Kenneth Einar Himma

Associate Professor
Department of Philosophy
Seattle Pacific University (USA)

http://home.myuw.net/himma

A DEONTOLOGICAL TWO-PRONGED MORAL JUSTIFICATION FOR LEGAL PROTECTION OF INTELLECTUAL PROPERTY
INTRODUCTION

Whether or not intellectual property rights ought, as a matter of political morality, to be protected by the law surely depends on what kinds of interests the various parties have in intellectual content. Although theorists disagree on the limits of morally legitimate lawmakers authority, this much seems obvious: the coercive power of the law should be employed only to protect interests that rise to a certain level of moral importance. We have such a significant interest in not being lied to, for example, that ordinary unilateral lies are morally wrong, but the wrongness of lying does not rise to the level of something the state should protect against by coercive criminal prohibition. Indeed, it would clearly be wrong for the law to coercively restrict behaviors in which no one has any morally significant interests (i.e., interests that are important enough from the standpoint of morality that they receive some protection from moral principles) whatsoever. Using the coercive power of the law to restrict freedom is not justified unless the moral benefits of restricting the behavior outweigh the moral costs involved in using force to restrict human autonomy and freedom.

In this essay, I argue that the interests content-creators have in the content they create (or discover) (1) outweigh the interests of other persons in all cases not involving content necessary for human beings to survive, thrive or flourish in morally significant ways, and (2) are sufficiently important that they deserve some legal protection. I also argue that (3) ordinary considerations of justice support the idea that content-creators have a morally protected interest in the value they introduce into the world through their intellectual creations. While (1), (2), and (3) do not obviously imply the existence of moral rights to intellectual property, they surely present a prima-facie justification for using the coercive power of the law to protect the interests of content-creators in the contents of their creations. And one eminently sensible way of protecting their interests is for the law to allow them limited control over the disposition of their creations. How much control they should be allowed is a further issue I do not address here.

TWO ISSUES CONCERNING THE JUSTIFICATION OF IP RIGHTS

There are two ethical issues regarding IP not clearly distinguished in the literature. The first is whether authors have a morally significant interest (i.e., one that receives some protection from morality) in controlling the disposition of the contents of their creations, which would include some (possibly limited) authority to exclude others from appropriating those contents subject to payment of an agreed-upon fee; this interest might, or might not, rise to the level of a moral right. The second is whether it is morally permissible, as a matter of political morality, for the state to use its coercive power to protect any such interests authors might have in the contents of their creations. Such protection might, or might not, constitute a legal right, as there are other legal mechanisms for protecting peoples’ interests.

These are logically distinct issues. The first concerns moral standards that apply to the acts of individuals, while the second concerns moral standards that apply to the acts of the state. Not every morally protected interest an individual has is legitimately protected by the state. For example, I have a morally protected interest in not being told lies, but it would not be legitimate for the state to create a
criminal or civil cause of action that makes a person liable for every lie she tells. Conversely, not every morally legitimate law protects some interest antecedently protected by morality. Apart from the existence of a law requiring people to drive, say, on the left-hand side of the road, no one has a morally protected expectation that people drive on the left-hand side of the road. Such an interest arises only after the enactment of a law requiring as much – and it arises because that law has been enacted. To put the point another way, the state may not legitimately enforce every moral rule that restricts the acts of individuals, and there are some rules the state is obligated to enforce that are not moral rules.

What individuals morally ought to do and what the law morally ought to do are issues that fall into two different areas of normative ethical theorizing because the law regulates behavior by coercively restricting freedom and hence impinges our moral right to autonomy. Because our right to autonomy includes a morally protected interest in not being subject to coercion, the state’s use of its coercive machinery to enforce law raises special moral issues that cannot be resolved simply by recourse to ordinary moral standards governing the behavior of individuals. A special moral theory that is concerned with identifying the moral standards that govern the state’s use of force is needed – a theory of state legitimacy or, otherwise put, a theory of legitimate state authority.

Of course, the two issues are sometimes connected. Surely, part of what justifies the state in coercively criminalizing murder is the moral quality of murder: it is one of the worst moral wrongs, if not the worst (I am not sure, for example, whether torture is worse), one can commit because it violates one of the most important moral rights – the moral right to life. It would be morally problematic to criminalize a behavior and punish it with incarceration or death unless it involves a pretty grievous moral transgression.

It is also reasonable to think that whether legal protection of intellectual property is justified as a matter of political morality turns, at least in part, on the moral importance of the interests of the various concerned persons in intellectual content. If content-creators have no morally significant interest in the content they create and other persons have an urgent need for unrestricted access to content, then it seems reasonable to think that it would be wrong for the state to enact restrictions on access to content of a sort that constitutes protection of intellectual property.

In what follows, I address the issue of whether the state may legitimately recognize and protect IP rights (which, again, need not mirror the content of existing IP law in the western world) because this is, as far as I can tell, the issue about which theorists and laypersons are most concerned. Accordingly, I will explicitly address both the issue of individual morality and the issue of political morality and take care to ensure that the reader is aware at all times which issue is being addressed.

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1 This is not to say that every law creates morally protected interests, much less moral obligations. There are some laws so evil that they utterly fail to create moral interests or obligations. But some laws, like certain traffic laws that properly regulate the flow of traffic to make it safe, clearly do create such interests.
LEARNING FROM LOCKE

The Lockean Approach to Justifying Moral Property Rights in Material Objects and Legal Protection of that Right

The Lockean Argument for a Moral Right to Property

It is instructive to begin with a brief look at the classical Lockean argument for original acquisition of property (i.e., morally permissible conversion of an object that no one owns into an object that someone owns). Locke realized that the existence of a moral right to property depends critically on the idea that persons can acquire a property right in objects to which no one else has a prior moral right (i.e., objects which are not the property of anyone else); for the idea that one can legitimately acquire a property right in something antecedently owned by someone else is comparatively unproblematic: if I own X and am hence morally entitled to dispose of it as I see fit, then it seems clear that I may transfer my property right in X to you by giving X to you, selling X to you, or otherwise abandoning my claim in X.

The ease involved in justifying transfer of property under certain circumstances is straightforwardly seen. The idea that a person with a property right in X may legitimately transfer that right in X to someone else is justified, in part, by conceptual considerations: it is part of what it means to have something fairly characterized as a “right.” Having a right, as a conceptual matter, entails having a corresponding liberty, in most cases, to waive or otherwise alienate that right – whatever right we are talking about. But the idea that a person with a property right in X may legitimately transfer that right in X to someone else is also justified by the specific character of property rights, which explicitly contain a bundle of liberties, including the liberty to alienate an interest in property, other things being equal, as one sees fit. In any event, there are no obvious problems, from the standpoint of ordinary intuition, with the idea that one person can transfer a property right to another person.

Original acquisition of property, however, is another story because our appropriating something that does not belong to us bears some resemblance to theft. While theft is, strictly speaking, the intentional appropriation of someone else’s property without permission or legitimate authorization, the idea that one can take some material thing out of the commons – i.e., an object that does not belong to anyone – and make it one’s own without the consent of any other person requires some justification. If, as Locke expressed the concern, God gave the world to all humanity in common, there is a puzzle about how it is that any one person can acquire an exclusive property right in some worldly object.

Locke’s solution is, of course, justifiably famous and remains the foundation for much classically liberal theorizing about property rights. According to Locke:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are proper his. Whatesoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own and thereby makes it his property. It
being by him removed from the common state nature placed it in, it hath by this labor something annexed to it that excludes the common right of other men (Locke 1690, Chapter V).

There are at least two different constructions of this argument grounded in Locke’s claim that we have a moral property right in our bodies and hence in our labor. On one interpretation, we acquire a property right in antecedently un-owned objects in which we labor because we literally mix our labor and hence our property into those objects; since our property is inextricably mixed into such objects, we attain a moral right to them that is parasitic on our moral property right to our labor. On the other interpretation, we acquire a property right in antecedently un-owned objects we improve by our labor because our labor creates value that did not exist in the world; since we created that new value with our labor and hence with our property, it follows we have a right to the objects we improve with our labor provided that no one else has an antecedent claim to them.

The Lockean Justification for Legal Protection of the Moral Right to Property

As we have seen, the issue of whether we have a moral right to X and the issue of whether the law, as a matter of political morality, should use its coercive force to protect or enforce the moral right to X are different issues. Again, because the law regulates behavior through coercive means, something that is presumptively wrong because inconsistent with the moral right to autonomy, the claim that X is morally wrong does not entail that X can legitimately be criminalized or legally prohibited. A special theory of legitimate political theory is needed to work out the conditions under which any set of acts can legitimately be coercively prohibited by the state.

Locke had an influential theory of legitimacy, as well as a theory of natural moral rights. Locke was a social contract theorist whose theory of legitimacy is grounded in claims about what people agree to as a means of escaping the so-called “state of nature” – a pre-social state in which there are none of the benefits associated with society and social cooperation, including no friends, art, science, education, technology, etc. Material scarcity under such conditions is extreme; competition for those scarce necessities is fierce, as persons in the state of nature face not only threats from other persons but from animals as well. As Hobbes aptly described it, the state of nature is a terrible state of war of all against all that all rational persons would attempt to escape by contracting to sacrifice their moral rights. Whereas Hobbes believed that persons would give all of their freedom to an absolute sovereign, Locke believed that persons would give up only their moral right to retaliate against wrongdoing in exchange for a system of democratic governance that protects and respects natural moral rights, including the right to property.

So Locke argued, first, on the basis of a moral theory dealing with individuals, that we have a natural moral right to property and then, second, on the basis of a moral theory dealing with states, that the law is morally obligated to protect the moral right to property – which is exactly the two-pronged strategy that any argument ultimately concerned to justify legal protection of a moral right must take.

2 “Legitimate” is a moral term. To say that the state may legitimately do X is to say that it is morally permissible for the state to do X; to say that the state may not legitimately do X is to say that it is morally wrong for the state to do X.
Problems with the Lockean Argument for a Moral Right to Property

The problems with the Lockean argument for a moral right to property are as well known as the argument itself. First, it is simply not clear that it makes sense to think of our relationships to our bodies as property relations. While we naturally use the term “my” to refer to our bodies, we do not intend this pronoun in the same way we use it when talking about other objects. I am not my house, but I am, in part, my body. To characterize the relationship between me and my body as one of ownership seems misleading at best and confused at worst. If someone breaks a window in our home, we would naturally characterize this as destruction of our property; but if someone breaks our nose, we would never think to characterize this as destruction of our property. The latter is a violation of a moral right – namely, the right to be free of unjustified physical assaults; but it is not a violation of a property right.

Second, and more importantly, it simply doesn’t follow from Locke’s premises that we have a moral property right in those un-owned objects we improve with our labor. It might very well be that we forfeit the expenditure of our labor or the value we create when we labor on some object that does not belong to us. If I swim out to the middle of the Atlantic Ocean and somehow fence off a portion and improve it by cleaning it of all pollution, most people will agree that I do not thereby acquire a moral property right in that portion of the ocean. The claim that I own my labor, even if true, does not imply that I own whatever material entities I mix it with or use it to improve.4

Not surprisingly, the consensus among property theorists is that the argument as Locke specifically formulates it is unsuccessful in justifying the existence of moral rights to property – though many more conservative theorists who believe that the right to material property is moral rather than social (i.e., granted by some social entity, such as a state) believe that Locke is on the right track and continue to tinker with the Lockean argument to produce a viable justification for the existence of moral property rights to material objects.

Nevertheless, it is important to keep in mind that the claim that we have a moral right to, or morally protected interest in, property does not automatically yield any results about whether it is legitimate for the law to use the coercive power of the state to protect these interests. The fact that the issue of individual morality and the issue of political morality are distinct is often forgotten by even the best theorists, who consequently leave their positions under-defended. One might have a moral right the state is not morally obligated to enforce and, conversely, the state might be obligated to enforce a legal right that does not correspond to some underlying moral right.

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3 Indeed, Locke’s position is in tension with the Christian doctrine he frequently seems to presuppose. On one common view, we are holding our bodies in trust for God, who is the sole owner of those bodies. I find it somewhat odd to think of human beings as being divine property, but this seems a plausible view to many Christians.

4 As Robert Nozick puts the point: “But why isn’t mixing what I own with what I don’t own a way of losing what I own rather than a way of gaining what I don’t? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?” (Nozick 1974, 174-5).
Of course, Locke’s contract theory of legitimacy faces its own set of problems. Locke believed that citizens of a democratic state like ours give consent to surrendering our moral right to retaliate against wrongdoing – either explicitly by, say, taking an oath or implicitly by accepting the benefits of some state law. One well-known problem here is that accepting the benefit of a legal system cannot be construed as implying consent unless it is voluntary; and we have no choice but to accept some benefits, like clean air and clean water, because we do not have the option of simply picking up and moving to another country. It is up to the other country to allow us to take up residence there. So it is simply false that we have a free and voluntary choice to accept, or not to accept, such benefits. For this reason, doing so cannot be construed as implying consent, which is meaningful only insofar as free, voluntary, and informed. So even if Locke succeeds in showing a moral right to material property, he fails to show that the state may legitimately enforce that right by the coercive machinery of law.

**Applying the Lockean Approach to Justifying a Moral Right in Intellectual Objects**

It is important to note that both interpretations of Locke’s argument for original acquisition of material property depend critically on the assumption that we causally interact with pre-existing material objects. To “mix” one’s labor with some pre-existing object is, at the very least, to causally interact with that object. I can put my labor into a piece of wood only because I can causally interact with the wood in the following sense: my labor changes the form taken by the piece of wood. Likewise, we can improve some material object only by changing it in a way that is more easily appropriated for the satisfaction of human wants or needs. It should be clear that we can change a material object only by causally interacting with it.

Even if Locke’s argument were successful in justifying original acquisition of material property, it doesn’t have any direct or obvious application to intellectual property because this assumption does not apply to intellectual content. If it makes sense to think of intellectual content as constituting objects that exist independently of us, they are abstract objects with radically different properties than material or mental objects (i.e., ideas, thought, perceptions, etc.). In contrast to material objects, abstract objects, if such there be, lack extension, solidity, and spatio-temporal location; it should be clear, for example, that the object denoted by the symbol “2” is an entity of a very special kind: it is intangible and neither here nor there in space. In contrast to mental objects, abstract objects exist without being present to anyone’s consciousness. We can think about the thing denoted by “2” and that is mental content, but the existence of the referent of “2” seems independent of whether there is anyone to think about it. Indeed, it seems reasonable to think that the number denoted by “2” and the proposition expressed by “2 + 2 = 4” exist in a world where there are no minds to think about those objects. We simply cannot causally interact with abstract objects – indeed, this is part of the very concept of an abstract object.5

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There might seem to be some difficult issues regarding the nature of certain artistic content. It seems clear, for example, that a sculptor causally interacts with pre-existing materials when she creates a sculpture; sculptures are, after all, physical objects. Here it is helpful to note that the sculptor has potentially two interests here. One is in the physical object that is the sculpture but this is not the relevant interest from the standpoint of intellectual property debates; there is no issue, after all, about whether the sculptor can exclude people from appropriating the physical object that is that particular sculpture. The relevant interest is the sculptor’s interest in the “content” of that sculpture; her interest is in protecting the content of that sculpture so that it cannot be reproduced in some other material object. The ontological nature of this content seems to be its form, which every copy of the sculpture instantiates. But this form is something that is abstracted from all possible copies, regardless of size, and is hence an abstract object, which has the same ontological status as that of a number but has different properties.

Indeed, it should be clear that artistic content characteristically has the nature of an abstract object. A set of propositions, such as is expressed by a novel, constitutes an abstract object that contains as its members abstract objects since both sets and propositions are abstract objects – if anything is an abstract object. A set of notes constituting a piece of music, as opposed to the physical performance of that piece of music, is an abstract object.

For that matter, the very foundation for expressing any intellectual content consists in abstract objects. A string of linguistic symbols (as opposed to their physical representations on a piece of paper) is an abstract object containing abstract objects as members if, again, anything is an abstract object. Accordingly, novels, plays, and every other form of intellectual content, artistic or not, that is linguistic in character are abstract objects.

What this means, it seems, is that we cannot causally interact with such objects – assuming they exist in a genuine way and are not merely theoretical posits. I can think about the abstract object denoted by “2” but I cannot causally interact with that object in any way. I can express some idea about “2” by means of the appropriate linguistic representation and communicate that idea to you, but I do not seem to have any direct causal access to that object; I cannot perceive “2” by any of the five senses; nor is it plausible to think that I have a sixth sense made for “perceiving” abstract objects. An abstract object might be important enough to warrant the expenditure of a great deal of human energy, but that energy will not be appropriately spent trying to causally interact with it. Reasoning about an abstract object is the way in which we come to understand it and does not involve causal interaction with such objects.

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6 I am indebted to Steve Layman for pointing this out to me.
7 At this point, no claim is being made about the moral character or legitimacy of this interest.
8 Of course, we could not causally interact with purely theoretical posits.
9 This is a standard view of abstract objects. See Rosen 2001.
It is not clear what Locke thought, if anything, about intellectual property, but the foregoing analysis suggests that neither version of the classical Lockean argument can be directly deployed to justify moral property rights in, at the very least, intellectual objects that are linguistic in character, such as novels, poems, etc. If I cannot causally interact with abstract objects, then I can neither mix my labor with an abstract object nor use my labor to create new value by improving some existing abstract intellectual object. The Lockean argument – as he formulated it – would have to be modified in some significant way to apply to these intellectual objects. Further, if all intellectual content is abstract in character, as seems reasonable, the Lockean argument would have to be modified to apply to any intellectual content whatsoever. As Locke formulates the argument, it has no bearing on the issues of intellectual property that currently divide us.

It should also be kept borne in mind that the Lockean argument for moral rights to property tells us nothing about whether those rights or interests should, as a matter of political morality, be protected by the law. Of course, we have seen Locke’s social contract theory is problematic, so even if he could show that we have moral rights to intellectual property, he would not have shown those rights should be protected by law. Again, these are separate, albeit sometimes related, questions.

The Deeper Insight in the Lockean Arguments

Despite these problems, however, the Lockean argument points in the direction of a more promising approach to justifying legal protection of both material and intellectual property. While it is undoubtedly true that the mere fact that I expend my labor in some un-owned object does not imply that I have a moral property right to that object that deserves legal protection, the fact that I labored on the object is of obvious moral significance in deciding whether I have any moral claim to the object that deserves legal protection. After all, it seems clear that I have a morally significant interest in my body and its activities. If this interest does not entail such a right and might be outweighed by other considerations, it is surely one consideration that must figure into determining whether I have a right to, or morally protected interest in, property that deserves legal protection.

Similarly, it seems reasonable to think that the interests of other people in such objects will also figure into determining whether one has something resembling a property right in them. One of the most plausible reasons for thinking that I cannot acquire a property right in some portion of the Atlantic Ocean by laboring on – and improving – it (say, by removing the pollution from it) is the importance of other persons’ interests in the ocean. My acquiring a property right in some significant portion of the ocean can cause tremendous damage to the interests of others. If I also had a right to the airspace above it, for example, this could make it much harder to ship necessities from one part of the world to another, dramatically increasing the costs of transporting goods and thereby resulting in other undesirable effects, such as loss of employment that accompanies the increased costs of goods and decreased demand for such goods. These are interests that are sufficiently important that it is not implausible to think, from the standpoint of morality, they outweigh – and greatly – my interest in the labor I have expended in improving a portion of the Atlantic Ocean. Accordingly, it seems reasonable to think that I fail to acquire a property right in it, not because the fact that I labored on it counts for
nothing, but rather because the interest I have in the labor I spent on it is greatly outweighed by the interests that other people have in that portion of the ocean.

The two interpretations of the Lockean justification of material property rights, then, might fail to show that the expenditure of labor is sufficient to create property rights in intellectual or material objects, but they are suggestive of a plausible approach for determining whether someone should be afforded a limited legal right to exclude others from appropriation of an object. To determine whether the law should allow someone to exclude others from appropriating some material or intellectual object, we must weigh, as a general matter, all the competing interests and determine their importance relative to other moral interests that receive justified legal protection. If my interests in X (1) rise to a certain level of moral importance and (2) outweigh the interests of all other parties, then we have a pretty good reason (though not necessarily a conclusive one) to think that my interests in X are justifiably protected by the law. If the disparity in my favor is great and the consequences of a failure to protect my interest are dire, then we have even better reason to think that my interests in X ought, as a matter of political morality, to be protected by the law in some way.

I do not pretend to have some sort of algorithm for assessing the various interests. Weighing competing interests is a messy, imprecise business that relies much more heavily on gut-level reactions and feelings than other ethical arguments – though it is fair to say that all ethical theorizing – applied, general, and meta-ethical – is, at the end of the day, grounded in such gut-level intuitions. Even so, the imprecise character of such reasoning surely diminishes the level of confidence we can have in any conclusions it supports. However, insofar as one shares these reactions, one is logically committed to any valid inferences made from the corresponding moral propositions.

Despite the imprecise character of such analyses, there are easy cases. One reason most people agree it is wrong to shoot someone in the back as he flees with stolen property is that our interests in life are much more weighty than our interests in property; in just about every case, a thief’s interest in his life is much more important than my interest in the property he steals from me. Life, after all, is sacred (or some secular equivalent of the notion) and property is not. For this reason, most people agree that it is morally wrong, other things being equal, to defend property with deadly force.

But this just gets us a judgment about individual morality; we need more to justify the claim that it is permissible (indeed, morally obligatory) to enforce that moral judgment. This is also not difficult to show on the strength of widely shared moral intuitions. Because our interests in the continuation of our lives is the most important worldly interest we have, it seems clear that no state could be morally legitimate if it did not protect the moral right to life with laws prohibiting the intentional killing of

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10 For a very plausible (non-algorithmic) device for balancing competing claims, see Moore (2001), Chapter 5 and 7. Moore argues for something he calls the Weak Pareto Proviso: If the acquisition of an intangible object makes no one else worse off in terms of her level of well-being (including opportunity costs) compared to how she was immediately before the acquisition, then the taking is permitted. As is readily evident, the Weak Pareto Proviso attempts to balance all the competing interests.

11 In a case where the thief steals something from me that is necessary for my survival, the calculus seems different to me.
innocent persons. Further, because our interest in the continuation of our lives is so much more important than the interest in property, the legal system is morally justified (and perhaps morally obligated) to enforce a law prohibiting any intentional killings of persons except when reasonably appears necessary to escape an attack involving deadly force on innocent persons – and this implies the justifiability of a legal prohibition on killing persons in defense of property.

A similar argument can be made in support of the idea that the law should coercively prohibit acts that cause harm to other people. From a prudential standpoint, my interest in being free of injury caused by, say, a violent assault, other things being equal, is greater than my interest in being free to commit assaults against others; the interest in physical security is, other things being equal, more important from the standpoint of prudential rationality than the interest in freedom to commit such assaults. It seems clear that, other things being equal, a rational person will benefit more from a rule that prohibits such assaults than from one that allows them. It is rarely in one’s self-interest to commit an unprovoked assault on someone; the probability of retaliation outweighs any gain one might achieve in doing so.

Certainly, this is true from the standpoint of morality. Even assuming that we might sometimes have a greater prudential interest in being free to commit unprovoked assaults than in being free from being victimized by them (e.g., if one is, by far, the strongest one on the block – though even the strongest person can be killed by a blow from behind on the head), it is clear that the moral importance of our interest in being free of such assaults greatly outweighs the interest in freedom to commit unprovoked assaults because morality assigns no importance to the latter interest and a great deal of importance to the former. Given the great disparity between the moral importance of the two interests, it seems clear that, as a matter of political morality, the state should enforce a law prohibiting such assaults.

These examples, of course, are merely sketches of the relevant arguments, but they are developed in enough detail to illustrate the plausibility and applicability of an interest-weighing strategy in determining which interests are significantly important from the standpoint of individual morality that they should from the standpoint of political morality be protected by the coercive force of the state. As both examples involve propositions that are uncontroversial, no more is needed, I think, to illustrate the soundness of the strategy than a sketch of its applicability in these cases. There are much harder cases; for example, it is not clear whether and to what extent our interest in being free from offense outweighs, from a moral standpoint, our interest in being free to do things that cause offense. But addressing the difficult cases isn’t needed to demonstrate the plausibility of the strategy here and would probably result in some contestable judgments; the easy cases are all that is really needed here for this purpose.

The general strategy is thus as follows. First, I will attempt to identify the interests that content-creators have in the contents they create and assess their moral significance. Second, I will attempt to identify the interests that people have in the content created by other persons and assess their moral significance. Finally, I will attempt to weigh the respective interests and determine whether there is a
disparity in favor of the content-creators sufficiently large as to warrant, from the standpoint of political morality, legal protection.

ASSESSING THE INTERESTS OF CONTENT-CREATORS AND OTHER PARTIES

The Moral Interests of Content-Creators: The Value of Time and Labor

This much should be clear at the outset: content-creators have a prudential interest (i.e., an interest from the standpoint of objective or perceived self-interest) in controlling use and dissemination of their creations. To devote time and energy to creating intellectual content, time and energy must be diverted from other activities. This means that any particular deployment of time and energy involves costs that are significant from the standpoint of prudential rationality (i.e., those standards governing rational self-regarding or self-interested behavior), including opportunity costs involved when one foregoes other opportunities to devote resources to a particular activity.

It also seems clear that we have a strong prudential interest in not wasting or squandering time and energy. Even if I do not feel like working, my time could be spent doing something that has value to me. Though we tend (incorrectly, on my view) to think of play and rest as counterproductive, it is clear that sometimes time invested in rest and recreation is well spent from the standpoint of self-interest because rest and recreation is rejuvenating. As paradoxical as this may sound, I would rather not waste time that can be spent watching or playing basketball when I have that time available for those purposes. I need time to recharge my batteries to do more productive work.

It is important not to underestimate the significance of this prudential interest. My time and energy matter a great deal to me because I know that I have a limited supply of both. Like everyone else, I am a finite being with an all-too-limited life span. Every moment I devote to a particular task spends one of a limited supply of moments I have in life to do all the things that make life worth living. Squandering these moments is nothing less important than squandering precious bits of my life.

The importance of this prudential interest seems to grow with time; the older I get, the more precious my time and energy seem to me. There are three reasons for this – one biological and the others psychological. First, and most obviously, our supply of time and energy is diminished over time as we get nearer to the end of our lives. Second, we tend to become more sensitive to the fact of our own mortality as we grow older. It is well known that older people have a far more acute sense of their own mortality than younger people and that this sense becomes more acute over time. Third, a person’s experience of time tends to change as she grows older: the passage of a year is experienced as much quicker by an older person than by a younger person.

As a general matter, these elements lead people to assign more value to expenditures of time and energy as they grow older because all draw attention to the unhappy fact that one’s supply of moments is limited; sooner or later, we all die. It seems clear, then, that, as a purely descriptive empirical matter, people generally regard their time and their energy as prudentially valuable.
It is true, of course, that the mere fact that people generally have a prudential interest in something tells us little about whether they have a morally protected interest in it. By itself, the claim that X wants something does not imply that X has a morally protected interest in it. People commonly want things, like prestige and power over others, to which morality affords no significant protection.

But the point here is not just the descriptive point that people generally value their time and energy: it should also be clear that, as a normative matter of practical rationality, people should regard their time and energy as prudentially valuable. Someone who cares nothing about how she spends her time and energy is fairly characterized as doing a disservice to herself - if not to the community in general.

Indeed, I would be tempted to regard such an attitude as signaling some fairly serious psychological disease. Other things being equal, it is reasonable to hypothesize that someone who cares nothing about how her time and energy are spent is severely depressed, and possibly suicidal. It is clearly irrational from the standpoint of prudential interest to care so little about what is, in essence, the central resource for pursuing the goods that make life worth living. Someone who does not value her time and energy at all is, it is reasonable to hypothesize, probably in need of medical or psychological treatment. From the standpoint of prudential rationality, we should care about how our time and energy is spent.

Of course, morality and prudential rationality sometimes depart. It might be that not everything that is reasonably in my interest is of moral value or receives moral protection. Perhaps it is rational from the narrow standpoint of self-interest to prefer having power over other people to not having power over other people. I am not entirely sure about even this, but it seems clear that such an interest has no value from the standpoint of morality and hence does not receive any moral protection – at least none specific to this particular interest.

But the idea that morality assigns no value to what is absolutely necessary to pursue any of the things that human beings ought, as a moral matter, to have seems paradoxical. We cannot pursue anything of moral value without having time and energy. If we have any interests at all that receive significant moral protection (as is true if we have any moral standing at all and especially true if we have the special status of “moral personhood”) because they are morally valuable, then the limited supply of time and energy available to each of us must be valuable from the standpoint of morality because these are the resources that must be spent to pursue any other interests at all. Having time and energy is a precondition for achieving any other interest – and this makes our time and energy very important indeed from the standpoint of morality.

At the very least, this means that, as a moral matter, we should care enough about the expenditure of our time and energy not to waste them. I might not have a moral obligation to myself not to waste my time. But if not, it is not because the interest is not important enough from the standpoint of morality to give rise to a moral obligation. Rather, it is because the idea that a person can owe herself a moral obligation is problematic from a conceptual point of view; it is hard to see how we can be bound to ourselves if, as is often the case, we can waive obligations owed to us by others. All we would have to do, so to speak, to unbind ourselves is simply waive the obligation. The idea that an obligation can be waived by the person who owes it (as opposed to being waived by the person to whom it is owed) is sufficiently problematic as to cast doubt on the idea that we can owe ourselves moral obligations.
But such considerations do not apply to obligations owed to others; there is nothing problematic with this from an intuitive point of view. The fact that time and energy are so precious that they are protected by morality means not only that we should, as a moral matter, value our own time and energy, but also that we should care enough about the time and energy of other people not to waste them. A person’s time and energy are precious not only from a purely prudential point of view, but also from a morally normative point of view. We should care about our and other people’s time and energy because they are so central to ensuring that human beings flourish in all the ways that human beings should flourish. This distinguishes our interests in such matters from interests that are more trivial from a moral point of view – such as our interests in even more affluent standards of living that allow us, say, to buy bigger and more expensive cars.

Indeed, it is not unreasonable to think that we owe a moral obligation to other people to respect their time and energy. Any other obligations we owe them to respect their liberty, life, property, and physical integrity are explained in part by the moral value of the time and energy that is needed to pursue the goods these other values make possible. One cannot pursue important projects if one is severely injured or if one’s liberty is restricted. The fact that time and energy are necessary to pursue anything that our rights to life, liberty, property, etc., enable us to pursue suggests that the moral importance of other people’s time and energy rises to the level of an obligation to respect them on our part.

A stronger argument is available with respect to the moral significance of our interests in our expenditures of time (as opposed to energy or labor). It is reasonable to think that we do, and should, value our time (as opposed to time itself) as an end-in-itself – and not merely as a means. While it might be true that energy is only instrumentally valuable (i.e., valuable as a means) because it enables us to achieve other ends by doing things, time is both instrumentally and intrinsically valuable.12 Our time is, of course, of considerable instrumental value because having some time is a necessary condition to being able to achieve any end; we can be and do nothing if we do not have an available supply of time. But if continued sentient life is, as seems reasonable, of considerable intrinsic value (i.e., valuable as an end-in-itself), then it follows that having a supply of time is also of considerable intrinsic value to a sentient being: someone who has no available time is no longer alive and hence no longer sentient. To have time to do X (for beings like us) is to be conscious for that period and have the ability to devote some of that consciousness towards performing X.

Again, there are two points here – one descriptive and one normative. The descriptive point is that people generally regard the moments of their lives as ends-in-themselves and hence as valuable for their own sake. The normative point is that we ought to regard the moments of our lives as ends-in-themselves and hence as valuable for their own sake. If practical rationality requires that we regard our continuing lives as intrinsically valuable, then it would seem to require that we regard the moments of our lives as intrinsically valuable – since, again, a continuing sentient life consists of the moments that a being remains sentient.

12 For a discussion of the significance of the distinction between intrinsic and instrumental value in ethical theorizing, see Himma 2004a, b, and c.
Moreover, it seems clear from the standpoint of ordinary moral intuitions that people should also regard other people’s time as intrinsically valuable as an end-in-itself – precisely because every other person’s time is, and should be, so intrinsically valuable to her. If, as seems reasonable, we should value the lives of others as intrinsically valuable, then it seems to follow that we should value the moments that constitute those lives as intrinsically valuable.

This suggests that our prudential interests in time are afforded significant protection by morality. While the claim that some resource $r$ is, or ought to be, regarded as instrumentally valuable does not imply that morality protects persons’ interest in $r$; the claim that $r$ is – and ought to be – regarded as intrinsically valuable does seem to imply that morality protects the interest in $r$. As a matter of substantive moral theory, what is, and ought to be, regarded as intrinsically valuable to beings like us with the special moral status of personhood is deserving of moral respect because these values constitute our ultimate ends; and it is very difficult to make sense of the idea that we deserve respect qua persons if what we ought to regard as our ultimate ends do not deserve respect from others.

Indeed, it is not implausible to think that the moral importance of our interests in the expenditures of our time and energy derives from the moral importance of our interest in the continuation of our lives, which rises to the level of a moral right to life that the state is morally obligated to respect. As Don Marquis argues, what explains why premature death is such a grave misfortune is not an interest in the continuation of our lives per se; someone in an irreversibly comatose state may have an interest in the continuation of her biological life, but if so it is morally negligible. Nor is it an interest in the continuation of our sentient lives; someone with a terminal condition in great pain that cannot be alleviated might rationally welcome death as a release. Rather, what explains why premature death is such a grave misfortune (and hence why murder is such a terrible wrong) is that it eliminates any future experience of the goods that make life worth living, which include friendships, family, sex, food, and, more relevantly, the projects that give our lives meaning. These basic goods are intrinsically valuable and are what gives our interest in the continuation of our lives such great importance that they rise to the level of a moral right that ought to be protected by the state.

Our time and energy are the chief resources by which we enjoy these goods and, in particular, pursue the projects that give such importance to our interests in the continuation of our lives. Without a supply of time and energy, we cannot pursue any of these projects, including the projects of creating artistic and other intellectual content. The value of these resources, if derived from the value of a continuing sentient life capable of experiencing what makes life worth living, might fall short of the value of life from a moral standpoint, but it seems clear that it will be of great moral importance.

Indeed, it will be of such importance that not only will the respect owed to other peoples’ time and energy rises to the level of a moral obligation, but also rises to the level of something that the state is morally required to protect through the coercive mechanism of law. If life is so important from a moral point of view that the state is morally obligated to protect it, then the time that constitutes a sentient,

\[\text{13 This is not to deny that morality protects much that we value instrumentally; it is only to assert that valuing something instrumentally is not sufficient to imply morality protects it.}\]
productive life will also be sufficiently important in some cases that the state will be morally obligated to protect it.

This shouldn’t be taken to mean, of course, that the law should criminalize any behavior that has the effect of wasting someone’s time. Other people have competing rights that may outweigh the importance of our time and energy from a moral point of view. This is surely true of certain expressive rights. Your right to try to persuade me of a political position, or even ask me for money, surely outweighs my interest in not having my time and energy squandered. Indeed, I can always minimize the intrusion by simply walking away.

But this is not obviously true of the time and energy I expend in creating content. If someone takes my content without my permission, I cannot minimize the damage done by walking away. Moreover, that person has taken value from me that would not exist in the world but for the expenditure of my limited time and my limited energy. The extent of the injury or damage done vastly exceeds what might be done by someone who merely wishes to have my attention for a couple of minutes. Our interests in the time and energy expended in creating content is on a different level, morally speaking, from our interests in the time and energy that entail an interest in being free from unwanted interruptions.

One plausible way of respecting our important interests in the limited supply of time and energy that goes into creating content is to respect the interest of content-creators in controlling the use and dissemination of what they have expended their time to create. To respect another person’s time requires refraining from doing something that would ultimately convert a worthwhile expenditure of time into a waste of a valuable resource. And it should be clear that legal protection of the interest in controlling the use and dissemination of one’s creation is a value-preserving form of respect. Paying you, for example, a negotiated price for limited use of your creation, and respecting those limits, clearly preserves the value of your expenditure of time. Allowing a content-creator limited legal authority to exclude others from using or disseminating the content she creates might not be the only way to respect this interest, but it is clearly one way to do so.

This is not to suggest or endorse any particular legal mechanism for protecting these resources. In particular, the foregoing considerations should not be construed as endorsing copyright, patent, or trademark protection in its current form. It is, rather, to assert that the moral importance of our interests in our time and energy, given its relation to the moral importance of our interest in the continuation of our lives, warrants some legal protection from the standpoint of political morality. These meta-ethical considerations regarding the sense in which moral protection is grounded in attributions of intrinsic value suggest, then, that we have a morally protected interest in the time and energy we spend on creating intellectual content that, from a moral point of view, presumptively deserves some legal protection. While our interest in the energy spent might be only instrumentally valuable, it is sufficiently central to our flourishing that it is reasonable to think it receives some

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14 One could argue, of course, that authors who do not wish to give away their creations should refrain from expending time in creating content, but one needs an argument in support of this counterintuitive claim that goes beyond pointing out that other people want those creations. As I will argue below, the mere fact that someone wants something does not entail that she has a morally protected interest in it.

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protection from morality. Moreover, our interest in the time we spend is intrinsically valuable and hence deserving of respect. Further, our interests in both our time and our energy are logically related to our interests in the continuation of our sentient lives and derive some of their importance from the importance of our interest in the continuation of our sentient lives, which, again, rises to the level of a moral right that the state is morally obligated to protect by law. And one way of protecting these interests is to allow an author some control over the content she makes available to the world – though, of course, this might not be the only way.

**Interests of Other Parties in Intellectual Content**

The reason there is such a contentious dispute over intellectual property rights is that content-creators are not the only persons with a morally significant interest in intellectual content. Other persons have significant interests in intellectual content that has been created or discovered by others. Because people generally assign significant value to different types of intellectual content, it is quite natural that they might resist theories attempting to justify intellectual property rights that make it more difficult for them to obtain and use such content. And depending on the importance of these interests, such interests may defeat the presumption that, from a moral point of view, the interests of the content-creators deserve legal protection.

As before, many of these valuations are at least partly prudential in character. I value intellectual content for both instrumental and intrinsic reasons, but all these reasons are largely prudential. This is particularly clear in the case of content I value instrumentally (again, as a means to some other end). I might value the content provided by an education because it enables me to earn a better living and achieve a better quality of material living than I could otherwise achieve. I might value a piece of music because it gives me great pleasure when I listen to it. I might value a film because it entertains me for a couple of hours and fills up the time with laughter or other forms of pleasure resulting from intellectual stimulation.

This also seems to be true of some intellectual content we value intrinsically. I value information about the existence and nature of God for its own sake (as well, of course, as for instrumental reasons) but the interests I am looking to satisfy by my pursuit of such information as an end are largely my own. I might value knowledge as an end-in-itself and hence pursue intellectual content for its value, but my pursuits are still being motivated by my interests and priorities, which presumably reflect some sort of view about my well being. The value is an end-in-itself, but the motivation for pursuing it is at least partly because I have an interest in it and that content fulfills the interest and me.

Here it is worth noting that the claim that my interest in some content is prudential or wholly motivated by considerations of self-interest does not imply that my interest is selfish or self-centered. The notions of selfishness and self-centeredness seem to connote the violation of a moral obligation to consider the interests of others. It is clear that many self-interested acts are neither selfish nor self-centered; brushing my teeth after every meal is self-interested, but it is not self-centered or selfish. Conversely, many selfish, self-centered acts do not conduce to self-interest; eating a whole cake in one sitting in
front of friends without offering them some is both selfish and self-centered but not self-interested because such behavior is not only unhealthy but also likely to alienate these friends. In any event, I do not mean to suggest either of those things by characterizing these interests as “prudential.” I merely mean to suggest that these interests are motivated by desires that are explicitly self-regarding: I want this content because I find it valuable and hence have an interest in obtaining it.

The strength of the prudential interest varies from one piece of content to the next. It is reasonable to think that there is some intellectual content that one needs to survive independently (i.e., without direct assistance from others) in a particular cultural context. For example, while it is possible to survive in a society like ours without being able to read or add, one will require considerable assistance from other people in order to feed, clothe, and shelter oneself. In most situations in a society like that of the U.S. with an inadequate safety net, a person will not be able to take care of basic needs by herself without knowing how to read and do simple arithmetic. Obviously, a person will have the strongest prudential interest in such content.

I think it is fair to say that people have the strongest prudential interest in intellectual content having to do with the existence and nature of God. Regardless of whether one believes or does not believe that a personal God exists, it should be clear that the various issues are of tremendous prudential significance. Anyone who understands the claim that un-forgiven wrongdoing is punished with eternal torment and is indifferent about the prospect of receiving such punishment is either in need of psychiatric treatment or an idiot. Not surprisingly, people care a great deal about being able to access intellectual content that will help them to reach an informed opinion about whether God exists and, if so, what God requires of us. Everyone wants (or ought to want) enough information to make a reliable judgment about such matters.

Not all intellectual content, however, has such importance from the standpoint of self-interest. Some intellectual content is fairly characterized as needed for individuals to thrive in all the ways that human beings ought to thrive. Artistic and philosophical (of course!) content might very well be necessary for a person to lead a meaningful life. Without such content, our lives would be very different – and probably wouldn’t be much different from that of some non-human animals. Although theorists disagree on what sorts of goods are needed to live a genuinely meaningful life (and hence to “thrive”), I would be surprised if anyone denied the claim that some access to certain kinds of content is needed for people to thrive in the appropriate ways.

But the vast majority of the intellectual content desired by people is essential neither to survive nor to thrive. We seek much intellectual content in order to entertain or amuse ourselves. Most of the time I spend watching films, for example, is intended to achieve nothing more noble than to make me laugh or entertain me in some other way. Most of the time I spend listening to music is intended to create a mood (perhaps one that is appropriately intense during a workout) or to produce aesthetic pleasure. The same is true of a fair bit of the time I spend reading; while much of it is intended to enlighten me, much of it is done for amusement.
Again, the claim here is not purely descriptive. It is not just that people tend to care about surviving, knowing about God, thriving, or being entertained; rather, it is that, from the standpoint of prudential rationality, people ought to care about these things (though not to the same degree). Someone who cares nothing about her own survival is, other things being equal, probably in need of immediate inpatient psychiatric care, as is probably true of someone who does not care at all about whether or not a personal God exists who punishes wrongdoing with everlasting suffering (imagine, for example, someone who says – and means – “I really don’t care whether or not I suffer eternal torment in hell”). Likewise someone who does not care at all about her own amusement or entertainment is, at the very least, mildly depressed.

These prudential interests have some moral significance but how much significance they have from the standpoint of morality depends on how strong these interests are. It is always a morally relevant fact about some piece of content that somebody wants it, but this does not tell us much about how much moral protection it might receive. It seems reasonable to think that morality would afford much more protection to a person’s interest in information necessary to survive in a self-sufficient way than to her interest in information necessary to thrive; food, water, shelter, and the truth about God are much more important than art and philosophy. Likewise, it seems reasonable to think that morality would afford more protection to a person’s interest in information necessary to thrive than to a person’s interest in being entertained or amused – though, again, it is always a morally relevant fact that some piece of content would amuse a person.

None of this should be taken, of course, to deny that intellectual content might be protected by morality for some other reason than just that it has prudential value. For example, intellectual content that people need to compete in a society like ours might be protected by something like a principle of equal opportunity. Other things being equal, it is better from the standpoint of morality that all persons have free access to such content because a society that does not make it equally available to all will afford some persons an unfair advantage in the marketplace. Here the motivation is not to protect the interests of persons, but to ensure that the distribution of opportunities is fair to all; although we might have a prudential interest in things being fair, fairness is about something other than prudential interests. There is nothing in the analysis of this paper that should be construed as inconsistent with the fact that prudential considerations might form one part of the explanation as to why some content gets protection from morality, but need not exhaust the explanation.

**Weighing the Competing Interests**

As is evident from the foregoing discussion, content-creators and other persons have conflicting interests that must be weighed. Content-creators must expend valuable resources in the form of their time, energy, and labor in order to bring new value into the world in the form of intellectual content to which people did not previously have access. Content-creators, as we have seen, have a morally protected interest in their time, energy, and labor, in part, because our supply of those resources is limited and, in part, because these interests derive from their interests in the continuation of their conscious lives. Other things being equal, this suggests that content-creators have a *prima facie* limited
morally protected interest in controlling (at least for some reasonable period of time) the disposition and distribution of the value they bring into the world in the form of new intellectual content.

Of course, other things are not always equal. It is quite reasonable to think, as noted above, that other parties have a special interest in intellectual content needed for survival that outweighs whatever interest its author might have in the value she brings into the world — though this should not be taken to mean that the author is owed no compensation. It is also reasonable to think that we owe it to individuals and nations to ensure that they have sufficient information to compete in a global economy; this seems to be required by the principle of equal opportunity.¹⁵

The distinction between factual intellectual content and non-factual content is relevant here. It is not unreasonable to think that third parties have a special interest in important factual information that outweighs such interests on the part of the author. Facts, after all, are not likely to lay undiscovered forever; if one person doesn’t discover some fact, someone else probably will — something that is just not true of non-factual intellectual objects like novels and songs. If Dickens doesn’t write *A Tale of Two Cities*, then it will never be written; in contrast, if Andrew Wiles doesn’t prove Fermat’s Last Theorem, it is likely that someone else eventually will, though it might take many more years until the proof is found.

Two considerations converge here to support the idea that people have some sort of special interest in factual content discovered or created by others. First, it is not unreasonable to think that we have some sort of special interest in knowledge of our world.¹⁶ Second, it is not true that if one content-creator does not produce a particular piece of factual content, then that piece of content is not likely to be produced, although its production by someone else might take a very long time; factual content, again, is different from non-factual content in that respect. Accordingly, if it is true that people have some special interest in factual information, say, because we have some special interest in knowledge about our world, this would support the altogether plausible claim that, for example, it would be wrong for the state to award intellectual property rights in genetic sequences.

Still, it is not clear that the interests of other persons always outweigh the interests of a content-creator in factual content she creates (or discovers) such as to preclude any legal protection of the creator’s interest in controlling disposition of that information.¹⁷ At an intuitive level, there is a world of difference between factual information needed for survival and factual information not needed for survival, as well as between factual information that is readily discovered and factual information that requires some special talent and effort to discover. While this should not be taken to imply that factual content should ever be afforded intellectual property protection, it is to assert that the issues are different with respect to non-essential factual content and factual content not easily discovered.

¹⁵ I am indebted to Herman Tavani for this point.

¹⁶ It would be incorrect, however, to think that knowledge is necessarily valuable as an end-in-itself. See Himma 2004b.

¹⁷ “Content-creation” and related terms should be construed to include discovery of factual content. While the content-creator does not create the facts, her production of previously undiscovered content is fairly construed as creating content since it makes available content for immediate consumption that was not formerly available for such consumption.
It also seems reasonable to think that the interests of other persons in content needed to thrive sometimes outweigh the interests of the creator of that content, but the issues here are just not very clear because the nature of our interest is just not clear. The fact that we need access to some artistic content to thrive doesn’t imply that we need access to all artistic content to thrive. Exactly what access is necessary to satisfy the interest in thriving is an exceptionally difficult issue that would require a paper of its own, but it does seem clear that we do not need access to all of it to satisfy this interest.

Indeed, the idea that we need access to all artistic content to thrive is simply too strong to be plausible. It seems ridiculous, for example, to assert that anyone needs access to the latest 50 Cent tracks in order to thrive. While it might (or might not) be fun to listen to the latest offering from 50 Cent, it is simply implausible to think that any person cannot thrive without free access to it. What this means is that the interests of other persons in thriving will defeat the interests of content-creators in some, but not all, cases of artistic content.

Again, exactly which cases is a difficult issue that would require a much more detailed analysis than I can pretend to give here, but I would hazard the following observation. It seems plausible to me that what is currently in the public domain by way of artistic expression is sufficient to ensure that people thrive in all the ways they ought to thrive. We do not need immediately to provide free access to new artistic content to ensure that all have an adequate opportunity to thrive in the ways that artistic content enables one to thrive. If this is correct, then the interests of content-creators outweigh the interests of other persons in such content – at least in cases of content that is of comparatively recent vintage.

But with respect to content that is merely desired, it is not even a close call. While it is, as I noted above, always a morally relevant fact that some agent A wants something p, the mere fact that A wants p is not strong enough to give rise to any significant protection of that interest. Other things being equal, if A wants p and I can satisfy A’s desire for p, it would be a good thing from the standpoint of morality for me to provide A with p. But the claim that A wants p, by itself, does not imply that it would be wrong for me not to provide A with p if I can do so. Indeed, failure to provide someone with something they want is not even a wrong-making property of an act; while it would be good, other things being equal, to provide A with p, the claim that A wants p does not provide any reason whatsoever for thinking not providing A with p is even prima facie wrong. Our desires just cannot do that kind of heavy moral lifting.

In cases where content is merely wanted, then, it seems clear that the interests of the content-creators in limited control over the content they create outweigh – and greatly – the interests of other persons. On the one hand, the content-creator expends precious resources in the form of a limited supply of life and energy in order to bring value into the world. On the other hand, other persons want merely to pass the time or enjoy themselves with such content.

Of course, there might be many people who want the content and just one content-creator whose interests are at stake, but this is not enough to defeat the content-creator’s interest. The content-creator’s interest is significant enough to receive moral protection: insofar as my behavior wastes another person’s life or energy, it is morally problematic. In contrast, the fact that someone wants content is not significant enough, by itself, to warrant any moral protection: while it might be good for
me to give someone something she wants, my failure to do so is not even presumptively problematic. An interest that receives moral protection, like the content-creator’s, cannot be defeated by aggregating interests that do not; aggregating interests that receive no moral protection still results in something that receives no moral protection. No matter how many times one adds zero to zero, one winds up with zero, which is less than any positive number.

Ironically (and somewhat selfishly, I would submit), most of the content that critics of intellectual property want for free is non-informative content that is merely desired. It is reasonable to think that the vast majority of contemporary music, film, and novels (which are not, strictly speaking, information because they do not purport to express true propositional content\(^\text{18}\)) are wanted primarily for entertainment and amusement. People who are illegally sharing music files online are violating the law for no better reason than they want to be entertained and to experience the pleasure of listening to the newest music – as though this desire is so much more important than the limited moments of life and energy spent by the content-creators.

Here it is worth noting that, at least with respect to artistic content, content-creators create not only a piece of content, but also the demand for it. There would be no demand, for example, for A Tale of Two Cities had Dickens never written that novel. There can be no demand for a song that has never been written.\(^\text{19}\) Although it is true that people want artistic content and might want content from a particular artist, this desire has no particular focus until a content-creator sharpens it by making available a suitable piece of content. Artists satisfy wants they bring into existence. Yet many people believe that these desires, which they would not have if not for people who create, take precedence over any interests that an artist has to control the distribution of her creations. As far as content that is merely wanted is concerned, this should seem implausible to put it mildly.

This is also true of particular material objects. There cannot be demand for the apple on the tree outside my yard unless there is an apple on the tree outside my yard. Although we have a need for food and nutrition, we cannot desire a particular item of food or nutrition without its existence.

But, in the case of material objects, there is, or was, an existing stock of material objects that did not depend on the efforts of human beings already there to be desired or needed – and this distinguishes material objects from intellectual objects. Every piece of intellectual content available to any of us was produced by someone through the expenditure of her life and energy. In the strict sense of the word “commons,” there was a material commons ready-stocked with material objects to use and consume, but there is no ready-stocked intellectual commons. The world of intellectual objects and the demand for them depends entirely on the expenditure of someone’s life and energy.

\(^{18}\) See Himma 2005 for a detailed defense of this point. See also Floridi 2004.

\(^{19}\) While I am not prepared to argue the point here, I am inclined to think this interest rises to the level of a right. The interest we have in the ideas, time, energy, and intellectual labor we invest in creating new content (and hence bringing new value into the world) are sufficiently important, it seems to me, to give rise, irrespective of effects on utility, to a right that binds any third parties who lack any greater interest in the products of those expenditures than a desire for those products. Of course, the suggestion that content-creators have a right over their products is not to say anything about the content of that right. In particular, it is not to endorse the conception of that right that is incorporated into, or expressed by, copyright law in the US.
CONTENT-CREATION AND CONSIDERATIONS OF JUSTICE

Ordinary principles of justice also suggest that the interest in controlling the disposition of one’s creations is afforded some moral protection. In this connection, it is crucial to realize that intellectual objects are not naturally occurring in a form that can readily be appropriated by any person. While it might be true that all possible intellectual objects exist in logical space (whatever that is), not every intellectual object is immediately available for appropriation. Intellectual objects are made available through the creative work of content-creators who discover or invent that content and thereby render it in a form that can be consumed by others.

Again, there is some available intellectual content that would invariably be made available. Much scientific and mathematical content probably falls into this category. If Einstein does not produce the theory of relativity for our consumption, someone else probably will; likewise, if Andrew Wiles does not produce a proof for Fermat’s Last Theorem, someone else probably will. But it might take many years to do so because the production of such content requires intellectual ability and creativity that is quite rare, even among scientists and mathematicians.

However, because the point is so important, it is important to reiterate it: there is some available intellectual content that would likely never be made available if not for the efforts of the relevant creators. If, for example, Mozart does not compose his Requium, this particular piece of music will probably never be produced. Likewise, if Charles Dickens does not write A Tale of Two Cities, it will never be available for consumption. Unlike descriptive scientific and mathematical content, artistic content is not the sort of content that someone is likely to create if never produced by the artist who, as a matter of fact, creates it.

This has an important implication for one very common criticism of intellectual property rights. It is commonly argued that legal protection of intellectual property rights is illegitimate because such protection has the effect of “depleting the information commons.” The idea is that intellectual property laws, then, deprive people of something to which all have legitimate claims – namely, the objects in the information commons.

But there is no intellectual commons stocked independently of the efforts of people who create (or discover) content. Unlike the material world, there is no stock of ready-made objects with which people mix their labor to produce something valuable or to introduce new material value into the world. Whereas a house is constructed out of naturally occurring materials (or materials that ultimately owe their existence to naturally occurring materials) with which we can causally interact, intellectual content must be conjured up by someone out of nothing. While all possible content might, as noted above, exist in logical space as abstract objects, human beings do not produce content by causally interacting with abstract objects; it is metaphysically impossible for us to causally interact with abstract objects – though we can surely think about them just as we think about material objects.

For an outstanding discussion of this view, see Tavani 2004. See Himma 2005 for a criticism of this view.
This is important for the following reason. If there were an intellectual commons consisting of intellectual objects to which human beings have such causal access such that producing content is akin to picking an apple, then that fact would provide some reason (though one that is far short of being conclusive) for thinking that intellectual property protection is illegitimate; even Locke, after all, limited original acquisition to circumstances in which there is as much of the material resource left for everyone else to use. But that is simply not true of intellectual content: *A Tale of Two Cities*, a poem, a song, or a proof of Fermat’s Last Theorem cannot be picked from some commons the way an apple is picked from a material commons. For all practical purposes, people invent such content, and no one has access to a particular piece of content unless someone, perhaps the user, invents it; again, if Dickens does not write *A Tale of Two Cities*, it will never be written. The argument that intellectual property protection is problematic because it depletes the information commons rests on a fundamental misconception about our access to content.

The fact that intellectual content is not available unless invented by someone is important for another reason: it implies that the efforts of content-creators introduce value into the world when they make available previously inaccessible intellectual content. When Dickens completes *A Tale of Two Cities* and makes it available to others, he has thereby produced something of value and introduced new value into the world. When Einstein produces the theory of general relativity, he introduces new value into the world. Content-creators create value that did not exist in the world by investing their own valuable resources (time, energy, and labor) into producing that value.

Indeed, the content-creator is responsible for the full value of what she brings into the world by way of new intellectual content, regardless of how valuable it is. This, however, is not true of material objects. Any material resource that can be used to produce something more valuable already has value in virtue of such uses. If I improve a resource, then I have introduced some value into the world, but not the whole value of the resource; the unimproved resource, after all, has value in virtue of its potential. Ordinary considerations of justice suggest that what people deserve is determined by the value and disvalue they introduce into the world by their free acts and that people should, other things being equal, get what they deserve and hence have some sort of morally protected interest in what they deserve. Such a view underlies, most conspicuously, most theories of punishment, but it also underlies positive views about how to distribute the material benefits and burdens of a society – which, of course, entail views about the extent to which property rights are legitimate. Arguably, I deserve the material resources I have (setting aside deeper issues of moral luck having to do with the fact that I did not choose to be born into an affluent nation with certain opportunities available to me) because of the value I introduce into the world by my hard work and sound investment decisions.

This shouldn’t be taken to mean that the claim that someone has created new value logically implies that they have a moral right to that value that deserves legal protection; as we saw above in discussing

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21 Indeed, even utilitarian theories frequently attempt to justify a principle that punishment is justified only insofar as deserved. What distinguishes pure retributivist views from such views is that the retributivist thinks that considerations of desert are both necessary and sufficient to justify punishment while the utilitarian believes that such considerations are necessary but not sufficient. In addition, it must be the case that punishment maximally promotes community utility.
the original Lockean arguments, the claim that someone has created new value doesn’t have such strong implications. And, by itself, this shouldn’t be taken to say much of anything about exactly how far those interests range. The analysis above, for example, wouldn’t imply that Dickens has a legitimate interest in excluding people from using variations on the title *A Tale of Two Cities*; in particular, it wouldn’t imply that Dickens has a legitimate interest in stopping people from using the title *A Tale of Seven Cities*.

But it is to assert that, according to ordinary intuitions about justice, people have some sort of morally legitimate interest, other things being equal, in the value they bring into the world via their intellectual efforts. It might not rise to the level of a right, and it might be defeasible by other considerations; however, our ordinary intuitions seem to imply that they have an interest in the value they bring into the world that receives theoretically significant protection from morality.

Moreover, to the extent that these widely shared intuitions about justice provide adequate justification for laws protecting material property rights, they would also function as one consideration in favor of laws protecting intellectual property rights. Of course, there might be morally significant differences between material property and intellectual content that override the considerations of justice that point in the direction of justifying legal protection of intellectual property.

But, taken together with the argument of the preceding section, these normative considerations of justice provide a strong reason for thinking that the state should, as a matter of political morality, provide some legal protection of the interests of content-creators in the content they create – at least in content that is merely desired by other people. The interests of content-creators in the life and energy they expend in the content they create receive significant moral protection, while the interests in other people in what they merely desire does not. Moreover, it is only just that people be compensated appropriately for the value they bring into the world – although what is fair compensation in the case of valuable intellectual content is not clear.

**SUMMARY AND CONCLUSIONS**

In this essay, I have argued that the issue of whether legal protection of intellectual property is morally legitimate depends on how strong the interests of content-creators in the content they create are relative to the interests of other parties. I have also argued that, in most cases, the interests that content-creators have in the content they create (or discover) outweigh – and hence receive greater moral protection – than the interests of other persons in at least those cases not involving content human beings need in order to either survive or thrive. Finally, I have argued that considerations of justice dictate that content-creators have an interest in being fairly compensated for the value their creations bring into the world. This, of course, does not obviously imply the existence of a moral right to intellectual property. But, as far as I can see, it provides a justification for laws that provide some protection of the interests of content-creators in the contents of their creations.

This should not be taken as a justification for copyright law in the U.S., or even for the idea that the proper protection for the interests of content-creators in the form of a legal right. I think existing
copyright law is deeply flawed in a number of ways. Here is a brief example. I think it fair to say that the existing length of copyright protection in the U.S. lacks an adequate justifying rationale. Although I cannot argue the point here, it is hard to understand how someone who is deceased could have any moral rights at all – much less property rights. It is true, of course, that we honor the wishes of people pertaining to how their property should be distributed after death, but the justification for this is to encourage continuing productive activity – and not that persons retain moral property rights after they die. One can, of course, set up the law so that it protects something the law calls a “right” even after the rights-holder has died, but this cannot be justified by some underlying moral right held by the deceased. Only persons have moral rights, and death involves the extinction of both the person and any moral rights she might have had.

What I am asserting, however, is that there are strong reasons for protecting intellectual property that are not purely consequentialist in character. The idea is that the primary reason for protecting intellectual property is not that protecting intellectual property maximally conduces to community utility, however defined, or the common good, assuming this is true. Rather, it is that, from the standpoint of morality, the interests of the content-creator are much more important than the interests of other persons in most cases and hence are the ones that receive the benefit of some fairly stringent moral protection; indeed, in many instances, the interests of other persons, though prudentially significant, are not significant enough from the standpoint of morality to receive protection.

It is worth reiterating in closing that, though related to and in some sense derived from Locke’s argument, this reasoning does not presuppose a Lockean framework for justifying property. The idea is not that such interests are morally significant because the author has mixed her labor with some sort of intellectual raw material in a way that cannot be extracted and thereby created value. Rather, the idea is that such interests are morally significant because they implicate uncontroversial principles of fairness and morality that are widely accepted among persons in our culture. From the standpoint of fairness and morality, I have some minimal claim to the value I bring into the world through expenditures of my time, energy, and intellectual labor – regardless of how minimal those expenditures might be.22

REFERENCES


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22 It is worth noting that such considerations provide stronger support for intellectual property rights than for material property rights in one important respect. One can always plausibly argue that one’s investment of labor in a material object is lost because it is invested in an external material object in which one has no antecedent claim; after all, if I carve a sculpture out of an unowned tree, I am putting my labor into something in which I have no antecedent claim. In contrast, one’s investment of labor in creating content does not involve working on something to which one has no antecedent claim; I do not carve a novel out of some previously existing object that is external to me.


