

Calibrating intellectual property: let's not get lost in metaphysics

Despite the longstanding consensus on the utilitarian and natural rights justifications of intellectual property rights, legal doctrine still struggles to translate these justifications into more detailed guidelines on calibrating these rights. Agreement, for example, on the need for copyright to correct market failure caused by externalities and to protect the author's natural right to the fruits of his labour, does not prevent discussion on the control which copyright is to grant the right holder over the distribution and the use of embodiments of his work.

This paper demonstrates that better insights in how intellectual property rights intervene at the level of perceptible things, also allows the following: more detailed instructions on how to calibrate their intervention in accordance with utilitarian and natural rights considerations. Conventional wisdom has intellectual property rights grant a power over the mental reality of an 'immaterial good'. This paper, however, analyses these rights as burdening perceptible things with intellectual servitudes which grant the right holder a power over a slice of the possible perceptible acts concerning these perceptible things. This analysis, firstly, clarifies the pitfalls of calibrating intellectual property rights to avoid externalities and to protect natural rights, as if 'immaterial goods' were perceptible goods, and then have a balancing of interests compensate for this flawed equation. Secondly, this analysis also allows a conceptual framework for guidelines, immediately at the level of perceptible things, on how to calibrate intellectual property rights from utilitarian and natural rights perspectives.