Knowledge as a Public or Private Good? A comparative human rights analysis of the protection of knowledge creation and diffusion

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Introduction

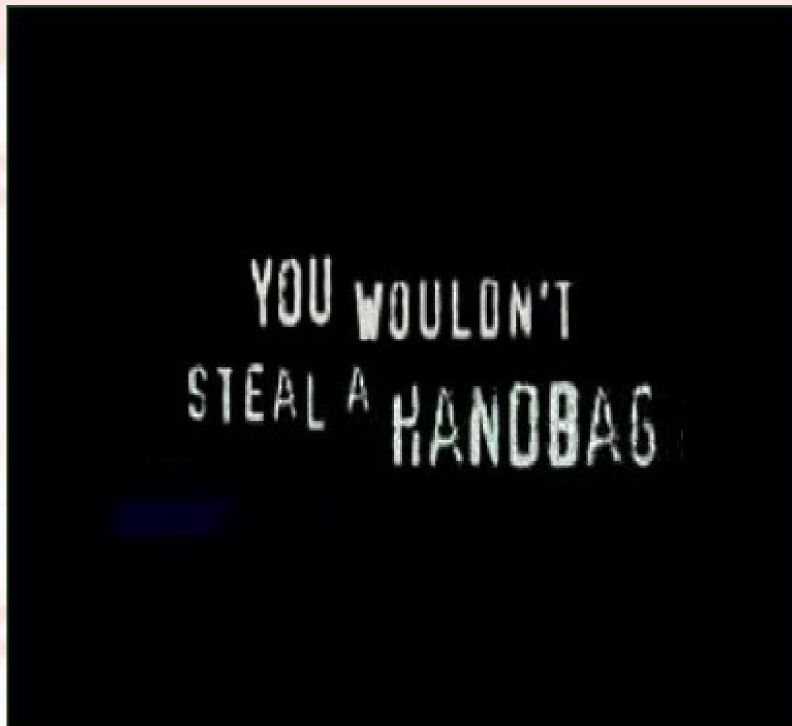
The polemic as to the nature of knowledge goods has been present in the doctrine of intellectual property since its very beginning.

The beginning of the dispute

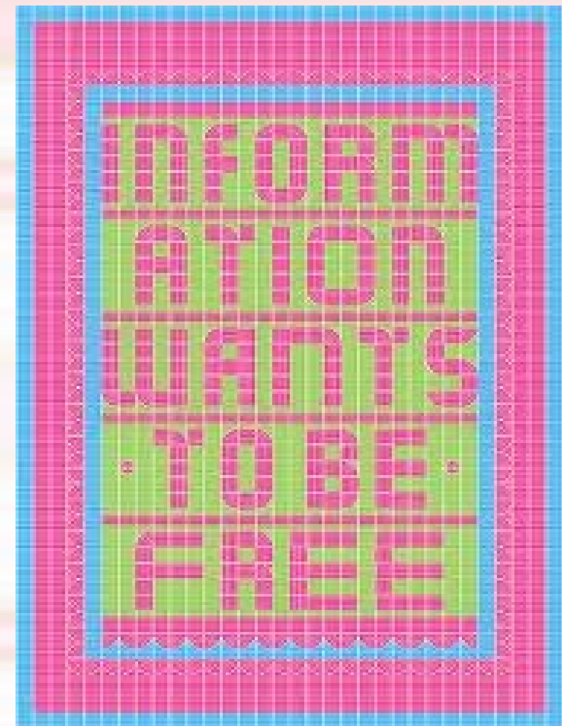
Locke: intellectual creations should be treated on a par with the fruits of physical labour – as the creator's private property.

Kant: intellectual works are *“continuing expression of [the creator's] inner self”*; moreover the public should have the right to access creations of others – private property right inadequate.

The current continuation



MPAA's antipiracy campaign



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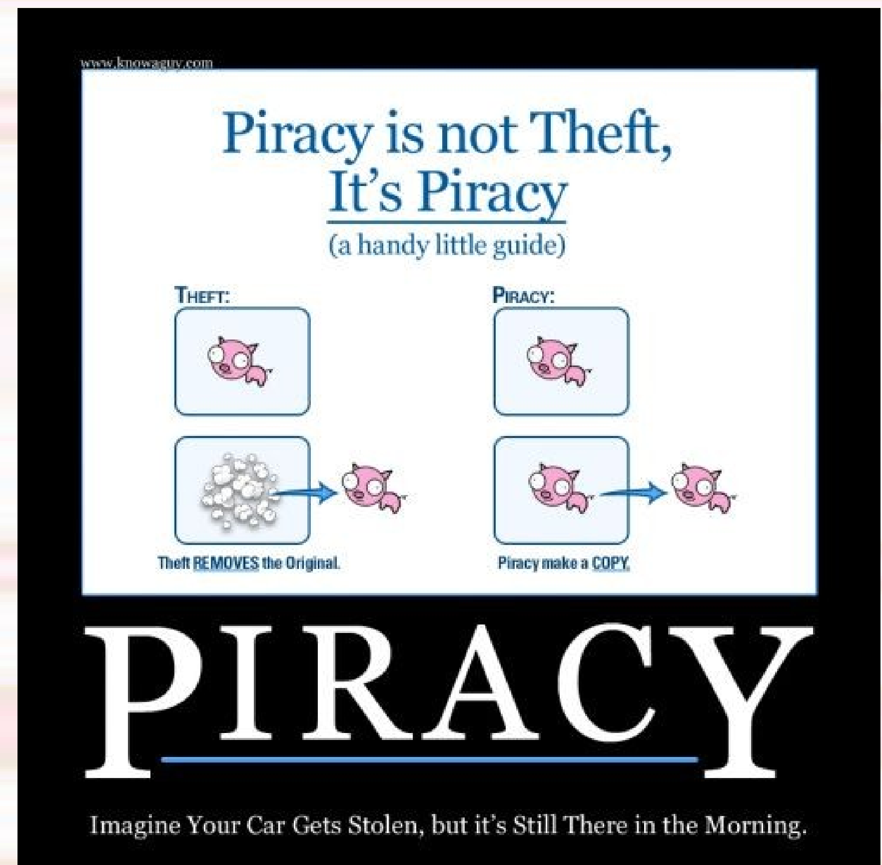

The focus of the presentation

The paper reconstructs the discourse on the nature of knowledge goods in the domain of human rights law, where the two opposing positions (knowledge as private v. public good) have been taken.

It attempts to show that the two contradicting perspectives may be actually reconciled on the basis of the social function of the right to property.

Private v. Public Goods

	RIVALROUS	NONRIVALROUS
EXCLUDABLE	Private Goods	*Club goods*
NONEXCLUDABLE	*Common Pool Resource*	*Pure Public Goods*

Public goods in italics, impure public goods underlined; [*Source:* Kaul I., Grunberg I. and Stern M. A., (eds.) (1999), p.5.]

Global Public Goods?

Global Public Goods are those public goods that could be enjoyed by the global *publicum*, i.e. are not limited to any specific population defined by geography, socio-economic status, gender, age, nationality etc.

This multidimensional attitude towards globality of some public goods resembles the human rights rhetorics.

Methods of interpretation

- Logical interpretation of the provision
- Historical context of the drafting process
- Drafting history

Article 27 of the Universal Declaration of Human Rights

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Historical Context of the Drafting Process

- The recent experience of World War II
- Science and art reserved for social elites

Preventing future misuse of science and abuse of scientists' work

The primary aim of the Universal Declaration is to assure that:

“disregard and contempt for human rights [that] have resulted in barbarous acts which have outraged the conscience of mankind would never be repeated”.

(Preambule of the Universal Declaration of Human Rights)

Preventing future misuse of science and abuse of scientists' work

How to attain that?

According to the drafters of the Universal Declaration:

protect the right of every individual to share in the benefits of scientific and artistic developments.

Democratisation of science and culture

- The United States – New Deal: financing public libraries and theatres, support for a growing interest in folk art and oral history
- Post-colonial world – revival of the native languages and cultural heritage
- Communist countries – financing palaces of culture and science, university quotas, art in the public sphere

Palace of Culture and Science in Warsaw

Phot.: Дејан Васић, Wikipedia

Phot.: Nnb, Wikipedia

Art in the public sphere in the communism's era

P. Guenther, *40 years since Slovak National Uprising,* 1984 [Source: Sabina Jankovicová, *Nostalgia and monumental art*]

Sabin Bălaşa, *Homage to the miners*, 1974, [phot. Alina Asavei, source: The National Museum of Contemporary Art, Bucharest, Romania]

Drafting history of the Article 27 of the Universal Declaration

Protection of human creativity approached from two perspectives:

- as a public access right,
- as a right of creators to have their interests protected.

The former was generally supported, the latter created controversy during the whole negotiating process.

Final interpretation

Article 27 of the Universal Declaration perceives knowledge as a global public good.

Knowledge as a global public good

“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. (....)

Inventions then cannot, in nature, be a subject of property”

Thomas Jefferson, the first U.S. Patent Commisioner

Knowledge as a private good? Case law of the European Court of Human Rights

Article 1 of the Protocol No.1 to the European Convention:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Intellectual property equated with other possessions?

- ***Dima v. Romania* (2005)** – copyright amounts to *possessions*
- ***Anheuser-Busch Inc. v. Portugal* (2005)** - registered trademarks and sole applications amount to *possessions*
- ***Melnychuk v. Ukraine* (2005) –** intellectual property in general amounts to *possessions*

Interpretation of the case law of the European Court of Human Rights

Intellectual property is equated with the right to property in tangibles.

The Court raises the rank of intellectual property to the level of a human right to property.

Right to property v. intellectual property

- Different subject: tangibles v. intangibles
- Different function: prevention of depletion v. incentive for creativity
- Different scope and temporal duration
- Similarity only in nomenclature

Social function of property as a remedy?

The property right is not absolute and unlimited.

Social function of property as well as all other doctrines imposing limits on the vision of property as an absolute right may be helpful in rediscovering a proper balance in intellectual property doctrine.

At the service of the society

Both the property right and intellectual property rights are not:

"an end in [themselves and] *must be used in a way that contributes to the realisation of the higher objectives of human society."*

(Cornides J., (2004), Human Rights and Intellectual Property. Conflict or Convergence, The Journal of World Intellectual Property, 7(2), p. 143)

Thank you for your attention!

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