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David Douglas

A Beneficial Monopoly: Jeremy Bentham on Monopolies and Patents

ABSTRACT

Here I examine Jeremy Bentham's arguments in favour of patents in light of his description of the five harms associated with monopolies. I find while these harms can be reduced by the limited duration and specific definition of patents, the existence of these harms means that a utilitarian (like Bentham) would have to support an alternative to patents if it produced the same positive results without the monopoly harms.

BIOGRAPHY

David Douglas is currently working on his philosophy PhD thesis on the subject of the justifications for the ownership of computer software.

A BENEFICIAL MONOPOLY: JEREMY BENTHAM ON MONOPOLIES AND PATENTS

A patent is an intellectual property right that grants the holder the exclusive right (i.e., a monopoly) to exploit her new unique invention for a limited period, in return for describing the workings of the invention. Patents are often justified on the grounds that the monopoly the inventor receives over the use of her invention acts as an incentive for inventors to make the effort necessary to create new and useful inventions.ⁱ Society as a whole is supposed to benefit from this monopoly from both the creation of new practical inventions and from the availability of detailed descriptions of the workings of these inventions that are contained within the publicly available patent application. This is the basis of the utilitarian justification for patents, and an early version of it can be found in the work of Jeremy Bentham.ⁱⁱ Bentham's interest in economics also means that he was well aware of the problems associated with granting monopolies.ⁱⁱⁱ Since a patent holder has a monopoly on the patented invention, Bentham's justifications for patents have to demonstrate why a patent is a beneficial monopoly. In this essay I will describe Bentham's views on the harms of monopolies, and consider how these harms may affect his arguments in favour of patents.

Before describing what Bentham wrote on the subject, it is important to consider Bentham's background with respect to the patent system and whether the works attributed to Bentham are accurate reflections of his thoughts on the matter. Bentham's lifelong project to reform the law on a utilitarian basis emerged from his law studies.^{iv} In a letter written to George Wilson, while Bentham and his brother (the engineer Samuel Bentham) were working in Russia in 1787, Bentham asks Wilson to take out a caveat^v on Samuel's invention to prevent anyone who may have seen it in Russia from patenting it back in Britain.^{vi} This demonstrates that Bentham had some knowledge of how contemporary patent law operated and that he took a practical interest in it.

The majority of Bentham's published work was the result of heavy editing of Bentham's original manuscripts by his associates.^{vii} The degree to which the result accurately reflects Bentham's original manuscript varies considerably from work to work. Discussions of patents within *The Works of Jeremy Bentham* (edited by John Bowring and published in 1843) are to be found within the *Anarchical Fallacies* (in Volume II of the *Works*), *The Rationale of Reward* (Volume II), and the *Manual of Political Economy* (Volume III). The discussions of patents in these works are in sections where the authorship is in dispute. For example, the *Manual of Political Economy* within *The Works* was a combination by the editor (Bowring) of Bentham's work of the same name and another Bentham work, the *Institute of Political Economy*, with the majority of the material coming from the later.^{viii} The material on patents is absent from Werner Stark's modern critical edition that restored the separation of these works.^{ix} That Stark did not see fit to include the section on patents from chapter 3 of Bowring's edition of the *Manual of Political Economy* in his restored edition of either the *Manual of Political Economy* or the *Institute of Political Economy* casts doubt over whether it was originally the work of Bentham or Bowring.^x

It is also open to question whether the later section of the *Anarchical Fallacies* (where patents are discussed) was the work of Bentham or his editor and translator into French Étienne Dumont.^{xi} Although the published English version of this work (edited by Richard Smith) was based on Bentham's original manuscripts, there is no surviving manuscript by Bentham of the later sections of this work.^{xii} While this part of the manuscript may have been lost, it is possible that it is the work of Dumont, as in his English version Smith follows Bentham's manuscript up until the same point as the surviving manuscript, and beyond this point Smith has translated into English the remainder of Dumont's French version.^{xiii} One reason for this uncertainty about the authorship is that the final section of the *Anarchical Fallacies* appears to misrepresent the nature of patents, as it states that the privilege granted by a patent 'has nothing in common with monopolies, which are so justly decried.'^{xiv} While this may be a rhetorical flourish by Bentham to separate patents from the tainted reputation of monopolies, it contradicts a statement found in Stark's critical edition of Bentham's *Manual of Political Economy* that rightly describes patents as a form of monopoly.^{xv} Given the uncertainty over the origin of this quote, it is more likely that Dumont wrote this passage and that he has misunderstood the nature of patents. *The Rationale of Reward* was also an English translation by Richard Smith of a published French edition (compiled by Dumont) of Bentham's notes (originally written in French).^{xvi} While these comments can certainly be regarded as the Benthamite position on patents and copyright, they cannot be totally confirmed as the thoughts of Bentham himself. However, since these are the only places where 'Bentham' discusses patents specifically, and as these discussions of patents do not contradict Bentham's confirmed writings (the claim distancing patents from monopolies aside), I will include these works in my consideration of Bentham's position on patents. I will begin with Bentham's views on monopolies, which thankfully have been established as coming from Bentham's pen.

MONOPOLIES

The negative economic effects resulting from monopolies had been recognised well before the work of Adam Smith.^{xvii} Even so, Smith's work defined the standard objections to monopolies in classical economics. Monopolies are, in Smith's words, 'a great enemy to good management', as the monopolist lacks the incentive to improve her product in order to gain a competitive advantage in the market.^{xviii} Perpetual monopolies artificially sustain higher prices than if there was competition, and all others are excluded from producing the good (or entering the market of) the monopoly holder.^{xix} However, Smith still recognised that a limited monopoly (such as that granted by a patent or copyright) can serve as an appropriate reward for costly and risky endeavours.^{xx} Bentham was uncharacteristically generous in his praise of Adam Smith and his work, even though he did not follow Smith's thought blindly.^{xxi} Even so, Bentham roughly follows Smith in his own justifications for patents.

Bentham's proposed reforms are based on his principle of utility, which states that the merit of an action is determined solely on the basis of how beneficial or otherwise that it would tend to be to all those it would affect.^{xxii} Since patents affect how others can use one's invention, the relevant utility is that which affects society rather than the individual. The inventor's reward or loss is only relevant to the degree that such benefits or costs affect the creation of new inventions in society generally. For Bentham, a reward must be proportional to the usefulness of the activity being rewarded. If too great a reward is offered, too many people will want to perform that activity, neglecting other more useful activities that they could perform.^{xxiii} If the reward is too small, not enough people will undertake that activity, or will perform that work to a merely acceptable level.^{xxiv} The extent to which someone should be rewarded for her efforts is the extent to which it produces the most utility overall.

In a proposal for tax reform, Bentham lists five possible harms that may result from a monopoly or exclusive privilege:

- 1) Reducing the quantity of the monopolised good supplied.
- 2) Increasing the purchase price of the monopolised good.
- 3) Reducing the quality of the monopolised good due to a lack of market competition for that good.
- 4) A reduction of the quality of the monopolised good due to the artificial restrictions on who may produce it. This includes excluding those who might be the best at producing that good from entering the market for it, and all those who would be producing that good if someone else did not hold a monopoly over it.
- 5) Increasing the *real price* of the good (i.e., its price compared to all other goods) due to restricting its supply.^{xxv}

Bentham also lists a rearranged version of these harms in a proposal for taxing the profits of bankers and stockbrokers in return for a monopoly against future competitors.^{xxvi} In both cases, Bentham is quick to point out that these are the only harms from a monopoly.^{xxvii} A monopoly is not intrinsically harmful. If these harms can be avoided, and there is an overall benefit to society from permitting such a monopoly to exist, then that monopoly is beneficial. This is consistent with his principle of utility, as it is not the fact that a monopoly exists that reduces utility, but the negative effects that monopolies normally bring about. In order to defend the monopoly granted by a patent, Bentham must show that they do not have these negative effects or that the benefits of patents outweigh the negatives associated with monopolies.

PATENTS

Bentham describes patents as a particularly advantageous privilege granted by law, since that the benefit gained by a patent is 'exactly proportioned to the merit of the invention'.^{xxviii} The reward an inventor gets from a patent is the return she receives from the invention in the market, either through sales of the invention itself or by licensing the patent to others to use for their own products. A more useful invention will give the inventor a larger economic return than a less useful one. To maximise their reward, inventors will seek to create inventions that they believe the market will find useful, and so society benefits overall from the encouragement for inventors to direct their talents towards creating useful inventions.

Patent protection also acts as an incentive. This point is made clear in Bowring's edition of Bentham's *Manual of Political Economy*: 'He who has no hope that he shall reap, will not take the trouble to sow.'^{xxix} The opportunity to gain patent protection is an incentive for potential inventors to invest the labour and resources necessary to implement their ideas and bring them onto the market. Without the protection of a patent, others are free to copy the invention and exploit it themselves. The copier gains the benefits of the invention without also

bearing the cost of developing it, giving her a competitive advantage over the original inventor. In such a case, no one would want to be the original inventor (as she has to bear the costs of developing the invention) without a way of preventing others from exploiting her work after it is completed and available on the market. Since patents prevent others from exploiting one's invention, they give an incentive for being the original inventor, and so encourage the creation of new inventions. The incentive effect of patents also motivates Bentham's criticism of the high cost of obtaining a patent, which he calls a 'tax levied upon ingenuity'.^{xxx} This cost reduces both the potential reward the inventor might gain from holding a patent (by increasing her costs) and acts as a disincentive to apply for a patent if she is unable to afford it.

The fixed period of patent protection (14 years in Bentham's time)^{xxxi} goes some way in negating the monopoly harms from patents. The limited period of time to exploit the invention means that the inventor must make the most of that time before competitors can copy her invention. If the patent holder charges more than the market will accept for her invention, or the resulting product is badly made (Bentham's second and third monopoly harms), no one will purchase it and will instead seek out alternatives to it if any exist. Bentham's fifth harm would be lessened by the incentive the patent holder has to produce as many of the invention as possible while she has a patent on it. Even so, the market is still likely to be undersupplied with the invention compared to a market where anyone could build and sell it. The fourth harm of restrictions on who may supply the invention depends on whether alternatives to that invention exist. If the invention is so revolutionary that no alternatives to it exist, it encourages other inventors to create similar (but different) inventions to perform the same task, since the original invention demonstrates that there is a market for that type of invention. While there would still be a period where the original patented invention would have no substitutes (giving the original inventor a first-move advantage), the success (or otherwise) it enjoys in the market may encourage others to create and supply alternatives.

The effects of Bentham's fourth monopoly harm could also be worsened if the patent holder had patented something that had already been used or produced by others. This should not occur if the patented invention is unique (i.e., has not been created before) and is specific to the created invention. If a patent application was vague enough that it prevented others from creating different inventions that nevertheless could compete with it in the market (such as James Watt's wide-ranging patent on methods of lowering fuel consumption in steam engines during Bentham's time),^{xxxii} substitutes for that good would be unable to enter the market. This would increase the detrimental effects of the other harms by allowing the inventor to remove the possibility of there being any alternative to her invention. The fourth harm in particular highlights the importance of both the novelty and specific nature of a patent.

The incentive effect that Bentham emphasises can also undermine his argument for patents. If the optimal amount of inventions were created without the availability of patent protection, then patent protection is unnecessary. Similarly, if patents act as a disincentive for invention, then Bentham's principle of utility would argue against patent protection, as it produces a less than optimal amount of new inventions for society. If another method of promoting the creation of new and useful inventions were more successful than patents, then a Benthamite would have to support it instead.

Another objection to Bentham's defence of patents is that as Sigrid Sterckx rightly observes, there is no guarantee that an inventor will gain a reward proportional to her invention's merit.^{xxxiii} As Sterckx points out, the strength and duration of patent protection remains the same, regardless of how useful or otherwise the invention is to society. Circumstances beyond the inventor's control can also prevent her from gaining her natural reward, such as market fluctuations or technological advances that make that invention obsolete. While the period of patent protection is some defence against temporary fluctuations in the market, bad timing can still deny the inventor the value of the invention to the market. Consider an inventor forced to sell off her patent at a low price, due to financial hardship. If the patent buyer capitalises on the patent, the original inventor is denied reward from the market appropriate to the merit of her invention, both from the low price she was forced to accept for her patent due to the difficult circumstances she was in, and from the success of her invention in the market. The patent buyer, on the other hand, has gained both from the success of the invention, and from receiving the invention for a price below its true market value.

An extreme case of an inventor being denied her market reward is that of an inventor who independently creates an invention already patented by someone else. The unwitting re-inventor is denied both the reward of a patent on her work and the ability to exploit her invention in the market at all. According to Bentham's five monopoly harms, this would be an example of the fourth harm (the harm to other potential suppliers from the granting of a monopoly to a single supplier). A possible Benthamite response to this criticism is to emphasise that a patent is a *reward* for the inventor's work, not a *right*. Much like only the first runner across the finish line can win a race

(regardless of how much effort the other runners go to), only the first to create an invention should be rewarded with a patent. The 'all or nothing' nature of gaining a patent acts as an additional incentive to create and register inventions as quickly as possible. Inventors will not be tempted to keep their inventions to themselves if there is a risk that they may be unable to exploit it in future because another inventor has independently created the same device and patented it. The loss to those independent inventors who independently develop an already patented invention is offset by the incentive to patent inventions as quickly as possible, making the information contained within the patent available to everyone sooner than it might be otherwise. Since patents affect society in general rather than just individuals, it should be the effects that patents have on society rather than on individual inventors that should be considered.

CONCLUSION

The connection between patents and monopolies is an important one, as the monopoly over the use of an invention that a patent brings to its holder is the source of its potential harms. For a utilitarian like Bentham to support patents, these harms must be minimised or outweighed by the positive benefits of granting patents. While Bentham can make some reply to the monopoly harms patents carry with them, he cannot avoid the problem that his justification depends on the absence of a demonstrated alternative that encourages new inventions without also bringing with it the harms of monopolies. Bentham does not show that the patent is the best compromise between the interests of inventors and the interests of others.

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ⁱⁱ Ibid.

ⁱⁱⁱ Jeremy Bentham, "Proposal for a Mode of Taxation," in *Jeremy Bentham's Economic Writings*, W. Stark (Ed.) (London: George Allen & Unwin, 1952), 389-90.

^{iv} Ross Harrison, *Bentham* (London: Routledge & Kegan Paul, 1983), 15.

^v A caveat was a document left with the patent office describing the submitter's technical interest. If a patent application was submitted within that particular field, the patent and caveat submitter were interviewed separately to determine whether the caveat submitter's work invalidated the patent application. See Neil Davenport, *The United Kingdom Patent System: A Brief History* (Havant, Hampshire: Kenneth Mason, 1979), 15, 63.

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^{vii} Harrison, *Bentham*, ix-x.

^{viii} W. Stark (Ed.), *Jeremy Bentham's Economic Writings*, Vol. 1 (London: George Allen & Unwin, 1952), 49.

^{ix} Ibid.

^x Jeremy Bentham, "Manual of Political Economy" in *The Writings of Jeremy Bentham* John Bowring (Ed.) Vol. 3 (Edinburgh: W. Tait, 1843), 71-72.

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^{xiv} Jeremy Bentham, "Anarchical Fallacies," in *The Works of Jeremy Bentham* John Bowring (Ed.) Vol. 2 (Edinburgh: W. Tait, 1843), 533.

^{xv} Jeremy Bentham, "Manual of Political Economy," in *Jeremy Bentham's Economic Writings*, 264.

^{xvi} Harrison, *Bentham*, 8.

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^{xix} Adam Smith, *The Wealth of Nations, Books IV-V* Andrew Skinner (Ed.) (London: Penguin Books, 1999), 344.

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- ^{xxiv} Ibid.
- ^{xxv} Bentham, "Proposal for a Mode of Taxation," 390.
- ^{xxvi} Jeremy Bentham, "Tax with Monopoly," in *Jeremy Bentham's Economic Writings*.
- ^{xxvii} Bentham, "Proposal for a Mode of Taxation," 390-91; Bentham, "Tax with Monopoly," 372.
- ^{xxviii} Bentham, "Anarchical Fallacies," 533.
- ^{xxix} Bentham, "Manual of Political Economy," 71.
- ^{xxx} Bentham, "The Rationale of Reward," 214.
- ^{xxxi} Davenport, *The United Kingdom Patent System*, 19.
- ^{xxxii} Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, Colorado: Lynne Rienner Publishers, 2006), 98.
- ^{xxxiii} Sterckx, "The Ethics of Patenting - Uneasy Justifications," 192.