Estelle Derclaye and Tim Taylor, "The well-being approach to IP - a more 'moral' approach to IP?"

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The dominant Law and Economics approach to the justification of IPR assumes that utility can be equated with economic activity. We have previously argued (Derclaye and Taylor 2015a, 2015b) that economic measures such as GDP are inadequate proxies for national well-being and should be replaced by a more direct focus on well-being itself. We proposed a theory-neutral approach based on 'markers' of well-being common to rival theories.

A further weakness of GDP as a measure of utility is that, at best, it can serve only as a (flawed) indicator of aggregate utility. It is thus compatible with only a single moral principle: the Principle of Utility, which is itself controversial and subject to several well-known objections. Some recent IP scholarship (e.g. Chander and Sunder 2007) has challenged the prevailing assumption that intellectual property should serve the single goal of 'incentivizing the creation of cultural and scientific products, as the market dictates'.

We argue that an approach which evaluates IPR directly in terms of well-being not only forms a better basis than GDP for the utilitarian justification of IPR, but is also more flexible, since it is compatible with a variety of other moral principles which might be invoked in appraising IPR in addition to (or instead of) utilitarian considerations. In particular, our approach:

Allows negative as well as positive impacts on well-being to be identified. It is therefore compatible with moral principles which posit a stronger obligation to avoid causing harm than to generate benefits.

Allows the effects of IPR on different individuals and groups to be evaluated. It is therefore compatible with moral principles, such as social justice, which concern the distribution of benefits.

Can complement a focus on human rights. Many of the markers of well-being we identify are recognised in the UDHR as rights to be protected.