

Fairness, Markets, and Intellectual Property
PROPOSAL FOR 2018 ATRIP
Shubha Ghosh
Crandall Melvin Professor of Law
Syracuse University College of Law

The intellectual property laws of many countries countenance limitations on intellectual property rights based on notions of morality or protection of the public order. The fragility of words like morality or public order mandates a more careful consideration of the policies surrounding intellectual property. Normative theories of fairness as developed by economist Walter Baumol and the many scholars who build upon his work address this mandate. Fairness, within economic analysis, is a technical term that counters normative theories based on Pareto Optimality and the related construct of welfarism. The first criteria, as is well known, can justify unequal distributions of well-being. Welfarism attempts to resolve this problem through the aggregation of individual subjective well-being into a criterion function that permits comparisons of “marginal utilities.” However, welfarism suffers from the problem of how to aggregate individual measures of subjective well-being.

Economic theories of fairness provide a different approach by introducing the concept of envy. Put simply, minimizing envy is a way to achieve fairness. Although far from perfect, the economic theory of fairness has stimulated a debate about how to assess the consequences of various policies. This paper will explain how fairness can inform the doctrines of morality and public order in intellectual property law. Specifically, fairness theory turns our attention from a narrow focus on wealth maximizing IP regimes to designing regimes that minimize envy through a more equal distribution of resources. Such regimes do not undermine incentives for innovation but serve to reinforce them by more equally spreading such incentives among individuals in society. Fairness theory affects our understanding of both IP substance and process, both political and administrative, as illustrated through examples involving access to copyrighted works, access to medicines, and protection for status goods through trademark law.