Happy IP

Replacing the Law and Economics justification for intellectual property rights with a well-being approach

***Estelle Derclaye & **Tim Taylor**

Contents

Abstract

The dominant justification for intellectual property rights at least in the West and international treaties is utilitarian and more precisely based on the Chicago School of Law and Economics (section 1). However, this school of thought is both flawed and ideological (section 2). Basing protection solely on the economic aspect of utility (i.e. income) has been increasingly challenged in recent years. We thus propose that intellectual property rights should be justified using a notion of utility based directly upon well-being, rather than using income as a proxy. We outline a theory-neutral approach to well-being that could be employed for this purpose (section 3). Our proposal, like any and every other legal programme, cannot avoid being ideological (section 4) but it avoids the flaws of the Law & Economics approach. It is also not paternalistic (section 5).

Introduction

Choosing a policy over another depends very much on what one wants to achieve in society. Up to now, the rhetoric in policymaking has been driven by economic growth and a country's prosperity. But research has shown that economic wealth is an inadequate proxy for general well-being: the former is only one contributory factor towards the latter. Recently, some politicians have awoken to that fact and have vowed to concentrate on well-being.[1] However, the current intellectual property rights (IPR) rhetoric in policy-making is still focused on economic growth and on (social) welfare as defined by orthodox economists.[2]

This paper discusses the utilitarian justification of IPR. We assume that in principle utilitarian considerations are relevant to the justification of IPR, but acknowledge that they are not necessarily the only relevant considerations. We are concerned with the question of how 'utility' should be defined for this purpose. We reject the assumption underlying the Law & Economics approach that economic indicators such as GDP can be taken as proxies of national well-being. Instead, recognising that there are competing theories of well-being, we argue for a theory-neutral approach. This takes advantage of the fact that, although different theories disagree on what constitutes well-being, there is likely to be a broad area of common ground between them on what we call the 'markers' of well-being: things which are either constitutive, productive or indicative of well-being. This area of common ground can thus be used in policy-making. Our proposal, like any and every other legal programme, cannot avoid being ideological but it avoids the flaws of the Law & Economics approach. Although the IPR justified in terms of well-being may appear paternalistic at first sight, we argue that it is not paternalistic as far as individuals are concerned.

Before we embark in our discussion, it is important to first clarify the meaning of the most important terms we use in this article, namely intellectual property rights, happiness and well-being as often people use them to mean different things.

In this article, we use the terms intellectual property rights to refer solely to patents and copyright. This is because the utilitarian justification is more suited to these two rights than to trademarks and related rights (such as geographical indications). By contrast with patents and copyright, trademarks apply to signs rather than products. They mainly serve as an indication of origin so as to avoid consumer confusion. The rationale for protecting them is therefore different than that justifying patents and copyright. We acknowledge that an investment function close to that of patents and

* Professor of Intellectual Property Law, University of Nottingham. I would like to thank Tim Taylor for all his thoughtful comments on my contributions to this article.

** Inter-Disciplinary Ethics Applied Centre, University of Leeds.

[1] *See e.g.* UK Prime Minister David Cameron's speech of 25 November 2010 announcing a new way of measuring well-being in the UK, available at https://www.gov.uk/government/speeches/pm-speech-on-wellbeing. Unless otherwise stated, footnotes are omitted in citations. All web sites have been accessed on 8 January 2015.

[2] Orthodox, mainstream or classical economists are those basing economics on economic wealth maximisation and presuming rational consumer behaviour. The majority of economists nowadays are still orthodox. For a summary of orthodox economists' assumptions, *see* below section 2.3. Behavioural economists and happiness economists have departed with these assumptions.

copyright also exists for trademarks, but it is not the dominant one and is only really relevant to some trademarks namely well-known ones. To the extent that designs are a hybrid between patent and copyright and that other intellectual property rights related to patents and copyright, such as plant variety rights and rights neighbouring copyright, can also be justified by utilitarian concerns, the reasoning in this article can apply to them too. However, for reasons of space, we have only conducted the analysis in relation to patents and copyright proper and further analysis is necessary to see if our conclusions would hold for rights related to patents and copyright.

We use the term 'well-being' to refer to the overall quality of a person's life – well-being is what someone has if their life is going well for them. Though the term 'happiness' is sometimes used as a synonym for 'well-being', we use it here in a slightly different sense to refer to a subjective mental state of some kind, or an aggregation of mental states, which reflects a person's positive affective response to and/or evaluation of their life at a given time.

1. Intellectual property law's rationales

This section shows that the predominant theory justifying IPR is the utilitarian rationale, also called the incentive theory.

As is known, there are two main justifications for IPR – teleological (or consequential) and deontological. Originally, civil law countries adopted deontological justifications and common law countries consequential ones. Within each of these justifications, there are two subcategories. In deontological justifications, we find natural rights and personality rights and in consequentialist ones, the utilitarian theory and its derivatives.[3] Because the utilitarian justification for IPR is the basis on which our article is built, we spend a little bit of time to remind readers about it.

The first consequentialist theory is the utilitarian rationale, and is also often called incentive theory. It is based on Bentham's axiom that the measure of right and wrong (and therefore the appropriate basis for making legal and social decisions) is "the greatest happiness of the greatest number" which has become known as utilitarianism.[4] This rationale translates as follows in the case of patents, copyright and related rights: because inventions and creations are easily copied by others, it is not possible for the creator or inventor to be adequately recompensed for the effort involved in producing them. Thus there is insufficient incentive for people to create and innovate. However, in utilitarian terms, it is desirable for intellectual outputs to be produced as there will be a greater sum of happiness as a result. To remedy this problem, some protection must be granted to authors and inventors. The current type of legal protection for such intellectual efforts is property rights. These exclusive rights give authors and inventors the possibility to recoup their investment by ensuring that they are the only ones to be allowed to sell their creations and inventions on the market for some time. In other words, they have a legal monopoly

[3] Elkin-Koren & Salzberger, "The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis" 46 (Routledge, London 2012), citing Fisher, 'Theories of Intellectual Property' in: Munzer (ed.), "New Essays in the Legal and Political Theory of Property" 168-199 (Cambridge, Cambridge University Press, 2001).

[4] Bentham, "A Fragment on Government", 2nd para (Preface, London 1776).

on their endeavours for a limited period of time, after which these inventions and creations fall in the public domain and can be used by all freely.

The second consequentialist justification is derived from the utilitarian rationale; it is its translation in economic theory applied to law. As this justification is well-known to IP experts, we do not restate it here but refer the reader to the literature.[5]

Suffice it to say that according to orthodox economists, enacting intellectual property rights is the best mechanism to allow creators and inventors to appropriate the fruits of their labour and makes private production of such information goods possible at a better level of production for society.

These four theories remain the main and most popular theories justifying intellectual property today.[6] But by far, the current prevailing justification for IPR is the utilitarian rationale and its derivatives, be it at international level[7], in the US[8] or the EU[9], whether in policy-making[10], legislation or case law.[11] Furthermore, it is generally the

[5] See e.g. Levêque & Ménière, "The Economics of Patent and Copyright" 5 (Berkeley Electronic Press, Berkeley 2004).

[6] The human rights justification can be included in the natural rights theory. Recently, some commentators have also advocated bringing together or unifying these theories as none if perfect to justify IPR in itself. See e.g. Gervais "Intellectual Property and Human Rights: Learning to Live Together" in: P. Torremans (ed.), "Intellectual Property and Human Rights" (Enhanced Edition) (Kluwer Law International, Alphen aan den Rijn, 2008), 3 There are other less recognised and thus less used theories for justifying IPR, *see* J.A.L. Sterling, "World Copyright Law" paras. 2.27-240 (Sweet & Maxwell, London 2008, 3rd edn); Bently & Sherman, "Intellectual Property Law" 3-5, chapters 2, 14 and part IV (OUP, Oxford 2009, 2nd ed.); Torremans, "Holyoak and Torremans Intellectual Property Law" 12-27 (OUP, Oxford 2013, 7th edn).

[7] Geiger, "Droit d'auteur et Droit Du Public à l'Information, Approche de Droit Comparé" 30 (Litec, Paris, 2004), referring to the preamble of the WIPO copyright treaty of 1996 and 7 of the TRIPs agreement.

[8] Geiger supra n 7, at 30 and references cited; Stadler, "Forging A Truly Utilitarian Copyright" 91 Iowa L. Rev. 609, at 643-644 (2006) and references cited and 656 (Another example of utilitarianism is found in the US copyright act's fourth fair use factor ("the effect of the use upon the potential market for or value of the copyrighted work")); Devlin and Sukhatme, "Self-Realizing Inventions and the Utilitarian Foundation of Patent Law" 51 Wm. & Mary L. Rev. 897, at 901, 913 (2009) (virtually all US commentators and US courts including the Supreme Court 'agree that utilitarian considerations enjoy hegemonic status in patent jurisprudence' and *see also* citations in notes 1 and 57); Elkin-Koren & Salzberger, supra n 3, at 4 (the US Constitution takes a consequential approach). *Contra:* Hughes, supra n 4, at 288 who thinks it is the labour theory which influenced the US constitution's vision of property.

[9] Musso, "Grounds of Protection: How Far Does the Incentive Paradigm Carry?", in: A. Ohly (ed.), "Common Principles of European Intellectual Property Law", 33-98 (Mohr Siebeck, Tübingen 2012) also citing Granstrand, "The Economics and Management of Intellectual Property. Towards Intellectual Capitalism", 321 ff. (Elgar, Cheltenham 1999) to say that the economic incentive is the main rationale for intellectual property in the EU now; Derclaye and Leistner, "Intellectual Property Overlaps, A European Perspective" 298-304 (Hart, Oxford 2011), although showing that some of the EU secondary law refer to human rights as counterbalance to IPR (and several recitals of directive 2001/29 (the information society directive) more specifically also refer to the interests of users, society in general, freedom of expression and culture). For Koelman, "Copyright Law and Economics in the EU Copyright Directive: Is the Droit d'Auteur Passé?" 35(6) IIC 603 (2004) (cited by Elkin-Koren & Salzberger, supra n 3, 52), Law & Economics has increased in influence in Europe lately.

[10] For some recent examples, *see* Hargreaves, "Digital Opportunity, A Review of Intellectual Property and Growth", May 2011, available at https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growthand endorsed by the UK government; UK Consultation on Designs, 2012, available at http://www.ipo.gov.uk/about/press/press-release/press-release-2012/press-release-20120724.htm (strangely no longer available on the new web site of the UKIPO) and the UK government proposal to modernise copyright at https://www.gov.uk/government/...data/.../response-2011-copyright.pdf. For the EU, *see e.g.* Green Paper on the Online Distribution of Audiovisual Works of 2011, available at http://europa.eu/rapid/press-release_IP-11-868_en.htm?locale=en (however talking about *sustainable* growth); Public Consultation on the Review of the EU Copyright Rules, p. 2, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm; COM/2014/0392 final,

more elaborated economic analysis of intellectual property law in its narrow approach (i.e. the neoclassical branch of law and economics or so-called Chicago School) which dominates[12], even if to some extent contemporary European intellectual property law is still influenced by natural law.[13] Because the law and economics of IPR is currently the predominant basis for IPR and also because it suffers from many flaws, it deserves longer treatment and we turn to it in the next section. Finally, while we recognise that deontological justifications have a role to play in justifying IPR, our focus in the remainder of the paper is solely on the consequentialist justification.

2. The Law & Economics of intellectual property rights: why it is flawed and ideological

This section summarises the origins of the law and economics movement (L&E), discusses its application to IPR, uncovers the L&E's flaws and reviews the literature's criticisms of the L&E of IPR.

2.1. The Law and Economics movement

The law and economics movement, also called the economic analysis of the law, started in the US in the 1960s, among others with the work of Coase[14] and developed throughout the 1970s and 1980s, chiefly with the work of Posner.[15] It then gradually spread in most Western countries.[16] L&E derives from American legal realism[17] and also directly from utilitarianism.[18] L&E is one of the most important and predominant contemporary American legal methodology, perspective or

---

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan, Introduction, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0392 ("The March 2014 European Council reaffirmed the importance of intellectual property as a key driver for growth and innovation and highlighted the need to fight against counterfeiting to enhance the EU's industrial competitiveness globally" and "All these actions seek to ensure that the EU's existing acquis in terms of IP rules, including those on civil enforcement, are applied and promoted in an effective manner. Their common objective is to (i) use all means to effectively dissuade and impede the entry and diffusion of IP infringing products on markets (both those of the EU and those with which its markets is increasingly linked) so as to (ii) stimulate investment, growth and employment in IP reliant sectors that are so key to our respective economies."). For the US, *see e.g.* the 2013 Green Paper on Copyright Policy, Creativity and Innovation in the Digital Economy available at http://www.uspto.gov/ip/global/copyrights/index.jsp

[11] Burk, "Law and Economics of Intellectual Property: In Search of First Principles", 8 Ann. Rev. L & Soc. Sci. 397, at 398 (2012). Kur & Schovsbo, "Expropriation or Fair Game For All? The Gradual Dismantling of the Intellectual Property Exclusivity Paradigm", in Kur & Levin, "Intellectual Property Rights in a Fair World Trade System – Proposal for reform of TRIPs" 408 (Elgar, Cheltenham 2011) think that even if IPR are classed as human rights and have strong personal rights aspects, they have primarily been created to incentivise creation and innovation.

[12] Burk, supra n 11, at 398; Elkin-Koren & Salzberger, supra n 3, at 4, 9, 52.

[13] Elkin-Koren & Salzberger, supra n 3, at 16.

[14] Coase, "The Problem of Social Cost", 3 J. L. & Econ. 1 (1960).

[15] With his book "Economic Analysis of Law" (Little, Brown, Boston 1972).

[16] Mackaay "An economic view of information law", in Korthals Altes, Dommering, Hugenholtz & Kabel (eds.), "Information Law Towards the 21st Century" 45 (Kluwer Law and Taxation Publishers, Deventer/Boston 1992).

[17] Elkin-Koren & Salzberger, supra n 3, at 14.

[18] Posner, *Economic Analysis of Law*, Little, Brown, 1972, at 356 ("Bentham's utilitarianism . . . is another name for economic theory").

movement[19]; it pervades virtually all areas of the law and claims to provide a general theory of law.[20] It is therefore not surprising that it is also dominant in the field of intellectual property law including in IPR policy-making.[21] Its world success may be owed to the fact that it has strong advantages over other theories: it provides a common language of discussion and it crosses geographical and legal borders[22] but also compared to other, philosophical, justifications for IPR, because economics is a science and is thus in search of truth and is not ideological.[23] But in fact, neither the definition of L&E nor that of the science of economics are set and the fact that there are different definitions implies an ideological aspect.[24] There are three ways of conducting economic analysis of the law: the analysis can be positive (it explains something and predicts what will happen)[25], normative (it prescribes the law)[26] or descriptive (it describes the rules, judgments and institutions in the language of economics).[27]

2.2. The law and economics of intellectual property rights

Like the L&E of others branches of law, the L&E of intellectual property has several strands which have different ideologies and methodologies.[28] These strands correspond to the several generations of the L&E movement and are in chronological order of development: the Chicago School of L&E, the Yale School of L&E, transaction cost and neo-institutional L&E, behavioural L&E and development L&E.[29] The strongest strand is the Chicago School of Law and Economics and it is also the mainstream one. The other branches are weaker to different degrees.[30]

The Chicago School is conservative in its politics[31] and, some would say, reductionist in its economics.[32] According to this version, law has to do with the maximization of aggregate wealth and the promotion of allocative efficiency.[33] It

[19] Wetlaufer, "Systems of Belief in Modern American Law: A View From Century's End", 49 American U.L. Rev. 1, at 34 (1999).
[20] *Ibid.*, at 36. Elkin-Koren & Salzberger, supra n 3, at18.
[21] Elkin-Koren & Salzberger, supra n 3, at 4, 9, 52; Burk, supra n 11.
[22] Elkin-Koren & Salzberger, supra n 3, at 20.
[23] *Ibid.*, 4, also noting that L&E even weakened the rights discourse of justice because it was thought as less objective than L&E. Horwitz, "Law and Economics: Science or Politics?", 8(4) *Hofstra Law Review* 905-906 (1980).
[24] Elkin-Koren & Salzberger, supra n 3, at 22.
[25] In the field of intellectual property, *see e.g.* Landes and Posner, "Trademark Law: An Economic Perspective", 30 Journal of Law and Economics 265 (1987) and *ibid.*, "An economic analysis of copyright law", 18 Journal of Legal Studies 325(1989).
[26] In the field of intellectual property, *see e.g.* Landes & Posner "Indefinitely Renewable Copyright", 70 University of Chicago Law Review 471 (2003).
[27] Elkin-Koren & Salzberger, supra n 3, 22.
[28] *Ibid.*, at 4.
[29] *Ibid.*, at 23.
[30] Wetlaufer, supra n 20, at 36-37.
[31] And thus associated with the political right. *See* Baker, "The Ideology of the Economic Analysis of Law", 5 Phil. & Pub. Aff. 3, at 47-48 (1975); Horwitz, supra n 24, at 911-12 and Rahmatian, "A Fundamental Critique of the Law-And-Economics Analysis of Intellectual Property Rights", 17 Marq. Intell. Prop. L. Rev. 191 (2013) at note 22 citing Balkin, "Book Review Essay: Too Good to be True: The Positive Economic Theory of Law", 87 Colum. L. Rev. 1447(1987).
[32] Wetlaufer, supra n 20, at 37-38.
[33] Spector, supra n 4; Wetlaufer, supra n 20, at 38. There is no agreement on the meaning of efficiency. However, in the main, it boils down to either maximisation of utility, maximisation of wealth or Pareto optimality. Elkin-Koren & Salzberger, supra n 3, at 23. Some even say that efficiency equates with wealth

assumes fully rational individuals motivated solely by wealth maximisation. In this model, "a person's value and moral worth exist in and only in the degree to which that person is willing and able to pay".[34] Notably, it is economic wealth not utility or happiness which the Chicago School is concerned with.[35] The Chicago School also generally believes that economics explain everything.[36] For them, because markets are self-correcting, private economic power is less problematic than government intervention in the market.[37] In its normative analysis, efficiency is the goal and distributional justice is excluded.

The other branches are more nuanced than the Chicago School. Indeed, a normative L&E analysis can have other goals, such as a distributional principle, alongside the efficiency goal. For instance, the Yale School uses more complex and more flexible assumptions. For instance, they believe that people want to maximise their personal wealth but also others' well-being. Distributional justice is included and the definition of efficiency is more complex. They recognise more market failures and thus more government intervention necessary to remedy them.[38] However, overall, the different branches of the L&E movement still embody some of the flaws of the neo-classical model, in other words, they fail to capture several important aspects of innovation.[39] Also, wealth maximisation became and still is the dominant criterion in all L&E movements.[40]

2.3. The flaws of the economic analysis of law

The economic analysis of law suffers from several flaws. The main shortcomings of the L&E are the assumptions it makes. The most important ones are the following. First and foremost, while economics as a science is positivist in nature, lawyers are normative and introduced this normative analysis into their writings.[41] Second, economics assumes the rationality of the consumer (*homo economicus*): s/he wants to maximize his/her well-being, this equates to wealth which is measurable in monetary units. So orthodox economics substituted utility with wealth.[42] In 1979, Posner further said that wealth maximisation was not a second best but had to be preferred normatively.[43] However, this position disregards the decreasing marginal utility of wealth.[44] Third, the Chicago School also presumes that consumer

---

maximisation. *See* Rahmatian supra n 32, note 37 citing Posner, "Some Uses and Abuses of Economics in Law" 46 U. Chi. L. Rev. 281, at 291 (1979).

[34] Wetlaufer, supra n 20, at 41.

[35] *Ibid.*, 38.

[36] Elkin-Koren & Salzberger, supra n 3, at 18.

[37] Wetlaufer, supra n 20, at 41. Elkin-Koren & Salzberger, supra n 3, at 24 ('only a few market failures are recognised – monopolies, public goods, externalities and information asymmetry – and those alone justify central intervention'.)

[38] Elkin-Koren & Salzberger, supra n 3, at 24.

[39] *Ibid.*, 27. Burk, supra n 11, at 404, for more details *see ibid*, at 407-408.

[40] Elkin-Koren & Salzberger, supra n 3, at 28.

[41] Baker, supra n 32, at 4-6 (although Posner states that he makes a positive analysis, most readers would see it as a normative one).

[42] Ealy, "Utilitarianism and Trademark Protection", 19 J. Contemp. Legal Issues 14 (2010); Elkin-Koren & Salzberger, supra n 3, at 47 citing Kaldor, "Welfare Propositions in Economics and Interpersonal Comparisons of Utility", 49(195) The Econ. J. 549 (1939).

[43] Elkin-Koren & Salzberger, supra n 3, at 48.

[44] *Ibid.*, at 31. And at fn 7: 'The decreasing marginal utility of wealth means that the utility generated from an additional unit of wealth is lower than the one form the previous unit thus there is no strict correlation between wealth and happiness.'

preferences are fixed i.e. never influenced by external factors whereas in reality it is untrue.[45] Fourth, the L&E analysis assumes the reign of the consumer and thus that his preferences must be accepted. However, many studies have now shown that people are poor judges of what is good for them and above a certain point, maximising wealth does not make people happy.[46] Last but not least, a major problem with most normative L&E analysis is its fundamental ideological basis and often objectionable consequences.[47] The Chicago School takes the current distribution of wealth as a given, so that if it is unjust, this does not matter to the analysis. Apart from the Pareto notion of efficiency, there are other economic criteria to enhance welfare such as equal distribution.[48] And in fact, a more equal distribution seemingly increases welfare.[49]

An additional problem is that the Chicago School has not only influenced (and still influences) scholars, but has influenced both the right and the left, which has now adopted its wealth maximisation rhetoric too.[50] In short, no one disputes L&E any longer[51], it is accepted as scientific and thus as true. But, as this analysis has revealed, it is an ideological belief[52] and reliance on the above-mentioned flawed assumptions also makes L&E unfit for normative legal analysis.[53]

These same flaws are present in the L&E of intellectual property. Nevertheless, at the start of the L&E movement, many economists were not convinced that granting property rights on information goods was efficient. For these sceptical economists, first mover advantage, tying, updates and imperfections in markets meant that inventors and creators had sufficient incentives and no IPR were needed.[54] But this

---

[45] *Ibid.*, at 31-32.

[46] Baker, supra n 32, at 34, already said in 1975, that there is "no evidence to indicate that people's existing orientations are those most conducive to their greatest happiness". Now, there is empirical evidence that proves that people are not always good judges of what makes them happy. *See e.g.* Bok, "The Politics of Happiness: What Government Can Learn from the New Research on Well-Being" 62 (Princeton University Press, Princeton 2010); Easterlin, "Building a Better Theory of Well-Being", in: Bruni &. Porta (eds.), "Economics and Happiness: Framing the Analysis", 42 and 47 (OUP, Oxford 2005).

[47] Baker, supra n 32, 6.

[48] *Ibid*, 45 and note 46 referring to Bentham, "Theory of Legislation" 98-109 (Harcourt, Brace and Co, New York 1931) "Because of the assumption that individuals have a diminishing marginal utility for wealth, Bentham concluded that welfare would be increased by increasing equality if the steps taken did not decrease production".

[49] Baker, supra n 32, at 47.

[50] Horwitz, n 24 above, at 909; Elkin-Koren & Salzberger, supra n 3, at 29.

[51] Of course apart from a few scholars recently, *see* below last paragraph of this section.

[52] Elkin-Koren & Salzberger, supra n 3, at 31; Baker supra n 32; more generally speaking, Burk, supra n 11, at 398 citing McGowan, "Copyright nonconsequentialism" 69(1) Mo. Law Rev. 58 (2004).

[53] Elkin-Koren & Salzberger, supra n 3; Baker, supra n 32, at 47.

[54] Plant, "The economic theory concerning patents for inventions" (1934) Economica 1, at 30-51 and *ibid.*, "The economic aspects of copyright in books", (1934) Economica 1, at 167-95; Palmer, "Intellectual Property: A Non-Posnerian Approach", 12 Hamline L. Rev. 261 (1989). *See also* Hirshleifer, "The Private and Social Value of Information and the Reward to Inventive Activity", 61(4) the American Economic Review 561(1971); Besen & Raskind, "An Introduction to the Law and Economics of Intellectual Property", 5(1) Journal of Economic Perspectives 3, at 3-4 (1991) are less convinced of the efficiency of IPR than Landes & Posner and say empirical research is needed. They also cite other economists who objected to Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs", (1970) Harvard Law Review 84, at 281-35; Frase, "Comments on Hurt and Schuchman. The Economic Rationale of Copyright", 56 American Economic Review, Papers and Proceedings 435-439 (1966); Hughes, supra n 3, at 1988. And Besen and Raskind, supra, at 8 ("Although economic literature about the patent system is substantial, many questions are still heavily disputed. For example, there is no consensus as to the impact of patent protection on the growth of technology (Kitch, 1986); or on the optimal duration of the patent right (McFetridge and Rafiquzzaman,

scepticism did not spread and the first mainstream economists were,[55] and most contemporary orthodox economists are, in favour of strong property rights for information goods.[56]

2.4. Recent developments in the L&E of IPR literature and criticisms

Furthermore, during the last decade, the mainstream literature on L&E of IPR has shifted from an incentives paradigm to a proprietary paradigm.[57] Incongruously, it brings the U.S. closer to the natural rights justification which still exists in European continental countries so that the philosophical divide between the U.S. and European continental countries is fading.[58] According to this proprietary model, "every potential economic value ought to be propertised"[59], thus it does not encompass the limits to IPR so fundamental in the utilitarian rationale. This new version of L&E is based on the economic justification for tangible property and land and the tragedy of the commons.[60] Its focus is the management of IPR once they have been created. Probably the reason for shifting from the incentives paradigm to the proprietary model is the methodological and empirical problems of the incentives paradigm. This is not to say that the new L&E has abandoned the incentive theory altogether. But it has shifted from an ex ante incentives justification to an ex post one.[61] It shifts the focus on maximising society's welfare to maximising the intellectual property owner's profit.[62] The problem is that this new model does not take into consideration the difference between physical and intellectual property and the fact that the tragedy of the commons was only a positive theory and again, the L&E movement placed it into a normative framework for IPR.[63]

1986); and the data on whether patents have been used to facilitate cartel behavior is inconclusive (Hall, 1986)").

[55] *See* Arrow, "Economic Welfare and the Allocation of Resources for Invention," In National Bureau of Economic Research, The Rate and Direction of Inventive Activity: Economic and Social Factors. Princeton: Princeton University Press, 1962, and references cited by Besen and Raskind, supra n 55.

[56] *See* Elkin-Koren & Salzberger, supra n 3, at 9 citing Granstrand, supra n 9; Landes & Posner 2003, supra n 27; Towse & Hozhauer (eds.), "Economics of Intellectual Property Rights" (Elgar, Northampton, MA 2002); Braga, Fink & Sepulvada, "Intellectual Property Rights and Economic Development", World Bank Discussion Papers 412, 2000 who all think strong IPR induce growth and are thus desirable. *See* however Gallini & Scotchmer, "Intellectual Property: When Is It the Best Incentive?", in: Jaffe, Lerner & Stern (eds.), "Innovation Policy and the Economy" 51-77, at 54-55, 59-62 (Cambridge, Mass. MIT Press, 2002, Vol 2) who posit that property rights are not always the best way to incentivise creations and innovations but a mixture of prizes and fixed payments is better in some situations (the main reason being that they avoid the deadweight loss caused by the temporary monopoly given by IPR). At 72, they conclude that in those situations where IPR are the better alternative, 'optimal design for intellectual property should depend on whether firms contract with others for the use of their protected innovations' but contracting such as cross licensing and patent pools and other things (*e.g.* duplicated efforts...) can be problematic. *See also* Sunder, "From Goods to A Good Life, Intellectual Property and Global Justice" at 4, 11 (Yale University Press, 2012).

[57] Elkin-Koren & Salzberger, supra n 3, at 9.

[58] *Ibid.*, at 50, 52 citing Koelman, supra n 9 and Samuelson, "Anti-Circumvention Rules: Threat to Science" 293 Science 2028 (2001).

[59] Elkin-Koren & Salzberger, supra n 3, at 50-53, Stadler, supra n 8, at 670-671 also implicitly acknowledges that there has been a shift from the utilitarian to the proprietary model in the U.S.

[60] Elkin-Koren & Salzberger, supra n 3, at 115. In short the advocates of this new L&E model argue that 'granting property rights in what otherwise would be considered a commons will prevent both over-use and under-utilisation of these resources'. *Ibid.*, at 118.

[61] *Ibid.*, at 115, 126.

[62] *See* mainly Landes & Posner 2003, supra n 27.

[63] Elkin-Koren & Salzberger, supra n 3, at 135.

However, scholars who have criticised the Chicago School as applied to IPR but have kept within the utilitarian discourse, have argued that in some cases, IPR are not needed: namely when information goods are produced without the incentive in the first place (e.g. academic works, works created for fun) and works of fine art created in a single copy.[64] In those cases, granting IPR actually makes society worse off.[65] And in some cases, one size does not fit all. Empirical evidence suggests that the costs of innovation vary with the type of technology and thus there should be different intellectual property rationales and thus different intellectual property regimes rather than a single one.[66] More precisely, the length, breadth and standard of protection must differ depending on the different economic environments (i.e. shape of demand curve, rate at which improvements to existing technologies are developed or relative costs of later innovators).[67] And there is a lot of flexibility to design IPR to reflect these differences. There are already different intellectual property regimes which vary in length, breadth and standard of protection for different types of subject-matter (e.g. copyright are different from patents, which are different from plant varieties rights, database rights, etc). So it is possible to tailor e.g. patents even further depending on the type of industry etc. More recently, alongside behavioural and empirical studies, experimental approaches are being conducted to assess intellectual property incentives.[68] Some of the most recent legal literature critical of L&E also argues that we need to take other considerations into account that L&E leaves out.[69]

In conclusion, it is clear that the current predominant Chicago School L&E of IPR is deeply flawed. On the one hand, even if it purports to include other approaches, much of the current critical literature still rests on L&E's flawed assumptions. On the other hand, more recent branches of L&E try to address these flaws but still use the proxy of income. However, as we shall see in the next section, this assumption has been challenged and research has shown that income does not equate with well-being. Consequently, we must take not income but well-being itself as a criterion in order to determine whether IPR lead to "the greatest happiness of the greatest number".

---

[64] Using the utilitarian rationale, Stadler supra n 8 shows that copyright is not necessary for works created for the purpose of existing in a single copy (i.e. works of fine art). In those cases, copyright may even be harmful, in the sense that it does not lead to happiness. She suggests that it may be useful to extend the same analysis to other types of works.

[65] Burk, supra n 11, at 402-403.

[66] *Ibid.*, at 411-412 (high costs for instance in pharmaceutical, semi-conductors chips and film industries but low costs in the software, sound recordings industry). *See also* Burk and Lemley, "The Patent Crisis and How the Courts Can Solve It" (University of Chicago Press, Chicago 2009). See *also* already Besen and Raskind, supra n 55, at 9 citing Mennell, "An Analysis of the Scope of Copyright Protection For Application Programs", 41 Stanford Law Review 1045-1104 (1989) and Sumner & Lundberg, "Patentable Computer Program Features As Uncopyrightable Subject Matter", 17 American Intellectual Property Law Association Law Quarterly 238-255(1989) (it is unclear which protection is better for computer programs (patent or copyright)).

[67] Gallini and Scotchmer , supra n 57, at 70.

[68] Burk, supra n 11, at 412 citing Buccafusco & Sprigman, "Valuing Intellectual Property: An Experiment" 91(1) Cornell Law Rev. 45 (2010) and Torrance & Thomlinson, "Patent Expertise and the Regress of Useful Arts", 33(239) South. Ill. Univ. Law J. 78 (2009).

[69] *See e.g.* Cohen, "Copyright and the Perfect Curve", 53 Vand. L. J. 1799 (2000), cited by Elkin-Koren & Salzberger, supra n 3, at 52. Burk, supra n 11, at 412 also cites new perspectives in intellectual property such as feminist and racial perspectives. Sunder, supra n 57, at 3-4 proposes a cultural approach that complements the economic approach.

3. What well-being research has showed and why the current predominant justification for IPR must be revisited

3.1. Utilitarianism

Utilitarianism as a political and moral philosophy has been subject to a number of well-known challenges. For example, it has been claimed to be excessively demanding, forcing individuals to subserve personal projects and principles to the impersonal general good;[70] it appears – at least in its classical, act-utilitarian form – to conflict with certain widespread intuitions about right and wrong, sanctioning acts that would conventionally be regarded as morally wrong if these would produce greater good overall; its focus on maximising the amount of good, irrespective of where it falls, has raised concerns about distributive justice.[71] Utilitarians have made various responses to these challenges.[72]

In this paper, we make no attempt to debate the merits of utilitarianism as a moral and political philosophy, and take it that the utilitarian foundations of the justification of intellectual property law are adequately solid, provided that 'utility' can be defined in an appropriate way. This assumption may seem questionable at first sight, given the many issues that utilitarianism raises. However, we believe that the assumption is a reasonable one, for two reasons: first, the utilitarian arguments for IPR do not, in fact, require the adoption of a thoroughgoing utilitarian political philosophy. They do not require us to adopt the principle of utility, the greatest happiness principle or something similar as the sole criterion determining right and wrong. All that is required is that we accept some notion of utility as *one* criterion – not necessarily the only one - which is relevant to law and public policy, and in particular to intellectual property law. If it is true a) that if something promotes utility, that is a point in its favour; and b) that IPR do promote utility, then the argument is valid – intellectual property law (or at least, those elements of it for which b) is true) can be justified on utilitarian grounds.

Whether b) holds is open to debate. The extent to which it holds may vary between different types of IPR, and between individual cases.[73] The question of how widely it holds falls outside the scope of this paper, but it is plausible enough that it holds at least some of the time. Condition a) requires only a modest claim that seems entirely reasonable in principle, subject to clarification of one important point. We will need to define how we are going to interpret the term 'utility' in order to satisfy ourselves that this is indeed something to be promoted. This will be the subject of the next section of this paper.

Basing the utilitarian justification of intellectual property law on this modest claim renders the classic objections to utilitarianism irrelevant, to a large extent. Since the criterion is that intellectual property law should *promote* – not necessarily maximise – utility, we do not need to worry about the problems that are associated with maximisation. Since we are not embracing utilitarianism as a complete moral system

[70] Williams, "Integrity", in: Smart & Williams (eds.), "Utilitarianism For and Against", 108-118 (Cambridge: Cambridge University Press 1973).
[71] Rawls, "A Theory of Justice: Revised Edition" 19-24 (OUP, New York 1999).
[72] *See e.g.* Smart, "An Outline of a System of Utilitarian Ethics", in Smart & Williams, supra n 71, at 3-74.
[73] *See* supra section 2.4. (*e.g.* most academic creations and inventions as they are subsidised by the state in most cases. Hence no need of IPR for those).

or a universal decision procedure to justify IPR, we do not need to fret about the demandingness of utilitarianism or its conflicts with moral intuitions.

We said that the classic objections to utilitarianism were irrelevant "to a large extent", because some of them are arguably relevant in an indirect way, in that they reflect unease, of various different kinds, about the prospect that the total amount of utility created should be the sole consideration related to the choice of action. Our adoption of the modest claim that the promotion of utility should be *one* such consideration – and one particularly relevant to the framing of law and policy in relation to IPR – does not fall foul of those objections. It allows that there might be other considerations – be they deontological worries about rights, or concerns about distributive justice – that could also be relevant. Thus, our endorsement of the utilitarian justification for intellectual property law is implicitly qualified. Utilitarian considerations can provide a pro tanto justification, but conceivably this might be defeated in certain cases by other considerations.

3.2. How Should we Construe 'Utility'

As we saw above, the L&E justification of IPR, like L&E more generally, makes the assumption that the notion of utility boils down to preferences for goods and services, identified through people's willingness to pay. This approach suggested that economic indicators such as Gross Domestic Product (GDP) could be regarded as proxies for national well-being.

These assumptions have increasingly been questioned in recent years, in the light of empirical research that suggests divergence between economic measures and other indicators of well-being. The most well-known research is that done by Richard Easterlin in the 1970s, which appeared to show that, although within a given country at a given time people with higher incomes were more likely to report being happy; between countries, and within countries over time the average reported level of happiness does not correlate very strongly with GDP.[74] This result is known as the 'Easterlin Paradox'.

The significance of this evidence – and numerous subsequent studies which have gone over similar ground – has been much debated. Whilst Easterlin and his supporters continue to defend his position, others argue that there is no paradox and that increases in GDP do correlate positively with increases in happiness.[75] What is not in dispute, however, is the fact that, if there is a correlation between GDP and happiness, it is not a straightforward equivalence. For example, Ruut Veenhoven, a prominent sceptic about the Easterlin paradox, acknowledges the existence of cases where GDP growth is not paralleled by rising happiness (although he argues that these are outnumbered by cases where growth *is* paralleled by rising happiness); and observes that "the correlation between happiness and economic growth is strongest in the poor nations ... and almost zero in the nations where the income per

[74] Easterlin, "Does Economic Growth Improve the Human Lot? Some Empirical Evidence", In: David & Reder (eds.), "Nations and Households in Economic Growth: Essays in Honor of Moses Abramovitz" (Academic Press, Inc., New York 1974).

[75] For example, Veenhoven & Vergunst, "The Easterlin Illusion: Economic Growth Does Go With Greater Happiness" (2013) MPRA Paper No. 43983, Munich Personal RePEc Archive, available at http://mpra.ub.uni-muenchen.de/43983/1/MPRA_paper_43983.pdf.

capita is at the upper middle level and the high level".[76] Thus, while it may be the case that GDP growth tends in general to have a positive impact on happiness, the evidence does not suggest that levels of GDP can be taken as a proxy for levels of national happiness.

It cannot be taken for granted, of course, that self-reported happiness is itself an accurate measure of well-being - the reliability and validity of happiness measures is also subject to debate. However, happiness does have a strong intuitive claim to be a constituent or at least an indicator of well-being. The lack of equivalence between the two factors thus casts doubt on whether GDP can be taken as a proxy for national well-being.

GDP has other serious weaknesses as a proxy for well-being. It is a measure of overall activity within an economy and takes no account of the distribution of benefits within or indeed, outside it. It includes activity which arguably is detrimental to well-being rather than beneficial to it, such as increased use of fuel during traffic jams. It is a measure of current economic activity and takes no account of later consequences, for example, through environmental effects, which may have significant negative effects on general well-being in the longer term.[77]

In recognition of the limitations of economic measures, governments have begun to look more directly at well-being in the context of public policy. In the UK, the Prime Minister, David Cameron, in a speech on 25 November 2010, declared his intention to measure national progress not merely by standard of living, but by quality of life. The UK's Office of National Statistics (ONS) subsequently instituted a programme entitled Measuring National Well-being.[78] Similar developments have been occurring elsewhere in Europe.[79] International organisations have followed a similar trend. In 2009, the European Commission issued 'GDP and Beyond', a roadmap of five key actions to improve the EU's indicators of progress in ways more appropriate to citizens' concerns than GDP alone[80], while the OECD introduced a 'Better Life Index' in 2011.[81] The UN introduced the Human Development Index as far back as 1990, again with the aim of shifting focus from financial to people-centred indicators.[82]

The rejection of GDP as a proxy for well-being does not necessarily imply that it should have no role whatsoever in the justification of IPR. As the above discussion shows, although there is disagreement about the nature of the relationship between GDP and national well-being, even those who defend the Easterlin paradox acknowledge a positive relationship between the two in certain contexts. GDP data might thus serve as evidence relevant to judgements about national well-being, alongside other kinds of evidence. What we reject is not the use of GDP per se, but its hitherto dominant role as the sole criterion relative to the justification of IPR.

---

[76] *Ibid*, at 14-15.

[77] For a summary, *see* Stiglitz, Sen & Fitoussi, "Report by the Commission on the Measurement of Economic Performance and Social Progress" (2009), available at: http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf, at 7-8, 21-40.

[78] *See* http://www.ons.gov.uk/ons/guide-method/user-guidance/well-being/index.html.

[79] Bache, "Measuring Quality of Life For Public Policy: An Idea Whose Time Has Come? Agenda-Setting Dynamics in the European Union" 20(1) Journal of European Public Policy 21-38 (2013).

[80] *See* http://ec.europa.eu/environment/beyond_gdp/EUroadmap_en.html.

[81] *See* http://www.oecdbetterlifeindex.org.

[82] *See* http://hdr.undp.org/en/countries.

3.3. What should replace GDP?

The preceding sections of this paper have given a qualified endorsement of the utilitarian basis of the justification for intellectual property law, but rejected the assumption that GDP can be taken as a proxy for 'utility' or national well-being. This raises the question of what should be put in its place. In this section, we argue that it should be replaced by a broadly-based conception of well-being, supported by a similarly broadly-based approach to measurement, utilising a range of subjective and objective measures (which might continue to include GDP).

The obvious implication of the rejection of GDP as a proxy for well-being is that we should base the justification for intellectual property law more directly upon well-being itself. This immediately throws up a serious challenge, however. Philosophers do not agree on a single, universal, theory of well-being. Rather, there are several competing accounts. There are broadly hedonistic accounts, which hold that well-being is constituted by happiness, or a balance of pleasure over pain. Related to these are accounts which focus on life-satisfaction. Others focus on the satisfaction of desires or 'preferences' about the world.[83] Accounts of both these types can be regarded as 'subjective', since they ground well-being ultimately in the mental states or attitudes of the individual subject. Other accounts wholly or partly reject this dependence, and are therefore regarded as 'objective'. Objective-list accounts specify a list of heterogeneous components of well-being (which may include some subjective elements).[84] Aristotelian theories focus on some notion of human flourishing, typically reflecting the development and exercise of certain capacities.[85] There are numerous different variants of these different approaches, and hybrids which incorporate elements of more than one.

There is no prospect that the philosophical issues which divide the proponents of the competing approaches are likely to be resolved in the near future. This fact may seem to render the task of replacing GDP a hopeless one. The choice of one of the competing approaches over the others, in the absence of conclusive arguments for its superiority, would seem arbitrary, and invite challenge from those who favour the rival theories. This problem is not unique to the justification of intellectual property law. It applies more widely to the adoption of well-being as a goal for public policy, and the measurement of well-being to inform such policy.

However, we argue that there is, contrary to initial appearances, likely to be a substantial area of common ground between the rival theories.[86] This is because

---

[83] For a recent hedonist account see Feldman, "What is this thing called Happiness" (OUP, New York 2010). Sumner, "Welfare, Happiness, & Ethics" (OUP, New York 1996) defends a life-satisfaction theory of well-being. An example of a desire-satisfaction is include Griffin, "Well-being: its Meaning, Measurement and Moral Importance" (Clarendon Press, Oxford 1986).

[84] *See e.g.* Finnis, "Natural Law and Natural Rights" Chapters III and IV (OUP, Oxford 1980). Martha Nussbaum's version of the Capabilities approach ("Women and Human Development: The Capabilities Approach" Cambridge University Press, New York 2000) also offers a list, though her view also has Aristotelian influences.

[85] *See e.g.* Kraut, "What is Good and Why" (Harvard University Press, Cambridge, MA 2007).

[86] This is discussed at more length in Taylor, "Towards Consensus on Well-being", in Søraker, Van der Rijt, de Boer, Wong & Brey (eds), "Well-being in Contemporary Society" (Springer, Cham 2014). A recent book

things may be relevant to well-being in different ways: they may be constitutive of well-being, or they may tend to produce well-being, or they may do neither of these things but nevertheless act as indicators of well-being. Something which stands in one or other of these relationships to well-being may be considered a *marker* of well-being. Markers of well-being, notwithstanding the different relationships in which they stand with respect to well-being itself, are all potentially relevant to its measurement. Data concerning a marker of well-being will facilitate the making of judgements about well-being itself.

The competing theories disagree about what constitutes well-being. However, for each theory it will be the case that other things beyond what it regards as constitutive of well-being will be either productive or indicative of well-being. These are likely to include things that a *different* theory would regard as constitutive of well-being. When this is the case, although the two theories will remain in disagreement about whether the item in question is a constituent of well-being, they can both agree that it is a *marker* of well-being.

For example, proponents of an objective-list theory of well-being are likely to include physical health in their list of objective goods: for them, it will be a constituent of well-being.[87] Hedonism about well-being implies that physical health is *not* constitutive of well-being: on this view, well-being is constituted only by happiness. Nevertheless, a hedonist would be likely to acknowledge that good physical health is, in general, something that tends to promote happiness: all else being equal, healthy people are likely to be happier than unhealthy people. There is ample empirical evidence to support that view. So hedonists could reasonably acknowledge physical health as something that is in general productive of happiness and is therefore a marker of well-being.[88]

Conversely, it would be reasonable for an objective-list theorist to acknowledge that people who possess the goods on their list (such as physical health) are, all else being equal, likely to be happier than people who do not, or who possess them to a lesser extent. The objective-list theorist, whilst rejecting happiness as a constituent of his list,[89] could therefore acknowledge it as a more or less reliable indicator of the extent to which people possess paradigm objective goods, and therefore as a marker of well-being.

Thus, we suggest, the significant differences between several theories relating to what is to be regarded as a constituent of well-being in its own right nevertheless allow the prospect of a broad area of common ground concerning the markers of well-being.

---

chapter by Valerie Tiberius draws a similar conclusion: Tiberius, "Recipes for a Good Life: Eudaimonism and the Contribution of Philosophy", in: Waterman (ed.), "The Best Within Us: Positive Psychology Perspectives on Eudaimonic Functioning" 19-38 (American Psychological Association, Washington, D.C. 2013).

[87] For example, health features in Martha Nussbaum's list of central human capabilities, supra n 85.

[88] Similarly, it would be reasonable for an informed-desire theorist to acknowledge that physical health is likely to be something that is a subject of well-informed desires, and something that is generally conducive to the fulfilment of other desires.

[89] We assume this here for the purposes of argument, though of course, happiness, or something like it, is included in some (but not all) variants of the objective-list approach (*e.g.* Fletcher, "A Fresh Start for the Objective-list Theory of Well-being", 25(2) Utilitas 206-220 (2013)).

There are, of course, limits to both the breadth and the depth of consensus on the markers of well-being. For example, we would expect Aristotelian theorists to reject happiness as even a marker of well-being in certain contexts: if, for example, it is drug-induced and therefore not linked to the development or exercise of human capacities.

When we include other markers of well-being as well as its constituents, it is important to note that the extent to which something is generally productive or indicative of well-being is always likely to be a matter of degree. For example, all else being equal it is in general likely to be the case that happier people are also those who score more highly on possession of paradigm objective goods like health. However, this will not always be the case: there will sometimes be other factors influencing their happiness which objective theorists will not accept as contributing to their well-being. Markers of well-being can thus be more or less reliable.

Note also that whilst the rival theories make their own pronouncements about what well-being consists in, the question of what is generally productive or indicative of well-being as defined by these theories is not solely one for their proponents to rule on. It is, in part, an empirical matter. The extent to which paradigm objective goods like health correlate with subjective states such as happiness is something on which empirical research can cast light.

We propose that in the context of public policy in general and intellectual property law in particular it would be desirable to adopt a theory-neutral approach to well-being based upon likely areas of consensus between the rival theories regarding the markers of well-being. This approach would involve identifying markers of well-being that would be likely to be acknowledged by all or most of the competing theories of well-being. These markers would be things that, according to different theories, would be either constitutive, productive or indicative of well-being. We suggest that the measurement of well-being should be targeted at a range of such markers, ideally including at least some of the things which each theory regards as constitutive of well-being. This would support a broadly-based approach to measuring well-being, including both objective and subjective elements. Suitable markers of well-being would be identified both by considering the implications of the different theories of well-being, and also by examining empirical research on correlations between different subjective and objective measures.

We argue that in the context of public policy, the theory-neutral approach is preferable to the alternative of choosing one of the rival theories of well-being.[90] It seeks to identify and build upon areas of common ground regarding the markers of well-being, which can form the basis of a body of shared assumptions about well-being to underpin its measurement. It recognises, however, the imperfect nature of consensus, and the need for continuing debate in those areas where it does not hold. In a forthcoming paper, we propose a list of markers of well-being that would

[90] We acknowledge (Taylor, supra n 87) that theory-specific approach has the advantage of offering a more straightforward way of interpreting cases where data on different markers of well-being diverges, since constituents of well-being might be considered more reliable markers than things which are only productive or indicative. However, such interpretations would be open to challenge by those who reject the preferred theory.

be consistent with the theory-neutral approach and consider what implications these would have for IPR.

4. While our proposal may still be ideological, it is better grounded and does not suffer from the flaws of the L&E of IPR

An obvious objection our proposal encounters is that by replacing L&E as a justification for IPR by a well-being approach, we are simply replacing an ideology by another. This section shows that every policy position is by definition ideological as it incorporates ideas and a plan of action for a society. Thus the current L&E is ideological. It is neither good nor bad per se but it is not scientific. By definition, our proposal is thus also an ideology but by contrast, and even if it also relies on scientific data, it remains open to other ideas and thus is far less strongly ideological.

To address the criticism that our proposal simply replaces an ideology (L&E) by another (welfarism), we first need to define ideology and then show the problems the concept entails.

4.1. Definition of ideology

It is worth briefly mentioning the origin of the term and concept of ideology as it helps understanding its meaning. While it was coined by a Frenchman (Destutt de Tracy) after the French revolution, its first developers were Marx and Engels.[91] For them, ideology was negative (i.e. it was by definition an instrument oppressing the masses) so we needed to get rid of ideology and it would no longer exist. However, as history and further evolution on the thinking of the term showed, this is not the case - ideologies are not by definition negative nor ephemeral[92] but they are pervasive and are here to stay.[93]

An ideology can be held only by one person (individual ideology) or held by a group (collective ideology). A political ideology is a set of ideas, beliefs, opinions and values, which aim to influence public policy[94], held by significant groups in order to preserve, modify or overthrow the existing social and political arrangements and processes of a political community.[95] Thus ideologies are inherently value-based, and include norms about how people should behave and what governments should

[91] Freeden, "Ideology: A Very Short Introduction" 4 (OUP, Oxford 2003).
[92] *Ibid.*, at 12-30 (tracing the evolution of the thinking on the term ideology from Marx until now); Strath, "Ideology and Conceptual History", in: Freeden, Tower Sargent & Stears (eds.), "The Oxford Handbook of Political Ideologies" 17 (OUP, Oxford 2013) (the concept of ideology is still well alive and it has more or less lost its negative connotation).
[93] Some scholars declared the end of ideology in the 1950s and 60s because they thought that the defeat of totalitarianism meant the end of ideology. But this was a logical error, if everyone agrees with one single ideology *e.g.* the welfare state, then there is still one ideology (instead of many) rather than none, *see* Freeden, supra n 92, at 35-37 (and even if the welfare state were to be the only ideology, there could still be dissent inside it – on how to raise taxes (direct/indirect) and to whom should they benefit in priority).
[94] Therefore, ideologies are aimed at the public arena, 'not every group plan is an ideology'. For instance, a director of a school's plans to change how pupils are accepted is not an ideology but of course it may reflect a particular ideology. *See* Freeden, supra n 92, at 34.
[95] *Ibid.*, at 32; Heywood, "Political ideologies, An Introduction" 11 (Palgrave Macmillan, Basingstoke 2012). For Freeden, the ideas, values etc must exhibit a recurrent pattern too. Note however that the definition of the term ideology is contested so Freeden (supra n 92, at 123) does not claim that this is the 'ultimate statement' on the concept of ideology.

do.[96] "All ideologies therefore have the following features. They (1) offer an account of the existing order, usually in the form of a 'world view', (2) advance a model of a desired future, a vision of the 'good society' and (3) explain how political change can and should be brought about."[97]

In short, ideologies are action-orientated systems of thought towards preserving or changing social arrangements.[98] "So defined, ideologies are neither good nor bad, true nor false, open nor closed, liberating nor oppressive – they can be all these things".[99] As ideologies are value-based, they are only good or bad in as much as one agrees or disagrees with their values.[100] An ideology's aim is to prioritise a value(s) over other(s) and claim legitimacy over what they claim.[101] Ideologies are pervasive because in practice neither persons nor groups occupy a neutral point of view.[102] Ideologies are also pervasive in the sense that we produce, disseminate and consume them our entire lives, consciously or unconsciously.[103] We cannot do without ideologies because they make sense of the world we live in.[104] Therefore, "there is no 'ideology-free' political or legal programme, given that law and politics are expressions of values and underpinned by force."[105]

An ideology is political because if one takes away the political aspect of the term, it is no longer an ideology but a 'belief system', 'world view', 'doctrine' or 'political philosophy.'[106] Thus utilitarianism is not an ideology but a branch of moral philosophy. However, it has been used by lawyers and economists. When utilitarianism is applied to law, it exits the realm of moral philosophies and becomes an ideology.

4.2. Ideologies' problems

There are two problems with ideologies. First, their producers often claim they are not ideologies but on the contrary, they claim that they are 'scientific', 'natural' or 'universal', something which is impossible. For instance, liberals argue that communism and fascism are ideologies but refuse to accept that liberalism is also an ideology.[107] But no one can prove that one theory of justice is preferable to any other, that human beings possess rights or are entitled to freedom.[108] A second problem is that sometimes ideologies mix or merge facts with values, making it difficult to

[96] Heywood, supra n 96, at 10.
[97] *Ibid.*, at 11.
[98] *Ibid.*, at 10.
[99] *Ibid.*. *See also* Freeden, supra n 92, chapter 1.
[100] Duncan (email on file with the authors).
[101] Heywood, supra n 96, at 15.
[102] Freeden (email on file with the authors).
[103] Freeden, supra n 92, at 2, 124.
[104] *Ibid.*, supra n 92, at 2; Strath, supra n 93, at 17. 'Making sense' does not mean by definition making good or right sense of course.
[105] Duncan, supra n 101; *see also* Freeden, supra n 103. Strath, supra n 93, at 17 ('Ideologies make sense of the world and in this respect we cannot do without them, although they do not represent an objective external reality'). This is something that some legal theorists, for instance legal positivists, do not accept. Some scholars of the critical legal studies movement however see ideology as pervading law. *See* Halpin, "Ideology and Law", in: Freeden (ed.), "The Meaning of Ideology: Cross-Disciplinary Perspectives" 148-163 (Routledge, London, 2007).
[106] Heywood, supra n 96, at 11, 13 (The difference between ideology and political philosophy is that ideologies are less consistent than political philosophies). *See also* Freeden, supra n 92, at 124.
[107] Heywood, supra n 96, at 10.
[108] *Ibid.*, at 12.

distinguish between ideology and science.[109] Indeed, 'what you see is not always what you get' i.e. there are meanings inside ideologies which are hidden not only from their consumers but also from their producers sometimes. So studying ideology involves extracting and decoding these hidden meanings from social and legal practices.[110]

This mixing between values and facts is what happened with the Chicago School and the L&E of IPR. This may also explain why L&E thrived so well as no one thought it was ideological but instead thought that it was scientific.[111] As we have seen in section 1, L&E is ideological and not scientific even if it takes economic science as its basis. Most contemporary intellectual property lawyers and policy-makers are still wedded to the L&E of IPR because they (mistakenly) think it is scientific and the only way to conceive intellectual property law scientifically, and by extrapolation, the only way to envisage intellectual property law seriously.

4.3. Our proposal is not as strongly ideological

What we propose in summary is to readjust the justification for IPR by taking all aspects of well-being rather than simply the proxy of income. Policy-makers should thereafter readjust the intellectual property laws according to this new justification when necessary.[112] However, as we said in section 3, we do not exclude the possibility that other considerations such as natural rights, fairness or distributive justice can justify IPR and may also have to be integrated in the IPR framework along with well-being. Our proposal is meant to be open to other ideas. Moreover, our approach does not take a stand on the debate between rival subjective and objective theories of well-being. Rather, it seeks to identify markers of well-being that could be recognised as either constitutive, productive or indicative of well-being under all mainstream theories. Our proposal is also dynamic in the sense that it may change once more data is available and more research occurs.[113] In short, we adopt an open belief system as opposed to a closed one and aim to be as non dogmatic as possible. Maybe we can venture to call our proposal a 'soft ideology'. In conclusion, our proposal is an ideology because it contains a plan of action to influence policy but contrary to other ideologies, it does not prioritise a value over others and claim legitimacy over what it asserts. We also do not fall foul of the two problems associated with ideologies. We are conscious that we are embracing an ideology. While we rely on scientific data, we separate our ideas from the science.

5. Why our proposal is not paternalistic

Another worry that has sometimes been expressed regarding the promotion of well-being or happiness as aims of public policy is that it might be paternalistic.[114] Paternalism has been defined by Gerald Dworkin as "the interference of a state or an

[109] *Ibid.*; *see also* Freeden, supra n 103.
[110] Freeden, supra n 92, at 11.
[111] As we saw above in section 1, L&E started in the 1960s and the thinking then was not yet that ideologies were pervasive and permanent.
[112] As most probably, many aspects of IPR are already aligned with well-being. This is something we show in our next article, Derclaye & Taylor "Happy IP: Aligning Intellectual Property Rights with Well-being" [2015] 1 IPQ 1-14.
[113] Therefore, we cannot be said to be foundationalist. Foundationalism is "the belief that it is possible to establish objective truths and universal values, usually associated with a strong faith in progress." *See* Heywood, supra n 96, at 340.
[114] *See e.g.*, Layard, "Happiness – Lessons from a new science" 113 (Penguin, London 2005).

individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm."[115] Can intellectual property law be considered paternalistic, if it is justified on the basis of a conception of well-being? Let us consider the three elements of the above definition in turn. Does it constitute interference (by the state) with another person? Yes. IPR prevent people from copying or using the works and inventions which they protect except under certain conditions. Is this interference against the will of the persons concerned? There will not be a single answer to this question, of course, since IPR will apply to many persons, who will no doubt have different attitudes to the restrictions it imposes. But we may assume that it will be against the will of at least *some* persons – if it were not, there would be no need for legal restrictions.

Is intellectual property law motivated by the claim that the person interfered with will be better off or protected from harm? The position on this point is rather complex. In the case of copyright law, the restrictions affect the general population, who are barred from using or obtaining copyrighted works without paying a royalty to their creator. The utilitarian argument in favour of copyright protection assumes that the enforcement of copyright will improve the well-being firstly of the creators of works, by ensuring that they are able to receive recompense for the effort and expense they have incurred. Secondly, the argument runs, it will also benefit the well-being of the general population, by providing an incentive for the creation of works.

Insofar as the utilitarian justification is based upon the well-being of the general population, then considered collectively, the people to whom the restrictions apply are the same people to whom the benefits are supposed to accrue. At the individual level, however, this is not the case. The main utilitarian argument for preventing person A from using or obtaining copyrighted works without paying a royalty is not that *person A* will be worse off for having done so. Rather, it is that widespread behaviour of this kind will ultimately affect the well-being of an indefinite number of people (including, but not limited to, those who do it), through the weakening of incentives to create such works. Insofar as the utilitarian justification is concerned with the well-being of the creators of works, the restrictions do not apply to the creators themselves but to others who would otherwise benefit unfairly from their work. Sometimes creators might not wish these restrictions to apply: in that case, IPR would be paternalistic if works were protected by copyright against their authors' will. However, it is usually possible to renounce to one's rights arising from one's copyright.

In the case of patents, once again the claim behind the utilitarian justification for protecting IPR rests to a large extent on the well-being of the general population: they stand to benefit from the innovations that patent protection helps motivate inventors to produce. Again, the restrictions imposed by IPR apply in theory to the general population, since everyone is bound by those restrictions. However, in practice, the restrictions have a direct impact primarily on the minority who would otherwise wish to use patent-protected inventions. The restrictions imposed by IPR on these people are not for their own benefit.

[115] Dworkin, "Paternalism", in: Zalta (ed.), "The Stanford Encyclopedia of Philosophy" (Summer 2010 Edition) available at http://plato.stanford.edu/archives/sum2010/entries/paternalism.

There is also an indirect impact on the wider population in that they are denied the use of products that would otherwise have been produced if not deterred by patent restrictions, and may have to pay more for products which *are* so protected. How significant these impacts are in practice is likely to vary from case to case. Where a very large up-front investment is required to develop a particular product, it seems unlikely that firms or individuals would make this commitment without the benefit of IPR protection – thus there would be nothing for others to copy, and therefore any negative impact of the IPR restrictions upon the choice of products available to the general population would be more hypothetical than actual. In other cases, IPR restrictions may have a more tangible effect upon the choices available to the general population. As with copyright, at the individual level the benefits flowing from the restrictions IPR places upon any given person fall not primarily to that individual but to the wider public.

Note also that any effect of IPR restrictions on consumers, to the extent that it has an impact on well-being,[116] is itself something that would need to be factored into a utilitarian assessment of the costs and benefits of a particular case. If the likely effect upon consumers is relatively high compared to the anticipated benefits in terms of incentivisation, it should not be taken for granted that a utilitarian justification based upon well-being would support IPR restrictions.

To the extent that the utilitarian justification of patent protection rests upon the well-being of inventors rather than of the general public, it does not appear to be paternalistic. The restrictions imposed by IPR do not impinge upon them. As in the case of copyright, there might be an element of paternalism if IPR protection was imposed against their wishes: however, it is not compulsory to patent an invention.

What, then, should we conclude about whether basing the justification of IPR upon well-being would involve paternalism? We have seen that the first two criteria of Dworkin's definition are met: IPR do constitute 'interference', which can be assumed to be without the consent of those interfered with at least some of the time. As for his third criterion - that the people interfered with are also those who are supposed to be benefited - insofar as the utilitarian justification of IPR rests on the well-being of creators and inventors, it does *not* meet this criterion and therefore does not seem paternalistic, provided that their intellectual property rights are not enforced against their will. Insofar as the justification rests upon the well-being of the general public, if they are considered collectively it could be argued that Dworkin's third criterion is met, since the general public are also affected, directly or indirectly, by IPR restrictions.

At the individual level, however, the justification for the restrictions imposed by IPR on any given person is not, or not primarily, based upon the well-being of *that* person, but on that of the wider public. As far as individuals are concerned, therefore, the third criterion does not appear to be met. We might note here that Dworkin does not regard as paternalistic

[116] For example, on health, through the high costs of drugs protected by IPR, which may therefore be unavailable to those unable to pay.

"restrictions which are in the interests of a class of persons taken collectively but are such that the immediate interest of each individual is furthered by his violating the rule when others adhere to it."[117]

Dworkin is talking here about legislation for a forty hour working week, but IPR would seem to fall within the same category. In this respect, IPR can also be compared to laws against tax evasion, for example. Here too, the law impinges upon everyone for the sake of the well-being of all (if we assume a utilitarian justification of taxation) but in the case of each individual, the beneficiary of the intervention insofar as it affects her own behaviour is not herself but the general population.

We conclude, therefore, that although the justification of IPR in terms of well-being may appear paternalistic at first sight, it is not paternalistic at the level of the individual, and there are no reasonable grounds here to reject our proposal.

Conclusion

In conclusion, we have shown that the current still predominant justification for IPR (the Chicago School of economics which takes maximisation of economic wealth as the only proxy for well-being) is both flawed and ideological and that replacing it by a well-being approach is warranted. In addition, this new approach is not as ideological nor is it paternalistic. Policy-makers should therefore base IPR on this 'utilitarian justification revisited', although by no means exclusively (e.g. deontological considerations may still matter). In our next paper[118], we identify the markers of well-being according to the theory-neutral approach of well-being and apply them to patents and copyright to check if the current legal framework respects this well-being approach and if not, what can be done to remedy this.

[117] Dworkin, "Paternalism", in: Wasserstrom (ed.), "Morality and the Law" 183 (Wadsworth Publishing Company, Belmont 1971).
[118] Derclaye & Taylor, supra n 113.