Libertarians and the Catholic Church on Intellectual Property Laws

Libertarios y la Iglesia Católica en las leyes de propiedad intelectual

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Abstract: Catholics and libertarians make strange bedfellows. They sharply disagree on many issues. However, when it comes to intellectual property rights, they are surprisingly congruent, albeit for different reasons. The present paper traces out the agreement on patents between these two very different philosophies.

Keywords: Catholic social doctrine, libertarianism, intellectual property.

Resumen: Católicos y libertarios son extraños compañeros de cama. Tienen fuertes desacuerdos en muchos asuntos. Sin embargo, en lo tocante a los derechos de propiedad intelectual, son sorprendentemente coherentes, aunque por razones diferentes. El presente trabajo estudia la convergencia de estas dos diferentes filosofías acerca de las patentes.

Palabras clave: doctrina social católica, libertarianismo, propiedad intelectual.

I. Introduction

If ever there were two groups with drastically opposing views, it would be the libertarians and the Catholic Church. Their divergences are derived from differing philosophies on how the world should, would and does function.

On one side, the libertarians believe in the power of the "invisible hand," Adam Smith's famous metaphor that explains how markets work. This phenomenon demonstrates that selfishness achieves good ends, and that the market is in fact fueled by those who operate by their own self-interest. As Smith states in his classic economics book, Wealth of Nations, "It is not from the benevolence of the butcher, the brewer or the baker, that we expect our dinner, but from their regard to their own interest."[1] The essence of the libertarian position is the non aggression principle (NAP): it is illegitimate to threaten or initiate violence against innocent people.[2]

The belief that self-interest is needed in order to form an efficient economy beneficial to everyone is at the root of many disagreements between libertarians and the Catholic Church.[3] A more egalitarian society is favored by the Catholic Church, and is one in which the rich give to the poor, not only based on benevolence, but because it is their duty to do so. This preferential treatment lies at the heart of Catholic ideology.[4] According to at least some interpretations of Church doctrine, all goods and services belong to everyone equally, and therefore individual private property rights are thrown out the window. However, this lack of property rights and equal

1 The authors thank Dwight Davison for his useful comments and suggestions for this essay. Wealth of Nations. Book 1, Chapter 2, Page 20.

2 For a further elaboration of this political economic philosophy, see Bergland, 1986; Hoppe, 1993; Huebert, 2010; Kinsella, 1995, 1996; Narveson,1988; Nozick, 1973; Rothbard, 1973, 1978, 1982; Woolridge, 1970

3 This disagreement cannot be fatal to a reconciliation between the two views, as there are indeed many Catholic libertarians. We mention only three: Fr. Hank Hilton, S.J., Fr. Robert Sirico, and Fr. Hank Hilton, S.J.

4 Centesimus Annus par. 11. It is often characterized as the "preferential option for the poor."

ownership of all goods and services is the very definition of socialism, an economic system the Church has vehemently scolded in various Papal encyclicals.[5]

It is very clear that the Catholic Church advocates an egalitarian view. However, this organization has had throughout history different socio-political views as a perusal of the various papal encyclicals, and Bishops' statements will demonstrate. Indeed, many of them read as if they were written by a committee, with egalitarianism advocated throughout, but various parts of these missives offering different visions of this philosophy.

Issues such as minimum wage, child labor, working conditions, discrimination, usury, and foreign aid are only several of the numerous instances in which many adherents of the Catholic Church and libertarians disagree. However, one area where both groups seem to concur is the issue of intellectual property law. Both the Catholic Church and most libertarians oppose intellectual property laws.[6] However, there are some libertarians who favor some government enforcement of intellectual property on the grounds of protecting against theft.[7] Due to the not fully compatible basic philosophies of both groups, the reasons for their stances on intellectual property also differ. By pointing out the different reasons each group is against intellectual property (IP) laws, it should become apparent not only that such laws do more harm than good, and thus cannot be justified on utilitarian grounds, but are also deontologically flawed.

We attempt to make three main contributions in this paper. First, IP is

5 Centesimus Annus par. 11; Rerum Novarum par. 15. Yet in Gaudium Et Spes, par. 65, Pope Paul VI writes, "[Citizens have a duty] to contribute to the true progress of their own community according to their ability," which is strikingly similar to the socialist mantra, "From each according to his ability, to each according to his need."

6 Our empirical analysis of this phenomenon, distinct from its philosophical elements, is confined to the U.S. It does not apply to any other country.

7 In the Cato Institute's Handbook for Congress, the writers declare that the government should "take the constitutional principle of 'promoting the progress of science and useful arts' seriously, but don't extend copyrights far beyond reasonable terms." (p. 2) This IP issue is not the same as the one between the minarchists and anarchists.

a fallacious doctrine. Second, all libertarians must oppose it, if they are to be logically consistent. Third, and this is our original contribution, that although the "social justice" philosophy of the Catholic Church, and the perspective of libertarians diverge on many issues, and often strongly so, there is a surprising congruence between the two on IP.

In section II we discuss the history of IP. Section III is devoted to the case in favor of IP. In section IV we offer several criticisms of IP some from the Catholic perspective, others emanating from the libertarian viewpoint. We conclude in Section V.

II. History of IP

Before discussing the harmful effects and implications of IP laws, it is necessary to explain their origin and current meanings. Without recognizing the reasons for creating IP laws, it would be more difficult to argue against their existence. Also, the nature of the laws themselves has evolved as technology has improved significantly in the past century. The more polarizing debates over intellectual property law concern patents and copyrights.

The Patent Act of 1790 was repealed and replaced by the Patent Act of 1793. In this act, the definition of a patentable invention, which has for the most part remained unchanged since then, was stated as "any new and useful art, machine, manufacture or composition of matter and any new and useful improvement on any art, machine, manufacture or composition of matter." Before then, the United States Constitution granted Congress the power to "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" ("A Brief", 2011). As evidenced there, the goal of the Founding Fathers was to encourage inventions by granting monopolies to their creators. By doing so, the logic was that inventors would be more inclined to innovate and therefore reap the benefits of their inventions. Ownership of a patent gives the inventor a monopoly and a right to prevent others from using or replicating the invention without his permission. This

held true even if someone else uses their own property to create his version of the original invention.

At the same time the Patent Act of 1790 was being passed, so too was the Copyright Act of 1790. Like the former, the latter was meant to "promote the progress of science and useful arts" (Copyright, 2011). Since 1790, drastic changes have been made to copyright law. Instead of a fourteen year term, a copyright protects the work for the remaining life of the author, plus seventy years. Copyrights do not protect the actual ideas that are discussed or portrayed, but rather the form or expression of these ideas (Copyright, 2011). One can imagine the "grey area" of this distinction. For example, if an author writes a novel, he has copyrighted the work. He can sell a copy of that work to someone else, but the author still owns the work. The other person simply owns a copy of the book, and cannot make any copies of his own without the author's permission (Kinsella, 2001, pg. 15).[8]

III. The case in favor of IP

The two main defenses of IP laws are based on natural rights and utilitarianism.

Beginning with natural rights, proponents of IP believe that inventions, ideas, and forms of art have to be created by someone. This "creation" requires an original conception and production of work. Supporters of this idea include Ayn Rand, who believes:

> The power to rearrange the combinations of natural elements is the only creative power man possesses. It is an enormous and glorious power—and it is the only meaning of the concept "creative." "Creation" does not (and metaphysically cannot) mean the power to bring something into existence out of nothing. "Creation" means the power to bring into existence an arrangement (or combination or integration) of natural elements that had not existed before. (quoted in

8 We would be remiss if we did not note that there are philosophical views on IP which are greatly at variance with those of Kinsella, and that these emanate from scholastic sources. See for example Perrota, 2004; Villajos Ortiz, 2009.

Kinsella, 2009)

Essentially, the ability to monopolize one's ideas and works are rewards for this production. Some proponents of the natural rights philosophy believe that creations of the mind are as much as entitled to protection as real property is. Just as someone can use physical labor and land to produce crops which would be considered his private property, he can also claim that his mind and body were used to produce a song or a novel or a work of non-fiction. Since it is accepted by all that one owns his body, anything created from his body should have the opportunity to be protected (Kinsella, 2001, Pg. 1). In essence, one is using his mental labor to "homestead" his work, making that work owned by the creator. This theory can be derived from Lockean philosophy of homesteading, as Locke was quoted in Weber (2011):

> Every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.

Locke's statement shows the foundation of natural rights philosophy. Without one's mind, nothing would be first thought of and then created. It is this process that leads to innovation and growth. If someone invents a new machine, he should be rewarded for his creation, as much as if he cleared some land or domesticated a cow. However, if he is instead "rewarded" with others copying him and even improving upon his original creation, he will receive no spoils of his mental and physical labor. These proponents of IP believe if a creator receives no reward for his invention or work, he will have little or no incentive to create in the future, and innovation would all but halt.

What is the Catholic response to this IP argument? It would be based on its belief that God has created everything, and in that sense, owns everything. Not only does God own everything, it is His intention that all

earthly goods are "for the use of all human beings and peoples," as mentioned by Pope Paul VI in Gaudium Et Spes (1965). The same encyclical explained that the goal of the Catholic Church is to show that everything should be shared and that one should "love thy neighbor as thyself." In response to Locke's statement that our incentive to innovate is profit, the Catholic Church would argue that it should be man's goal to help others, not gain a profit. In other words, creations and innovations should be for the greater good, not for selfish purposes (Avanzado, 2009).

As is clearly seen, there is a stark difference between the IP supporters and the Catholic Church. The former believes that one's mind creates, and these creations are owned by him and should be protected. On the other hand, the Catholic Church maintains that God has created earth and everything on it, including man and his mind. Therefore, since whatever is "created" man should be considered created by God himself and spread to everyone around the world. To the Catholic Church, IP laws preclude God's creation, other people, from ideas and inventions. One could argue that IP laws are in effect attempting to undermine God's work.

A similar yet distinct argument that could be proposed by the Catholic Church is that humans do not "create" at all. As Kinsella (2001) points out, matter is not created. Rather, it is manipulated and rearranged by man. By this logic, nobody actually creates anything. Instead only new arrangements of already existing matter are produced. The Catholic interpretation of this would lead to the belief that God has created his matter, and that anything man does with it is simply a rearrangement of God's creation. This argument supports the above proclamation that everything on Earth is God's creation, and that if anything is "created" by man using God's property, it should be shared with the world. In a recent encyclical, Pope Benedict wrote:

> On the part of rich countries there is excessive zeal for protecting knowledge through an unduly rigid assertion of the right to intellectual property. At the same time, in some poor countries, cultural models and social norms of behaviour persist which hinder the process of

development.[9]

In this statement, the Pope is denouncing IP laws because they help the rich and hurt the poor by preventing poorer countries from reproducing already invented creations.

Another defense of IP laws comes from the utilitarian economists. This philosophy is based on the goal of maximizing wealth and utility. Utilitarians believe that if an inventor is not compensated for his creation, he has little or no incentive to innovate. Therefore, by providing the inventors and creators with protection for their ideas and inventions, IP laws incentivize innovation which leads to the maximization of wealth and utility.

IV. Criticisms

There are two main fallacies with this philosophy. First, for libertarians, the problem with IP laws is that they essentially "steal" the resources and property away from those who did not invent or create something, but would like to replicate or use it. IP laws may incentivize the original inventor, but that does not hide the fact that they are also holding down others from maximizing their resources and property (Kinsella, 2001 Pg. 15). For example, A invents the bicycle. A obtains a patent for this implement. That logically implies that B is forbidden to use his own metal, rubber, foam, leather, etc., as he wishes. To wit, B is legally prohibited from fashioning his own property into "bicycle" proportions. This amounts to a "taking" from B.[10]

Second, the utilitarian argument preaches the maximization of wealth and "general happiness", yet it is obvious that IP laws do the exact opposite (Weber, Critique. Pg. 1). The main purpose of IP laws is to promote invention and innovations. However, the actual consequences of the laws discourage innovation. For example, if an inventor receives a patent for an

9 Caritas in Veritate par. 22. These "rigid" laws that help the rich and hurt the poor are most clearly seen in the pharmaceutical industry, as large pharmaceutical companies are protected against the "little guy" producing generic versions of the new drugs.

10 See on this Epstein (1985).

invention, nobody is allowed to use or replicate that invention for a period of time, typically fourteen years. This means that for that duration, the inventor can choose to enjoy the spoils of his labor and not try to improve his original design or invent anything else. Instead, he is encouraged to relax and profit from others' use of his product that must be permitted by him first. Also, during this fourteen year period, nobody else is permitted to improve, replicate, or mass produce the invention without paying hefty costs to the original inventor. This is essentially creating monopolies for the first person who made the invention. These steep costs discourage others from improving and innovating on their own, and they are forced to wait almost a decade and a half to do so. It is entirely possible that this stalling of progress and innovation is doing more harm than good for the goal of wealth maximization.

Other than the discouraging effects of others paying high costs to use or improve the invention, those costs also lower the potential innovation. The time and money that is spent getting permission to use or improve an invention is essentially being wasted. This money could have been used to invest in the research and development of new or improved products. Because of IP laws, it is only consequential that a tremendous amount of money and human capital would be needed during the process of filing a patent. The government would have to spend resources receiving patent and copyright applications, recording and storing all of the necessary information, and deciding whether or not to grant the protection. No doubt these costs are passed on to citizens in the form of higher taxes. Companies would have to hire a staff of IP lawyers to defend against "theft" of their ideas and inventions, most likely leading to higher prices for consumers. Another problem concerning companies is the fact that when an employee develops and creates an idea or invention, he or she does not receive the patent or the profits. Instead, the company enjoys all of the rewards of the creation, even though the mind of one employee created it. If the goal of utilitarianism is to maximize general happiness, then it should become apparent that implementing IP laws is having the opposite effect.

The perfect example that undermines the utilitarian stance is that of

Jonas Salk. Salk invented the vaccine for polio, and instead of patenting it and gaining a fortune, he released it for mass production, saving millions of lives. Had Salk received a patent, production of the vaccine would have been limited to only the richest countries that could afford to pay for his discovery. Instead, the vaccine was available to anyone around the world to produce and administer. It seems difficult to deny that the lack of a patent lead to a much greater "general happiness" than if Salk would have patented his vaccine.

This case raises the issue of pharmaceuticals and intellectual property rights. The well-being of the pharmaceutical industry constitutes the main special pleading for patents. IP supporters claim that monopolistic privileges encourage research and development because the inventors can receive compensation for their contributions to medical improvement. Without IP laws, there is nothing stopping copiers from making generic versions of the original drugs, which would drive down the price, reducing the potential profit for the inventor. Research and development costs are exorbitant, and without the promise of being compensated for them, pharmaceutical companies will have radically decreased incentives to further their experimentations.[11]

These assertions are misguided, as Tucker (2009) notes that costs outweigh benefits. While the benefits of protecting the inventor and "incentivizing creativity" are theoretical (more innovations), the costs of implementing patents in the pharmaceutical industry are very specific and likely far greater. For one thing, the high costs associated with research and development can largely be attributed to the legal fees and adherence to strict federal mandates which are part and parcel of the intellectual property philosophy. These include higher a staff of lawyers dedicated to

11 Kinsella (2011) recounts a conversation he had with a friend of his discussing the need for IP laws. His friend brought up these points about the need for patents in order to protect "the little guy" from the large corporations. This is a common misconception, as patents for the most part end up protecting large companies from being copied and undersold, therefore hurting the little guy. Also the Catholic Church would support the ability to create cheaper, generic drugs so that the less fortunate can use them.

protecting the company's product and completing numerous retrials in order to achieve FDA and other governmental approval.[12] Without patent law, the costs of producing a drug would fall tremendously, and the savings would tend to be passed on to the consumer. The argument that these government forced retrials prevent the release of harmful drugs can be countered with basic economics. A pharmaceutical company would be motivated to create a safe and effective product because if it doesn't, the market will respond by not buying from the company and it will eventually go bankrupt.

The IP doctrine is intellectually incoherent. Even its advocates cannot articulate it, without pain of self contradiction. Suppose one of them were to voice this view. He might say something along the lines of "Intellectual property is justified." Note, that in so doing, the defender of this doctrine has used four different words: "Intellectual," "property," "is," and "justified." However, according to his own fallacious doctrine, he has no right to use any of this quartet of words. For each of them was invented by someone else, and he has not paid their proper owners for using them. For example, "Intellectual," was invented by a person we shall call Mr. Intellectual, "property," was invented by a person we shall call Mr. Property "is," was invented by a person we shall call Mr. Is and "justified" was invented by a person we shall call Mr. Justified. How dare the advocate of IP use these four words without permission? How dare he use any words in the English language (or any other language for that matter), since they were all created by someone else. Now, we of course full well realize that IP law does not prohibit the use of language. Even if it did, it would only prohibit

12 Kinsella (2007) provides an anecdote that points out the rather humorous state of the patent system. Pfizer was granted a patent for a new drug in a lawsuit with competitor, Apotex, that lead to the invalidation of the patent. As soon as the patent was invalidated, another pharma company that was already given FDA approval for the generic version of the drug once the patent would normally expire, Mylan, ramped up their production and tried to sue Apotex in order to prevent them from getting FDA approval. Basically, Apotex was able to get the patent on the original drug removed, only to find that they were precluded from making the generic version, too. The expression, "hoist by his own petard" comes to mind.

"theft" for a short time period. But, the logic of this malicious philosophy certainly does prohibit the promiscuous use of language, or even any use of it. For if property is permanent. If a man truly owns even a pencil, he may hand it down to his progeny, who may keep it forever. If ideas are truly property, and words are ideas, then words, too, may be owned permanently, and it would be a criminal act for anyone else to use them without permission, and presumably payment. But they could not even ask for this permission, for they would have to do so with the use of words.

On the other hand, costs and benefits are ultimately subjective, so one must take these estimates with a grain of salt.[13] In terms of whether we are likely to have more or fewer innovations with or without a patent system, at best we can say it is likely that the costs in terms of possibly fewer inventions due to reduced incentives will be lower than those in terms of increased legal and economic obstacles for inventors (Palmer, 1989, Boldrin and Levine, 2007, 2008). With our present system, an awful lot of very specialized human capital is devoted not to laboratories, but rather to courts, where scientists fight it out as to whether a new insight does or does not violate intellectual property rights. But, in terms of the argument, this may well be more than enough. For all too many discussions on this topic focus solely on the former, and completely ignore the latter.

What are the opposing views on private real property between the Catholic Church and Libertarians? The central debate is over intellectual compared to real property. The Catholic Church holds the same stance on both intellectual and real property. It believes that everyone has a right to all property because it is all of God's creation for mankind to share. Libertarians, on the other hand, draw a strong distinction between real and intellectual property rights. They believe in the non-aggression principle, which states that one is entitled to do whatever he wants, as long as it is not violating others' rights or preventing them from using their own property.

13 States Hayek (1979, 52): "And it is probably no exaggeration to say that every important advance in economic theory during the last hundred years was a further step in the consistent application of subjectivism." Also, see the following on this issue: Barnett, 1989; Block, 1988; Buchanan and Thirlby, 1981; Buchanan, 1969, 1979; DiLorenzo, 1990; Mises, 1998; Rothbard, 1997

Essentially, if one owns something, he can do anything he desires with or to the property and is entitled to prevent others from using or taking it. The major distinction that libertarians make is that unlike real property, intellectual property is not scarce. That is, once the idea is out there for E=MC2, for example, everyone can use it without detracting in the slightest from the originator, Einstein in this case, using it too. In very sharp contrast, if someone uses a wristwatch, or a piece of chalk, or eats an apple, then no one else can do this too. Thus, for the libertarian, there is no reason to limit the use of ideas through private property rights, while there certainly is justification for this institution with regard to wristwatches, chalk and apples. We need to know who has a right to these scarce physical products, otherwise we will constantly be at each others' throats over them. The same does not at all apply to intellectual property.

Moreover, such limitations would be unjust. If someone invents a device and patents the design, it precludes anyone else from replicating the device with their own resources and property, thus preventing them from the right to use their property how they please. As Long (1995) explains:

> It may be objected that the person who originated the information deserves ownership rights over it. But information is not a concrete thing an individual can control; it is a universal, existing in other people's minds and other people's property, and over these the originator has no legitimate sovereignty. You cannot own information without owning other people.

The last sentence cements the libertarian distinction between intellectual and real property. One can own land and use it as he wishes without violating the rights of others or preventing them from using their own resources. However, one cannot protect his inventions and ideas without violating the non-aggression principle and preventing others from using their own resources and property.

V. Conclusion

Libertarians and the Catholic Church may not agree on very many

issues, but one where they are both in agreement on is intellectual property laws. Both groups oppose IP although they have differing reasons for their opposition. The Catholic Church maintains its belief that everything is God's creation and therefore should not be owned by any one person. Instead, creations and inventions should be shared with everyone, since that is God's wish. On the other hand, libertarians make both ethical and economical arguments against IP laws. The very essence of IP laws requires the prevention of people using their own resources and property due to another's invention. This situation violates the basic law of libertarians, which is the non-aggression principle. From an economic standpoint, IP laws do the opposite of what they intend to do. Instead of maximizing wealth, they end up raising costs and lowering benefits. IP laws were supposedly created to incentivize innovation, but instead they hinder it. When two groups as polarized as the Catholic Church and libertarians agree on an issue, one has to wonder about the legitimacy of the presence of the topic and the proponents of its existence. In this case, the confusion is over the existence of IP laws and their effects.

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