Conceptual Fallacies behind the Idea of an Area without Protection of Intellectual Works

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Abstract

Conventionally, the protection of intellectual works by granting copyrights, patents, trademarks or other intellectual property rights has its limits which cause that some intellectual works are fully protected, while the others are left with weaker or even no protection at all. Since the advent of modern intellectual property laws, these boundaries of an "area without protection of intellectual works" have been again and again challenged in order to strengthen and extend intellectual property protection to cover various forms of previously "unprotected" intellectual works. The claims made in intellectual property scholarship as well as law making to support such extension of intellectual property protection are often based on several theoretical concepts of intellectual works ("intangibles"). Depending on respective theoretical underpinnings, the lack of protecting such intellectual works by intellectual property laws is deemed to be unfair or inefficient.

This keynote speech points out that the main problem of these theoretical concepts is that they significantly depart from actual patterns of human behavior. As a solution, it is argued that any sound intellectual property law and policy must focus on concrete aspects of human behavior patterns—so-called "connecting points" for regulating human activities. There is thus no need to regulate all possible exploitations of intellectual works. The intellectual property rights should restrict only certain human conduct.

However, the rule-makers have some room in conceptualizing the respective connecting points for regulating individual human activities. To avoid possible shortcomings, it is advocated here that the rule-makers should take into account actual factors affecting intellectual property law making, as well as its application and enforcement, such as various minoritarian biases that often occur in these processes.

To minimize the occurrence of minoritarian biases, it is essential to find an appropriate and adequate division of roles between market, lawmaking and judiciary in regulating human activities, especially, from the standpoint of achieving sufficient

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legitimatization of individual policy making processes. This keynote speech shows the advantages of a market-driven approach toward intellectual property laws through examining the regulation of passing-off and slavish imitations.

INTRODUCTION

As the main theme of this conference is to enquire into new spaces, new actors and the institutional turn in contemporary intellectual property law, my keynote speech will tackle the often discussed problem that some intellectual works are insufficiently protected or even not protected at all. In the legal theories, as well as in the enforcement, of intellectual property rights, we often hear the suggestion that there is an area without any protection of intellectual works or if there is any legal protection, it is deemed to be insufficient with regards to protection of certain intellectual works. In this keynote speech, I will use the term "intellectual works" which broadly refers to all those intangibles which are the result of human intellectual creative or inventive labor.

When someone says that there is an area with insufficient or lacking protection of intellectual works, I think that there are three types of assumptions behind this expression. The first assumption is that there is a "thing" or object that embodies an intellectual work. The second assumption is that if there is no or insufficient protection over this type of intellectual work as an object, it will cause tensions or frictions in society, since such object belongs to its creator. The third assumption is that the protection of such intellectual works should be provided for in the form of law.

1. PITFALLS IN THE CONCEPTUALIZATION OF INTELLECTUAL WORKS

In this regard, I would like to point out several conceptual fallacies behind the idea that there exists an area with insufficient or no protection of intellectual works. First of all, I will enquire whether intellectual works *per se* do actually exist. In his seminal work entitled *A Philosophy of Intellectual Property*, Peter Drahos introduces two lines of thinking concerning intellectual works as objects in legal and political philosophy. One line argues that intellectual works do exist as real entities. The second line suggests that they only exist as constructs of the mind. In this line of thinking, intellectual creations or works are deemed to be artificial concepts based on mental constructs.

Regardless of which line is actually adopted as the correct one, another problem which needs to be dealt with in our endeavor is whether we can distinguish intangible objects from

the act of their usage. In theory, the objects of intellectual creations and the acts of their usage are often thought of separately. A separation of this kind is based on the idea that it is possible to distinguish an actual act of human conduct from the object of an action.

However, this distinction is just relative. We can consider an act of transmitting a computer program through the digital network as an example. Copyright law distinguishes between a computer program that is a copyright work—an intangible object—and an act of its transmission to the public which is deemed as an act of using such copyright work. Contrarily, the assessment of the entire situation may be seen differently from the point of view of patent law where all depends on the particular claims written in the granted patent. If a method of transmitting the given computer program through the digital network is claimed as an invention, it is viewed as an intangible object under patent law and not only as a use of intangible good.

This example clearly illustrates that the identification of what exactly is an "intangible object" and what exactly is an "action"—the use of such object—is actually a matter of the degree of abstraction in individual branches of intellectual property law due to the differences in their objects of protection. Accordingly, we can abstract, from the act of public transmitting a program through the digital network, an action—human conduct—and an intangible object constructed as a computer program in the case of copyright protection. If we go even further in this abstraction, the actual intangible object becomes the method of transmitting the program as it was in the abovementioned case under patent law.

From this example, one can learn that the distinction between human behavior and intangible objects is just simply some kind of fiction. The reason is that all concepts of intangible objects are based on rather relative degrees of conceptualization. Wendy Gordon puts it succinctly. She suggests that the way of regulating intangible objects is simply the regulation based on certain similitudes in patterns of human behaviors which are called intangible objects.

If we take this relativistic position of human action and intangible objects, the concept of rights over intellectual creation is a little bit problematic as well. Behind this idea of intellectual creation, there is a strong metaphor that assumes that there is a "thing" or there is an object of intellectual creation that can be distinguished from human beings' actions, and that one can institute a right over that object. This metaphor hides the fact that the relativistic concepts of human actions and intangible goods actually cause the restriction of human actions by granting the right over intellectual works.

For instance, it is often suggested that intellectual property laws deal with a right over information.Although I have no substantial objection against the concept of a right over information, it is important to point out that this concept is also one type of metaphor which is somewhat problematic in my opinion. I think that information does not exist *per se*. It cannot be distinguished from the respective human activity. This metaphor thus obscures the

difficulties with the possible distinction between an intangible object and human action. A similar objection can be found in Gordon's work on intellectual property. She suggests that instead of calling this right as the intellectual property right over information, it would be more proper and adequate to refer to it as the right restricting a certain pattern of human action.

One might argue that the same argument applies to the use of tangible things and the property rights to them. What is then the difference between property rights to tangible things and intellectual property rights? To answer this question, I will refer to Immanuel Kant's writings. It is often suggested that it was Kant who proposed to distinguish the use of intangible things from the right to ownership. Although the rights of ownership over the tangibles are also the rights over the use of such object, in the case of the rights over tangibles, the focal point is a physical contact between a tangible thing and the respective way of its use.

Due to the physical focal point, there is limited danger that this type of property rights would be extended indefinitely to the degree that it would broadly restrict the other persons' actions. The property rights over tangible things can thus be easily distinguished from the property rights over intellectual works. Although Peter Drahos doesn't use the expression "focal point", the analysis used in this keynote speech stems from the ideas presented in his philosophy of intellectual property. As there are no physical focal points in the case of intellectual property rights, the lack of clear conceptual limitations allows the granting of rights which can significantly and broadly restrict other persons' activities due to their artificial creation.

Another problem is that a high economic value is attached to intellectual property rights. The intellectual property rights are thus likely to become the object of lobbying by interested groups such as multinational enterprises and the like. The negative outcome of such activities is that the intellectual property rights become unnecessarily broad and ubiquitous.

2. From Monistic Theories towards a Pluralistic Theory to Justify Intellectual Property

So far, I have talked about the distinctions between intellectual works as intangible objects and their actual use, now I am going to talk a bit about the idea of protected intellectual works. The ideas that intellectual works should be protected stems from two main justificatory theories: the natural rights theory and the incentive theory. Although the grant of intellectual property rights and their extension are often justified by using the Lockean labour theory, it is heavily debated whether John Locke himself thought his theory can be applied to the justification of intellectual property rights. The same applies to Georg Wilhelm Friedrich Hegel's geistiges Eigentum with regard to applying his mental property theory to the

justification of intellectual property rights. As pointed out above, intellectual property rights are the rights that restrict the other person's liberty and freedom. The idea that a person should own the intellectual works that he creates can therefore hardly justify any restrictions on another person's freedom alone. Hence, the justification of intellectual property rights requires other additional justifying factors.

For this purpose, I will rely on a Japanese scholar, Susumu Morimura, who uses in his theory of ownership various arguments stemming from libertarianism. Accordingly, I think that the justification of intellectual property rights should not be based only on their benefits to an individual right holder's private interests, but they should be designed in a way that the majority of people can benefit from them. It leads me to relying on an efficiency argument to a certain degree. By restricting some types of free-riding activities, it is possible to prevent the underproduction of concerned intellectual works. The public can then benefit from the protection of some intellectual works by an access to a variety of intellectual works which would not be otherwise created or invented.

Contrary to the abovementioned theories, I advocate a more pluralistic approach. It is hard to completely ignore the rhetoric of the natural rights theories. If one follows only the incentive theory, intellectual property rights can be deemed as rights that can restrict another persons' freedom for the benefit of the entire society. In this regard, the incentive theory might be a bit weak due to its pure utilitarianism. One needs to engage in more research into utilizing the teachings from constitutional, public choice and other theories.

As noted before, the fact that a person created something—the act of creation—can hardly be the only reason for the justification of its proprietary rights to the results of his intellectual labor. At the same time, just using the incentive theory as the sole way of justifying intellectual property is also very weak. In particular, if one uses efficiency as the justification for such restrictions, for example, in order to prevent the free-riding problem, their justification becomes quite problematic because of emerging difficulties with measuring or verifying the improved efficiency by adopting a certain type of intellectual property institution. However, if one considers the idea of efficiency with regard to granting the intellectual property rights, the fact that a person created something can become a passive justification to restrict the freedom of another person.

From my previous observations, the main point I wanted to make thus far is that the restriction of freedom is not always necessary. It is necessary to distinguish the occasion where the restriction is necessary and where it is not. The intellectual property rights are not the protection over an "intangible thing"—an intellectual work—but they are the rights that restrict the freedom of persons who are not the right-holders. Consequently, we can conclude for now that if the lack of intervention into human activities by the law does not cause any harm to improving efficiency, it is probably better to leave such area of human activities without any regulation.

3. Policy Making Process as a Justification for Legitimacy

It is clear that the conclusion that intervention by law is not necessary in any case is contradictory to the third assumption behind the need to sufficiently protect all intellectual works which I have raised at the beginning of my presentation. The question thus arises whether this third assumption that intellectual works must be always protected is correct. And if not, whether there are any alternatives to the legal protection of intellectual works.

My argument here is based on Nari Lee's work where she argues that regulation by law is effective mainly in cases where the idea of intellectual works has some connection with the physical, material world. If there is no such connection, there is no need to always regulate any exploitation of such intellectual works. As I have already noted several times before, it is very difficult to distinguish the act of use from the intangible object itself.

In terms of regulation, the connecting point often becomes a person's act of use. But the connecting point which is the subject of regulation does not always have to be the actual use of an intellectual work, especially since it can hardly be sufficiently clearly determined. If the distinction between an intangible object and an act of its use is just a relative point, it is possible for the legislature to choose which connecting point should be the point of regulation. It might thus be assumed that there is a certain freedom to choose such a connecting point. Accordingly, it is important to explore more the notion of a connecting point of regulation—the point where efficiency can be achieved as much as possible but at the same time, the encroachments on other people's liberty are kept at the minimum level possible.

There are different types of regulatory regimes. For instance, Antonina Bakardjieva Engelbrekt, among others, puts forward four types or methods of regulations and institutional arrangements: market, legislation, administration and judiciary. Based on the traits or nature of individual institutions, it is possible to make an institutional choice with regard to the respective method of regulation. As I have pointed out several times elsewhere, if it is very difficult to verify the efficiency of choosing a particular institution from all available ones, it is not important only to seek for the legitimacy of the substance of such regulation, but it is more crucial to explore the possibility of seeking its legitimization by the process of its adoption.

At the same time, it should be pointed out that institutional choice has several problems. One of them faced by the democratic decision-making process is a so-called collective action problem. Neil Komesar identifies two main collective action problems: the minoritarian bias and the majoritarian bias. In addition to them, the democratic decision-making process—put in other words, the legislative procedure—also has to face other particular problems that are going to be pointed out now.

Although it has not been used so many times in the Japanese academic circles, I agree with Komesar that the market is also one significant method of participation, similar to the legislative, administrative and judiciary procedures. One of the reasons why I am going now to focus quite a lot on the idea of market as one of possible participation methods is that the market has been often ignored in academic circles with regard to the need to protect intellectual property rights. Although I might sound a bit too much pro-market oriented, I am doing so just to introduce the idea of using the market in this context.

I borrow this idea from Friedrich von Hayek and his work entitled *The Use of Knowledge in Society*, where he suggests that the principle of the market is always inevitably accompanied by the idea of liberty. Put in other words, if the market choice functions properly, the decision-making process does not get controlled by a specific individual or group of people. Therefore, the individuals are free of any dominance and control by other persons. In this sense, the concept of liberty is inherently embodied in the principles of the market.

To return back to the intellectual property rights, I think that their concept as the rights to intellectual creations is accompanied with severe risks. As stressed several times before, the intellectual property rights are the rights that restrict other persons' freedom. Due to their freedom-restricting or sometimes even freedom-inhibiting character, the property institutions and the grant and extension of property rights over intellectual works have to be modest and very cautious. But one result of minoritarian bias in intellectual property policy making is that the rights tend to be extended or to become excessively strong. In this regard, the collecting societies play a significant role in keeping and expanding the exclusive rights they manage. But attention also needs to be drawn to the fact that once the institutions are formed, extended or strengthened, they often stay in that way for a long time.

4. Advantages of a Market-Driven Approach to Intellectual Property Laws

Based on all the previous observations, I will try to argue for a *market-driven* approach towards intellectual property laws. One conclusion based on the above is that intervention by law can be allowed, even if it restricts other person's freedom, as long as the interference is kept at the minimum. As the distinction between the intangible object and its use are only relative, the connecting point of regulation does not need to be necessarily static. There is, therefore, a certain room to choose which connecting points should be the point of regulation. It is not necessary to tie the use of intellectual works or to tie the legal protection to the intellectual work itself. Furthermore, the market plays a significant role of participation in the decision-making process just like the legislation, administration and judiciary.

If all the four points are taken into consideration, it is not the act of use or the object of intellectual creation which should be regulated by law, but it should be the market environment where such intellectual creation emerges and is exploited. It is the regulation of that market environment that could be one of the possible alternatives.

The regulation of the market environment is often seen to be the domain of competition (antitrust) law. In Japan, antitrust law belongs under the authority of the Fair Trade Commission. Nevertheless, one of the recent trends which can also be observed in Japan is that many entities attempt to enforce antitrust law violations through private litigation. This can lead to the emergence of an interfacing area between the antitrust-law type of enforcement and intellectual property. That is also the reason why I employ a slightly flexible categorization of law concerning particular competitive activities, including those regulated under intellectual property law, unfair competition law, antitrust law and civil law.

Accordingly, intellectual property law should be viewed as *incentive-creating* type of property law, since it creates incentives that do not exist in the market. However, it should be noted that there are some types of intellectual property laws that do not simply create necessary incentives, but which also support the incentive already existing in the market. Those types of intellectual property laws should also be taken into consideration.

As an example of the first type of intellectual property law—the *incentive-creating* type of intellectual property law—I will give you an example of regulation by patent or copyright law contrary to the trademark and unfair competition prevention laws in Japan.

Although some might think - and common sense might lead you presume this to be the case - that the aim of trademark law is the protection of marks, the law itself does not protect the progress or development of marks, contrary to copyright or patent law with regard to the work of authorship or invention respectively. One can thus look at trademark law as the second type of intellectual property law—the *incentive-supporting* type of intellectual property law. By regulating the acts of passing off, it supports the cluster of incentives that already exist in the market, such as an incentive for quality control including the improvement of service quality, or the improvement in general. Hence, trademark law and passing off can also be characterized in this way.

In this case, what the law aims to promote is not the mark as an object of protection, i.e. an intangible object, but the general improvement and maintenance of quality in terms of goods or services. The law therefore does not interfere with the market. It is left to the market to decide exactly what type of product or service should be developed under the goodwill and the incentives created and supported by law.

Engelbrekt argues that the traditional copyright protection is horizontal protection, since it does not distinguish between individual types of protected intellectual works. She also points out that when the protection is horizontal, it does not easily become the target of lobbying activities. Therefore, if some *incentive-creating* intellectual property laws can be

designed as horizontal protection regulations, the *incentive-supporting* type of intellectual property laws must be seen as horizontal even on a broader level, because what the law aims to regulate is something completely different from what the law actually protects.

Another example can be the ban on a slavish imitation of product configuration. I guess that this regulation is rather less horizontal because it focuses on more concrete and specific information. One of the reasons why I use the slavish imitation regulation as an example is that it is a bit different from the usual kinds of intellectual property laws, where the subject matter of protection is the same thing—what the law protects is the same thing as what law aims to protect. In the case of slavish imitation regulation in Japan, what law protects and what the law aims to protect are two different things.

Slavish imitations do not require a creative value of commercial products at all. The protection against slavish imitation is granted regardless of any creative value of the actual products. The objective of the law is not to support the incentives based on the monopoly, which already exists on the market, by regulating or prohibiting the slavish imitating or exact copying of commercial products regardless of the type of commercial product. Conversely, the law protects the incentives to acquire the market share. It protects and supports such incentives. What the law wants to promote is not the intangible object, which would be the actual configuration of commercial product. What the law actually aims to promote is the actual act of its development. Again, the law here does not interfere with what exactly gets developed under this incentive system. It is left to the market to decide.

When these provisions were drafted in Japan, I was asked to give an expert opinion. I was very young at that time and now I am not so young anymore. One of the legal scholars, Mitsuda, heavily criticized this law. He argued that the logic of the law did not make any sense at all from the then contemporary legal concepts. My belief was that the main consideration made by the law did not focus on the individual interests of would-be plaintiffs and defendants, since their interests could considerably differ from one case to another. On the contrary, by regulating an actual act of slavish imitations, the long-term benefits to society could be gained. The law's aim was based exactly on these considerations. Returning back to Mitsuda's criticism, his criticism was actually to the point. The law did not make any sense as part of the contemporary legal concepts referred to by Mitsuda.

Now, I would like to talk about, and summarize, the types of regulations that support the incentives. As already mentioned several times, the connecting point of regulation is a little bit remote from the actual intellectual creation or intellectual work as an intangible object in the case of this type of intellectual property laws. The result is that the actual creative works or certain types of creative works that get developed are all decided by the market. The merit in this type of regulation is that instead of lobbying during the legislative process, the decision-making is done by the market, where there is no such thing as lobbying.

I have previously been criticized on the grounds that my approach is too *market-oriented* and can thus lead to some kind of market absolutism. But I would like to point out that my approach is, instead, market-*driven*. It considerably differs from the traditional market-oriented approaches. For example, a famous law-and-economics scholar, Frank H. Easterbrook, argues that if the right to property is created, the market will achieve efficiency. However, I think that already at the time when the idea of granting the property rights to certain things is molded in the law and policy-making process, the biases exist in these processes. Furthermore, once the property institutions are established, the actual transaction costs never equal to zero. The actual extent of transaction costs can significantly affect the efficiency of redistributing the granted rights by the market.

Consequently, the market-driven approach presented in this presentation considers the cost of instituting the property institution itself, and the division of roles between the market and the legislation. Searching for an adequate and proper division of roles between the market and the legislation is generally behind the idea of the entire market-driven approach presented here today.

CONCLUSION

To conclude with what I have already said several times, the actual active justification for intellectual property rights should be based on an improvement in efficiency. As it is often difficult to verify efficiency, the actual substantive improvement of efficiency by the law should not be the only basis of law and policy-making, but the main aim should be that the actual process of policy making will lead to the improvement in efficiency. Improving the actual process may be even a better way of achieving the legitimacy of the whole intellectual property law system. However, due to the biases in the law-making process, to overcome this ambivalence between the law and policy-making process and the substance of the law should be one of the main targets of any research on the justification of intellectual property laws.

Although my presentation has mainly focused on the division of roles between the law and the market and the legitimization of the law and policy-making process, it should be pointed out that there are still the administration and judiciary which have a huge impact on the operation, implementation and enforcement of law. This might be the case of patentability requirements in patent law, where the legislation only sets up the standard’s scope in general terms. It is left on administrative agencies and the judiciary to concretize the actual legal requirements by their interpretation. In cases of this sort, the crucial point is to choose an institution that is not susceptible to lobbying activity, such as an administrative agency or the judiciary.