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Are Rawlsians entitled to copy?

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Rawls' *Theory of Justice* is a book about just institutions. It represents nowadays the standard approach in theories of justice. "Philosophers", one critic said, "must either work within Rawls' theory or explain why not"¹. They must nevertheless refrain, when they borrow or buy the book, from (unduly) reproducing parts of it. This is a legal "must", arising from copyright law that one might question from a Rawlsian perspective. After all, one might say, *A Theory of Justice* has already sold 300,000 English copies. Two different editions are presently on the market and the book exists in translation in 27 languages. It has been a bestseller and the prohibition on reproducing it will continue to bring economic benefits until 2072. Is one really conforming to a just institution, by respecting the authors' and publishers' legal rights to limit access to books?

This paper is in two parts. First, I ask whether intellectual property could be supported by Rawls' theory. As a matter of fact, neither Rawls' writings, nor philosophers working within his theory, ever dealt with intellectual property rights². However, when Rawlsians try to answer the question "Is such-and-such institution just?", they proceed by checking firstly whether the institution's rules do not conflict with some fundamental liberties, and then they look to their effects on economic inequalities. Hence, I shall argue that Rawls' theory would justify a *prima facie* liberty to copy, not on the basis of the principle of equal liberty, but on a more fundamental one: a principle of rationality that Rawls called the Aristotelian principle. A liberty to copy, however

justified, is incompatible with intellectual property rights.

But is Rawls' theory a good one for assessing justice of the intellectual property rights? This is the question addressed in the second part of the paper. For even though the Aristotelian principle justifies a *prima facie* liberty to copy, limited abridgements can still be conceded in so far as they provide incentives for talented people to create new and original products. Then, the question whether intellectual property rights are as *just* as other efficient incentives could become relevant. However, Rawls' theory is unable to assess monopoly rights on intellectual goods *from the point of view of justice*. Tailored for rival goods and centred on economic inequalities, it lacks, as I shall argue, appropriate tools to take into account (i) the nature of intellectual products, (ii) the type of inequality implied by monopoly rights, and (iii) the kind of competition talented people are engaged in.

Since this article is concerned with justice of intellectual property in general, the differences between copyright and patent systems will be swept under the rug whenever possible, while other forms of intellectual property, like trade marks, will be ignored. Rawlsians tend to look at an institution as a set of distributive rules. In the same manner, intellectual property law could be defined as a set of rules distributing monopoly rights to talented people for a limited period of time in exchange for divulgation of new and original intellectual goods. There are, of course, important differences. Patents are monopoly rights on the use, fabrication and sale of an invention, granted for 20 years to those who divulge a new process or composition of matter of technical application. Copyrights are monopoly rights on the reproduction and sale of an original creation; in addition to pecuniary rights that cease 70 years after the author's death, most legal systems recognize four perpetual rights of the author (to paternity, respect for the integrity of the work, disclosure and withdrawal) called "moral rights". Despite these differences, the question this paper addresses remains general: Would monopoly rights for talented people be just in the Rawlsian sense?

1. A *prima facie* liberty to copy

Intellectual property rights are exclusive rights. They give patent owners the right to prevent others from using, fabricating or selling the same invention. They entitle copyright holders to exclude others from reproducing parts or the whole of their original creation. Such claim-rights of inventors and artists have a common juridical opposite, to speak in Hohfeld's terms³: the duty not to copy. Third parties should refrain from copying patented inventions by reverse engineering or otherwise, and from reproducing, with or without technology, copyrighted materials.

The duty to refrain from copying could hardly be justified within Rawls' theory. Rather, a Rawlsian would go in the opposite direction and defend *a privilege* or *a liberty to copy*. In Hohfeldian terms, someone has a "privilege" or a "liberty" to do something, if no one else has the right to prevent her from so doing. To justify a liberty to copy is then to argue (indirectly) against intellectual property rights. A Rawlsian could appeal to two principles to provide a justification. The first is the principle of equal liberty. By protecting freedom of speech, it provides some reasons to resist intellectual property rights. However, these reasons, as I will show in the first section of this part, are relatively weak and apply only to copyright. A stronger justification of the liberty to copy could be found in a more fundamental principle, that Rawls called the Aristotelian principle. By asserting that people have a fundamental interest to exercise their talents in novel activities, it provides sufficient support to the liberty to copy new and original products, or so I will argue in the second section.

A. How the first principle supports moral rights

According to Rawls' first principle of justice, everyone has an equal right to the most extensive system of basic liberties. While the right to *personal* property clearly belongs to this system, it is unlikely that *intellectual* property as such would count as one of the basic liberties. One may even argue that the protection of free speech by the first principle is incompatible with copyright. However, I will argue here that the first principle, by also protecting person's rights to privacy, supports to some extent the rights covered by the copyright system, specifically those designated as the *moral rights* of the author. Moral rights preserve the author's interests of paternity, respect for the integrity of the work, disclosure and withdrawal. Nevertheless, this support is not sufficient to justify a third party's duty not to copy the author's creations.

The argument from free speech runs as follows. Freedom of speech is unquestionably one of the basic liberties protected by Rawls' first principle. When speech becomes private property, public's access to it is by definition restrained. Copyright owners, as one legal scholar put it, "are able to stop people from saying what they want, when they want, in the way they want (...) and there is an obvious prima facie interference with the right to expressive freedom"⁴. Therefore, the argument goes, rights that are not basic liberties (such as those protected by the copyright system), but are instead in conflict with them (i.e. with freedom of speech) are ruled out by Rawls' first principle.

There are nevertheless good reasons to maintain that property in speech does not conflict with Rawls' principle of equal, most extensive, liberty. Many legal scholars, and indeed most courts, have argued that copyright is not incompatible with the free speech principle either⁵. Firstly, copyright holds only for expression – the form in which an author has chosen to cast her thoughts and concepts – and not for the ideas themselves. Copyright protection is then, without any doubt, consistent with freedom to use ideas. The line between idea and expression may be difficult to draw in practice. But while restrictions on expression remain

significant, it could hardly be maintained that the right to use other people's expression is a significant part of one's freedom of speech. In addition, these restrictions are limited in scope through the fair use doctrine, which allows for reasonable use of copyrighted material, without the author's consent and notwithstanding the monopoly granted by copyright.

Some scholars go further and argue secondly, that copyright is not only compatible with, but also favours free speech. They stress that free speech principle is not only about the public's rights to hear, to be informed and have access to speeches, but it is also an expressive freedom, understood as the individuals' right to speak. By providing legal protection and financial incentive for creative speech, copyright promotes a diversity of opinions, thus furthering one of the purposes of expressive freedom. Moreover, legal systems that protect moral rights, especially the right of disclosure, are thus protecting the authors' freedom to say what they want, when they want. The rights of disclosure and withdrawal insure then a conceptual link between author's freedom of speech and copyright. Although historically, copyright was conceived of to enable authorities to control printed materials (by granting permissions to publish in a discretionary way), the modern copyright system has ruled out any possibility of censorship and authors decide themselves how, when and to whom to speak. The idea that copyright provides a protection for the author's freedom of speech has been highlighted, since the 18th century, by Kant, who defined an author as "one who speaks to the public in his own name". Based on the authors' right to control their "discourses to the public", Kant drew the conclusion that "unauthorized publishing of books is forbidden as a matter of right"⁶.

Note that even if copyright is likely to abridge freedom of speech, as some legal scholars have argued⁷, there is still no reason to deem copyright as incompatible with Rawls' first principle. Certainly, an abridgement of liberty is likely to violate whatever principle calling for

the most extensive liberty. However, Rawls' maximizing principle holds for a *system* of basic liberties taken as whole, not for each liberty in particular. Freedom of speech is but one element of the system, along with political liberty, freedom of assembly, liberty of conscience, freedom of the person, and the right to hold personal property. No priority is assigned to free speech as such and some ways of abridging it (more by rules of order than by rules restricting the content of speech) are explicitly envisaged⁸. Rawls also admits that some basic liberties may be more extensive than others, and could be broadened or narrowed, according to how they affect one another. Indeed, granting the aim of maximizing the system of liberties as a whole, a basic liberty could be limited, but given the priority of the liberty principle in Rawls' theory, it could be limited only for the sake of liberty itself. That is, a basic liberty could be limited only to insure that the same liberty or a different one is properly protected⁹. It follows that it is *possible* to abridge freedom of speech without violating Rawls' first principle.

Moreover, it is permissible to curtail freedom of speech for the sake of other basic liberties. While copyright could hardly be included in the list of basic liberties, freedoms of the person and the right to hold personal property already have this status. They could even play a justificatory role for some rights protected by the copyright system. It should be noted however that the right to hold personal property gives little support to pecuniary rights associated to copyright: economic rights, whether exercised in a monopoly position or not, are regulated by Rawls' second principle. Yet, authors' interests protected by moral rights are unproblematically covered by the first principle.

Moral rights are rights attached to the author's personality, and some legal systems call them "person's rights"¹⁰. It is in virtue of this link, seen as indissoluble, that they are considered perpetual, inalienable and imprescriptible. There are many similarities between personality rights such as individual's privacy and moral rights of the author¹¹. Often defended as property¹², privacy rights are, like moral rights, exclusive

rights. Whether conceived of as property or mere civil liberties, they are rights to control information about oneself. In the same way, works protected by moral rights are seen as “the mark” or “the emanation of the author’s personality”. Subsequently, the right to control disclosure and further use of personal data is analogous to the right to divulgate and withdraw a work. Likewise, an individual has integrity and reputation interests in the accuracy of personal information, just as an author has the right to respect for the integrity of her work.

To sum up, moral rights of authors could be defended under Rawls’ first principle. Despite their prima facie interference with free speech, they benefit from support from personality rights. While both freedom of speech and privacy are basic liberties protected by the first principle, the public right to information may not be invoked to deny one’s right to control information about oneself and arguably, other “marks of one’s personality” as well. However, personality rights are insufficient to justify a duty to refrain from copying. Unlike disclosure of personal data, a work is not divulged to a specific target. So long as an author does not exercise her right to withdrawal, publication stands for her consent to address the public *as a whole*, whoever composes it. It follows that nobody, *pace* Kant, is bound to refrain from hearing, reading or copying a discourse addressed to the public, provided that moral rights of the author are not violated. Whether the duty to refrain from copying can be supported, as is often argued, by economic considerations, Rawls’ first principle cannot take them into account and rather leans against this duty.

B. How the Aristotelian Principle justifies a liberty to copy

The duty to refrain from copying does not hold for all intellectual works. Only new inventions, previously unavailable to the public and unobvious for persons skilled in the art, are patentable. And only original works, understood as creations through which the author

expresses her personality, are protected by copyright. Should a just society recognize a duty not to copy novel and original products? To this question, Rawls' theory can answer by the negative.

Rawls would rather argue that the basic structure of a just society should protect a prima facie liberty to copy novel products. The duty not to copy, he would say, is not only questionable in the light of the liberty principle, but, more fundamentally, it is also contrary to the thin theory of the good, which underlies principles of justice, and hence the liberty principle. The theory of the good is restricted to specifying the fundamental interests of the persons, as well as some formal rules of rational choice¹³. What Rawls calls the Aristotelian principle exemplifies such a rule. This 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"¹⁴. At first sight, the Aristotelian principle is a general principle of human motivation concerning the satisfaction provided by complex activities. What does it have to do with the liberty to copy novel or original products?

The link between novelty and the Aristotelian principle is both explanatory and conceptual. Firstly, the principle states that the satisfaction obtained through the realization of one's capacities increases according to the complexity of activities. This can be explained, according to Rawls, by a more fundamental desire which complex activities satisfy: "the desire for variety and novelty of experience, and (...) for feats of ingenuity and invention"¹⁵. Such a desire is supposed to be universal: "human beings", claims Rawls, "take pleasure in the novelty and the occasions for ingenuity and invention that such activities provide"¹⁶. However, assuming that the pleasure of novelty is generally experienced, as the Aristotelian principle supposes, 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.

This objection would be relevant if the disposition to invent was like the disposition to eat or to walk. Inclinations of this kind are compatible with performing an action whose type is instantiated by similar tokens. For instance, it is not contradictory for someone inclined to eat to be disposed to swallow only potatoes, always with the same gestures, and sitting every time at the same place. Unlike a disposition to eat, the propensity to invent is inescapably incompatible with the performance of the same action. To put it in Rawls' words, the Aristotelian principle allows for ordering activities according to the principle of inclusiveness. This principle states that, from two options, it is rational to prefer that whose execution would achieve all the aims of the other option and one more aim in addition¹⁷. It follows that activities could be arranged in a chain: the $n+1^{\text{th}}$ activity exercises all skills of the n^{th} activity and some other in addition. There are indefinitely many chains, but as far as one chain is concerned, there is a general preference for ascending it¹⁸. The disposition to invent is then incompatible with the performance of the same n^{th} action. Rather, it expresses the very tendency to always move up a chain. The sole limit Rawls envisages for this tendency is set by the balance between the amount of the final satisfaction of performing the $n+1^{\text{th}}$ activity and the burdens of further practice and study needed to pass from n^{th} to $n+1^{\text{th}}$ activity¹⁹.

Should the Aristotelian principle be true, the preference for intellectual property rights would be *prima facie* irrational. The reason is obvious: if the preference to innovate, to progress in a chain so long as the burdens are not unbearable is universal, nobody will be interested in establishing rights that prohibit one's further ingenuity. The inevitable objection to this reasoning is that the rationale of intellectual property system is, on the contrary, to encourage ingenuity, by recognizing it publicly. What exclusive rights are prohibiting is only copying, not inventiveness. Indeed, once someone has invented a new device, how could someone else reasonably complain that being prevented from

fabricating the same object obstructs *her ingenuity*? As Heraclites might have said, no object is new twice. The meaning of novelty and inventiveness consecrated by the intellectual property system is defined from the society's viewpoint: novelty is equated with what was previously unavailable to the public, not to some particular individual. This definition can disadvantage some independent (though surely latecomers) inventors, but exclusive rights, if correctly granted, block only duplication and plagiarism, not ingenuity.

Yet, the Aristotelian principle protects imitators. This will not surprise whoever remembers that it is an activity-centred principle. Creation and invention are highly valuable neither in themselves, nor for the society's general progress. The Aristotelian principle is not a perfectionist proviso. Rawls' theory of justice aims to remain neutral to society's goals and, as such, would not support an American constitutional clause striving for "promoting progress and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries"²⁰. Rather, from the Aristotelian principle perspective, creation and invention are valuable as occasions, for an individual, to exercise her capacities and talents through new and more complex activities. The problem intellectual property system poses, by forbidding duplication and reproduction, is that it establishes monopoly rights on those activities which permitted the realization of the protected intellectual products. Without the consent of the exclusive rights holder, people are not allowed to exercise their skills by copying the latter, even though these activities involve increasing novelty and complexity for the imitator herself.

Thus, the Aristotelian principle, insofar as it is centred on activity and not on the production of novelty as such, supports a liberty to copy. It even justifies it as a corollary. "A companion effect", Rawls maintains, of the Aristotelian principle, is the general tendency to appreciate, to 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"²¹. Therefore, a duty to refrain from copying, from "doing the same things ourselves", will undoubtedly conflict with the Aristotelian principle. In addition, if the "companion effect" is a genuine principle of rational choice and, as Rawls argued, an essential constituent of everyone's self-respect²², a preference for establishing intellectual property rights will appear as irrational.

Now, it becomes easy to see why the liberty to copy needs to 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"²³. 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". Otherwise, he maintains, "human beings will find their culture and form of life dull and empty"²⁴.

To sum up, the Aristotelian principle pleads in favour of a liberty to copy. It is, however, a *prima facie* liberty to copy. The Aristotelian principle, as other rules of rational choice belonging to the thin theory of the good, expresses only a general pattern of the individual decision. At a collective level, equally rational maximizers could 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 abridgements of the liberty to copy if they constituted the only incentives for talented people to create new and original products.

In fact, this seems to be the case for a system, which protects everyone's liberty to copy (as supported by the Aristotelian principle) but also moral rights (justified by the liberty principle). The reason is that the most talented people will be tempted to use their right to disclosure in a strategic manner. Even if they "do [novel activities]

without the incentive of evident reward²⁵, as the Aristotelian principle presupposes, talented people may still aim to earn from their creations. Some inventors will simply choose not to disclose their products to the public, relying instead on trade secrets. But confidentiality is a strategy available only for inventions difficult to copy by reverse engineering. With this exception, inventors, as well as authors and publishers, are bound to disclose their products. They may try to sell them conditionally, for instance, by including in the transaction contract a clause prohibiting unauthorized reproduction and further disclosure, which will enable them to sue "pirates" for breaching the contract²⁶. Nevertheless, since books are sometimes stolen or lost, and secrecy is bound to be revealed or uncovered, creative people have little incentive to divulge their works. As economic analysis teaches us, "for a new work to be [divulged], the expected return – typically, from the sale of copies – must exceed the expected cost "of producing it²⁷.

2. Just incentives for the most talented

A Rawlsian scheme, combining liberty to copy and moral rights, discourages creative people from divulging their products: they will tend to rely on trade secrets or other particular forms of contracts that protect their interests. By contrast, intellectual property rights are conceived of as a bargain for disclosure: society gives an author or inventor monopoly rights for a limited period of time in exchange for disclosure of their new and original work. There are conceivably different solutions 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. A theory of justice must be able to say what kind of incentives, for whom, and on what products, are just²⁸. If monopoly rights are the just incentives, should their duration and scope be strengthened or weakened?

Unfortunately, a Rawlsian-like theory of justice is not able to

compare monopoly rights to other forms of incentives, nor to various schemes of intellectual property rights. It lacks, as I shall argue, appropriate tools to take into account (i) the nature of intellectual products, (ii) the type of inequality implied by monopoly rights, and (iii) the kind of competition talented people are engaged in. Firstly, in a theory of *distributive* justice restricted to conflicts of interests in conditions of scarce resources, claims related to non-rival goods wouldn't be regarded as claims for justice. Secondly, a theory centred on *economic* disparities will tend to assess all incentives in terms of these disparities, thus failing to address the question whether inequality of (monopoly) rights is unjust, independently of economic contingencies. Thirdly, a theory of equal opportunities centred on fair *initial conditions* disregards the question of why winner-takes-all competitions between talented people could be unjust. 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. But this is a reason why the second principle and the definition of circumstances of justice should be amended.

A. Justice without rivalry

New and original products have special properties. They share with other public goods two characteristics: non-rival consumption and non-excludability. A good is *non-excludable* when it is difficult, if not impossible, to provide it to one person, without providing it to everyone else. 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 individual²⁹. Unlike books, which are ordinary goods of private consumption, like cars, ideas embodied in books and new models of cars are of non-rival consumption in the sense that "no one possesses the less, because every other possesses the

whole of it"³⁰. 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"³¹. 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"³². In other words, if resources were abundant and benefits from cooperation did not fall short of the demands people make, questions of justice would simply not arise, according to this account. 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, is wider in scope, and are not be confused with, the idea of "rivalry". Rivalry is an inherent property of some kind of goods, describing the impossibility of joint consumption³³. Rivalry accounts for some, but not all, conflicts of interests. Part of them, perhaps the most significant, flows 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"³⁴. However, rivalry does account for the way Rawls designed the theory of justice, namely 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. It is then surprising that some scholars argued that under Rawlsian contractualism, *information* should figure on the list of primary goods to be equally distributed³⁵. Actually, no institution is necessary to

adjust the distribution of information: once produced and divulged, information is already 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 problems³⁶. This kind of problem occurs whenever individuals have an incentive to "free-ride" or to 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 to elude contribution. It is rational for an individual to wait an intellectual product be created, and then to copy and to 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 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 (or difficultly excludable) good could not be deemed to be scarcely provided, 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 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 tricky result for any theory taking the aim of equal distribution of benefits as an axiom.

To this argument, it might be objected either that the dismissal of scarcity doesn't follow from its premises or that free-riding doesn't raise questions of justice. Let us look at the first point. What makes free-riding subject of justice, one could argue, is not the availability of intellectual goods to everyone, without contribution, but the way they become available, their production. Indeed, intellectual goods are created through people's work, talents and material resources. As a

matter of fact, Rawls included "intelligence and imagination" (and not information they are likely to produce) in the list of natural primary goods, useful for any life plan, thus suggesting that talents are scarce and unequally distributed³⁷. There would then be no need, the objection runs, to modify the description 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 for, or a failure to reward, already scarce talents. But reproducing for free the n^{th} copy of a book or taking the bus without paying tickets could be defined as acts of free-riding before establishing that they are just, according to one or another theory. The question 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 but a matter of "not to take advantage of one's fellows either as a free-rider or as a parasite"³⁸, but others will deny that benefiting from others' efforts is (always) unjust³⁹.

One may also deny that free riding raises any questions of justice. Besides this option seems counter-intuitive, Rawls' explicit position was to regard free riding as a version of egoistic *conceptions of justice* and to reject it⁴⁰. When he discusses the production of public goods (mainly, domestic safety and national defence), Rawls suggests that coercion is both rationally and morally justified to enforce financing⁴¹. Insofar as rationality was concerned, he argued that since a collective end is to the advantage of everyone, 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 usual 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. The second 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"⁴². One may assume 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 push Rawlsians into an uncomfortable dilemma. If they judge it unjust, their theory of justice should work out a stronger connection between distribution of benefits and the costs undergone 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 production of intellectual goods.

The problem the principle of fairness raises for Rawlsians is the moral connection it establishes between one's labour and others' obligations arising from this labour. According to Rawls, one does deserve 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 "labour" then be more able to raise *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 needs to 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 creates 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.

B. Is there anything wrong with monopoly rights?

As already 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 stimulate ingenuity⁴³ and even as far as monopoly rights are concerned, the efficiency of stronger or weaker protection is largely debated. Let us suppose that direct financial reward of talented people through taxes was established 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 will answer this question by comparing the two systems from the point of view of the second principle of justice. If, let us again assume, each incentive system creates economic inequalities that satisfy *to the same extent* fair equality of opportunity and improvement of the least advantaged' condition, no further discrimination between the two forms of reward could be made. Monopoly rights and financial reward are equally just. However, if it could 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 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 patent system, is misguided. Usually, this criticism takes health care and an already existing drug for an important disease, say AIDS, as a counterexample to show that a pharmaceutical firms' interest to maximize profits lessens poor people's access to medicine⁴⁴. While this argument is correct (prices are greater when established by monopoly than by competition), it is neither an argument against patents, nor against patents in the health care domain. At best, it is an argument for compulsory licensing of this particular drug or alternatively, for progressive taxes and redirection of collective efforts in favour of poor, AIDS suffering, people.

As a matter of fact, monopoly rights are granted for inventions and creative works, independently of their market or artistic 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 reason to criticize 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, like that of 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 inventor's patent, 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 new product. They allow for instance 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 capacity to limit others' conduct. The logical independence of monopoly rights from the economic benefits they are associated to parallels Rawls' distinction between liberty and worth of liberty⁴⁵. In other words, the ability or inability to take advantage from 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 never 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 supposed 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 as unjust, the stronger reasons we can press are beforehand deontological ones and only secondarily, of consequentialist and distributive nature.

Even if monopoly rights over an invention are justified as the best incentives, different facts will continue to bother us from the point of view of justice. One is the salient inequality they establish between the rights holder and third parties. As already 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, how much and for what price the invention will be produced and to whom it will be licensed). The right to exclude third parties holds 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 copied the patented device. They could equally be sued and sentenced without discrimination. We all have, I suppose, a strong intuition that treating someone who realized 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 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, to a second inventor to realize the device⁴⁶. Beyond this duration, 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 enter the market⁴⁷. While the question of optimal patents' length and breadth is under debate⁴⁸, 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 instead draw an important improvement from them. Assessed through the equal opportunity principle, intellectual property appears as just, if the competition between talented people was 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"⁴⁹. An egalitarian conception of justice cannot fail to ask for which positions people should have equal opportunities to compete⁵⁰. From this perspective, the difference between competitions for direct financial reward and the winner-takes-all competitions for monopoly rights will appear once again as salient from the point of view of justice.

To sum up, Rawls' second principle seems incomplete and inadequate to distinguish between different forms of incentives for talented people. It is incomplete since it neither takes into account inequalities of rights, nor is it able to reject the winner-takes-all competition for monopoly rights. It is inadequate since, focusing on economic inequalities, it is unable to distinguish between free-riders and independent inventors. It should however be noted that this argument applies to patents and rarely to copyrights. As a matter of fact, if Rawls' conception of ingenuity as expressed through the justification of the Aristotelian principle was to be taken as relevant for intellectual property, it would hold only for the copyright, since he completely excluded the possibility of independent inventions. In valuing human inventiveness, he thought it favours individuality, "for how could everyone do [complex activities] in the same way?"⁵¹

¹ R. Nozick, *Anarchy, State, and Utopia* (Oxford UK & Cambridge US: Blackwell, 1974), p. 183

² With very few exceptions, i.e., E. Rakowski, *Equal Justice*, (Oxford: Clarendon Press, 1991), who discusses the amount of luck implied by inventions and discoveries (at p. 84-87); R. Nozick, *op. cit.*, who discusses the optimal length of patents (at p. 182); Th. Pogge, "Human Rights and Global Health: A Research Program", *Metaphilosophy*, 36 (2005), p. 182-209, who criticizes patents on fundamental drugs.

³ W.N. Hohfeld, "Some Fundamental Legal Conceptions as Applied to Judicial Reasoning", *Yale Law Journal*, 23 (1913), 16-59

⁴ P. Loughlan, "Copyright Law, Free Speech, and Self-Fulfilment", *Sydney Law Review*, 24 (2002), p. 429.

⁵ M.B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?", *UCLA Law Review*, 17 (1970), 1180-1204.

⁶ I. Kant, *The Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1996), p. 71-72.

⁷ R.C. Denicola, "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression" *California Law Review* 67 (1979); D.L. Zimmerman, "Information as Speech, Information as Goods: Some Thoughts On Marketplaces and the Bill of Rights" *William & Mary Law Review*, 33 (1992), 665-740; W.J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property", *Yale Law Review*, 102 (1993), 1533-1609.

⁸ *TJ*, 203

⁹ *TJ* 204

¹⁰ In German system, moral rights are called *Urheberpersönlichkeitsrecht*, author's personality rights.

¹¹ P. Samuelson, "Privacy as Intellectual Property?", *Stanford Law Review*, 52 (2000), 1125-1173.

¹² S.D. Warren & L.D. Brandeis, "The Right to Privacy", *Harvard Law Review*, 4 (1890), 193-220; J.J. Thomson, "The Right to Privacy", *Philosophy and Public Affairs*, 4 (1975), 295-314

¹³ 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.

¹⁴ J. Rawls, *A Theory of Justice*, (hereinafter *TJ*), (Oxford: Oxford University Press, 1971), 426

¹⁵ *TJ* 427

¹⁶ *TJ* 431

¹⁷ *TJ* 412

¹⁸ *TJ* 430

¹⁹ *TJ* 428

²⁰ US Constitution, Sect. 8

²¹ *TJ* 428

²² *TJ*, 440-441

²³ *TJ* 432

²⁴ *TJ* 429

²⁵ *TJ* 432

²⁶ This solution is consistent with libertarian, contractualist approach, see e.g. Nozick, *op. cit.*, p. 141

²⁷ Fragment revised from W.M. Landes & R.A. Posner, "An economic Analysis of Copyright Law", *The Journal of Legal Studies*, 18 (1989), p. 327. The original text states "...for a new work to be created" and not "to be divulged".

²⁸ This question was not explicitly addressed in the literature and as D. Friedman notes, "What we want, however, is not merely incentive but the right incentive", in *Law's Order* (Princeton: Princeton University Press, 2000), p. 135.

²⁹ P.A. Samuelson, "The Pure Theory of Public Expenditure", *The Review of Economics and Statistics*, 36 (1954), 387-389.

³⁰ T. Jefferson, "Letter to Isaac McPherson, August 13, 1813", in *The Writings of Thomas Jefferson*, vol. XIII.A. Lipscomb and A. E. Bergh ed. (Washington, 1905), 326-338

³¹ *TJ* 128

³² *Ibid.* (my emphasis)

³³ Some scholars disagree that publicity is a characteristic inherent to goods, taking it as rather an attribute of institutions. See e.g. T. Cowen, "Public Goods and their institutional Context: A Critique of Public Goods Theory", *Review of Social Economy*, 43 (1985), 53-63.

³⁴ *TJ* 129

³⁵ P. Drahos, *A Philosophy of Intellectual Property*, (Dartmouth Publishing Group: 1996), ch. 8

³⁶ M. Olson, *The Logic of Collective Action*, (Cambridge MA.: Harvard University Press, 1965)

³⁷ *TJ*, p. 62.

³⁸ D. Gauthier, *Morals by agreement*, (USA: Oxford University Press, 1987), p. 252

³⁹ For opposite justifications of this view, see R. Nozick, *op. cit.*, p. 93-95 and M. Lemley, "Property, Intellectual Property and Free Riding", *Texas Law Review*, 83 (2005), p. 1031-1075.

⁴⁰ *TJ* 124

⁴¹ *TJ* 97, 267

⁴² *TJ* 112

⁴³ P. Croskery, "Institutional Utilitarianism and Intellectual Property", *Chicago-Kent Law Review*, 68 (1993), p. 631-657; M. Polanyi, "Patent Reform", *Review of Economic Studies*, 11 (1944),

⁴⁴ For a Rawlsian scholar having defended recently this solution see e.g. Th. Pogge, "Human Rights and Global Health: A Research Program", *Metaphilosophy*, 36 (2005), p. 182-209.

⁴⁵ *TJ*, 204

⁴⁶ The suggestion belongs to Nozick, *op. cit.* p. 182

⁴⁷ See e.g. S. Scotchmer, "Standing on the Shoulders of Giants: Cumulative Research and Patent Law", *Journal of Economic Perspectives*, 5 (1991), p. 29- 41

⁴⁸ W. D. Nordhaus, *Invention, Growth, and Welfare: A theoretical Treatment of Technological Change*, (Cambridge: MIT Press, 1969); Gilbert & Shapiro "Optimal Patent Protection and Breadth", *RAND Journal of Economics*, 21.

⁴⁹ L. A. Jacobs, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice*, (Cambridge: Cambridge University Press, 2004)

⁵⁰ For a more powerful criticism of the ideal of equal opportunities, see C. Arnsperger and P. de Villé, "Can competition ever be fair? Challenging the standard prejudice", *Ethical Theory and Moral Practice*, vol. 7 (2004), p. 433-451

⁵¹ *TJ*, 427