

ACCESS VERSUS EXCLUSION TO KNOWLEDGE BALANCING THE EFFECTS OF INTELLECTUAL PROPERTY ON SOCIAL CONTEXT

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ABSTRACT:

The term intellectual property rights (IPRs) denotes a set of legal doctrines -namely patent, copyright, trademark and trade secret- that differ in their structure, scope and spheres of application, but nevertheless have in common the feature of granting the owner rights over the economic exploitation of an idea or its 'reification' (i.e. its expression in any tangible medium, as in the case of copyright-author's right). Such rights are exclusive, meaning that the owner is given a legal monopoly over the protected idea and thus she/he can exclude other individuals from the access to specific information.

Nevertheless, in economic terms IPRs have been designed in order to solve a market failure, the underproduction of specialized knowledge as, according to the utilitarian paradigm, "he who has no hope that he shall reap, will not take trouble to sow" (Bentham, 1839, p.31). In this perspective they represent a special kind of entitlement, functional to solve a social and economic problem, that is to say the optimal provision of knowledge. In other words, they present *ab origine* the feature to pursue a social goal by means of limited private appropriability. This makes them significantly different from the other property rights over tangible private goods. The enounced difference is then strengthened by the peculiar nature of the good involved, information, which is a public good. Accordingly, IPRs are functional to the collective interests – the production and the preservation of knowledge -, not to private ones.

This point relates intellectual property to social justice for a number of reasons. First of all, IPRs and social justice recognize the existence of a 'common good', that is to say a goal to reach and preserve (Hobhouse, 1911; Klamer, 2004; Ramello, 2005). From this point of view the state plays a representative role in defining the rights and duties required by the

common good. The former and the latter thus must be designed in order to reach the goal and do not represent per se the target of the laws.

In addition, both dimensions experience the opposition between the 'individual' and the 'anti-individual' as expressed analysing the social justice by a stream of literature (since Oakeshott, 1958) but equally raised considering the economic dimension (since Sweezy, 1942 and more recently Granovetter, 1985) and for the knowledge production and diffusion, with specific reference to the complementarity of the codified and tacit knowledge (Polanyi, 1958 and 1966). Thus the treatment of both the levels requires analogous treatment.

Finally, they are equally concerned at balancing liberties of different individuals in the stream of the Rawlsian meaning (Rawls, 1971). According to the this interpretation IPRs are not to be intended as privileges granted to specific individual, but as devices aimed at stimulating and preserving the freedom of expression of individuals. That was the reason to define a set of limited rights – at least at the beginnings IPRs are heavily bounded property rights - with more the nature of liability rules rather than property rules (Calabresi and Melamed, 1972). The above for example explains the set of extended derogation regime to the property, as in the case of the 'fair use doctrine' (Gordon, 2002).

It is worth noting that in the case of IPRs, nevertheless there is a peculiar convergence in preserving the social goal and the economic efficiency. In fact the productive milieu, a special kind of common, presents idiosyncratic feature with increasing returns (Klamer, 2002; Ramello, 2005). Consequently, an extended restriction to knowledge by means of strong property rights will imply a decay in productivity of the knowledge as a 'commons'. Since this depletion will also affect the feasible informative inputs for follow-on creators, thus disturbing the incremental process of expression and communication, the described regime can also impact on the essential human liberties and needs which constitutes, according to another school of thought, the main criteria upon social justice relies (Miller, 1976).

The proposed paper will further investigate this relationship, trying to assess the effect of the extension of the property rights regime occurred in the recent years in knowledge domain and comparing the social justice goal of the IP laws with the economic efficiency.

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