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# Inconsistencies in Himma's Intellectual Property Theory

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Słowa kluczowe: dobra niematerialne, własność intelektualna, stan natury, prawo naturalne, pierwotne zawłaszczenie, Locke

## Abstract

The intellectual property theory of Kenneth E. Himma aims to vindicate natural rights to abstract objects, believed to form the "intellectual content of creations." Himma proposes a reformulation of John Locke's property rights theory in terms of value. He maintains that even if abstract objects preexist their alleged creation, then they are not ready for consumption until access to them is provided by laboring innovators and artists. He declares that making them available is an act of value creation that justifies granting intellectual property rights. In this paper, tacit presuppositions on which Himma's theory relies are examined and challenged. Against his claims, it is argued that no human labor can improve the availability of abstract objects. It is then demonstrated that "intellectual commons" cannot be "stocked" by human activities and that the alleged value creation cannot happen, because the concept of value is inapplicable to abstract objects. This derails the theory. Finally the meaning of rights envisaged by Himma is investigated. It is shown that they cannot be exercised with respect to causally inert entities.

## Introduction

Several scholars have attempted to provide moral justification for intellectual property (IP) rights. A popular strand of these theories refers to the philosophy of John Locke, and portrays IP as a natural right, derived from the pre-institutional, pre-contractual state of nature. One such theory has been proposed by Kenneth E. Himma. It deserves attention for at least two reasons. Firstly, Himma states his views more systematically and explains his assumptions more precisely than many other IP advocates.[1] Secondly, he recognizes shortcomings of the Lockean approach in the context of IP justification, noticing that the nature of abstract entities makes their appropriation more difficult than is usually admitted. In an attempt to overcome this obstacle, he formulates his own, original theory. The present study is an evaluation of his proposal, as exhaustively discussed in Himma's (2012) paper.[2] It is aimed at answering the question: *Is it possible to justify IP through Himma's theory?* In what follows, it is argued that the answer is negative.

The study is an internal critique. It is carried out by examining the logical structure of Himma's views. In the second section a sketch of his theory is presented and his explicit ontological assumptions on the objects to be regulated are recognized. In the third and fourth section Himma's terminology is examined in more detail. A conflict is identified between his stated explicit assumptions, and a tacit presupposition that abstract objects can be created and controlled. This leads to the realization that *abstract objects to be governed by Himma's proposed rights cannot be created, possessed or used.* In the fifth, sixth and seventh section the consequences of this finding are explored. A refutation is presented for three essential claims of Himma's theory: content unavailability, stocking of the commons and value creation. Possible objections are dealt with in the eighth section. In addition, the proposed meaning of postulated IP rights is examined in the ninth section. It is shown that they are ineffectual. The investigation is supplemented by analogies involving material and immaterial objects.

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[1] Such as Nozick (1974), pp. 174–182, Easterbrook (1990), Diamond (2015), or Cwik (2014, 2016).

[2] Some of his other works are also accounted for (Himma 2005a, 2005b, 2007, 2008).

## An outline of the theory

The stated aim of Himma's work is to "provide the beginnings of a viable moral justification for recognizing and providing legal protection of intellectual property." He describes his approach as following the line of arguments inspired by John Locke's theory of property, signaling that what is sought is the justification of objective natural rights. By objectivity he means that the existence and contents of these rights are not social constructs, and their validity does not depend on how many people believe in them. They are meant to be "conferred by morality," rather than by the legal system, and to exist even in the state of nature. At the same time Himma emphasizes that these rights are not necessarily property rights *per se*. He suggests that they might equally well be called "property" or "shmoperty." The objects to be governed by the envisaged rights are referred to as the *intellectual content of creations* or, in short form, as the *content*. Himma states that they are abstract entities "with radically different properties than material or mental objects," and that in particular they lack extension, solidity and spatio-temporal location.[3] These entities are "intangible and neither here nor there." They would exist "in a world where there are no minds" to think of them. They cannot be "perceived by any of the five senses" and the way we come to understand them is by reasoning. Himma also maintains that they "can be simultaneously appropriated by everyone" without diminishing the supply available for others. Moreover, he admits that abstract objects are causally inert, so humans cannot interact with them. Elsewhere, he also concedes that they cannot be destroyed.[4]

Himma speaks of IP in general terms, mentioning patent, copyright and trademark systems. Hence the "intellectual content" may represent both technological innovations and works of art. Nevertheless, the emphasis is placed on copyright. He routinely refers to "authors," mentioning sculptures, novels, poems, films, theatrical plays and culinary recipes as examples of objects to be regulated. However, he distances himself from

[3] The view that objects governed by IP are abstract is also expressed by Drahos (1996), p. 6; Craig (2002); Resnik (2003); Madison (2012); Von Gunten (2015), p. 12; Błaszczyk (2016) and Chatterjee (2022).

[4] See: Himma (2005b).

any existing IP regime, declaring instead the interest in "the general issue of whether intellectual property protection is morally justified."

The argument begins by criticizing the standard Lockean theory of original acquisition. Himma considers two interpretations of Locke's thought. The first postulates that a property right in previously unowned material objects is acquired by mixing one's labor with them. According to the second, the improvement of material objects through labor is the source of property rights. Himma notices that both readings depend critically on our ability to causally interact with preexisting resources. Therefore, he finds both of them inapplicable to abstract entities and concludes that they fail to justify IP rights. This realization leads him to propose another variant of the Lockean account. The argument is rephrased in terms of value. Human labor is still central to the acquisition but its role changes. Rather than being mixed with an abstract object or transforming it, labor is now supposed to create its value. Himma maintains that even if abstract objects initially "exist somewhere in the logical space," then they are not ready for consumption until access to them is provided by the labor of innovators and artists. He interprets this act as value creation and insists that those who "bring new value into the world" should be granted a right "to define the terms upon which others may take advantage of this value." Therefore, it is the act of making the abstract object available that is meant to justify rights of innovators and artists. Himma envisages some limits to appropriation. He approvingly mentions Lockean provisos but then suggests that a better restriction would be to "balance interests" of all competing parties. This is followed by an admission that the weighing of interests is a "messy, imprecise business" and that Himma does not possess any "sort of algorithm for assessing" them. Instead, circumstances that might facilitate weighing are discussed. Certain "gut-level intuitions" are presented on why particular interests should prevail in various situations. Himma concludes that "some intellectual property protection is morally legitimate."

## Content creation

Himma's distinction between material "creations" and their immaterial "content" roughly reflects the type-token distinction widely discussed in the

formal analysis of intellectual property theories.[5] The "content" corresponds to abstract types while "creations" correspond to material tokens of those types. Nevertheless, Himma refrains from mentioning types and tokens, and sticks to his preferred terminological convention. A specific feature of his writing is the insistence on creation, exemplified by the statement:

> What is important is whether content creators have an interest in the content they create that the law should protect by allowing content creators to exclude others from the content they create unless the content creator consents to its appropriation.[6]

In this passage, and in the whole paper, readers are literally bombarded with a constant reiteration of two words. Not fewer than 125 occurrences of the word "content" in the paper are accompanied by the reference to creation *in the same sentence*.[7] The meaning of these unqualified statements is obvious. Himma suggests that the abstract "content" is brought to existence by innovators and artists.[8] This appeals to a widespread sentiment in favor of granting to individuals property rights in what they have produced. However, besides incessant repetition, no evidence for creation is provided. Meanwhile, these assertions are incompatible with his explicit declaration that abstract objects constituting the "content" would exist "in a world where there are no minds" and with his statements about novels initially existing "in logical space."

More importantly, Himma's creationism is in conflict with his firm declaration that abstract objects cannot take part in causal relations. If a given object is not capable of causal interaction, how could it be created? The former implies that one cannot affect its mode of being. The latter implies the contrary. Similarly, the creation postulate cannot be reconciled with

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[5] See: Moore (1997, 1998); Dodd (2008); Fallis (2007); Trerise (2008); Wilson (2009, 2010); Wreen (2010); Biron (2010, 2016); Radder (2013); Faraci (2014); Koepsell (2015, p. 52); Uszkai (2014, 2017); Koepsell and Inglott (2017); Hauser (2017); Young (2020), p. 21.

[6] See: Himma (2012), pp. 1106–1107.

[7] For the record, 12 mentions of "content" are accompanied by the verb "discover" and 11 by the verb "produce" in the same sentence.

[8] Similar claims are made by LeFevre (1971), p. 68; Rand (1986), p. 141; Gordon (1989); Yen (1990); Becker (1993); Reisman (1996), p. 388; Ramello (2005); Attas (2008); Peterson (2008); Spinello and Bottis (2009), p. 9; Breakey (2010); Spitzlinger (2011); Lambrecht (2015) and Timmermann (2017).

Himma's concession that abstract objects are indestructible. This implies again that one cannot affect the existence of the abstract "content." But in order to create, one must be able to affect it. These two statements are again self-contradictory. Causally inert, indestructible entities cannot be created.

Finally, Himma (2005a) admits that abstract objects are unique, which means that there are no identical-but-distinct abstract objects.[9] This may be confronted with properties of the time-space. According to Einstein's Theory of Relativity, the chronological ordering of two events A and B may vary between different reference frames.[10] Such frames may be found when the two events occur outside event horizons of each other, and in particular when they are distant and simultaneous in one frame. Let events A and B correspond to two individuals respectively coming up with the same "content." It may happen that in some frame A precedes B, while in another frame B precedes A. Temporal orderings of alleged originations contradict each other. Each contender is overtaken by someone else. Hence none of them is the creator. Creation does not take place. This argument extends to any abstract "content," irrespectively of events' time-spatial configurations.[11] Hence, contrary to Himma's claims, the "content" is not created.[12] What humans can create, are barely its material embodiments.

## Possession and use

Other verbs also require attention. It is sometimes claimed that immaterial objects may be *possessed*.[13] However, the possession is simply the ability to direct a given object: to manipulate and rearrange it. It does not depend

[9] There is an important external reason to do so. Uniqueness is dictated by the principle of parsimony.

[10] The reference frame is a four-dimensional time-spatial coordinate system.

[11] There is no reason to believe that initial existence or nonexistence of an abstract object could depend on later events distributed throughout the whole time-space. See Gamrot (2021) for more details.

[12] This is pointed out by Tucker (1926), p. 286, Luper (1999), and Dodd (2000) for various kinds of types.

[13] The possession of ideas is mentioned among others by Spooner (1855); Hettinger (1989); DeLong (2002); Moore (2003, 2004, p. 159, 2012, 2015); Sandefur (2007); Kraft and Hovden (2013).

on history and reflects actual physical possibilities, rather than duties or rights defined by a positive or moral law.[14] Now, from Himma's admission that abstract objects are causally inert, it immediately follows that their mode of being cannot be altered. Therefore, they cannot be controlled, and they cannot be possessed. Metaphorical statements about possessing the "content" may be paraphrased in such a way that they refer to material or mental entities. They typically represent being aware of an abstract object, being able to draw others' attention to it, or to produce its material representations. This may involve rearranging matter or mental states. But it does not entail any ability to affect abstract objects anyhow.[15] The "content" cannot be possessed.[16]

Another action often mentioned with respect to immaterial beings is *using* them.[17] Himma repeatedly refers to the use of abstract content. The verb "use" reflects putting something into service, employing that thing for a purpose, or attaining an end by means of that thing. All these characterizations involve a purposeful action with respect to an object and the goal that is attained by changing the state of the object. However, being causally inert, as explicitly conceded by Himma, abstract objects cannot be affected by any action and cannot cause anything. Hence the talk about using them is meaningless. They are passive. They may be thought of, spoken of, identified, described, embodied, considered or recognized, but they cannot be directed to fulfill human purposes.[18] Various statements on the "use" of "content" merely reflect mentioning abstract objects, pointing to them, referring to them or using their material representations. These metaphors may be paraphrased in a way that does not imply causality. The "content" is not

[14] It is therefore not synonymous to ownership and should not be conflated with it. See: Demsetz (1967); Bouckaert (1990); Kinsella (2003); and Narveson (2010).

[15] This is recognized by Scanlan (2005).

[16] Błaszczyk (2020) also notes that declarations of possesing intangibles are devoid of any real content.

[17] See e.g., Hughes (1988); Kuflik (1989); Gordon (1993); Weckert (1997); Friedman (2000), p. 138; Damstedt (2003); Spinello (2003); Lemley (2004); Epstein (2009); Breakey (2009); Yung (2009); Murphy (2012); Cernea and Uszkai (2012); Cohen (2014); Varelius (2015); Lester (2016); Slutskiy (2021), p. 235.

[18] This is noted by Reinach (1989), p. 53, cf. Massin (2017). Similarly, Boldrin and Levine (2008), p. 173 recognize that "no usable non-rival knowledge ever came into existence." The finding agrees with Wiśniewski's (2020) view of ideas as preconditions of action, rather than economic goods.

used. The consequences of these findings are explored in the following sections.

## Availability for consumption

Apart from suggesting creation, Himma offers another justification for IP rights, whereby abstract objects have to be "made available" by expending labor before they are "consumed". He explains:

> Of course, these propositional objects might have already existed as abstract objects in logical space prior to their creation or discovery, but the important, interesting, nonobvious propositional objects cannot be readily consumed by people until someone, through the expenditure of her labor, makes it available to other people.

and states:

> The proof of Fermat's Last Theorem, for example, did not become available for consumption, despite the intense labors of mathematicians for hundreds of years, until Andrew Wiles produced it in 1994. *A Tale of Two Cities* did not become available for consumption until Charles Dickens produced it. Although it might be true that someone else would have eventually found a proof for Fermat's Last Theorem, it is not true that someone else would have written *A Tale of Two Cities* had Dickens not done so. The probability of someone else independently composing a perfect copy of what is *A Tale of Two Cities* is so low as to be morally negligible.

Are these claims credible? Could abstract objects really be consumed? Understood narrowly, the verb "consume" represents ingesting a given object. In a wider sense it may also mean using this object, expending it, depleting it, or using it up. But abstract "content" is immaterial, so it cannot be ingested. Being causally inert it cannot be used for any purpose, expended, depleted or used up. Hence it cannot be consumed in a narrow or even wider sense. Himma's reference to consuming the "content" amounts to a category error. His "availability for consumption" claims are hence pointless. What could perhaps be consumed is a material "creation" but not its abstract "content." Claims of "content consumption" make as much sense as declarations that a distant galaxy is consumed by using up

or ingesting its photos or descriptions. The galaxy may have ceased to exist billions of years before its distant glow reaches Earth.

The related assertion that "important, interesting, nonobvious" abstract objects are "not available" unless someone labors on them is also unconvincing. The abstract "content" cannot be controlled, possessed, used, or consumed and no amount of human labor can enable these actions. One might then ask, what else could it mean for such an object to become readily available or accessible? Himma seems to suggest that there is some barrier, mechanism, or law of nature that prevents anyone from thinking about it or embodying it unless an inventor or artist expends some significant amount of labor. However, there is no such barrier. Elsewhere, Himma admits that "a poem or a song might be created in a matter of minutes with little thought or effort."[19] It is also widely recognized that technological or artistic innovations may emerge in a blink of an eye, spontaneously, or accidentally, without any spectacular great-barrier-crossing activities. Very often it is enough to notice the existence of various innovations that appear in nature without any human involvement. These include suction cups, echolocation, hook-and-loop fasteners, anesthetics, anticoagulants, and antibiotics. Himma cannot deny that these are important and interesting. They are also nonobvious until they become widely known. Moreover, the world is replete with objects which have extraordinary aesthetic qualities, and which were not created by humans but may be instantly noticed, appreciated, photographed, and publicized. They constitute glaring counterexamples to his nonavailability claim.

Even Himma's example of Dickens's novel fails to support his rhetoric. In the case of a novel, the abstract type reflects a sequence of signs (words, or perhaps letters and punctuation marks). Due to limited human capabilities there must be some practical limit to its length. It may be very high, but it is *finite*. Hence for a given alphabet of signs and length limitation, we may consider the set $U$ of all the possible sequences—that is all possible novels. Knowing the alphabet size one can easily count them according to well-known combinatorial formulae. Let $N$ be the count. It may be astronomically large, but it is certainly finite as well. Our ability to count these sequences implies that they already exist.[20] Moreover, by running a random

[19] See: Himma (2012), p. 1139.

[20] Those who claim otherwise would have to explain what is it that is counted.

number generator one may draw any element from *U* in such a way that all its elements are equally likely to be selected. Contemporary computers may instantiate the corresponding novel in mere fractions of a second. Those who happen to draw the sequence that corresponds to Dickens's novel will have it instantly embodied: displayed, printed or saved to a hard drive. This is not contradicted by the observation that Dickens spent several months writing the manuscript. Undeniably, the first sequence chosen (likely some meaningless noise) is perfectly accessible and available without any spectacular effort. But the situation is symmetric. Each sequence is equally likely to be drawn, regardless of being interesting or not. Therefore, the accessibility status of all the sequences—that is novels—must be the same. Contrary to Himma's suggestions, they are all perfectly available for instant embodiment. This reasoning is not affected by the magnitude of *N*. It remains equally true when *N* reaches $10^{10}$, $10^{100}$, $10^{1000}$ or any other impressive number. Himma's arbitrary declaration that the probability of choosing the same sequence is "morally negligible" is irrelevant. It does not contradict symmetry.

These findings may run against popular intuitions. After all, Dickens did not use a random number generator to prepare the manuscript of his novel. The chances of instantly becoming a new Dickens, Verne or Tolkien through random draws are miniscule. This apparent paradox is resolved by distinguishing between two categories: likelihood and availability. Himma apparently treats them as synonyms. But their meaning is different. One does not imply the other. There are numerous situations where they diverge. Let us consider some material examples:

**Example 1**

An automated fragrance warehouse offers *N* distinct perfume varieties. In order to have a sample delivered, one just needs to type in an identifier of a given substance that is a number between 1 and *N*. An individual A spends a long time assessing various aromas, in order to find the finest one. For a very large *N*, the probability that another individual B will draw randomly without any guidance the perfume chosen by A equals $1/N$ and is very small. The chances that B will instantly select another equally attractive substance may also be modest. Finding such a sample may require numerous attempts. But all those observations cannot contradict a simple

truth. Every substance in a warehouse, including the finest samples, is equally, instantly available. It is this fact that makes A's search practical.

**Example 2**

Two individuals, A and B, possess teleport devices which let them visit any place on the surface of Mars. The individual A spends years making numerous attempts to find a location which offers a particularly impressive panorama. As Mars is a huge planet, the probability that B instantly lands without guidance in the same place is extremely small. Most likely B's first landing will end up in a boring Martian desert covering most of the planet's surface. It may also take several attempts to find any aesthetically interesting place at all, unless B is particularly lucky. Despite these observations, it cannot be denied that a teleport makes all the locations equally, instantly accessible.

The condition of unavailability is logically distinct from, and does not follow from the low likelihood of being independently or spontaneously chosen. What an author actually does, is just an evaluative selection.[21] A sequence of signs is chosen for embodiment in matter from among a huge multitude of equally available possibilities. The choice involves more or less extensive, direct or indirect comparisons among various sequences. Material embodiments of the selected sequence—such as physical books—may be used for reading pleasure or for other benefits. Depending on the skills, knowledge, expertise and effort of the author, the choice is more or less likely to bring these benefits. Nevertheless, contrary to Himma's allegations, the abstract sequence is not made any more available when its embodiments are distributed. Nothing prevents thinking about it at any moment. All sequences are perfectly accessible for anyone willing to perform an evaluative selection or a random draw. The fact that most of them will never be chosen due to the massive number of possibilities is irrelevant. Analogically, one does not make a number—say 79495498—any more available by uttering it, transmitting it or writing it down. These acts may draw someone's attention to it, but they do not make it more accessible than all other numbers are. Our ability to think of this number does not depend on someone having already written it down. It does not depend on someone having planted 79495498 carrots in a garden either, even if Himma declares that the probability of others

[21] See: Dodd (2000).

independently doing the same is "morally negligible." The view of abstract objects as initially "non-available" is groundless.

## Stocking of the commons?

Himma mentions "commons" several times when discussing the original Lockean theory in the context of appropriating material objects. In these statements, the meaning of the word seems to reflect the set of preexisting unowned material resources, in general agreement with Locke's writings. However, he then focuses on "intellectual commons" and states:

> The intellectual commons, unlike the land commons, is not a resource already there waiting to be appropriated by anyone who happens to be there; it is stocked by and only by the activity of human beings. Although people can improve the value of land, they cannot make land; in contrast, people can and do make novels, music, proofs, theories, et cetera, and if someone does not make a particular novel, it is not available for human consumption, even if it exists, so to speak, somewhere in logical space.

The reference to "stocking the intellectual commons" suggests supplying abstract objects or providing them. But these objects have no location, so they cannot be transported from elsewhere in order to declare "stocking." Moreover, Himma's concession that they preexist their making in the "logical space," rules out the possibility that they were indeed made. Entities that already exist cannot be "made" or "created," because these verbs signify transition from non-being into being. An object that exists, cannot undergo this transition again. Finally, as shown in the previous section, the abstract "content" cannot be made any more available or accessible by human labor. All of this means that the "stocking" claim cannot be reconciled with Himma's assumptions, and in particular with the lack of causal interaction. It is self-contradictory.

The source of this incoherence may be traced back to an equivocation. It is possible to interpret "novels, music, proofs, theories" as abstract objects (say, a novel is an abstract sequence of signs), or as material objects (say, a novel is a particular gathering of paper and ink). Himma conflates these two meanings in a single argument. In order to resolve self-contradictions,

the type-token distinction must be recognized. It is abstract types that exist "in logical space" before anyone thinks of them. But it is only their material tokens that are "made," "created" or "made available." The abstract "intellectual commons" cannot be stocked with abstract "content" by human activity. What humans can stock, are material shelves in material libraries, and material warehouses where material embodiments of types are stored.

## Evaluating value creation claims

The central component and main innovation of Himma's IP theory is the value creation postulate. This is supposed to be the missing link that connects intellectual labor with causally inert abstract objects. Himma explains:

> [...] Locke does not exploit what seems a plausible moral principle that could form the basis for a second, more persuasive version of the argument—the moral principle that when a person labors on an object from the commons and creates new value in it, that person is entitled, as a matter of both fairness and just desert, to the value he creates and hence the object.

So, it is the increase in value of a given object that is supposed to justify rights to it. Instead of mixing labor with an abstract object or improving it, Himma suggests that making this object "available for consumption" increases its value and hence vindicates innovators' or artists' IP rights.

This argument is easily refuted. Abstract objects constituting the "content" are like numbers.[22] The claim of making them available for consumption is pointless, because they cannot be consumed. It is also impossible to make them available for thinking, because they always are. This is enough to conclude that Himma's argument fails to justify IP. However, his theory also collapses at a more fundamental level. The concept of value is simply inapplicable to such abstract entities.

Firstly, being causally inert, these objects cannot be used for any purpose. Their mode of being never changes. They cannot be directed to attain any objective. Therefore they have no *use value* and no amount of human

[22] Moglen (1999) notes that many abstract objects regulated by IP simply *are* numbers.

labor can change this state of affairs. The alleged value creation cannot follow from making them usable or useful.

Secondly, these objects cannot be controlled or possessed. Therefore one cannot acquire them or give up possession. They cannot be subject to transactions.[23] Hence it is nonsensical to assign exchange ratios or prices to them. This means that they have no *exchange value*. It does not exist and hence cannot be modified to announce any value creation.

Thirdly, there is no way for innovators and artists to create *intrinsic value* in these objects. This is because the intrinsic value is the value that the entity has "in itself," "for its own sake," "as such" or "in its own right," and not because of someone's actions. The intrinsic value cannot be implanted or embedded in an object. This is precisely what the word "intrinsic" means. Moreover, these objects cannot be created, so the intrinsic value cannot be created along with them. If they are intrinsically valuable at all, then they are so timelessly. If they are not, human actions cannot make them so.[24]

The above considerations may be summarized as follows. Abstract objects that constitute "content" have no use value or exchange value. If they have any intrinsic value, then one cannot change it. Hence any declaration of creating value in them is nonsensical. Himma's variant of Lockean theory fails to justify IP rights.

## Possible objections

The finding that one cannot "create value" in the abstract "content" may trigger resistance. Certain possible counterarguments are dealt with below.

One intuitive objection would point to situations where individuals are paid for informing others. Indeed, weather forecasters, mining prospectors, detectives, teachers, scientists, and spies are routinely paid for extending the knowledge of other individuals. Music composers, screenplay writers, film directors and advertising specialists are paid for proposing various ideas to be implemented. For numerous occupations, something that might be called a "market for information" apparently exists, and one might be tempted to

[23] This is noted by Gamrot (2022).

[24] This is not contradicted by Himma's discussion on the intrinsic value of time. Time is not the "content."

conclude that the abstract "content" may be traded, priced or valued. This view is wrong. All these prices are not paid for abstract objects. None of these individuals gives up the possession of an abstract object and no one acquires such a possession. The prices are simply paid for the *service* of making others aware of various facts or types, or drawing others' attention to them. The provision of such services may change mental states of those served, or the state of their notepads, and laptop screens. However, it does not affect abstract "contents." Analogically, an astronomer who is paid for studying distant galaxies only sells the service of informing others about them, but does not sell galaxies. The amount of money earned this way is not the price of a galaxy.

Another possible objection might point to IP-related contracts signed every day. They involve selling manuscripts, novels, films, patents, computer programs and shares of IP-reliant companies. Hence it might be tempting to conclude that the prices paid reflect the value of associated abstract "content." This is also untrue. These contracts depend on regulations of positive law that allow certain individuals to prohibit certain uses of paper, ink, computers, printers or human bodies. In contracts, an innovator or artist is simply paid for not interfering with others' use of their own material resources. Again, abstract objects are not affected. Analogically, an astronomer who discovers a new galaxy could be legally authorized to prohibit others from pointing their telescopes towards it. This could be enforced, and the violation could be harshly punished. Some clever legislator might even call it "intergalactic property." But such a regulation would only affect the use of material resources on Earth. Any price the astronomer might negotiate for letting others legally see the galaxy, would not be the price of that galaxy. It would be the price of waiving a regulatory barrier in the use of their own material devices.

## The meaning of IP rights

Like many other IP advocates, Himma distances himself from existing legal regulations. He prefers to concentrate on vague general principles, leaving the details to others. Arguing for "some protection" is a clever strategy. It lets him condemn and reject existing absurdities as resulting from incorrect implementation of allegedly just—although never precisely

stated—principles. A vague postulate of "some protection" may always signify something different than the currently discussed perversion. This, however, will not shield his general claims from the critique. Let us now consider the meaning of proposed IP rights.

According to Himma, authors should be granted rights to "control the disposition of the content they create" and the "authority to exclude others from appropriating those contents." He reiterates these two incantations several times and in several papers.[25] But the abstract "content" is causally inert. Its state cannot be changed. It cannot be controlled anyhow or disposed of anyhow. The proposed right to control the disposition of such an entity is hollow. Moreover, humans cannot create such objects. So the rights to "created content" refer to nothing. The set of abstract objects to be governed by these rights is empty.

The postulate of "excluding others from appropriating" does not fare better. Appropriation is an action which amounts to taking a given object into possession or ownership. Possession is simply the factual ability to direct the object and ownership is the right to an undisturbed control over it.[26] In other words, it is the right to use, possess and dispose of an object.[27] But the abstract "content" cannot be controlled, used or disposed of. Hence there is no meaningful way in which it could be possessed or owned. This rules out any appropriation. The action Himma wants to regulate is impossible. Therefore, the right to exclude, that he speaks of, is pointless. There is no way to exercise it.

Essentially, claims about "controlling the disposition of the content" and "excluding others from appropriating the content" make as much sense as the talk about controlling the disposition of distant galaxies and excluding others from appropriating them. They are groundless declarations devoid of any practical meaning. The actions that may indeed be undertaken with respect to abstract objects include recognizing them, thinking of them, and remembering them. But any prohibition regarding such objects requires an individual to engage in these very actions: to recognize them, think of them and remember them. Prohibiting these actions would be self-contradictory.[28]

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[25] See: Himma (2005a, 2007, 2008, 2012).

[26] See: Resnik (2003), Kinsella (2009).

[27] See: Mossoff (2005).

[28] See also: Penner (1997), p. 120.

Blatant inconsistencies are resolved by realizing that Himma equivocates again. He speaks of controlling the abstract "content" and excluding others from it. But what he means is the control over material objects already owned by others.[29] Himma simply postulates a partial redistribution of their material property rights. However, types and tokens are separate entities and rights to them are logically distinct. The right to control matter does not follow from rights to abstract objects, just like rights to control a house do not follow from the right to a train, and rights to control boats do not follow from owning a space station. Himma's theory fails on yet another level.

## Conclusions

Causally inert, unique entities cannot be created, possessed, used or consumed. Hence the abstract "content" contemplated by Himma cannot be made available or accessible. One cannot boast of having increased its value, to justify appropriation. The "content" cannot be altered or controlled anyhow. Therefore it is also impossible to exercise any rights with respect to it. Consequently, the question posed at the beginning of the present study must be answered negatively. Himma's theory fails to justify IP rights.

This fiasco may be entirely attributed to an equivocation. Himma conflates material tokens with immaterial types tacitly postulating, against his own assumptions, that actions undertaken with respect to material "creations" also affect their immaterial "content." The following analogy exposes the fallacy. Abstract entities resemble unreachable celestial bodies. Whether X is a distant galaxy or a piece of abstract "content," the following statements remain true:

1. Identifying, recognizing or apprehending X is not the *creation* of X
2. Producing a material representation of X is not the *creation* of X
3. Being aware of X is not *possession* of X
4. Possessing a material representation of X is not *possession* of X
5. Using material representations of X is not the *use* of X
6. Consuming material representations of X is not *consumption* of X

[29] This is noted among others by Palmer (1990), Kinsella (2008), Dominiak (2014) and Wysocki (2014).

7. Being able to prohibit material representations of X is not *ownership* of X
8. Learning about X and representing it in matter is not *appropriation* of X
9. The value assigned to material representations of X is not the *value* of X
10. The value assigned to the service of informing others about X is not the *value* of X

The disregard for these distinctions resulted in fatal inconsistencies that derailed Himma's IP theory. Those who intend to propose a convincing and logically correct IP justification may wish to take them into account.

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