

**Chapter 2** in *Intellectual Property and Théories of Justice*, A. Gosseries, A. Strowel, A. Marciano (eds.) Palgrave Macmillan, 2008

## **Are Rawlsians Entitled to Monopoly Rights?**

*Speranta Dumitru*<sup>1</sup>

Talented people are at the centre of Rawls' theory of justice. Of two principles, one is devoted to analysing what they are entitled to: equal opportunities for the equally talented, regardless of their social position; and unequal income for the unequally talented, provided that it benefits the least advantaged. Talented people are at the centre of the patent system, too. Within this system, some of the most talented people – those who are the first to invent and divulge a new device – are entitled not to a higher income, but to monopoly rights. They have a twenty-year right to prevent anyone from using, fabricating or selling the invention without their consent. How they manage this right determines the level of their income. Are monopoly rights for talented people justified by Rawls' criteria of justice?

In this chapter, I shall argue that Rawls' theory of justice is ill-equipped to answer this question. Tailored for rival goods and, as a result, centred on the distribution of benefits, it tends to restate questions of justice about unequal rights as questions about economic inequalities. Therefore, it lacks the tools necessary to distinguish among different forms of incentives for talented people. Once social and economic inequalities observe equality of opportunity and improve the least advantaged, the theory is indifferent as to whether talented people are allowed to compete for monopoly rights or for direct financial reward.

This chapter is divided into two sections. In the first I argue that Rawls' theory supports a *prima facie* liberty to copy. In fact, neither Rawls' writings, nor

philosophers working within his theory, ever make reference to intellectual property.<sup>2</sup> But on the basis of Rawls' defence of the Aristotelian principle (Rawls, 1971, § 65), one can conjecture that people having a fundamental interest in exercising their talents in complex and new activities are generally averse to intellectual property rights. However, limited curtailments of the liberty to copy can be conceded in so far as they provide incentives for talented people to create new and original products. Then, the question of whether intellectual property rights are as *just* as other efficient incentives becomes relevant.

In the second section, I turn to two related features, which prevent Rawls' theory from assessing incentives based on unequal rights from the point of view of justice. One is the decision to define questions of justice as distributive issues arising in contexts of scarcity. The other is the second principle's focus on economic inequalities.

### **The Aristotelian principle**

Intellectual property rights are exclusive rights. Their holders have the right to prevent others from using, fabricating or selling the patented invention. An invention is patentable if it is new (previously unavailable to the public), unobvious for persons skilled in the art and useful (or of industrial application). The correlative duty<sup>3</sup> of patent holder's claim rights is the third party's obligation to refrain from copying patented inventions. Should a just society recognise such an obligation?

Except for personal property, which is protected as a basic right, Rawls' theory neither defends nor rejects ownership rights.<sup>4</sup> Instead, it contains some elements conceding that a just society should protect the liberty to copy novel products. The foundation of such a liberty can be found in Rawls' thin theory of the good. In the

architecture of Rawls' theory of justice, a theory of the good is needed in order to specify the fundamental interests of the persons and the rules of rational choice, enabling parties to choose the principles governing a just society.<sup>5</sup> Rawls lists a couple of principles of rational choice, the Aristotelian principle being one of them.

The Aristotelian principle is stated as follows:

other things being equal, human beings enjoy the exercise of their realized capacities (their innate and trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity.

(1971, p. 426)

If this principle is a genuine rule of rational choice, and if the duty to refrain from copying could be shown to be contrary to the Aristotelian principle, then the preference for intellectual property rights will appear to be *prima facie* irrational. At first sight, the Aristotelian principle is a general principle of human motivation concerning the satisfaction derived from complex activities. What does it have to do with the liberty to copy novel products?

### *The preference for novelty*

There is both an explanatory and conceptual link between the satisfaction obtained from complex activities and the preference for novelty. The Aristotelian principle states that the satisfaction obtained through the realisation of one's capacities increases with the complexity of the activities undertaken. This correlation can be explained, according to Rawls, by a more fundamental desire which complex activities satisfy: 'the desire for variety and novelty of experience ... for feats of

ingenuity and invention' (1971, p. 427). Such a desire is assumed to be universal: 'human beings', claims Rawls, 'take pleasure in the novelty and the occasions for ingenuity and invention that such activities provide' (1971, p. 431).

The conceptual link is as follows. If the satisfaction increases with the complexity of activities, activities can be ordered in a chain: the  $n + 1$ th activity includes the  $n$ th activity and one other in addition. Moreover, the Aristotelian principle is a version of a rational choice rule which Rawls calls the 'principle of inclusiveness' which states that, from two options, it is rational to prefer the one whose execution would achieve all the aims of the other option and one more (1971, p. 412). There are indefinitely many such chains, and the Aristotelian principle aims to remain neutral as to which is to be preferred. But as far as one chain is concerned, there is a general preference for ascending it, for innovating within the chain (Rawls, 1971, p. 430). Here, the sense of 'innovation' is certainly relative to one's chain of activities, and not every activity added to one's chain is objectively new. But once all known ways of acting and aims are exhausted, one's preference always to move up in a chain corresponds, at the limit, to a disposition to invent and to solve new problems.

Now, assuming that the pleasure of novelty is as widespread as the Aristotelian principle implies, one can still object that this simply means that people are inclined to invent themselves, not that they are disposed to deny exclusive rights to the more inventive. But why should one's preference for novelty lessen whenever novelty is someone else's invention? In fact, the sole limit Rawls envisages for the tendency to enjoy novelty is set by the balance between the amount of the final satisfaction of performing the  $n + 1$ th activity and the burdens of further practice and study needed to pass from the  $n$ th to the  $n + 1$ th activity (1971, p. 428). Now, this burden is clearly lower when the new activity is accomplished by copying someone

else than by inventing oneself. Therefore, if the preference to innovate, to progress in a chain so long as the burdens are not unbearable, is universal, nobody will have an interest in establishing rights that prohibit further ingenuity.

*How the Aristotelian principle protects imitators*

One inevitable objection to this is that the rationale behind the intellectual property system is, on the contrary, to encourage ingenuity by publicly acknowledging it. What exclusive rights prohibit is only copying, not inventiveness. Indeed, once someone has invented a new device, how can others reasonably complain that being prevented from fabricating the same object obstructs *their* ingenuity? As Heraclites might have said, no object is new twice.

This objection relies on the distinction between the objective and subjective meaning of novelty and inventiveness. The meaning of novelty endorsed by the Aristotelian principle is subjective. This is not the case with the concept consecrated by the intellectual property system: novelty is equated with what was previously unavailable to the public, not to a particular individual. As a consequence, there is always a single inventor of a device, be it an individual or a group. Someone having ‘independently invented’ a device already available to the public is ineligible for monopoly rights and is liable for patent infringement if the device is patented. This narrow sense of novelty is tightened by the doctrine of equivalents. According to this, if one device performs the same function as another, in substantially the same way and with substantially the same result, it is the same as the second even though they differ in name, form or shape. The ‘inventor’ is consequently liable for patent infringement.

Yet, the Aristotelian principle protects not only independent inventors but also

imitators. This comes as no surprise to anyone aware that the principle is centred on individual activity. Invention is valued insofar as it is a new activity to an individual, not for the sake of society's general advancement. In other words, the Aristotelian principle is not intended to function as a perfectionist proviso and its role is not to support some constitutional clause for 'promoting progress and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries'.<sup>6</sup> Rather, from the Aristotelian principle perspective, creation and invention are valued as occasions, for an individual, to exercise her capacities and talents through new and more complex activities.

The Aristotelian principle, insofar as it is centred on activity and not on the production of novelty as such, supports a *prima facie* liberty to copy. It even encourages it by means of a corollary. 'A companion effect', Rawls maintains, of the Aristotelian principle is the general tendency to appreciate, learn and imitate products of human excellence: 'as we witness the exercise of well-trained abilities by others, these displays are enjoyed by us and arouse a desire to do the same things ourselves' (1971, p. 428). Therefore, a duty to refrain from copying, from 'doing the same things ourselves', seems to conflict with the Aristotelian principle. In addition, if the 'companion effect' is a genuine principle of rational choice and, as Rawls argues, an essential constituent of everyone's self-respect (1971, pp. 440–1), a preference for establishing intellectual property rights will appear as irrational.

The problem the intellectual property system poses, by forbidding duplication, is that it establishes monopoly rights on those activities which have permitted the realisation of the protected intellectual products. Without the consent of the exclusive rights holder, people are not allowed to exercise their skills by copying, even though these activities involve adding to novelty and complexity for the imitator herself.

*Which institutions promote the Aristotelian principle's goals?*

Should the liberty to copy be protected by the basic structure of a just society? Rawls explicitly acknowledges that 'granted that the [Aristotelian] principle characterizes human nature as we know it' the question is not so much how to justify it, but rather 'to what extent is it to be encouraged and supported'? (1971, p. 432). Since the tendency to invent and to perform increasingly complex activities 'is strong and not easily counterbalanced', Rawls believes 'that in the design of social institutions a large place should be made for it'. If not, 'human beings will find their culture and form of life dull and empty' (1971, p. 429).

At an institutional level, however, there are two strategies to prevent culture from becoming 'dull and empty'. The first is to trust the Aristotelian principle and its 'companion effect' and grant the liberty to copy. The second is to consider the interests expressed by the Aristotelian principle only as a starting point. Equally rational maximisers can choose to curtail the liberty to copy if the goals expressed by the Aristotelian principle are promoted to everyone's advantage. In other words, it would be rational to concede limited curtailments on the liberty to copy if they constitute the only incentives for talented people to create original products.

The second strategy seems more promising. In a system protecting everyone's liberty to copy, the most talented people will be tempted to use their right to disclosure strategically. Even if they 'do [novel activities] without the incentive of evident reward', as the Aristotelian principle presupposes (Rawls, 1971, p. 432), talented people may want to recover their investment through sales. Some inventors will then choose not to disclose their products to the public, relying instead on trade secrets. But confidentiality is a strategy available only for inventions that are difficult

to copy by reverse engineering. The rest are bound to be disclosed once they are sold. In order to minimise losses, inventors may try to charge the first buyer the full amount of their investment, or alternatively distribute it among more buyers, by imposing conditions on the sale of their products. They could, for instance, include in the transaction contract a clause prohibiting further disclosure, which will enable them to sue ‘pirates’ for breaching the contract.<sup>7</sup> Nevertheless, inventive people who know that secrecy is generally revealed or uncovered will have little incentive to divulge their work. As basic economic analysis teaches us, ‘for a new work to be created, the expected return must exceed the expected cost of producing it’ (Landes and Posner, 1989, p. 327).

Indeed, intellectual property rights are conceived of as a bargain for disclosure: society grants an inventor monopoly rights for a limited period in exchange for disclosure of their new product. However, there are various solutions available to this bargaining problem: reputation or financial rewards are alternative incentives for the most talented, and monopoly rights themselves could be arranged in different schemes. Among equally efficient incentives, which are the just ones?

### **Just incentives for the most talented**

A theory of justice must be able to say what kind of incentives, for whom and on what products are just.<sup>8</sup> Are monopoly rights better incentives than direct financial reward? If monopoly rights are the just incentives, should their duration and scope be strengthened or weakened?

Unfortunately, a Rawlsian theory of justice is not able to compare monopoly rights to other forms of incentives or to various schemes of intellectual property rights. It lacks, as I shall argue, appropriate tools to take into account the nature of



intellectual products, the type of inequality implied by monopoly rights and the kind of competition talented people are engaged in. First, in a theory of *distributive* justice restricted to conflicts of interests in conditions of scarcity, claims related to non-rival goods would not be regarded as claims for justice. Second, a theory centred on *economic* disparities will tend to assess all incentives in terms of these disparities, thus failing to address the question of whether inequality of (monopoly) rights is unjust, independently of economic contingencies. Third, a theory of equal opportunities centred on fair *initial conditions* disregards the question of why winner-takes-all competitions among talented people could be unjust.

#### *Justice without rivalry*

New devices have special properties. They share with other public goods two characteristics: non-rivalrous consumption and non-excludability. A good is *non-excludable* when it is difficult, if not impossible, to provide to one person without providing it to everyone. National defence and environmental conditions are examples of such goods. *Non-rivalry* means that each individual's consumption does not subtract the good from any other individual (Samuelson, 1954). Unlike machines, which are ordinary goods of private consumption, ideas embodied in new machines are of non-rivalrous consumption in the sense that 'no one possesses the less, because every other possesses the whole of it' (Jefferson, 1813). As Jefferson famously put it, 'he who receives an idea from me, receives instruction himself without lessening mine'.

Rawls' theory of justice seems to be tailored for goods of private, rival consumption. The theory is built on the fundamental assumption that scarcity of resources and competing interests are the two features explaining why questions of

justice arise. They also explain why questions of justice are supposed to be mainly about the *distribution of benefits*. Following Hume, Rawls maintains that circumstances of justice ‘obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity’ (1971, p. 128). Both features, scarcity and diverging interests, are assumed to be *necessary* conditions for justice: ‘unless these circumstances existed, there would be *no occasion* for the virtue of justice’ (ibid.; emphasis added). In other words, according to this account, if resources are abundant and benefits from cooperation do not fall short of the demands people make, questions of justice will not arise. Scarcity is the ‘objective’ side of the circumstances of justice.

It should be noted that conflicts of interest, the ‘subjective’ part of circumstances of justice, are wider in scope, and should not be confused with, the idea of ‘rivalry’. Rivalry is an inherent property of some kind of goods, describing the impossibility of joint consumption.<sup>9</sup> Rivalry accounts for some, but not all, conflicts of interests. Some of them, perhaps the most significant, stem from the fact of value pluralism since, as Rawls put it, ‘in an association of saints agreeing on a common ideal ... disputes over justice would not occur’ (1971, p. 129). However, rivalry does account for the way Rawls designed the theory of justice as one primarily concerned with *distributive* issues.

Now, intellectual goods raise no allocation problem: there is a zero marginal cost for an additional individual to enjoy benefits of a public good. They are not scarce in the sense that they need to be distributed. It is then surprising that some scholars have argued that under Rawlsian contractualism, *information* should be included in the list of primary goods to be equally distributed (Drahos, 1966, ch. 8). Yet, no institution is necessary to adjust the distribution of information: once

produced and divulged, information is available to all. Distributive concerns become relevant only when intellectual property rights are established, since they artificially create excludability.

Rather than allocation problems, information and, more generally, intellectual goods, give rise to collective action problems (Olson, 1965). This kind of problem occurs whenever individuals have an incentive to ‘free ride’ or take advantage of the efforts of others. Pure public goods, by being non-excludable, give everyone a sure benefit of consumption, and as such an incentive not to contribute. It is rational for an individual to wait for an intellectual product be created, and then to copy and enjoy it without incurring any of its production costs. By artificially creating excludability, intellectual property rights provide an institutional tool to avoid free riding.

Does free riding raise questions of justice? If Rawlsians agree that it does, they should also agree that scarcity of resources is not a *necessary* condition for qualifying claims as being made in the name of justice. A non-excludable good (or one that is difficult to exclude) could not be deemed to be in short supply, yet this is not a sufficient reason to leave free riding out of debates over justice. The definition of ‘circumstances of justice’ should then be revised to include those conditions favouring free riding, such as the non-excludability of some goods. This means that not only scarcity, but also *equal availability to all* raises questions of justice, and this constitutes a problematic result for any theory taking the aim of equal distribution of benefits as an axiom.

It might be objected either that the dismissal of scarcity does not follow from its premises or that free riding does not pose questions of justice. Let us look at the first point. What makes free riding the subject of justice, one could argue, is not the availability of intellectual goods to everyone, without contribution, but the way they

become available, i.e. their production. Indeed, intellectual goods are created through people's work, talents and material resources. Indeed, Rawls included 'intelligence and imagination' (but not the information they are likely to produce) in the list of natural primary goods, useful for any life plan, thus implying that talents are scarce and unequally distributed (1971, p. 62). There would then be no need, the objection runs, to modifying the definition of the circumstances of justice in order to accommodate free riding.

This objection is misleading. By pointing out the scarcity of talents, it rightly suggests that the distribution of benefits should be linked to the distribution of costs. However, this link explains why (and which) acts of free riding could be unjust, and not why free riding raises questions of justice. These questions are independent. Depending on the theory endorsed, free riding will be considered a disincentive to, or a failure to reward, already scarce talents. But reproducing free of charge the nth copy of a drug or taking the bus without paying could be defined as free riding before establishing that they are just, according to one or another theory. The question of whether a criterion is relevant for an evaluation is distinct from the question of the result this evaluation leads to. Accordingly, one can agree that free riding raises questions of justice without condemning it as unjust conduct. For some philosophers, justice itself is a matter of 'not [taking] advantage of one's fellows either as a free-rider or as a parasite' (Gauthier, 1987, p. 252), but others will deny that benefiting from others' efforts is (always) unjust.<sup>10</sup>

One may also deny that free riding raises any questions of justice. Not only does this option seem counterintuitive, but Rawls' explicit position was to regard free riding as a version of egoistic *conceptions of justice* and to reject it (1971, p. 124). When he discusses the production of public goods (mainly, domestic safety and

national defence), he suggests that coercion is both rationally and morally justified to enforce financing (1971, pp. 97 and 267).

First, as far as rationality is concerned, he argues that since a collective end is to everyone's advantage, it will also be in the individual's interest to contribute to its production. This argument fails to grasp the nature of a collective action problem by committing the fallacy of composition, that is, to infer from a group's having an interest in contributing to the provision of a good, the individual's interest to bear its cost.

Second, the moral argument against free riding is founded on the principle of fairness, which states that 'we are not to gain from the cooperative labour of others without doing our fair share' (Rawls, 1971, p. 112). One may then conclude that benefiting from others' labour gratuitously is *prima facie* contrary to fairness, but what counts as free riding will depend on what 'labour' and 'fair share' mean.

Moral evaluation of free riding seems to force Rawlsians into an uncomfortable dilemma. If they judge it to be unjust, their theory of justice needs to establish a stronger connection between distribution of benefits and the costs incurred to produce them. If, on the contrary, free riding is not unjust, then the fairness principle should be weakened. None of the alternatives is really convenient for Rawlsians and the dilemma is not specific to the production of intellectual goods.

The problem the principle of fairness raises for Rawlsians is the moral connection it establishes between one's own labour and others' obligations arising from that labour. According to Rawls, one deserves neither one's abilities, nor the willingness to make an effort: they are owed to natural lottery and social circumstances. Since labour depends on morally arbitrary characteristics, no one can claim to deserve its fruits either. Would, then, 'labour' be more able to impose

*obligations on others* than to *entitle one* to its benefits? In the economy of Rawls' theory of justice, the scope of the principle of fairness must be gained at the expense of the moral arbitrariness thesis. Accordingly, what counts as free riding will depend both on what counts as labour and on how much we owe to what counts as labour. In the extreme case, if others are entitled to few benefits from their labour, and if *doing* our fair share means only *being* a cooperative member of society, few acts would be qualified as free riding.

To sum up, if Rawlsians agree that new and original ideas are the kind of goods that create incentives to free ride, and that free riding raises questions of justice however they are assessed, they should also agree to modify the definition of 'circumstances of justice'. Not only scarcity of rival goods, but also equal availability to all of intangible goods raises debates over justice. However none of the arguments suffices to reject free riding on intellectual goods.

*Is anything wrong with monopoly rights?*

As noted, intellectual property rights are monopoly rights. They are often justified as incentives to create and divulgate new and original products, and that is the way a Rawlsian would justify them too. Certainly, there are various institutional tools to encourage ingenuity (Polanyi, 1944; Croskery, 1993) and even as far as monopoly rights are concerned, the efficiency of stronger or weaker protection is widely debated. Let us suppose that direct financial reward of talented people through taxation was shown to be as efficient as monopoly rights are: is there something wrong, *from the point of view of justice*, with monopoly rights, as compared to financial reward?

Rawls' theory would answer this question by comparing the two systems from

the point of view of the second principle of justice. If, let us assume, each incentive system creates economic inequalities that satisfy *to the same extent* fair equality of opportunity and improvement of the condition of the least advantaged, no further discrimination between the two forms of reward could be made. Monopoly rights and financial reward are equally just. However, if it can be shown that monopoly rights are unjust for reasons other than those related to optimal incentives and economic inequalities, it follows that Rawls' framework for analysing justice of institutions is at least *incomplete*.

Intellectual property rights provide us with reasons to believe that it is *unsuitable* as well. Rawls' followers tend to analyse the justice of an institution by focusing on its effects on economic inequalities. But monopoly rights entail first and foremost an *inequality of rights*. The focus on economic benefits explains why most criticism of intellectual property rights, and in particular of the patent system, is misguided. Usually, this criticism takes health care and an already existing drug for an important disease, such as HIV/AIDS, as a counter-example to show that a pharmaceutical firms' interest to maximise profits limits poor people's access to medicines.<sup>11</sup> While this argument is correct (as prices are greater when established by monopoly than by competition), it is not an argument against patents as such, or against patents in health care in particular. At best, it is an argument for compulsory licensing of a particular drug or alternatively, for progressive taxes and redirection of collective efforts in favour of poor AIDS sufferers.

In reality, monopoly rights are granted for inventions independently of their market value. While inventions should have some 'utility' or 'industrial application' to be patentable, no threshold of how much utility they should have is specified. A corkscrew inventor is granted the same monopoly rights as a molecule inventor. If the

pharmaceutical researcher is not allowed to sell her molecule as a drug, while the corkscrew inventor manages to earn important benefits from his monopoly, will we say that the first patent is less unjust than the second? Alternatively, if the first inventor sells her drug at a lower price and in a smaller quantity than the successful corkscrew inventor, is this a valid reason to criticise patents on corkscrews rather than those on drugs? Economic benefits and their effects on inequalities, while deriving from monopoly rights, are contingent, in the sense that they depend on market demand and patent owner management of an invention.

It might be objected that these are isolated cases which, as with HIV/AIDS drugs, prove little about the institution of patents in general. But if it could be argued that researcher's monopoly rights can *harm* more than the corkscrew's inventor patent, then the example illustrates the idea that monopoly rights raise problems of justice *independently* of their economic benefits, and this question is our concern here.

Monopoly rights allow their holders to prevent third parties from using their product. They allow the pharmaceutical researcher, whose molecule is patented but not marketable, to sue any other researcher for the use of her molecule. Assuming that less subsequent inventions could be developed from the new corkscrew, it follows that economic benefits derived from a patent are not relevant for evaluating the right holder's capacity to limit others' conduct. The logical independence of monopoly rights from the economic benefits parallels Rawls' distinction between liberty and the worth of liberty (1971, p. 204). In other words, the ability or inability to take advantage of patent rights is not a criterion for evaluating the inequality of rights the patent system imposes. If this argument is correct, Rawls' second principle of justice, which deals with economic inequalities and not with unequal rights, is not the most suitable criterion to assess the justice of intellectual property rights.



One may ask how anything can be wrong, from the point of view of justice, with monopoly rights, once they are deemed to be both the best incentives for the most talented and to the greater advantage of all, including the least advantaged. This question assumes both a *consequentialist* position about justice and a conception privileging *distributive* justice. Nevertheless, if monopoly rights appear to be unjust, the stronger reasons we can press are primarily deontological and only secondarily consequentialist and distributive in nature.

Even if monopoly rights over an invention are justified as the best incentives, other facts will continue to trouble us from the point of view of justice. One is the salient inequality they establish between the rights holder and third parties. As noted, this inequality is not only of economic advantages (due to monopoly prices), but of rights (the patent holder has the right to decide when and at what price the invention will be produced and to whom it will be licensed). The right to exclude third parties applies over an extended domain: all possible instances of the patented device, be it a process or a composition of matter. But beyond distributive concerns, there is a further reason why monopoly rights over all instances of a device seem unjust. From the point of view of the patent holder, an *independent inventor* is on a par with someone who copies the patented device. They could equally be sued and fined without discrimination. We all have a strong intuition that treating someone who produces a device by her own efforts as a thief or a free rider is profoundly unjust, independently of the conception of justice we happen to endorse. This failure to distinguish a free rider from an independent inventor is intrinsic to monopoly rights. Here is also the difference to be made from the point of view of justice between incentives by monopoly rights and incentives by financial reward, a difference that neither a consequentialist nor a distributive conception of justice can grasp.

It might be objected that a system distinguishing between free riders and independent inventors is too costly, if not impossible, to enforce and the benefits of the actual system exceed its unjust side-effects. This is a utilitarian objection. But even such a theoretical framework can try to accommodate these side-effects. A utilitarian aiming to diminish the injustice of treating independent inventors as free riders has two institutional mechanisms at her disposal. One is to modify the length of patent rights: to have both more efficient and less unjust monopoly rights a reasonable rule of thumb would be to approximate how long it would have taken, in the absence of patent system, for a second inventor to produce the device.<sup>12</sup> Beyond this, incentives to create seem suboptimal. Another mechanism is to modify the breadth of a patent: by narrowing its scope, it allows improvements and subsequent innovators to reach the market (Schotchmer, 1991). While the question of the optimal length and breadth of patents is under debate (Nordhaus, 1969; Gilbert and Shapiro, 1990), the question of (deontological) justice seems to plead in favour of lessening them.

If Rawls' second principle seems unable to address questions of justice specific to monopoly rights, it may derive an important improvement from them. Assessed through the equal opportunity principle, intellectual property appears as just if the competition between talented people is open to all, including the least advantaged. Rawls' conception of equality of opportunities is highly concerned by procedures and initial conditions, while neglecting completely 'stake fairness' (Jacobs, 2004). An egalitarian conception of justice cannot fail to ask for which positions people should have equal opportunities to compete. From this perspective, the difference between competitions for direct financial reward and winner-takes-all competitions for monopoly rights will appear once again as salient from the point of view of justice.

## Conclusion

There are two elements explaining why Rawls' theory is unable to assess the justice of intellectual property rights. The first is the decision to confine questions of justice to scarcity contexts, thus neglecting problems of justice related to non-rival goods. As a consequence, the theory of justice overemphasises the importance of the distribution of benefits at the expense of the distribution of costs. The second element is the exclusive focus on economic and social inequalities. According to Rawls' second principle of justice, once social and economic inequalities respect fair equality of opportunity and improve the least advantaged condition, no further discrimination between winner-takes-all competitions for monopoly rights and competition for direct financial reward for the most talented could be made. As a consequence, a theory focused exclusively on economic inequalities is unable to distinguish between free riders and independent inventors.

## Notes

- 
- 1 Thanks to Marc Rügger, Nicola Riva, Alain Marciano, Lubomira Radoilska, Vincent Aubert, Axel Gosseries and to participants of the Chaire Hoover (UCL Belgium) seminar for their helpful comments on earlier versions of this chapter.
  - 2 With very few exceptions, e.g. Rakowski (1991, pp. 84–7), discussing the amount of luck implied by inventions and discoveries; Nozick (1974, p. 182), discussing the optimal length of patents; and Pogge (2005), criticising patents on essential drugs.
  - 3 Or the 'jural opposite', cf. Hohfeld (1913).
  - 4 Private property is not a basic right, *pace* Resnik (2003)

- 
- 5 The fundamental interests of the persons are specified by preferences for primary goods. The theory of the good should remain thin: while defining what is necessary to any life plan, it aims to be neutral on the content of each life plan.
- 6 US Constitution, § 8
- 7 This solution is consistent with the libertarian, contractualist approach, see e.g. Nozick (1974, p. 141).
- 8 This question was not explicitly addressed in the literature and as Friedman (2000, p. 135) notes, ‘What we want, however, is not merely incentive but the right incentive’.
- 9 Some scholars disagree that being public is a characteristic inherent to goods, taking it rather as an attribute of institutions. See Cowen (1985).
- 10 For quite opposite justifications of this same view, see Nozick (1974, pp. 93–5) and Lemly (2005).
- 11 For a Rawlsian scholar who defends this solution, see Pogge (2005).
- 12 The suggestion is Nozick’s (1974, p. 182).

## References

- Cowen, T. (1985) Public Goods and their Institutional Context: A Critique of Public Goods Theory, *Review of Social Economy*, 43: 53–63.
- Croskery, P. (1993) Institutional Utilitarianism and Intellectual Property, *Chicago-Kent Law Review*, 68: 631–57.
- Drahoš, P. (1996) *A Philosophy of Intellectual Property*. Sudbury, MA: Dartmouth.
- Friedman, D. (2000) *Law’s Order*. Princeton, NJ: Princeton University Press.
- Gauthier, D. (1987) *Morals by Agreement*. New York: Oxford University Press.
- Gilbert, R. and Shapiro, C. (1990) Optimal Patent Length and Breadth, *RAND Journal*

---

*of Economics*, 21.

Hohfeld, W. N. (1913) Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, *Yale Law Journal*, 23: 16–59.

Jacobs, L. A. (2004) *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice*. Cambridge: Cambridge University Press.

Jefferson, T. (1905) Letter to Isaac McPherson, 13 August 1813, in A. Lipscomb and A. E. Bergh (eds.) *The Writings of Thomas Jefferson*, vol. XIII. Washington, pp. 326–38.

Landes, W. M. and Posner, R. A. (1989) An Economic Analysis of Copyright Law, *The Journal of Legal Studies*, 18: 325–63.

Lemley, M. (2005) Property, Intellectual Property and Free Riding, *Texas Law Review*, 83: 1031–75.

Nordhaus, W. D. (1969) *Invention, Growth, and Welfare: A Theoretical Treatment of Technological Change*. Cambridge, MA: MIT Press.

Nozick, R. (1974) *Anarchy, State, and Utopia*. Oxford and Cambridge, MA: Blackwell.

Olson, M. (1965) *The Logic of Collective Action*, Cambridge, MA: Harvard University Press.

Pogge, T. (2005) Human Rights and Global Health: A Research Program, *Metaphilosophy*, 36: 182–209.

Polanyi, M. (1944) Patent Reform, *Review of Economic Studies*, 11: 61–77.

Rakowski, E. (1991) *Equal Justice*. Oxford: Clarendon Press.

Resnik, D. B. (2003) A Pluralistic Account to Intellectual Property, *Journal of Business Ethics*, 46: 319–35.

Rawls, J. (1971) *A Theory of Justice*. Oxford: Oxford University Press.

---

Samuelson, P. A. (1954) The Pure Theory of Public Expenditure, *The Review of Economics and Statistics*, 36: 387–9.

Scotchmer, S. (1991) Standing on the Shoulders of Giants: Cumulative Research and Patent Law, *Journal of Economic Perspectives*, 5: 29–41.