Toward the end of *Kapitalismus,* the author briefly discusses the other-directed orientation of the entrepreneur with specific reference to Germany: "We need to produce things that no one else can produce and that are so good and desired that the whole world wants them. That we can do so has been demonstrated by our companies for decades" (174–75, my translation). This rings true, as Germany is, we know, economically more exposed to exports than the United States, and it is increasingly focused on the developing markets.

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Intellectual Property Law: Economic and Social Justice Perspectives

Anne Flanagan and Maria Lilla Montagnani (Editors)
Cheltenham, United Kingdom and Northampton, Massachusetts: Edward Elgar, 2010 (212 pages)

Edited volumes present a challenge to a reviewer; this one is no different. In this volume of nine chapters (each a distinct paper), the various authors explore the theoretical foundations of intellectual property rights (IPRs) beyond traditional utilitarian and "law and economics" approaches, and expand the scope of intellectual property (IP) law to accommodate "the full range of human values implicit in intellectual production" (xii) and "the regulatory dimension in terms of social goals that can be achieved through their construction (xiii)." This approach to "social justice" (defined in various ways by the authors in their papers) is further elaborated on by the editors, Anne Flanagan and Maria Lilla Montagnani:

> Enhancing the regulatory dimension (as well as the normative effects) of IP laws would thus bring right into the policy picture those goals that have been so far kept outside. It would morph IPRs from sources of exclusivity to means for any number of social ends, such as combating disease or providing access to educational content, or to the technology needed to build capacity to address such issues as global warming (xiv).

To meet this goal of melding "economic and social justice perspectives" in chapter 1, Giovanni B. Ramello posits that law and economics theory does not give sufficient weight to the complexity of knowledge production, resulting in a distortion of the meaning of maximizing cultural production. In his article, Ramello considers that a social justice approach can simultaneously produce IP-enhancing distributive effects and realize market efficiency with the precondition being a weaker level of IP protection, resulting in a wider accessibility of knowledge among individuals as a critical feature for creative endeavors.

In chapter 2, Federico Morando addresses the current status of public and private interests concerning society and the Internet, specifically how the World Wide Web 2.0 has altered the economics and status of authorship and challenged the effectiveness and efficiency ("appropriateness") of current copyright defaults. Morando recommends a

policy approach whereby alternative copyright regimes built on Creative Commons licenses could efficiently provide sufficient IP protections without negatively impacting fairness or distributive social justice.

Sharon K. Sandeen, in chapter 3, questions why the utilitarian approach (i.e., law and economics approach based in rational choice theory) and its incentives for innovation rationale is so narrowly ingrained in the law, especially given that there are other so-called irrational values beyond efficiency-to-create that exist in society. Sandeen suggests that these other nonefficiency-based motivations can be promoted by the right IP policies to promote innovation for the benefit of society.

In chapter 4, Jerzy Koopman reviews how changes in patent disclosure requirements could redress some of the inequities found in the exploitation of traditional knowledge in indigenous cultures with respect to biochemical materials and to thus protect cultural and biological diversity. Koopman suggests that patent examiners more readily assess the novelty and innovation of such inventions to avoid unjust property acquisition but also to promote "biotechnological R&D that is both just and instrumental in all respects" (92).

Using the biomedical industry (and the potential problem of a biotechnology anticommons) as her innovation platform of choice, Rosa Castro Bernieri, in chapter 5, explores how the U.S. Supreme Court, in the test for whether a defendant may be enjoined from commercializing a patent while the outcome of a patent case is determined, has reset a balance in the principles of injunctive relief. This court intervention will likely serve to redress (through a substantive justice remedy of monetary damages to make the complainant whole) a growing offensive strategic use of biomedical patents (as a potential biomedical anticommons) to preclude innovation and competition.

In chapter 6, Anne Flanagan, Federico Ghezzi, and Maria Lilla Montagnani explore the principles of equity—based in historical notions of fairness, redressing balances, or restoring situational justices—as established in the original IP "bargain," specifically as pertains to the IP misuse doctrines in the United States that are premised alternatively on equity and antitrust law, in evaluating whether parallels may be found in the European Union (EU), under competition law or possibly its abuse of rights doctrine. While the authors conclude that abuse of rights in the EU has doctrinal limitations, competition law serves as a broader policy tool (than the United States' IP misuse doctrine) to compensate for IP's disequilibria and supports a balance between public and private interests by regulating the exploitation of IPRs beyond their grant by monopolists or dominant firms.

Maria Mercedes Frabboni, in chapter 7, continues the direction taken by Flanagan, Ghezzi, and Montagnani and further explores competition law as an external tool shaping IPRs to achieve distributive justice. In this case, she focuses on the collective exercise of IP rights pertaining to the EU Commission (responsible for competition policy and enforcement) decision on collection societies, which struck down their mutually reciprocal exclusivity clauses in light of online music distribution. Employing an economics-based analysis, Frabboni notes that the EU Commission, in a recent decision, uses competition law not to require actual competition among national collection societies, but to alter their practices impeding such online distribution, therefore furthering a form of greater

access to creative works while attenuating the negative effects of business practices in highly concentrated markets.

In chapter 8, Mariateresa Maggiolino further explores competition law as an external compensation to balance the structure and exercise of IP rights by dominant firms in markets to protect their innovations and analyzes recent EU decisions imposing a duty to license that arguably changes the scope of national IPRS. While fairness, equity, and the protection of rival welfare, that is, social justice considerations, are no longer, if ever, the stated principles or objectives of modern US or EU competition law, Maggiolino argues that the recent EU Microsoft case resulted in protection for rivals (based on allocative efficiency criteria) by ensuring their incremental follow-on innovation, and she further questions whether adding the social justice dimension to competition law is advisable or necessary. Gustavo Ghidini and Valeria Falce, in chapter 9, note, however, that the EU Commission has recently instituted the Consumers Rights Directive, whose aims are based in economic efficiency, a competitive marketplace and consumer welfare, thus revealing its complement to and reinforcement with the goals of competition law. Ghidini and Falce conclude that this consumer protection directive aims at creating a real internal market in the EU, making it easier and less expensive for firms to sell cross-border and increase customer choices at highly competitive prices.

The purpose of this edited volume is to extend the analysis of intellectual property law beyond the traditional "law and economics" basis, expanding the scope of such concerns to broader concerns of social justice. It partially succeeds in attaining this goal. The editors are correct in their approach to emphasizing both an economic *and* social justice perspective, so as to avoid the error that economist Thomas Sowell identified in his most recent book, *Intellectuals and Society* (2009). "In John Rawls' elaborate and intricate *A Theory of Justice* (1971)," Sowell writes, "justice becomes categorically more important than any other social considerations. But, obviously, if any two things have any value at all, one cannot be categorically more valuable than the other."

While the economic perspective of intellectual property law is generally well defined by the book's authors, the social justice perspective is another matter. Because of the existing exploratory nature of this perspective, the editors intentionally provided a carte blanche approach to defining the social justice concept. Other than Ramello (chap. 1:18–19) who provides direct reference to a formal definition of social justice based on Rawls (1971) in his excellent overview chapter focusing on insights from law and economics, and Maggiolino (chap. 8:163) personally defining her vision of social justice on the first page of her article, in general, the reader must infer what definition of social justice is being discussed in each chapter. More often than not, ethics-based terminology is scattered (or judiciously placed) to reconnect with the volume's general theme of social justice perspective. While in certain cases the social justice perspective (as earlier defined by the big policy social ends referred to by the editors Flanagan and Montagnani) is simply not present, for example, with Frabonni (chap. 7) and her topic of music licenses. In the case of Koopman (chap. 4), who intricately discusses the IP patent challenges related to ensuring the maintenance of cultural and biological diversity, this chapter could have

benefitted from a coauthor with an applied ethics background to further focus the paper's big policy social justice perspective. While an ambitious attempt to widen the perspective of how intellectual property law impacts the greater society, this volume could have been a much stronger scholarly work if its coauthorship were expanded to law and philosophy and/or business, ethics, and society scholars—beyond the circle of IP/antitrust attorneys and industrial organization/law and economics economists who have traditionally operated with a general concept of social welfare maximization as a broad public policy concept. Hopefully this recommendation will be adopted in a follow-up volume.

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The Moral Rhetoric of Political Economy: Justice and Modern Economic Thought

Paul Turpin

New York: Routledge, 2011 (163 pages)

When I accepted the task of reviewing Professor Turpin's book, it seemed to be a rather straightforward exercise. However, I must confess that I have struggled to complete the task. My problem is not that I did not understand what Turpin was driving at; the book's message is pretty clear. My problem is the message itself. It seems to me that the author is trying to square the proverbial circle. Eventually, I made my way through the book, but I would not recommend it to others.

Turpin argues "that markets and commutative justice are distorted, and distort us, by our acceptance of the idea that commutative justice is the only justice that matters" (6). What is important for Turpin is to argue for some combination of commutative justice coupled with some idea of distributive justice. In attempting to make this argument, the author suggests that an alternative rhetorical discourse in society would give rise to a different view of justice, namely, one more attuned to Turpin's concerns. As the author writes, "The purpose of this book is to search out these presumptions and assumptions in an examination of how our attitudes about justice are influenced by our attitudes toward economics" (14). Finally, Turpin argues "that the neglect of relational issues as matters of distributive justice has aggravated the feelings of fragmentation and alienation so commonly identified with modern life" (105).

Thus, Turpin aims to attack a natural-law concept of the purpose of government along with the corollary free market that results from the equal protection of everyone's private property. By examining the work of Adam Smith and Milton Friedman, the author seeks to show that there have been unintended consequences to an unhindered, self-regulating free market. However, from the very outset Turpin's approach seems very much misplaced.

First, to argue that Smith and Friedman are advocates of the free market on the same philosophical basis is absurd. Smith's work is rightly attached to the natural-law philosophy that held sway in the academy from the rise of Greek thought to Smith's age.