

Love and Intellectual Property

*Thomas C. Berg**

I've been working for a while on how Christian thought might relate to intellectual property rights, or IP rights.¹ That area of law is hotly debated these days. One reason is that the scope of US patent and copyright laws, as well as the duration of copyright, have greatly expanded in the last generation. A second arena of debate is international. Developed nations have used trade agreements to push developing nations to strengthen their IP laws because, it's asserted, this will attract innovation and investment. Critics say this harms people in the poorer nations, for example by blocking affordable generic versions of patented AIDS and malaria drugs. IP has become a social-justice issue.

In these arenas, arguments for maximal versus minimal IP clash. Property rights in information rest first on an instrumentalist, argument: that they provide necessary incentives to creation by preventing free riding that would undercut the creator's return on investment. Broader economic arguments emphasize that property rights facilitate market exchanges that most efficiently commercialize inventions and creations. And there are Lockean rights arguments—that the creator is entitled to full reward for her talents and labor.

From the minimalist side, one critique is instrumentalist: broad IP laws impede innovation and creation by raising the costs to users engaging

* James L. Oberstar Professor of Law and Public Policy, University of St. Thomas (Minnesota). © 2014 Thomas C. Berg.

¹ See, e.g., Thomas C. Berg, Intellectual Property and the Preferential Option for the Poor, 5 J. Cath. Soc. Thought 193 (2008); Thomas C. Berg and Ruth Okediji, Intellectual Property and Religious Thought, 10:2 Perspectives (Dec. 2009), online at <http://www.stthomas.edu/perspectives/2009/winter/IntellectualReligious.html>.

in downstream creation. But more broadly, many critics offer a competing account of how creativity is motivated and disseminated. They appeal to virtues of sharing and invoke the concept of the “gift economy,” in which in which valuables are not sold—as in a market economy—but rather given without an explicit agreement for immediate or future rewards.² They point to examples where major knowledge has been generated and refined through sharing. One example is open-source software, such as the Linux/GNU operating system, free to all other persons to use and improve as long as they in turn allow free use of their improvements. And there’s Wikipedia, which has generated a staggering amount of content from dispersed, anonymous, uncompensated contributors. Critics say that the expansion of property control over information encourages selfishness as well as cutting off avenues of generating knowledge.

Whatever you think of the general idea of gift economy, in the IP area it’s supported by a distinctive argument: the nonrivalrous nature of information goods. If I give you my bicycle, I lose its use during the time you have it. But if I give you an idea, we can use it simultaneously and indeed may derive greater value from the shared use than the sum of our solitary uses—much as, in Thomas Jefferson well-known image, “he who lights his candle at mine, receives light without darkening me.” Jefferson thought that ideas were “less susceptible than all other[things] of [being] exclusive property”; “that ideas should freely spread from one to another over the globe,” he said, “for the ... improvement of [man’s] condition, seems to have been ... designed by nature.”³ So why not share?

² See, e.g., Lewis Hyde, *The Gift: Creativity and the Artist in the Modern World* (Vintage Books 2d ed. 2007).

³ Thomas Jefferson to Isaac McPherson (Aug. 13, 1813).

But there are two major difficulties with the gift economy, even as applied to information. First, don't there have to be some rewards to induce or at least support sharing? Rewards can be non-monetary or indirect: open-source programmers reap reputations from their work; so do academics, who also receive salaries and grants. Wikipedia contributors receive none of these—but then writing Wikipedia content is pretty low-cost. For contributions to knowledge that require much more investment, we may need more substantial, monetary, rewards, for which some property rights are an important component.

A second problem is that gift-giving may be effective only within distinct communities such as traditional societies, academics in a discipline, or software programmers. Economists tell us that people may be unwilling to share knowledge freely outside a group of familiar, repeat players: the ongoing relationship inspires greater sharing and creates reputational incentives that reduce free-riding. Even free software itself depends on copyright protection: only that way can users far downstream be compelled to distribute their own improvements for free.

I've focused on the "gift economy" because in several ways it parallels the Christian notion of love. As Peter Leithart remarked in an article on this in *First Things*, for Christians "'gift' is a basic element of human life."⁴ He cites Martin Luther's *Large Catechism*, which "sums up the entire history of creation and redemption under the rubric of gift:" the Father gives at creation, the Son "give[s] himself to reconcile us to the Father"; and the Spirit gives himself so we can receive and retain the gift.⁵

⁴ Peter J. Leithart, *The Dark Side of Gratitude*, *First Things*, <http://www.firstthings.com/web-exclusives/2012/08/the-dark-side-of-gratitude>.

⁵ *Id.*

Leithart adds: “Since all is gift, Luther taught, we are bound to be grateful, to ‘thank and praise, serve and obey.’” As this suggests, the sense of gift and gratitude tie closely to our love of God and neighbor. “We love because He first loved us,” I John says; “if God loved us so much, we also ought to love another.”⁶ As Pope Benedict writes in *Deus Caritas Est*,⁷ this changes love from an externally imposed (and impossible) “commandment” into “a freely-bestowed experience of love from within, ... which by its very nature must then be shared with others.” Think of the two kinds of love in Anders Nygren’s *Agape and Eros*, and what motivates each. If the motivation we experience in *eros* is desire for the beloved, the motivation in *agape* is joyful gratitude.

So the first thing Christian love might add is an additional, and distinctive, motivation to create and share. Intellectual creation may reflect *eros*—pursuing the beautiful or true—but it is also *agape*, sharing a gift. But if gift and gratitude issue in love, this inspires one not simply to create—which might still be consistent with restricting access solely to maximize profit. Love should also inspire the creator to share in ways such that all can benefit. In short, love has the potential to unite the motivation for creation and an obligation to benefit others through it.

Non-Christian and secular creators also describe “inspiration as emanating from an external source beyond that of the author herself.” Lewis Hyde’s influential book *The Gift* quotes the environmentalist and beat poet Gary Snyder: “You get a good poem and you don't know where it came from. “Did I say that?” And so ... you feel humility and you feel

⁶ I John 4:19, 4:11 (New Revised Standard Version).

⁷ *Deus Caritas Est* (God Is Love), #18,

http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html.

gratitude.”⁸ Hyde adds that the gift “isn’t fully realized until it is given away,” and he quotes Meister Eckhart that the true form of gratitude for a gift is to be fruitful in it. “Pay it forward”—or around. Even our pluralistic, secular society can understand the idea of expressing gratitude for an externally bestowed gift by making it available for others’ benefit.

A second relevant feature of *agape* is its element of universality: each human being has “irreducible worth and dignity,” regardless of their status or their actions and desert. No doubt *agape* is expressed distinctively in special, immediate relationships, which affects our particular obligations. But no one is so distant that we might not be called to give to him. Here’s Benedict again: before the parable of Good Samaritan, he says, “the concept of ‘neighbour’ was understood as referring essentially to one’s countrymen and to foreigners who had settled in the land of Israel; in other words, to the closely-knit community of a single country or people. This limit is now abolished. Anyone who needs me, and whom I can help, is my neighbour.”⁹ Peter Leithart contrasts traditional gift economies with the Christian view that “[b]ehind every gift is a transcendent giver, the generous Father, and his gifts create an all-encompassing bond that relativizes all human loyalties and obligations.” Leithart’s specific point is that the Christian view undercuts any justification for power imbalances between donor and recipient; but the insight applies also to who the range of recipients may be. *Agape* entails at least potential moral obligations to those seemingly distant from us. It constrains and directs not just personal gift relationships, but commodity transactions.

⁸ Hyde, *supra* note 3.

⁹ Deus Caritas Est, #15.

What does all this mean for intellectual property law? That raises the driving question of this conference: whether love has any relation in general to civil law and justice. Briefly, my own view, influenced by theologians like Paul Ramsey and Reinhold Niebuhr and their reading of Augustine, is that justice is not the same as love, but neither is it divorced from it. Justice implements the obligations of love under conditions of finitude and sin: imperfect knowledge, limited capacities, limited sympathy for others, and outright self-centeredness.

For many of the reasons above, legal rights in IP play a valuable in making love operational; sharing alone won't do it. But love calls for at least two important qualifications on IP rights. First, sharing must occur—and IP rights must give way if necessary—to when basic human needs are at stake, for example, when people face death or serious harm from disease or starvation. In his study of the *agape* concept, Gene Outka concludes that “to each according to his needs” is the distributive principle closest to *agape*. It “includes those things essential to the life and welfare of humans, considered simply as humans”—capturing *agape*'s egalitarianism—while still allowing for differential treatment when, because of individuality, those basic needs differ.¹⁰ He adds that “[m]any of Jesus’s teachings [and actions] emphasize the urgent importance of meeting mundane needs (apart from merit)”: “food, drink, shelter, clothing, health, and liberty.” Thus the obligations of love plainly were, and are, implicated by the crisis over the affordability of AIDS drugs and the uses of patents to block far cheaper generics. The preference for voluntary solutions means Christians should be happy that drug companies are increasingly providing subsidized cheap supplies. But the poorer nations were quite warranted when, in the early

¹⁰ Gene Outka, *Agape: An Ethical Analysis* (Yale U. Press 1974).

2000s, their governments declared public-health emergencies and resorted to law: compelling licenses at reduced costs, importing generics from India and elsewhere, and pushing the World Trade Organization to validate these steps. People were dying; few voluntary agreements were then in place; companies were not developing new drugs but instead were enforcing patents based on an unwarranted claim that cheap drugs might be diverted to the rich-nation markets.

Beyond basic needs, I think that IP law should primarily be shaped to help empower people in need to become producers themselves, participants and agents in economic life. *Agape* also desires the other person's freedom: to quote Outka again, "it is of the essence of proper respect that we encourage others to be co-agents, and accept and welcome them as such, as co-operating with ourselves in a common enterprise." So I'll conclude just a few brief comments about IP and empowerment.¹¹

First, poor people can use their own IP rights to protect and to benefit from their own creativity—although this may require adjustments in IP laws to recognize the communal cultural processes that are more common in traditional societies as contrasted with the generally individualistic title of Western IP law. Second, when IP rights are enforced in poorer nations, it's essential there be enforceable obligations on rights owners to reciprocate by transferring appropriate technology and know-how to those nations so they can advance.

Finally, empowering the poor does requires preserving and solidifying certain limits on IP rights that work to lower the cost to users of building upon existing knowledge to innovate further. These include the

¹¹ For more detailed discussion of means of empowerment, see Berg, *supra* note 1, at 215-21, 225-28.

copyright fair-use defense and various other defenses based on noncommercial use. It is crucial to emphasize that these limits do not create entitlements that foster dependency or bureaucracy. Instead the limits are tailored to encourage “productive” or “transformative” uses: individuals and groups, often non-profit groups, use the limits to be free to create further. IP maximalists have been trying to erode these limits in various ways, and the erosion should be resisted.

Without such limits on IP rights, and concerted efforts to transfer technology, IP will be—as it too often has been—a great immediate deal for the wealthy nations and a bad one for the poor. I think we can critique that from the standpoint of love as well as justice.