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BOOK REVIEW

Richard Spinello and Maria Bottis: Understanding the debate on the legal protection of moral intellectual property interests: review essay of A Defense of Intellectual Property Rights

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The thesis of *A Defense of Intellectual Property Rights*, as the title makes clear, is that some legal protection of intellectual property rights is morally legitimate. At the very start of the book in Chap. 1, however, Spinello and Bottis are careful to describe their thesis in a way that clearly indicates their dissatisfaction with many existing laws protecting intellectual property. Their thesis should not be read as an endorsement of all existing legal protections: they set out their position clearly—a sensible move given that much of the intellectual property literature generates more heated sloganeering than light.[1]

This is such a crucial point to remember in reading this outstanding volume—and it is an outstanding contribution to the literature whether one agrees or not with their conclusions and analysis—that I think it helpful to let Spinello and Bottis speak for themselves; they make the point much more perspicuously than I could. After a brief survey of a number of laws they find problematic (including the Copyright Term Extension Act and the Digital Millennium Copyright Act), they state their position with precision and elegance:

> [T]he answer to these problems is not to dismantle or radically overhaul the whole system. Nor is it to jettison traditional concepts of authorship and originality in a post-modern conceptual frenzy. Rather, it is to concentrate on finding the right balance, to recalibrate the requisite measure of legal protection so that authors and creators are justly rewarded and future innovation stimulated, without impediments to the vitality of the intellectual commons or the free flow of knowledge and information (3).

This short paragraph exemplifies many of the excellent elements of their analysis. It is clear and nuanced, articulating all of the major concerns about legal protections of intellectual property. And it is eminently fair, conceding the legitimacy of those concerns, proposing an alternative conception that addresses such concerns. Again, agree or not, this paragraph shows that the authors treat their subject with the sophistication, impartiality, nuance, depth, breadth and fairness it deserves; even dissenting readers will not be disappointed by the quality of this book.

Chapter 2 provides a comprehensive outline of the history of copyright, distinguishing between the histories of patent, trademark and copyright. The chapter begins with a discussion of early copyright in England, including an especially insightful discussion of the Statute of Anne. It continues with a discussion of the evolution of authors' rights in Europe. It concludes with a discussion of the origins of copyright law in the US. Spinello and Bottis conclude the chapter with a brief discussion of patent law. Although any attempt to summarize the relevant history in one comparatively concise chapter is risky business, the authors pull it off in splendid fashion, providing sufficient insightful discussion of the turning points to properly ground the arguments that form the foundation of the book.

[1] For example, John Perry Barlow's facially implausible suggestion that information is a "life form" that has rights, which misunderstands both the biological category of "life" and the concept of a "right." The claim that information should be free is, it should be noted, a very different claim that is facially more plausible and logically follows from Barlow's claim. But this more reasonable claim can be held without holding Barlow's stronger (and deeply implausible) view. For a critique of this view, see Himma (2005).

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In Chap. 3, Spinello and Bottis provide a critical exegesis and analysis of intellectual property law in both the US and in Europe. This chapter is especially notable as it continues from the last chapter the international coverage of the arguments—which makes it relevant in discussions about IP law both in the US and in Europe and capitalizes on the expertise of Spinello with US law and Bottis with European law. Here the authors organize the chapter by discussing patents, copyright and trademarks separately, and under each of these headings provide a discussion of the basics of the each area of the law in the US and in Europe, carefully separating the discussions of the two regimes. Each section provides a discussion of the general principles of the relevant area of IP law, along with hard cases that potentially problematize the general principles, again demonstrating the nuanced approach that Spinello and Bottis take to this subject. This chapter, I would recommend as required reading for any introductory course in information ethics that covers the legitimacy of IP law. It is well written, includes sufficient detail to satisfy an expert without overloading a student with information they cannot absorb, while again contributing to building the necessary foundation for the arguments to come.

Chapter 4 begins a critical review of the arguments for the conclusion that legal protection of intellectual property interests is illegitimate. The first argument the authors explicate is the "libertarian argument," which is grounded in the assumption that people should have free access to all information. This assumption is grounded in a number of different claims from John Perry Barlow's claim, which he intends literally, that information is a life form and "wants to be free" to the assumption that there is simply no way to effectively protect a legal IP rights. The second argument is the "deconstructionist" critique: one version is grounded in postmodern theories of Derrida and Foucault, who essentially see in legal IP rights an illegitimate hierarchy of IP constraints, while another is grounded in the idea that no one is capable of complete originality because all content is grounded upon the content-contributions of others. The third section of the chapter describes some of what Spinello and Bottis regard as illegitimate expansion of IP rights; the excellent discussion here includes accounts of federal statutes, such as DMCA, as well as controversial court cases. The fourth argument they consider is one made frequently on behalf of developing countries, viz., that "individual claims on intellectual property are subordinated to more fundamental claims of social well-being" (138); the very difficult problem here is that legal IP rights tend to keep developing nations from overcoming their economic problems and becoming competitive.

As it is crucial to the development of the next chapter, Spinello and Bottis critically evaluate some of the arguments against protecting IP rights. Of crucial importance in this regard is Foucault's (1977) challenge to the very idea that any piece of content has a determinate and determinable author and the familiar idea that any "author's" content borrows heavily from the content of pre-existing works and hence can't claim exclusive responsibility for the content. On Foucault's view, it is the *reader* who interprets the sentences or work and thus actively creates the content or "meaning" of the sentences or work; he concludes, there is no single autonomous author. Of course, if a putative author's content is created either by the reader or by the body of pre-existing work that influences the author's content, it follows that no one has a legitimate claim to legal IP protection.

Spinello and Bottis defend the modest conception of authorship that is compatible with legal IP rights. They respond convincingly to Foucault's view with two responses. Again, as the authors' state the point with far more elegance and force than I can, I let them speak for themselves:

> The [problem] involves the nature of Barthes' (1977) own text.[2] For the sake of argument let us formulate Barthes' assertion as a simple proposition: "no text or statement has a stable or fixed meaning." But what about the meaning of *this* proposition? If Barthes' proposition (or text) has a fixed or determinate meaning, then the proposition contradicts itself…. On the other hand, if this proposition too lacks a fixed meaning, we can interpret it any way we like; as a result, Barthes' position on the instability of meaning becomes relativized and is hardly worth our attention because it doesn't convey an objective or determinate truth (127).

In response to the assertion that no author can claim responsibility for the content she produces because it is all influenced from pre-existing sources, Spinello and Bottis reply:

> [I]t is not a sensible idea to reduce the author's role to that of an impassive conduit who merely channels what is already present in the commons. To some extent, authors re-construct and re-shape the ideas that they have borrowed from others. But this fact does not deny the single author's irreducible role as a *creative catalyst*, the conscious origin and source of a fresh interpretation, a new work developed through hard labor that often entails considerable imaginative input and sometimes advances the frontiers of knowledge (127).

[2] On the authors' view, Barthes' proposition captures, I take it, the spirit of Foucault's view.

Both responses are clear, concise, and deserve to be taken very seriously by dissenters. These arguments are, as is characteristic of the other arguments in the book, extremely insightful and plausible. This is high quality philosophical analysis.

Chapter 5 lays the foundation for legal protection of IP rights by exploring philosophical foundations in principles of political morality. Again, it is important to emphasize that there are two distinct issues here: (1) the issue concerning whether so-called content-creators have a moral right or morally protected interest in the content of their creations; and (2) if so, whether this morally protected interest rises to the level of requiring protection by a morally legitimate state.[3] As important as this distinction is, it is frequently unarticulated and even overlooked in the literature concerning IP legal protection.[4]

Spinello's and Bottis's discussion begins with a consideration of Locke's (1690) influential argument for property rights, and starts with the indispensible observation that, for Locke, property rights in one self and labor is a "God-given natural right"—i.e., a right that is moral in character and not social, like legal rights, an absolutely crucial observation to begin to understand these theories of property rights. They correctly observe that Locke's argument concerns material property, and that there are certain disanalogies with intellectual property that problematize the application of Locke's argument to IP rights: e.g., the idea of an intellectual commons, the non-rivalrous nature of consumption of content, and the issue of fair use. Spinello and Bottis then go on to articulate a nuanced theory of IP rights that is compatible with Lockean foundations that acknowledges the flaws of existing IP law, potentially satisfying both those who support IP legal protection and those who oppose it. The analysis here is nuanced, sophisticated, and delightfully insightful.

Spinello and Bottis go on to consider the Hegelian argument, which is grounded in the idea that property is either partly constitutive of self or is expressive of self and personality. Although Hegel does not make the argument in explicitly moral terms, he implicitly relies on moral premises: the descriptive claim, as Spinello and Bottis put it, "the individual needs private property as a vehicle of personal freedom and self-expression" does no work unless one assumes that individuals are *morally* entitled to some level of protection of what they *need*, presumably, to flourish and lead meaningful lives.[5] Spinello and Bottis artfully explicate the notoriously difficult views of Hegel, making connections he makes to intellectual property and deriving other connections, again all while pointing to the limits of the view in legally protecting IP rights (which includes some pointed criticism of existing copyright, trademark, and patent laws).

The treatment here is, as always, fair, balanced, and nuanced. Although arguing for legal protection of IP moral rights, they are careful to point out the limitations of each of the arguments they are considering—a hallmark of good serious philosophy and intellectual integrity and vision:

> Like the Lockean framework, a Hegelian approach to intellectual property has some shortcomings. We are confronted with the basis for granting intellectual property rights. To what extent does expression of one's personality justify increased property protection? What happens if inventions, reflecting the personality of their respective inventors, are developed simultaneously?… (165–166).

One of the many reasons this review is so favorable is precisely examples like the above. Spinello and Bottis are not concerned with arguing for a particular position, come what may. They explicitly acknowledge weaknesses and counterarguments to their positions. One sees this much more in the traditional areas of philosophy than in information ethics; and this is a welcome development in the field. I hope to see other theorists follow their example.

Finally, the authors consider consequentialist arguments—in particular, utilitarianism. According to utilitarianism, we are morally obligated to bring about a certain objective state of affairs—namely, maximizing utility (where utility is alternatively used as an index for happiness, well-being, satisfied preferences, and pleasure). The utilitarian argument for legal protection of IP rights is grounded in the ideas that (1) authors' need some sort of incentive to create content, and (2) the creation of content contributes to maximizing utility; legal IP rights are the most appropriate incentive, on this view.

In the spirit of fairness and philosophical balance, Spinello and Bottis consider the weaknesses of the incentive approach. Other utilitarians argue that IP protection actually reduces creative output because creative content gets into the hands of fewer people, and IP protection makes it harder to utilize the results of the creative content that does

[3] Of course, there are a couple of cases where the issue (1) is suppressed. If one takes a consequentialist analysis or subscribes to a theory of legitimacy whereby the law is justified in exercising its coercive force only to promote the common good, then the issue of whether the law should legally protect IP rights is a question, purely of political morality. But it should be noted, as Spinello and Bottis do, that a utilitarian theory is still a general theory of morality; it simply doesn't identify *specific* interests or rights of individuals that receive moral protection. Instead the objective state of affairs to be promoted is maximized community utility. See Spinello and Bottis, 169, for a discussion of this important observation.

[4] For exceptions, see Himma (2008).

[5] The same considerations apply to the Hegelian assertions that "property is a mechanism for self-actualization" and "a way for a person's self-identity to be recognized by others" (163).

reach people who can afford it. The free flow of information, on this view, maximally promotes content-creation, in part, because the assumption that people need a material incentive to create is problematic. As Spinello and Bottis concede, to their credit, "the primary problem … is the lack of empirical data that can support the correct policy choices aimed at maximizing social welfare" (170)—a concession that cannot be refuted and, as such, increases the credibility and authority of the authors.

In Chap. 6, the authors continue their defense of intellectual property rights, citing the need for a justification for legal protection of IP rights that does not depend on utilitarian considerations that are difficult to assess, such as the law-and-economics claim that legal IP rights are justified insofar as they promote economic efficiency.

The strategy here is to rely primarily on the Lockean argument and defend it against criticisms that have been raised by a number of opponents. Spinello and Bottis begin with the reasonable (but rebuttable) presumption that the laborer who brings new value in the world, be it material or intellectual, has a *prima facie* moral claim to that value. For example, Kai Kimppa (2005) reasons that Locke's argument may justify material property rights but only because material objects are scarce; in contrast, intellectual objects are not scarce because of their non-rivalrous character. Seana Shiffrin (2001) argues that Locke's theory supports only private property rights in goods when such rights are necessary to make full and proper use of those goods.

Spinello and Bottis reply that both counterarguments downplay the moral significance of *labor* in the Lockean justification for property rights. What is absolutely crucial in Locke is that the investment of labor into a material object creates a morally significant interest in the created work; and the same, if Locke's argument can be extended to IP, would apply to content-creation. Labor, after all, has introduced new value into the world that would not be there but for the laborer's efforts.[6] Moreover, the suggestion that creators of content that has become iconic should be collectively owned is problematic because "the person who doesn't happen to create a work that seeps into the culture can enjoy unencumbered property rights, but the person who create a cultural icon or similar product must sacrifice his or her rights, [which] hardly seems fair or just" (187).

In a particularly unusual and interesting line of argument, the authors discuss a Catholic theory of property rights, which parallels Locke's in certain ways. Indeed, as Spinello and Bottis point out, Pope Leo (1956) asserts, as Locke essentially does in his *Second Treatise on Government*, that "God has granted the earth to mankind in general" and "private possession… [is] fixed by man man's own industry" (189). Much of the argument in this part of the book does not so explicitly depend on Christian theology but these remarks are notable, not only because Locke makes similar claims, but because they highlight the difficulty of the problem of moral property rights for Christians: If God gave the world to humanity in common, how can one person acquire exclusive property rights over any piece of the world? Locke solves it as Leo does by asserting the importance of labor, but Locke is quick to point out that there must be enough left of sufficient quality for everyone else after the appropriation—a condition that is clearly not satisfied in the world, at least with respect to land, as every acre of it is owned by someone.

Spinello and Bottis conclude this outstanding work with a consideration of the argument that the intellectual commons must be protected to allow free flow of information. As the authors point out, legal protection of moral IP rights does not "hermetically seal off [protected] content from public access" (196). They also point out that the differences between the physical commons and the intellectual commons (if such there be): While the physical commons is characterized by material scarcity, "there are no real limits to the information commons, given the fertility of the human mind" (197). Surely, this much has to be admitted: we produce more and more content despite the existing strictures of legal IP rights. If IP rights are stifling innovation, that simply cannot be assumed. That is an empirical claim and requires empirical study, rather than the armchair arguments philosophers are accustomed to making.

There is little to criticize in this outstanding volume. The volume makes an outstanding contribution to the literature on intellectual property. The discussion is consistently fair, balanced, clear, nuanced, sophisticated and insightful. Every chapter provides content from which a professional can learn but in written in such an accessible way that it can be used in even a lower-division class on information ethics. Spinello and Bottis consistently pull off what is sadly uncommon in a body of literature that is increasingly so abstract and jargon-laden that it is doubtful that the authors know what exactly they are saying. Obscure, impenetrable language is a sign that the author is

[6] As I have argued elsewhere, the morally significant interest of the content-creator might be trumped by stronger interests on the part of the public in information necessary to survive or thrive; but most content that is wanted by persons is content desired merely for *entertainment* purposes. It is hard to conceive any plausible argument that would defeat the claim that the interest that people have in content I have created for entertainment outweighs the interest I have in controlling that content. Of course, one can make other arguments to try to address this point—including some that have been made. But all of these arguments will have to involve the assumption that the interests that labor creates in the laborer is outweighed by some other morally significant interest than individual desires for being entertained. It seems clear that different arguments will have to made for content that implicates different levels of moral interests in the persons desiring free access to the content—a point too frequently ignored in the literature. See Himma (2008) and Himma (2007).

not clear on his or her ideas; the unrelenting clarity throughout this book clearly shows the mastery and uncommon expertise that Spinello and Bottis have over the material.

Nonetheless, and this is a criticism that applies to most essays on IP rights in the literature, it would have been useful to have seen the issues of individual morality more clearly distinguished from the issues of political morality that are involved in the IP question. There are two issues that are frequently conflated in the literature: (1) Does some person or class of persons have a morally significant interest in content created by herself or others? and (2) Should that interest be legally protected?

These two dimensions are present in many of the most pressing applied issues of the day. For example, the abortion debate is about whether the law should protect abortion rights. This requires two different kinds of analysis. First, one has to determine the morality of abortion: Is it wrong? And, if so, what level of wrong is it? Abortion rights opponents and mainstream proponents disagree on these questions—although they are not as far apart as is frequently presumed: abortion rights opponents regard abortion as the killing of a *moral person* and hence *murder*; proponents regard early fetuses as merely potential persons. Second, is the issue of political morality: should the law protect abortion rights? The opponent argues against such protection because no state could be morally legitimate if it used its coercive force to protect murder of defenseless persons. The proponent argues that since a potential person is not a person and hence cannot be *murdered*, a legitimate state should protect, as a matter of political morality concerning sex equality, a mother's right to reproductive privacy.

Similarly, there are two issues with respect to whether assisted suicide should be legally permitted. First is the issue of individual morality: is suicide or assisting in suicide morally wrong? Second is the issue of political morality: should the state use its coercive power to put medical professionals in prison for assisting suicide? Indeed, the case can be made, given the right political theory of legitimate state authority, that even if suicide and assisting suicide are morally wrong, the state should not use the threat of incarceration to criminalize it. The second issue is at least as critical as the first because the state characteristically operates by enacting laws that restrict autonomy through the use of force—something that is, as anyone who has studied political philosophy knows, presumptively morally problematic.

The same two issues arise with respect to legal protection of IP rights. Although Spinello and Bottis are acutely aware of the important distinction between the issue of individual morality and the issue of political morality, one of the few nits one can pick about the book is that the distinction between the two issues does not emerge as clearly as it could—though it does so far more clearly than in most other essays on the issues. For example, they do not discuss Locke's social contract theory of political legitimacy (or Nozick's (1974) influential theory of the state, which is partly grounded in Locke's view of natural property rights). Locke argues that, to avoid the state of nature, we contract for a state that is democratic in character but must respect the natural moral rights to life, liberty and property. Thus, Locke moves from a purely moral right to property among individuals to a moral right that must, as a matter of political morality, be afforded legal protection through his social contract theory. One reason to characterize this as a misstep is that two of the most important political theories of legitimacy since the Twentieth Century are social contract theories, though they differ in methodology from the classic contract theories of Locke and Hobbes—Robert Nozick's (1974) theory articulated in *Anarchy, State and Utopia* and John Rawls's theory articulated in *A Theory of Justice*. If one is going to go through Locke's theory of moral property rights to a theory advocating legal protection of moral rights to IP, then these two theorists simply must enter in the conversation.

Even consequentialists frequently distinguish between issues of individual morality and issues of political morality—although ultimately decided by the same foundational principle. Where Henry Sidgwick believed that the proper laws to enact were those that maximized utility, Mill argued that only acts resulting in harm to others should be restricted by law. Yet both were utilitarians. Consequentialists frequently articulate a political theory of legitimate state authority and theories of distributive justice on the basis of the foundational consequentialist principle but the theory involves different considerations precisely because the nature of all state authority with which we are familiar in this world is that states enact laws that they coercively enforce—and in that sense resemble an armed robber.

Still, this is a minor quibble. *A Defense of Intellectual Property* is, on this reviewer's view, required reading for both professionals and serious students of the ethical issues involved in whether to recognize and legally protect IP rights. A lovely addition to the literature.

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