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Happy IP: replacing the law and economics justification for intellectual property rights with a well-being approach

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*E.I.P.R. 197 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 (first section). However, this school of thought is both flawed and ideological (second section). 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 (third section). Our proposal, like any and every other legal programme, cannot avoid being ideological (fourth section) but it avoids the flaws of the Law and Economics approach. It is also not paternalistic (fifth section).

Introduction

Choosing a policy over another depends very much on what one wants to achieve in society. Up to now, the rhetoric in policy-making 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 article 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 and 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 and Economics approach. Although 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 term "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 trade marks and related rights (such as geographical indications). By contrast with patents and copyright, trade marks 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 from that justifying patents and copyright. We acknowledge that an investment function close to that of patents and copyright also exists for trade marks, but it is not the dominant one and is only really relevant to some trade marks, 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 copyright neighbouring rights, 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.

The rationales of intellectual property law

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 sub-categories. In deontological justifications, we find natural rights and personality rights, and in consequentialist ones, the utilitarian theory and its derivatives. Because the utilitarian justification for IPR is the basis on which our article is built, we spend a little bit of time reminding readers about it.

The first consequentialist theory is the utilitarian rationale, which 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. 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 on their endeavours for a limited period of time, after which these inventions and creations fall into 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.2

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.5 But, by far, the current prevailing justification for IPR is the utilitarian rationale and its derivatives, be it at*E.I.P.R. 199 international level,2 in the USA, or the EU,2 whether in policy-making,10 legislation or case law.11 Furthermore, it is generally the more elaborated economic analysis of intellectual property law in its narrow approach (i.e. the neo-classical branch of Law and Economics or the 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 article is solely on the consequentialist justification.

The Law and 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.

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 realism17 and also directly from utilitarianism.18 L & E is one of the most important and predominant contemporary American legal methodologies, perspectives or movements;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.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, but it also prevails in comparison with other, philosophical, justifications for IPR, because economics is a science and is thus in search of truth and is not ideological. But, in fact, neither the definition of L & E nor that of the science of economics is set, and the fact that there are different definitions implies an ideological aspect. There are three ways of conducting an economic analysis of the law: the analysis can be positive (it explains something and predicts what will happen); normative (it prescribes the law); or descriptive (it describes the rules, judgments and institutions in the language of economics).

**The law and economics of intellectual property rights**

Like the L & E of other branches of law, the L & E of intellectual property has several strands which have different ideologies and methodologies. 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. 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.

The Chicago School is conservative in its politics and, some would say, reductionist in its economics. According to this version, law has to do with the maximisation of aggregate wealth and the promotion of allocative efficiency. It 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". Notably, it is economic wealth, not utility or happiness, which the Chicago School is concerned with. The Chicago School also generally believes that economics explains everything. For them, because markets are self-correcting, private economic power is less problematic than government intervention in the market. 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. 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. Also, wealth maximisation became and still is the dominant criterion in all L & E movements.

**The flaws of the economic analysis of law**

The economic analysis of law suffers from several flaws. The main shortcomings of 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 normative analysis into their writings. Secondly, economics assumes the rationality of the consumer (*homo economicus*): s/he wants to maximise his/her well-being, and this equates to wealth, which is measurable in monetary units. So orthodox economics substituted utility with wealth. In 1979, Posner further said that wealth maximisation was
not a second best but had to be preferred normatively. However, this position disregards the decreasing marginal utility of wealth. Thirdly, the Chicago School also presumes that consumer preferences are fixed, i.e. never influenced by external factors, whereas in reality this is untrue. Fourthly, 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. Last but not least, a major problem with most normative L & E analysis is its fundamental ideological basis and often objectionable consequences. 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. And, in fact, a more equal distribution seemingly increases welfare.

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. In short, no one disputes L & E any longer; it is accepted as scientific and thus as true. But, as this analysis has revealed, it is an ideological belief and reliance on the above-mentioned flawed assumptions also makes L & E unfit for normative legal analysis.

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

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. Incongruously, it brings the US closer to the natural rights justification which still exists in European continental countries, so that the philosophical divide between the US and European continental countries is fading. According to this proprietary model, "every potential economic value ought to be propertised"; 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. 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. It shifts the focus on maximising society’s welfare to maximising the intellectual property owner’s profit. 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.

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. In those cases, granting IPR actually makes society worse off. 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 so different intellectual property regimes rather than a single one. More precisely, the length, breadth and standard of protection must differ depending on the different economic environments (i.e. the shape of demand curve, the rate at which improvements to existing technologies are developed or relative costs of later innovators). 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 is different from patents, which are different from plant variety rights, database rights, etc.). So, for example, it is possible to tailor 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. 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.

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".

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

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 subordinate personal projects and principles to the impersonal general good; it appears—at least in its classical, act-utilitarian form—to conflict with certain widespread intuitions about right and wrong, sanctioning acts that are conventionally 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. Utilitarians have made various responses to these challenges.

In this article, 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 (1) that if something promotes utility,
that is a point in its favour; and (2) that IPR do promote utility, then the argument is valid—
intellectual property law (or at least, those elements of it for which (1) is true) can be justified
on utilitarian grounds.

Whether (2) holds is open to debate. The extent to which it holds may vary between different
types of IPR, and between individual cases. The question of how widely it holds falls
outside the scope of this article, but it is plausible enough that it holds at least some of the
time. Condition (1) 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 article.

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 or a universal decision procedure to
justify IPR, we do not need to fret about the demanding nature 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—which 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.

**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 best-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. 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. While 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. 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 capita is at the upper middle level and the high level”. 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.

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 November 25, 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. Similar developments have been occurring elsewhere in Europe. 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, while the OECD introduced a "Better Life Index" in 2011. 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.

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 judgments 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.

**What should replace GDP?**
The preceding sections of this article 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. Accounts of both these types can be regarded as "subjective", since they ground*E.I.P.R. 205 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). Aristotelian theories focus on some notion of human flourishing, typically reflecting the development and exercise of certain capacities. 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. This is because 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 judgments 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.\textsuperscript{57} Hedonism about well-being implies that physical health is \textit{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.\textsuperscript{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, while rejecting happiness as a constituent of his list,\textsuperscript{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.

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 such as 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.*E.I.P.R. 206

Note also that, while 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. 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 separate article, we propose a list of markers of well-being that would be consistent with the theory-neutral approach and consider what implications these would have for IPR.

**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 one 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 one ideology (L & E) by another (welfarism), we first need to define ideology and then show the problems the concept entails.

**Definition of ideology**

It is worth briefly mentioning the origin of the term and concept of ideology as it helps in understanding its meaning. While it was coined by a Frenchman (Destutt de Tracy) after the French Revolution, its first developers were Marx and Engels. 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 or ephemeral, but they are pervasive and are here to stay.

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, held by significant groups in order to preserve, modify or overthrow the existing social and political arrangements and processes of a political community. Thus ideologies are inherently value-based, and include norms about how people should behave and what governments should do.

"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."
In short, ideologies are action-orientated systems of thought towards preserving or changing social arrangements:

"So defined, ideologies are neither good nor bad, true nor false, open nor closed, liberating nor oppressive — they can be all these things."

As ideologies are value-based, they are only good or bad inasmuch as one agrees or disagrees with their values. An ideology’s aim is to prioritise a value or values over others and claim legitimacy over what they claim. Ideologies are pervasive because in practice neither persons nor groups occupy a neutral point of view. Ideologies are also pervasive in the sense that we produce, disseminate and consume them our entire lives, consciously or unconsciously. We cannot do without ideologies because they make sense of the world we live in. Therefore, "there is no ‘ideology-free’ political or legal programme, given that law and politics are expressions of values and underpinned by force."

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". 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.

**Problems with ideologies**

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 that is impossible. For instance, liberals argue that communism and fascism are ideologies but refuse to accept that liberalism is also an ideology. 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. A second problem is that sometimes ideologies mix or merge facts with values, making it difficult to distinguish between ideology and science. 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.

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. As we have seen in the section "The rationales of intellectual property law" above, 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.

**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. However, as we said in the section "What well-being research has shown" above, 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. 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.

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. Paternalism has been defined by Gerald Dworkin as:

"[T]he interference of a state or an 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."

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 first 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 copy patent-protected inventions. The restrictions imposed by IPR on these people are not for their own benefit.

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.*E.I.P.R. 209

Note also that any effect of IPR restrictions on consumers, to the extent that it has an impact on well-being, 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 with 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:

"[R]estrictions 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." \[^{118}\]

Dworkin is talking here about legislation for a 40-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 I.P.Q. article \[^{119}\] 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 whether the current legal framework respects this well-being approach, and, if not, what can be done to remedy this.

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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 section “The flaws of the economic analysis of law” below. Behavioural economists and happiness economists have departed from these assumptions.


8. Geiger, Droit d’auteur et droit du public à l’information (2004), p.30 and references cited; S.K. Stadler, "Forging a Truly Utilitarian Copyright" (2006) 91 Iowa L. Rev. 609, 643–644 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"); A. Devlin and N. Sukhatme, "Self-Realizing Inventions and the Utilitarian Foundation of Patent Law“ (2009) 51 Wm & Mary L. Rev. 897, 901 and 913 (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 fnn.1 and 57); Elkin-Koren and Salzberger, The Law and Economics of Intellectual Property in the Digital Age (2012), p.4 (the US Constitution takes a
consequential approach). Contra: J. Hughes, "A philosophy of intellectual property" (1988) 77 Georgetown L J 287. who thinks it is the labour theory which influenced the US constitution’s vision of property.


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.


26. In the field of intellectual property, see e.g. W.M. Landes and R.A. Posner, "Indefinitely Renewable Copyright" (2003) 70 University of Chicago Law Review 471.


37.


41. Baker, "The Ideology of the Economic Analysis of Law" (1975) 5 Phil. & Pub. Aff. 3, 4–6 (although Posner states that he makes a positive analysis, most readers would see it as a normative one).


44. Elkin-Koren and Salzberger, The Law and Economics of Intellectual Property in the Digital Age (2012), p.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."


utility for wealth, Bentham concluded that welfare would be increased by increasing equality if the steps taken did not decrease production."

51. Of course, apart from a few scholars recently; see section "Recent developments in the L&E of IPR literature and criticisms" below.
54. A. Plant, "The economic theory concerning patents for inventions" (1934) 1(1) Economica 1, 30–51; and A. Plant, "The economic aspects of copyright in books" (1934) 1(2) Economica 167; T.G. Palmer, "Intellectual Property: A Non-Posnerian Approach" (1989) 12 Hamline L. Rev. 261. See also J. Hirshleifer, "The Private and Social Value of Information and the Reward to Inventive Activity" (1971) 61(4) American Economic Review 561; S.M. Besen and L.J. Raskind, "An Introduction to the Law and Economics of Intellectual Property" (1991) 5(1) Journal of Economic Perspectives 3, 3–4, are less convinced of the efficiency of IPR than Landes and Posner and say that empirical research is needed. They also cite other economists who objected to S. Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harvard Law Review 281; R. Frase, "Comments on Hurt and Schuchman: The Economic Rationale of Copyright" (1966) 56 American Economic Review, Papers and Proceedings 435; Hughes, see fn.8. See also Besen and Raskind, "An Introduction to the Law and Economics of Intellectual Property" (1991) 5(1) Journal of Economic Perspectives 3, 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, 1986); and the data on whether patents have been used to facilitate cartel behavior is inconclusive (Hall, 1986)").
Property (1999); Landes and Posner, "Indefinitely Renewable Copyright" (2003) 70 University of Chicago Law Review 471; R. Tows and R.W. Hozhauer (eds), Economics of Intellectual Property Rights (Northampton, MA: Edward Elgar, 2002); Braga, C. Fink and P. Sepulveda, "Intellectual Property Rights and Economic Development", World Bank Discussion Paper No.412 (2000), who all think strong IPR induce growth and are thus desirable. See, however, N. Gallini and S. Scotchmer, "Intellectual Property: When Is It the Best Incentive?" in A. Jaffe, J. Lerner and S. Stern (eds), Innovation Policy and the Economy (Cambridge, MA: MIT Press, 2002), Vol.2, pp.51–77 at pp.54–55 and 59–62, 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 p.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 M. Sunder, From Goods to A Good Life: Intellectual Property and Global Justice (Yale University Press, 2012), pp.4, 11.


59. Elkin-Koren and Salzberger, The Law and Economics of Intellectual Property in the Digital Age (2012), pp.50–53; Stadler, "Forging a Truly Utilitarian Copyright" (2006) 91 Iowa L. Rev. 609, 670–671 also implicitly acknowledges that there has been a shift from the utilitarian to the proprietary model in the US.

60. Elkin-Koren and Salzberger, The Law and Economics of Intellectual Property in the Digital Age (2012), p.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": see p.118.


64. Using the utilitarian rationale, Stadler, "Forging a Truly Utilitarian Copyright" (2006) 91 Iowa L. Rev. 609, 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.


73. See section "Recent developments in the L & E of IPR literature and criticisms" above (e.g. most academic creations and inventions as they are subsidised by the state in most cases. Hence no need of IPR for those).


75. For example, R. Veenhoven and F. Vergunst, "The Easterlin Illusion: Economic Growth Does Go With Greater Happiness", MPRA Paper No.43983 (2013), Munich Personal RePEc


84. See e.g. J. Finnis, Natural Law and Natural Rights (Oxford: Oxford University Press, 1980), Chs III and IV. Martha Nussbaum’s version of the capabilities approach, in Women and Human Development: The Capabilities Approach (New York: Cambridge University Press, 2000), also offers a list, though her view also has Aristotelian influences.

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


87. For example, health features in Martha Nussbaum’s list of central human capabilities: Nussbaum, Women and Human Development (2000).
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; see e.g. G. Fletcher, "A Fresh Start for the Objective-list Theory of Well-being" (2013) 25(2) Utilitas 206.

90. We acknowledge (see Taylor, "Towards Consensus on Well-being" in Well-being in Contemporary Society (2014)) that a theory-specific approach has the advantage of offering a more straightforward way of interpreting cases where data on different markers of well-being diverge, 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.


93. Freeden, Ideology (2003), pp.12–30 (tracing the evolution of the thinking on the term "ideology" from Marx until now); B. Strath, "Ideology and Conceptual History" in M. Freeden, L. Tower Sargent and M. Stears (eds), The Oxford Handbook of Political Ideologies (Oxford: Oxford University Press, 2013), p.17 (the concept of ideology is still alive and well, and it has more or less lost its negative connotation).

94. Some scholars declared the end of ideology in the 1950s and 1960s 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, Ideology (2003), pp.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 as a priority).

95. Therefore, ideologies are aimed at the public arena: "not every group plan is an ideology". For instance, a director of a school’s plan to change how pupils are accepted is not an ideology, but of course it may reflect a particular ideology. See Freeden, Ideology (2003), p.34.

96. Freeden, Ideology (2003), p.32; A. Heywood, Political Ideologies: An Introduction, 5th edn (Basingstoke: Palgrave Macmillan, 2012), p.11. 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 does not claim that this is the "ultimate statement" on the concept of ideology, See Freeden, Ideology (2003), p.123.


100. Heywood, Political Ideologies (2012), p.10. See also Freeden, Ideology (2003), Ch1.

101. Grant Duncan (email on file with the authors).


103. Freeden (email on file with the authors).


106. Duncan (email on file with the authors); see also Freeden (email on file with the authors). Strath, "Ideology and Conceptual History" in The Oxford Handbook of Political Ideologies (2013), p.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 M. Freeden (ed.), The Meaning of Ideology: Cross-Disciplinary Perspectives (London: Routledge, 2007), pp.148–163.

107. Heywood, Political Ideologies (2012), pp.11, 13 (the difference between ideology and political philosophy is that ideologies are less consistent than political philosophies). See also Freeden, Ideology (2003), p.124.


110. Heywood, Political Ideologies (2012), p.12; see also Freeden, supra n 103.


112. As we saw above in the section "The rationales of intellectual property law", L & E started in the 1960s and the thinking then was not yet that ideologies were pervasive and permanent.

113. As most probably, many aspects of IPR are already aligned with well-being. This is something we show in our article Derclaye and Taylor, "Happy IP: Aligning Intellectual Property Rights with Well-being" [2015] I.P.Q. 1, 1-14.

114. 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, Political Ideologies (2012), p.340.


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