liberty and autonomy, the right to personal property is one of the rights guaranteed by the Equal Liberties Principle (“Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all”)¹⁰. On the other hand, the second form, ‘Social Capital’, is property that has value only within the context of a pattern of social and economic cooperation. Indeed, social capital typically only comes into existence as part of a pattern of social cooperation. (A drug patent, for example, is social capital but not personal property. The patent does not have value outside of a shared system of social cooperation. The drugs in my cupboard, however, are my personal property because possessing them is a way in which I exercise autonomy over my health.) Social capital is regulated by the Difference Principle (“Social and Economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society”)¹¹. The Difference Principle requires that the background institutions of society be structured in such a fashion as to advance the interests of the least advantaged. Whatever institutional structures achieve this are, then, legitimate. Questions about whether social capital is privately or publicly owned are decided according to whatever form of institutional ownership best satisfies the demands of the Difference Principle, that is, by whatever ‘is in the best interests of the worst off’. This in turn is a question of setting up just background institutions that insure fairness and reciprocity, both in terms of social opportunity and wealth.

Property and Entitlement

The distinctiveness of Rawls’ position can be seen in his rejection of the concepts of ‘legitimate expectation’, ‘entitlement’, and ‘desert’ insofar as these are understood as logically prior to rules of social cooperation:

I stress that there is no criterion of a legitimate expectation, or of an entitlement, apart from the public rules that specify the scheme of cooperation. Legitimate expectations and entitlements are always (in justice as fairness) based on these rules. Here we assume, of course, that these rules are compatible with the

¹⁰ Rawls, *Justice as Fairness*, p. 42.

¹¹ Rawls, *Justice as Fairness*, p. 42.

two principles of justice. Given that those rules are satisfied by the basic structure, and given that all legitimate expectations and entitlements are honored, the resulting distribution is just, whatever it is. Apart from existing institutions, there is no prior and independent idea of what we may legitimately expect, or of what we are entitled to, that the basic structure is designed to fulfill. All these claims arise within the background system of fair social cooperation; they are based on its public rules and on what individuals and associations do in the light of those rules.¹²

It is not difficult to apply this model to intellectual property rights. According to this two-fold conception of property, intellectual property rights are part of the background structure of society and as such constitute a scheme of social cooperation. They are simply and only legal constructions ('fictions'). The question of whether or not a particular corporation or person is 'entitled' to an intellectual property right is decided by these principles. These principles require that 'entitlements' to intellectual property rights be part of a larger pattern of social cooperation according to which wealth or property is distributed fairly. 'Fairness' in turn is defined as (a) not violating any personal liberty guaranteed by the equal liberties principle, (b) insuring fairness of opportunity to all persons, and (c) advancing the interests of the least advantaged members of society.

It is arguably the case that contemporary patent law (in the United States and Europe) at least attempts to conform to these principles. While often framed in terms of individual desert and right, "political authorities have recognized for 500 years that the public benefits of wide dissemination [of technology and public benefit] must also be protected."¹³ Drug patents, for example, may provide a corporation with a market monopoly for a limited period, but doing so is at least conceptually in the best interests of the worst off since it provides an incentive for capital investment and risk, supposedly leading to the introduction of useful pharmaceuticals. Note, however, that in contemporary industrial societies, drug patents are only in the 'interests of the least advantaged' given the assumption of just background institutions. These vary from society to society, but the relevant just background institutions include such things as guaranteed employment (and income), access to medical care either through socialized medicine or universal insurance, and so forth. Without these background institutions in place, it is highly doubtful that awarding drug patents could

¹² Rawls, *Justice as Fairness*, p. 72.

¹³ May, *op. cit.*, p. 293.

reasonably be seen as a just policy that ‘maximizes social minimums’. For our purposes, the key point is that an intellectual property right exists for Political Liberalism only as part of a complex pattern of social cooperation which itself can reasonably be judged as promoting fairness and equality.

Libertarian Conceptions of Property

Compare this view of property rights with alternative theoretical conceptions of property. On a libertarian or Lockean view, property ownership is secured either through Locke’s ‘labor-mixing principle’ or through legitimate market transactions (as Nozick stressed). On this view, a pharmaceutical corporation would come to own a drug because it developed the drug, which normally includes acquiring the technology to do so through legitimate market transactions. Unfortunately, it is widely recognized that there are some deep conceptual problems with using Locke labor-mixing principle as the basis for intellectual property rights. Most importantly, conceptualizing most intellectual property rights, especially pharmaceuticals, on a libertarian model can only be defended by grossly misrepresenting the process by which the patent was produced. This fact is widely recognized in the secondary literature. Not only are pharmaceutical patents almost always collective projects, but they (a) depend heavily on past research, (b) take advantage of primary scientific research that is not patented, (c) depend on a community of scholars that values openness and the exchange of ideas, and (d) often rely upon public funding. Complex technological patents only come into existence—and thus only have value—as part of a pattern of social cooperation between scholars, business, and government agencies that is almost always so complex as to defy simplistic claims to originality and innovation.

Political Liberalism, for its part however, agrees that some forms of personal property may well be acquired by Locke’s principle. Libertarian conceptions of property rights seem well suited for some intellectual property rights such as literary and artistic copyrights. On the other hand, nothing can be said about ‘entitlement’ or what ‘one deserves’ as compensation for these copyrights. The key point is that intellectual property rights are legitimately regulated by the state according to whatever pattern of social cooperation secures social and economic fairness and reciprocity. Of course, assigning patent rights to the corporation that organized and structured the various contributions of the various sections into the creation of a

useful drug is normally a fair and reasonable decision,¹⁴ but it is critical to recognize here that complex pharmaceutical products are *never* the product of individuals or even of ‘corporations’. The technology to create a new pharmaceutical exists only within the context of a complex legal and social system that makes the acquisition of this knowledge possible and that gives it value. Drug development almost always occurs as part of a public-private partnership that includes private capital, but also government grants and research by universities.

Utilitarian Conceptions of Property

Political Liberalism can also be contrasted with utilitarian or ‘wealth-maximizing’ conceptions of property ownership. (Posner is a representative example of this view in legal theory; Friedman for economic theory.) On this view, intellectual property rights are assigned according to whatever schema maximizes social wealth. A drug patent that gives a corporation a market monopoly is thought to be wealth-maximizing because it encourages capital investment in a risky field by promising windfall profits. The

¹⁴ In a discussion about native endowments, Rawls states that “what is regarded as the common asset is the distribution of native endowments and not our native endowments per se....[T]he question of ownership of our endowments does not arise....What is to be regarded as a common asset, then, is the distribution of native endowments, that is, the differences among persons” (Justice as Fairness, p. 75). Although the context is different, the same principle applies to ownership of intellectual property. It is not the intellectual property that is the common asset. Rather, the common asset is how that intellectual property is part of a pattern of distribution that produces differences between persons. If we assume a background maximin principle, then ownership becomes irrelevant per se. What is relevant is how those ownership rights contribute toward maximizing social minimums. Of course, in most instances, when it comes to social capital, it is profit, not ownership that is at stake.

In my view, one of the conceptual problems with Lockean conceptions of property is that the emphasis on ownership fails to answer the more pressing and relevant question about the degree to which property ownership legitimates rent-seeking behavior. For its part, Political Liberalism can then fully incorporate Lockean conceptions of property ownership as long as they are conceptually distinguished from the concept of a ‘fair entitlement’ through market transactions.