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IDEATION AND APPROPRIATION: WITTGENSTEIN ON INTELLECTUAL PROPERTY

ABSTRACT. This paper provides a critique of the contemporary notion of intellectual property based on the consequences of Wittgenstein's "private language argument". The reticence commonly felt toward recent applications of patent law, e.g., sports moves, is held to expose erroneous metaphysical assumptions inherent in the spirit of current IP legislation. It is argued that the modern conception of intellectual property as a kind of natural right, stems from the mistaken internalist or Augustinian picture of language that Wittgenstein attempted to diffuse. This view becomes persuasive once it is shown that a complete understanding of the argument against private language must include Wittgenstein's investigation of the role of the will in the creative process. It is argued that original thought is not born by decree of the will, but engendered by a public context of meaning and value. What marks a person as a genius is, therefore, according to Wittgenstein, not some sovereign capacity of conceptual world-making, but merely a propitious dose of intellectual courage.

KEY WORDS: aesthetics, author, invent, meaning, metaphysics, patent, private language, value, will

Ce qui est le plus souvent interne à ce qu'on appelle
l'"acte" c'est qu'il se méconnaît
lui-même.

(Claude Levi-Strauss)

One of the fundamental assumptions or "pictures" that Wittgenstein was most intent on dispelling is what he called the idea of "private language". This internalistic conception of meaning has dominated Western philosophy since Descartes and continues to exert such a profound influence that it has become the dominant research paradigm for cognitive science.[1] The formidable propagation of this idea throughout intellectual history is certainly not merely the result of Descartes' genius. Human experience,

[1] According to Descartes, mental events and states belong to a private psychical world inaccessible to public observation. A. Kenny offers a convincing account of the continuing widespread influence of this view in "Descartes' Myth", chapter one of his book *The Metaphysics of Mind* (Oxford University Press, 1989), 1–16. For a more sustained Wittgensteinian critique of residual Cartesianism in cognitive science, see D. Proudfoot, "On Wittgenstein on Cognitive Science", *Philosophy* (April 1997), 72, 189–217.

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on its most ordinary level, is made up of innumerable mental events lived by the individual. One's sensations, sentiments, and intentions are surely one's own. It is, therefore, entirely natural to believe that we all possess a certain imaginative autonomy. All that we represent to ourselves mentally is ours, for we produce those ideas ourselves by acts of will.

This essentially individualistic aspect of human consciousness underlies not only the tendency to adopt the internalistic model of language, but also the tendency to attribute singular ideas to singular individuals. The laws governing what is called "intellectual property", appeal as much to the practical needs of encouraging and protecting authors and inventors, as they do to the deeper sentiment that such laws preserve a good that is so fundamental that one is almost tempted to call it a natural right: The right of individuals to be recognized as the masters of their own ideas. We shall see that Wittgenstein shows this assumption to be, in fact, based on erronious metaphysical foundations and that these continue to provide for the development of various questionable practices of intellectual property law today.[2] In conclusion, I will attempt to clear the way for a more sound treatment of this rapidly growing legal domain.

Wittgenstein remarks in 1947 that the debate between Newton and Leibniz, concerning which of the two had actually invented calculus, is the sort of question that arises from the illusory reflection of human vanity:

> I completely understand how someone may find it *hateful* for the priority of his invention or discovery to be disputed, and want to defend his priority 'with tooth and claw'. *All the same* this is completely chimerical. It certainly seems to me too cheap, all too easy, for *Claudius* to make fun of the squabbles between Newton and Leibniz over who was first; but it's nevertheless true, I think, that this quarrel is simply the expression of evil weaknesses and fostered by VILE people. Just *what* would Newton have lost if he had acknowledged Leibniz's originality? Absolutely nothing! He would have gained a lot. And yet, how hard it is to acknowledge something of this sort: Someone who tries it feels as though he were confessing his own incapacity. Only people who hold you in esteem and at the same time *love* you can make it easy for you to behave like this.
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> It's a question of *envy* of course. And anyone who experiences it ought to keep on telling himself: "It's a mistake! It's a mistake! –".[3]

And also during the same period he writes:

> Is what I am doing really worth the effort? Yes, but only if light shines on it from above. And if that happens – why should I concern myself that the fruits of my labours should not be stolen? If what I am writing really has some value, how could anyone steal the value from me? And if the light from above is lacking, I can't in any case be more than clever.[4]

[2] The following discussion shall be framed primarily within the context of patent law. Though a Wittgensteinian critique might be extended to other areas of IP law (particularly copyright), those areas proper are beyond the scope of this piece.

[3] L. Wittgenstein, *Culture and Value* (University of Chicago Press, 1980), 58e.

[4] *Ibid*., at 57–8e.

Wittgenstein is attempting to expose here the chimera of human vanity, thinking itself capable of manufacturing the precious and the meaningful by sheer force of will. Wittgenstein considered this illusion to be at the source of Russellian conventionalism, and it would seem that it is still somewhat operative in the internalistic models of cognitive science today. According to the atomistic conventionalism eventually held by Russell (ironically through the partial influence of the early Wittgenstein), meaning is entirely made up of simple verbal conventions, reducible to a small and limited number of words.[5] An individual would hence be capable of establishing certain elemental facts of meaning by acts of will. Russell holds that all linguistic conventions are simply established in the following way: "Suppose, for example, that you are counting pound notes. By an act of will, you establish a one-one relation between the several notes and the numbers 1, 2, 3, etc., until there are no notes left".[6] For Russell, then, logical propositions assert facts of meaning which are verified entirely by their own transparency.[7]

The picture of language projected by this reductionistic conventionalism necessarily includes a private language within which to establish an ostensive relation between the signifier and the signified. Wittgenstein calls this theory the "Augustinian picture of language" and immediately sets out to deconstruct it at the very beginning of his *Philosophical Investigations*. The essence of Wittgenstein's critique is that to root all meaning in internal convention is to initiate an infinite regress.[8] For as he points out: "no course of action could be determined by a rule, because every course of action can be made out to accord with the rule".[9] If facts of meaning are verified only by other facts of the same kind, then there is "no criterion of correctness. One would like to say: whatever is going to seem right to me is right. And that only means that here we can't talk about 'right' ".[10] Unlike natural laws governing phenomena, rules governing behavior are conventional, which is to say that one can only follow a rule if one can also break it.[11] It would, therefore, be absurd to presume that the origin of language

[5] B. Russell, "Is Mathematics Purely Linguistic?", in D. Lackey, ed., *Essays in Analysis* (New York: G. Brazillier, 1973), 306.

[6] B. Russell, *My Philosophical Development* (London: Routledge, 1993), 55.

[7] Wittgenstein famously shows, however, that logical propositions assert nothing about meaning and correct usage – they *determine* them tautologically. *Tractatus logico-philosophicus* (London: Routledge, 1961), §4.461.

[8] This criticism applies equally to all internalistic models of language acquisition currently dominating cognitive science. See D. Proudfoot, *supra* n. 1.

[9] L. Wittgenstein, *Philosophical Investigations* (New York: Macmillan, 1953), §201.

[10] *Ibid*., §258.

[11] See Kenny, *supra* n. 1, at 154–155.

is essentially characterized by a sort of magical baptism delivered either by individual acts of will or biological law.[12] Grammatical facts do not originate internally in mental gestures of private experience or in hidden brain functions and genetic programming. Propositions can only reflect the public grammatical background by which correct usage is determined and verified. To say the opposite, namely, that grammar itself is genetically given through emergent psychophysical processes or the product of primordial acts of private ostensive definition, is to put the cart before the horse. For a word to obtain a role, it must have a place within an entire public system of linguistic convention. Hence, Wittgenstein reminds us that language is a *form of life,* by directing our attention to the artificiality of a purely invented language:

> Esperanto. The feeling of disgust we get if we utter an *invented* word with invented derivative syllables. The word is cold, lacking in associations, and yet it plays at being 'language'. A system of purely written signs would not disgust us so much.[13]

If meaning does not ultimately originate in private acts of will, then the same must be true of value. However, there still subsists what can be generally referred to as the "myth of genius": The notion of the extraordinarily gifted human being capable of creating whole worlds of private meaning and consequence, never entirely accessible even to those who have dedicated their entire lives to the study of his or her work. According to Wittgenstein, this concept is deeply rooted in the philosophical myth of "private language", or in what Jacques Bouveresse calls the "Myth of Interiority".[14] The idea of a work of art expressing the mysterious internal life of the artist remains an essential factor in determining the importance of myriad works of famous and even not so famous artists. This myth is part of the reason why today, as Foucault points out, literary anonymity is intolerable.

> Literary discourses have come to be accepted only when endowed with the author-function. We now ask of each poetic or fictional text: from where does it come, who wrote it, when, under what circumstances, or beginning with what design? The meaning ascribed to it and the status or value accorded it depend upon the manner in which we answer these questions. And if a text should be discovered in a state of anonymity – whether as a consequence of an accident or the author's explicit wish – the game becomes one of rediscovering the author. Since literary anonymity is not tolerable, we can accept it only in the guise of an enigma.[15]

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[12] See L. Wittgenstein, *supra* n. 9, §38 and "Notes on 'Private Experience' and 'Sense Data' ", R. Rees, ed., *Philosophical Review* (1936), 77, 275–320.

[13] *Culture and Value*, *supra* n. 3, at 52e.

[14] J. Bouveresse, *Le Mythe de l'intériorité* (Paris: Minuit, 1976).

[15] M. Foucault, "What Is an Author?", in J.V. Harari, ed., *Textual Strategies* (Cornell University Press, 1979), 149–150.

But Wittgenstein shows us that it is logically impossible for an individual, even a brilliant one, to choose for himself what is meaningful, precious, or beautiful. Try to *choose* (I do not say acknowledge) the value of something. If you actually perform this experiment, you will certainly feel a similar impression to the one Wittgenstein points out in the following remark:

> Make the following experiment: Say the sentence "It is hot in this room", and mean: "It is cold". Observe closely what you are doing.[16]

Similarly, with respect to purely aesthetic value, it is not within our power to rate for example, Emily Dickinson's mastery of the English language below that of, say, George W. Bush. If the attribution of aesthetic, symbolic, or propositional value were determined by the will, then each of us would be entirely comfortable performing such tasks. We would then be able to say for example, "The ceiling of the Sistine Chapel brings tears to my eyes", but mean: "The ceiling of the Sistine Chapel gives me a sore neck" or "Open a window, I feel sick". We could then literally use anything whatsoever to convey anything whatsoever. But meaning does not function in this way. If Wittgenstein asks us to observe closely what we must do to mean the opposite of what we say, it is because it would be impossible to live in such a manner. We cannot invent our own cognitive points of reference. Our world is bounded by rules, and hence Wittgenstein reminds us that "if a rule does not compel you, then you aren't *following* a rule. But how am I supposed to be following it, if I can after all follow it as I like?".[17]

An individual cannot then be said, properly speaking, to *possess* his or her own ideas any more than an individual can be said, properly speaking, to *possess*, his or her own sense impressions. That is to say, one's conceptual apparatus belongs to one only as much as one's sensory apparatus does – the will being incapable of appropriating either one. The deeds and gestures of language and behavior are essentially public in nature and can, therefore, never be borrowed from any single person.

The expression "intellectual property" is, therefore, somewhat grammatically misleading. The act of appropriation is essentially an instantiation of the will. Ideation, on the contrary, though it may be *occasioned* by the will, is never ultimately *subject* to it. It is certainly true that mental representation (intentionality) can in fact be a deliberate act of will. However, a mental representation can only function in the imagination according to a given public conceptual background, commonly referred to in the philos-

16 L. Wittgenstein, *Blue Book* (Oxford: Blackwell, 1958), 42.

17 L. Wittgenstein, *Remarks on the Foundations of Mathematics* (Oxford: Blackwell, 1994), 413.

ophy of mind as "pre-intentional".[18] Although the intentional continually influences the pre-intentional in the perpetual transformation of language games, such changes only occur through transitions between intermediate cases.[19] That is to say, the members of the family of say, woodwind instruments can each, little by little, transform the overall character of the woodwind sound. Still, each novel instantiation (real or imagined) will have to exploit a sufficient quantity of external criteria in order to retain its identity as a member of the woodwind family.[20] This is why, when we usually speak of "having an idea" we are not referring to a mere representation of a particular image, deliberately *called* to mind. Rather, we are more referring to a kind of discovery or solution which has finally *come* to mind as the result of a certain amount of investigation. One cannot order oneself to produce an idea in the same way as one can order oneself to imagine a pink elephant for, in that case, the idea would be immediately accessible and would, hence, completely lose its revelatory quality.

If we still feel somehow that the artist, author, composer, or inventor produces a work by sheer representational force of will, it is because we are only thinking of the intentional content. The creator of a work does indeed choose certain ingredients, but the reasons for which they are chosen, and the way in which they become organized will depend on the public pre-intentional background. Even if he or she deliberately acts against convention, the result will still be determined by that negation. During the creative process, it is therefore just as important to listen as it is to dictate.

Ideation is hence essentially the actualization of conceptual potentiality. We have just shown the absurdity of thinking that the will could itself determine the extent of that potentiality. It would thus be incoherent to speak of "possessing a conceptual potentiality". Accordingly, intellectual property rights do not purport to protect any claims to conceptual potentiality. They only protect specific ways in which certain potentialities have become actualities by the intervention of the will. Nevertheless, a concept is obviously immaterial. Consequently, it cannot be appropriated in the same way as a physical object. As a result, "one can imagine a culture in which discourses would circulate and be received without the benefit of

[18] See for example, Searle, *Intentionality* (Cambridge University Press, 1983); and Johnson, *The Body in the Mind* (University of Chicago Press, 1987).

[19] See Wittgenstein's remarks on family resemblance, *Philosophical Investigations*, *supra* n. 9, §65–80 and those on the evolution of mathematics, *ibid.*, 204.

[20] Notice that such developments often occur without appeal to an individual expert authority on what does or does not in fact qualify as a legitimate member of the family. Saxophones for example became universally accepted as Woodwinds without insighting controversy over the detail that they are in fact entirely made of steel. This was the case even in such languages as French in which these instruments are simply called "Woods".

the author-function. All discourses, whatever their status, form, value, and whatever the treatment to which they are subjected, would then develop in the anonymity of a murmur".[21]

Intellectual property law, however, does seek to exclude any claims to ideas or natural laws. One can only patent that which falls within three categories – procedures, machines, or compositions of matter.[22] Essentially, this means the following: Though each person has the right to *think about* a patented concept, only the holder of the patent can *bring the concept into physical existence*, or give permission to anyone else to do so. As soon as the concept leaves the domain of thought and becomes realized into a tangible form, the patent rights apply. Conversely, *ideas*, are considered non-patentable and can, therefore, be freely used by anyone. Hence, during the 1950's it was possible for example to call oneself an "existentialist" without having first to obtain written permission from Jean-Paul Sartre.[23]

All of this might seem entirely reasonable and unproblematic. However, as we shall see, there do seem to remain countless ideas that are nonetheless patentable. In fact, the expression "intellectual property" would clearly lose its meaning if it did not apply in some sense to *ideas*. But in an attempt to exclude them, intellectual property rights only apply to what is considered to be a "useful process" that is "new" and "non-obvious" – all highly interpretive notions.[24] And perhaps most importantly, the inventor must be able to specify the identity of the invention in sufficient detail for the reader to understand precisely its function.[25] If a concept does not meet these four requirements then it is to be considered a non-patentable *idea*. However, evidence that these criteria are not met must not depend on the patent clerk's subjective judgement. Even evidence of obviousness

[21] M. Foucault, *supra* n. 15, 160. The first sentence, being absent from the English version, is translated from the French text "Qu'est-ce qu'un auteur?", *Dits et Ecrits 1954–1988* (Paris: Gallimard, 1994), 800.

[22] In addition, most patents are only held for around 17 years. R.M. Kunstadt, F.S. Kieff and R.G. Kramer, "Intellectual Property", *The National Law Journal* (May 20, 1996), C2.

[23] This, however, did not keep the members of the surrealist school from attempting to ban Salvador Dali from the movement after he had begun signing blank canvasses for large sums of money. Such antics inspired the "real" surrealists to start calling him "Salvador Dollars".

[24] 35 U.S. Constitution 103 (1995). Consequently, one cannot yet patent theoretical models (their usefulness remains dubious), though one can as of 1998, patent mathematical formulas, namely, those contained in computer code.

[25] *Ibid.*, 112.

must be publicly observable in the form of actual references in published literature.[26]

These general criteria are perhaps best illustrated by the fact that, while the word 'game' cannot be precisely defined, a *type of game* can be. Wittgenstein remarks on this in the *Investigations*:

> As things are I can, for example, invent a game that is never played by anyone. – But would the following be possible too: mankind has never played any games; once, however, someone invented a game – which no one ever played?[27]

Gaming, in general, is part of our shared form of life, which is precisely the reason why it is not a patentable process. It is akin to various other ordinary human processes such as walking, swimming, and singing.

We may nevertheless still find it imaginable that a sufficiently gifted person could associate ideas in a way so intimately private that the result would be completely inaccessible to anyone but the inventor. It would, hence, be possible that in a world in which, for example, no-one had ever played any games, once, however, someone would invent a game which no-one ever played. A person would simply have to undertake the task of assembling certain ideas in absolutely unheard of ways. The following remarks on chess from the *Investigations*, however, provide convincing evidence to the contrary:

> But it is just the queer thing about *intention*, about the mental process, that the existence of a custom, of a technique, is not necessary to it. That, for example, it is imaginable that two people should play chess in a world in which otherwise no games existed; and even that they should begin a game of chess – and then be interrupted.
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> But isn't chess defined by its rules? And how are these rules present in the mind of the person who is intending to play chess?[28]
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> It is not possible that there should have been only one occasion on which someone obeyed a rule. It is not possible that there should have been only one occasion on which a report was made, an order given or understood; and so on. To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions).
>
> To understand a sentence means to understand a language. To understand a language means to be master of a technique.
>
> It is, of course, imaginable that two people belonging to a tribe unacquainted with games should sit at a chess-board and go through the moves of a game of chess; and even with all the appropriate mental accompaniments. And if *we* were to see it we should say they were playing chess. But let us now imagine a game of chess translated according to certain rules into a series of actions which we do not ordinarily associate with a *game*, say into

[26] The burden of proof is hence on the patent clerk, many of whom have stated that there is a general incentive in the U.S. Patent Office to maximize the number of approvals – of which the current rate is 10,000 every three weeks. See J. Gleik, "Patently Absurd", *New York Times Magazine*, March 12, 2000.

[27] Wittgenstein, *supra* n. 9, §204.

[28] Wittgenstein, *supra* n. 9, 181e.

yells and stamping of feet. And let us now imagine those two people yelling and stamping instead of playing the form of chess that we are used to; and that this in such a way that their procedure is still translatable by suitable rules into a game of chess. Should we still be inclined to say that they were playing a game? What right would we have to say so?[29]

What has to be accepted, the given, is – one could say – *forms of life*.[30]

It is, therefore, entirely appropriate that intellectual property law seek to exclude the appropriation of processes so embedded in our ordinary practices that they might well be called "forms of life". Although we cannot patent *gaming*, it is permissible to patent *types of games*, as well as particular *ways of playing* them. In other words, while forms of life cannot be appropriated, each of their instantiations can, in principle, be subject to intellectual property rights. The upshot is that any concept that can actually be marketed can also be patented.

This brings us to what is perhaps the greatest interpretive difficulty in the notion of intellectual property: the criterion of "non-obviousness". It would indeed seem that the potential to obtain a market price would guarantee that a given process would meet this criterion. However, this is unfortunately not the case. For it is possible nowadays to patent all sorts of products and processes of the most banal stylistic distinction. Staying only within the realm of games, we already have a wealth of examples. Take for instance the game of "pictionary®". This is roughly a version of charades transformed into the drawing of pictures representing the word in question which must be discovered by one team before the members of an opposing team. In order to play this game, all that is required is paper, pencil, people, and a watch. Nevertheless, this game is now patented, which means that it is now forbidden to sell the game or to make commercial use of the title without first obtaining written permission from the holder of the patent.[31] Furthermore, many would even argue that we are ethically required to only write, record, or utter the word "pictionary®" when referring in fact to the official trademarked version.[32]

[29] Wittgenstein, *supra* n. 9, §199–200.

[30] Wittgenstein, *supra* n. 9, 226e.

[31] Conversely, a game such as charades would be much less lucrative to patent since it is played entirely with the human body, which would of course be most awkward to sell. As for games such as chess and checkers, they are not subject to intellectual property rights in virtue of the fact that they have been sufficiently widespread for so long that such rights do not apply.

[32] It is, therefore, quite common nowadays for a company to attempt to protect its trademarked name through advertisements, reminding everyone that its product or service is, in fact, patented and that its name should only be used (either in writing or in speech) when referring to that specific company's product or service. Xerox for example recently placed an advertisement in *Wired Magazine*, in order to discourage people from using its name when referring to photocopies made by photocopy machines manufactured by other

It is far from certain that a pictorial version of a game as common as charades is, in fact, non-obvious. People have been playing pictionary since long before its commercial version appeared. And different groups of people certainly played it slightly differently since one can imagine countless ways of transforming charades into pictorial form. The essence of a game is not a process that can be precisely described. It is for this reason that games, like many other relatively obvious kinds of invention (especially computer programs) are continually patented by simply changing a few more or less significant details of someone else's patented product. Consequently, innumerable patents are routinely granted, based on characteristics that are entirely obvious, merely because the product in question can obtain a market value. For example, U.S. patent #5,960,411 recently granted the internet company, Amazon, exclusive rights to allow its customers to purchase a product online with only a single action, such as a mouse click, key press, or sound.[33] Since there was as yet no explicit mention of such a process in the relevant literature, the patent office felt compelled to accept it as novel and non-obvious.

Conversely, in 1993 Lower Court Judge Patti B. Saris ruled against a patent infringement suit concerning an intricate computerized strategy of managing a multi-tiered portfolio of mutual funds, stating that "mental processes and abstract intellectual concepts are not patentable" for "they are the basic tools of scientific and technological work". Saris decided that the so-called invention was no more than a way of calculating: "The same functions could be performed, albeit less efficiently, by an accountant armed with pencil, paper, calculator and a filing system." The patent gives its owner a monopoly, she pointed out: "patenting an accounting system necessary to carry on a certain type of business is tantamount to a patent on the business itself."[34] Wittgenstein's remarks clearly lend support to Seres' ruling since it rejects the right to lay claim to ordinary human processes of buying and selling, i.e., to business itself – a non-patentable idea. Nevertheless, the Court of Appeals reversed that ruling in 1998 and

companies. We are told not to employ the word "xerox" either in the form of a noun ("a xerox copy") or in the form of a verb ("to xerox") if it does not imply the use of a genuine Xerox Photocopy Machine. It is often the case that the name of the first major brand of a new invention becomes ordinarily employed to refer to the invention itself. The names "aspirin" and "jaccuzzi" are notable examples. When this happens, the company loses its exclusive rights to that name. It is certainly easier to say "Xerox" than "photocopy" and so the company of the same name has good reason to worry. It suggests, therefore, that we simply say "copy" instead, even though in many contexts that word does not always carry the same meaning as *photo*copy.

[33] Gleik, *supra* n. 26.

[34] *Ibid*.

reinstated the patent, finding that "software – even if it merely manipulates numbers, juggling them and transforming them into other numbers – produces something tangible."[35]

A new and particularly questionable application of intellectual property law is that of sports moves patents. It is now possible for a sports player or athlete to patent any ingenious movements yielding a significant competitive advantage and/or aesthetic value. For example, a patent actually exists for executing a tennis stroke while wearing a kneepad (U.S. 5,993,366: "The tennis racket is swung toward a tennis ball so as to hit the tennis ball with the racket . . ."). [36] If a new movement can give a sports player or athlete a measurable advantage, it is therefore a useful process.[37] Similarly, sports moves often have an aesthetic value when considered choreographically. Broadcast rights of sports events are already bought and sold as choreography. Hence it may be legally feasible for a sports player or athlete to sell the execution rights of his or her move or moves to others, as well as the broadcast rights that his or her choreographic work represents to the general media. It is already the case that "stage business" gags and jokes are copyrightable.[38] Consequently, the same could be said of "slam dunks, pitching stances, golf swings and Fosbery Flops".[39]

What is metaphysically unsound about this possible eventuality is again the notion that the will of the sports player or athlete is the cause of his or her idea. By introducing something new, he or she enriches the world – offering to others certain possibilities previously unavailable. Still, this perspective overlooks the organic nature of utility in general. If a sports move is considered useful, it is but the result of the nature of an activity within the given sport. One must remember that during the evolution of a sport, or any other practice, new movements most often manifest themselves somewhat unconsciously. Games for example, continually produce varying contexts in which new moves spontaneously suggest themselves to players. And when the new idea comes to mind, it is not a new insight into the private realm, but rather a new reaction to the external world. As Wittgenstein states, "to understand a sentence means to understand a language. To understand a language means to be master of a technique."[40] To this example we could add other forms of life such as gaming and sport, e.g., chess and basketball. Wittgenstein stresses that these activities are

35 *Ibid.*
36 *Ibid.*
37 R.M. Kunstadt, F.S. Kieff and R.G. Kramer, *supra* n. 22, C3.
38 *Ibid.*, C4 cites Nimmer, *supra* n. 1 at sec. 2.13.
39 *Ibid.*, C2.
40 Wittgenstein, *supra* n. 9, §199.

customs, uses, and indeed institutions.[41] The willing subject who comes up with a novel action in such contexts is hence guided by *them*. The context itself engenders the willed action, for as Wittgenstein points out, one cannot will to will:

> One imagines the willing subject here as something without any mass (without any inertia); as a motor which has no inertia in itself to overcome. And so it is only mover, not moved. That is: One can say "I will, but my body does not obey me" – but not: "My will does not obey me." (Augustine.)
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> But in the sense in which I cannot fail to will, I cannot try to will either.[42]

This picture of the will as unmoved mover is at the root of the erroneous metaphysical assumption that individuals are the masters of their own ideas. Since, as Augustine states, it is absurd to say that "My will does not obey me", it becomes possible to fall into the conceptual trap of thinking that the will itself has a master, and that this office is held by each individual mind. From there, philosophers furthering the legacy of Descartes have postulated the will as an essentially private metaphysical entity. Today, this assumption seems to have become sufficiently embedded in Western ideology that it continues to guide a wide array of eminently influential economic and scientific enterprises – from intellectual property law to cognitive science.

It is important to remember that patents not only exist for the practical purposes of protecting business, for even private non-commercial reproductions can be forbidden by the patent holder despite the fact that they cannot realistically be sanctioned. This stipulation openly reveals the presumption that a concept (if not an idea) can in fact belong to a particular person. The object of concern is not merely a commercial possession, but also an conceptual one. Whoever reproduces another's intellectual property without permission, even for personal use, becomes a thief.[43] Since such theft is not of any material nature, it can therefore only be of a purely intellectual nature. Yet, as Wittgenstein shows, this peculiar sort of feat can only be accomplished by a metaphysical chimera.

If the somewhat misleading notion of intellectual property continues to function in modern Western culture, it is largely because it corresponds to the practical necessity of orienting oneself in the world of meaning. Foucault elucidates this indispensable role of the notion of authorship with the following perspicacious remarks.

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41 *Ibid*.

42 *Ibid*., §618.

43 Literary quotations obviously excepted.

> The author allows a limitation of the cancerous and dangerous proliferation of significations within a world where one is thrifty not only with one's resources and riches, but also with one's discourses and their significations. The author is the principle of thrift in the proliferation of meaning. As a result, we must entirely reverse the traditional idea of the author. We are accustomed to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely.
>
> The truth is quite the contrary: the author is not an indefinite source of significations which fill a work; the author does not precede the works, he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. The author is, therefore, the ideological figure by which one marks the manner in which we fear the proliferation of meaning.[44]

The notion of authorship being hence intrinsically paradoxical, it has naturally engendered the contemporary expression "intellectual property" that is all the more troublesome. It may, therefore, be of some use to cleanse this expression a bit by examining how it might be re-employed more conscientiously. Any expression may come to carry an absurd or dated meaning. This does not, however, keep us from continuing to use it, so long as we know what it really means (or should mean) today. Thus, we often defend ourselves from reproach over the literal meaning of a sentence by replying that it is just an old *expression*, obviously not intended to be taken literally. When we say for example "You are going to catch cold" this does not mean that the cold temperature is actually going to trap itself within the person's body in the form of a cold or flu. Although this is, nevertheless, what the expression more or less meant originally. This fact does not keep us from continuing to use the same expression, knowing full well that its intended meaning is now quite different (or should be different). According to Wittgenstein, the same is true of philosophical expressions that need now and again to be purged of their dated or erroneous usage before they can be correctly re-employed:

> Sometimes an expression has to be withdrawn from language and sent for cleaning, – then it can be put back into circulation. [45]

Up to now, the results of our "cleaning" have shown that the expression "intellectual property" is partly metaphysical nonsense derived from

[44] Foucault, *supra* n. 15, 159.

[45] Wittgenstein, *supra* n. 3, 39e.

the purely ideological concept of the author/inventor. All the same, this realization cannot lead to a complete rejection of the concept. Such a stance would amount to an absurd position of metaphysical nominalism, contradicting all of our most common experiences of choosing and willing. It is enough to admit that the expression "intellectual property" has no meaning outside of the realm of business law. There, at best, it justifies certain reasonable protections to creators and to trademarks, providing important points of reference to the consumer. At worst, it permits the exploitation of creators and the establishment of monopolies. Intellectual property is hence better understood as a purely commercial appropriation than as a conceptual one. This distinction should be retained at least implicitly if not explicitly within both the language of law and the language of arts and letters. Hence with respect to law, we could at least begin by no longer criminalizing (even in principle) the private reproduction of intellectual property carried out without written permission from the rights holder. And with respect to arts and letters (excluding biographical research and bibliographical citations), we would no longer hear the questions that have been re-hashed for so long: "Who really spoke? Is it really he and not someone else? With what authenticity or originality? And what part of his deepest self did he express in his discourse?" Instead, there would be other questions, like these: "What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject-functions?"[46] This would not entail banishing certain questions so much as employing them in another fashion. The concept of plagiarism for example would still exist, only we would no longer consider it the theft of personal property. It would be perceived, rather, as a violation of our intellectual heritage, compromising its historical integrity.

Lastly, one central question that still remains is the following: "What exactly is the object that bears the stamp of original thought in general, and of genius in particular?" To this, Wittgenstein provides only a vague answer:

> You could attach prices to thoughts. Some cost a lot, some a little. And how does one pay for thoughts? The answer, I think, is: with courage.[47]
> One might say: "Genius is *talent exercised with courage*." [48]

[46] Foucault, *supra* n. 15, 160.

[47] Wittgenstein, *supra* n. 3, 52e.

[48] *Ibid*., 38e, or "Genius is what makes us forget the master's talent", *ibid*., 43e, or "Only where genius wears thin can you see the talent", *ibid*.

Thus, if we accept with Wittgenstein that there can be no private psychical realm of language and will, the feeling of accomplishment one experiences after completing an original work should not so much be a godly exaltation of world-making, as the satisfaction of having proven one's courage to insightfully carry out certain particularly salient ideas to further points of consequence. Courage is essential. For it is courage that pushes one to surpass oneself conceptually, and ultimately to develop and maintain the talent that is indispensable to genius. Hence, Wittgenstein does not supply any firm theoretical grounds for granting intellectual property rights. Rather, he offers a critique of intellectual property that guards against reaching for rough and ready metaphysical assumptions in an attempt to satisfy the pressing demands of practical legal necessity.

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