

# THE WIPO JOURNAL:

## ANALYSIS OF INTELLECTUAL PROPERTY ISSUES

GENERAL EDITOR: PROFESSOR PETER K. YU

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# Intellectual Property, Asian Philosophy and the Yin-Yang School

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☞ Asia; Intellectual property; Jurisprudence

## Introduction

Since its inception, *The WIPO Journal* has devoted the first issue of every volume to intellectual property topics within a specific discipline. Thus far, the journal has covered law and policy, economics, politics, culture, history and geography. This issue will focus on intellectual property philosophy. Although this area has been quite extensively covered in scholarly literature, especially in regard to the nature and justification of intellectual property rights, intellectual property philosophy has not yet been featured in any special issue of this journal.

As far as the scholarship in this area is concerned, one can easily recall the pioneering articles by Wendy Gordon, Edwin Hettinger, Justin Hughes and Jeremy Waldron<sup>1</sup>; the widely cited book on intellectual property philosophy by Peter Drahos<sup>2</sup>; and many latest writings that go beyond the traditional discussions of John Locke, Georg Wilhelm Friedrich Hegel, Immanuel Kant and Karl Marx.<sup>3</sup> In *Justifying Intellectual Property*, Robert Merges also draws on insights from John Rawls, Robert Nozick and Jeremy Waldron to explore the foundation of the intellectual property system and to locate what he described as “midlevel principles” of intellectual property law.<sup>4</sup>

Thus far, virtually all of the writings on intellectual property philosophy have focused on Western literature. This Western-centric focus is unsurprising considering that most scholars who have explored these topics either come from or have studied in the West, including Europe, North America, Australia and New Zealand. The intellectual property system, while not necessarily a Western construct, is also generally considered to have originated in the West. Although it remains debatable whether indigenous notions of intellectual property rights existed in the East—as some Chinese scholars have claimed<sup>5</sup>—commentators have repeatedly traced the global patent system to the Venetian Republic in the 15th century and the copyright system to the English Statute of Anne as well as some early French statutes.

As an introduction to a special issue on intellectual property philosophy, this article focuses on insights from Asian thought. Such a focus is needed not only to provide balance within this special issue, which

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<sup>1</sup> Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (1993) 102 Yale L.J. 1533; Edwin C. Hettinger, “Justifying Intellectual Property” (1989) 18 Phil. & Pub. Aff. 31; Justin Hughes, “The Philosophy of Intellectual Property” (1988) 77 Geo. L.J. 287; Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1992) 68 Chi.-Kent. L. Rev. 841.

<sup>2</sup> Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth, 1996).

<sup>3</sup> E.g. Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Basingstoke: Palgrave Macmillan, 2008); Annabelle Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (Cambridge: Cambridge University Press, 2012); Symposium, “The Philosophical Foundations of Intellectual Property” (2012) 49 San Diego L. Rev. 955–1282.

<sup>4</sup> Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011), pp.102–136.

<sup>5</sup> E.g. Zhou Lin and Li Mingshan (eds), *Historical Documents of China’s Copyright Law* (Beijing: Zhongguo Fangzheng Publishing, 1999) (in Chinese); Ken Shao, “The Global Debates on Intellectual Property: What If China Is Not a Born Pirate?” [2010] Intell. Prop. Q. 341.

includes articles focusing primarily on Western philosophy, but also to highlight the compatibility between Asian philosophy and the notion of intellectual property rights. More importantly, this article aims to demonstrate that Asian philosophy may suggest new ways to address the ongoing and highly complex intellectual property challenges confronting emerging economies and the digital environment.

Greater engagement with Asian philosophy in the intellectual property arena is highly important from various standpoints—theoretical, policy and strategic. Such an engagement is also timely and urgent considering the continued massive piracy and counterfeiting problems in Asia, the growing attention to the technological rise of Asian countries, the rejuvenated interest in Confucianism in China and elsewhere, the recently concluded negotiations on the Trans-Pacific Partnership Agreement as well as the ongoing negotiation of the Regional Comprehensive Economic Partnership under the ASEAN+6 framework.

This article begins by providing a brief discussion of the many different schools of Asian philosophy, including those in China and India. Although Confucianism has garnered considerable attention in intellectual property literature, the nexus between Asian philosophy and the notion of intellectual property rights remains largely understudied. Thus, instead of revisiting the debate on intellectual property and Confucianism, this article aims to introduce to the Western audience Yin-Yang, one of the six dominant ancient schools of Chinese philosophy. It argues that this school's focus on contexts, relationships and adaptiveness and its high tolerance for contradictions have made it particularly well-equipped to address the ongoing intellectual property challenges concerning both emerging economies and the digital environment.

## Asian philosophy

In his book, Kishore Mahbubani asked a thought-provoking question, “Can Asians think?”<sup>6</sup> His question goes in two directions. First, can Asians think—and if so, “why have Asian societies lost a thousand years and slipped far behind the European societies that they were far ahead of at the turn of the last millennium?”<sup>7</sup> Secondly, if Asians can think, can they “think for themselves”? This question is important not just in the policy arena (the focus of his book), but also in regard to innovation and development—and, of course for us, the development of intellectual property law and policy. To Dean Mahbubani, it is important that “Asian societies can enter the modern universe as Asian societies rather than Western replicas”.<sup>8</sup>

The short answer to his highly provocative question is, “Of course, Asians can think.” Indeed, a growing volume of scholarship has explored the nexus between Asian philosophy and the notion of intellectual property rights. In an earlier special issue of this journal on intellectual property and culture, for instance, I contributed an article on the Confucian challenges to intellectual property reforms in China and other parts of Asia.<sup>9</sup> In that article, I specifically examined the compatibility between Confucianism and the notion of intellectual property rights, the gradual but dramatic evolution of this school of philosophy in the last two millennia, and the problem of using Confucianism as a proxy for either Chinese or Asian philosophy.

In a later book chapter, which expanded on that article, I further noted that Confucianism could provide useful explanations for the improved protection and enforcement of intellectual property rights in China and other parts of Asia.<sup>10</sup> As stated in the preface to a book on Confucian humanism:

“Confucian ethics, as reflected in government leadership, competitive education, meritocratic elitism, social interaction, a disciplined work force, principles of equality and self-reliance, and self-cultivation,

<sup>6</sup> Kishore Mahbubani, *Can Asians Think?*, 4th edn (Singapore: Marshall Cavendish, 2009).

<sup>7</sup> Mahbubani, *Can Asians Think?* (2009), p.11.

<sup>8</sup> Mahbubani, *Can Asians Think?* (2009), p.38.

<sup>9</sup> Peter K. Yu, “The Confucian Challenge to Intellectual Property Reforms” (2012) 4 WIPO J. 1.

<sup>10</sup> Peter K. Yu, “Intellectual Property and Confucianism” in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests, and Intersections* (Cambridge: Cambridge University Press, 2015).

provides a necessary background and a powerful motivating force for the rise of industrial East Asia.”<sup>11</sup>

Thus, if one takes seriously the claim that Confucianism has had both historical and continuous influence on intellectual property developments in Asian countries—or, worse, condemns Confucianism for blocking or slowing down intellectual property reforms—one has to be prepared to rebut the argument that Confucianism should be credited for the more promising recent developments in Asian countries.

That book chapter did not stop there, however. It went further to suggest that Confucianism may provide important insight into solving some of the most treacherous problems in today’s international intellectual property regime:

“For example, would a Confucian system of intellectual property rights—which emphasizes harmony, balance, and social responsibility—strike a better balance between proprietary interests and public access needs? Would the Confucian approach to resolving disputes hold the key to the litigation explosion in the intellectual property field and the continuing problems concerning so-called copyright, patent, and trademark trolls? Would the Confucian focus on virtue, benevolence, and familial values be conducive to reducing disagreements between developed and developing countries in the intellectual property arena? Finally, would Confucianism provide important insight into the growing popularity of open source, free culture, and access to knowledge movements?”<sup>12</sup>

Although Confucianism remains one of most dominant schools of philosophy in China—due partly to its widespread use for self-cultivation and partly to the heavy influence of the imperial civil service examinations—Chinese thought includes many different schools of philosophy. In the last chapter of the *Historical Records (Shiji)*, for instance, Sima Qian, the grand historian in the Han Dynasty (206 BC–220 AD), recalled the six dominant schools of Chinese philosophies: (1) Yin-Yang; (2) Confucianism (or, more properly, *Rujia*); (3) Mohism (*Mojia*); (4) School of Names, Dialecticians or Logicians (*Mingjia*); (5) Legalism (*Fajia*); and (6) Daoism, which derived from the teachings of Laozi and Zhuangzi.<sup>13</sup>

When one looks beyond China, one will also see the heavy influence of non-Chinese philosophy. It is no coincidence that George Coedès wrote a book on the “Indianization” of Southeast Asian states.<sup>14</sup> David Kang also reminded us that “the states of Southeast Asia experienced twin cultural influences, from India and from China”.<sup>15</sup> Indeed, recent scholarship, while still scant, has provided useful discussions of the nexus between Indian philosophy and the notion of intellectual property rights.

For example, in a recent book chapter, Prabha Sridevan, a retired judge of the Madras High Court, showed us how ancient Vedic texts in Sanskrit could shed light on Indian thinking on knowledge, creativity and sharing.<sup>16</sup> In her book on moral rights, Mira Sundara Rajan drew attention to the Sanskrit term “*rasa*”, which “describes the ecstatic essence of the creative moment ... and ... is made possible by the shared experience of artist and audience”.<sup>17</sup> In addition, Shyamkrishna Balganesha extracted important contemporary lessons from Mahatma Gandhi’s thinking on copyright law—in particular, how the pragmatism and nuance that he developed as a colonial lawyer tempered his “philosophical opposition to market-oriented utilitarianism”.<sup>18</sup> Finally, writing for a symposium on “Intellectual Property and Religious Thought”,

<sup>11</sup> “Preface” in Tu Weiming, Milan Hejtmanek and Alan Wachman (eds), *The Confucian World Observed: A Contemporary Discussion of Confucian Humanism in East Asia* (Honolulu: East-West Center, 1992), p.vii.

<sup>12</sup> Yu, “Intellectual Property and Confucianism” in Calboli and Ragavan (eds), *Diversity in Intellectual Property* (2015), p.270.

<sup>13</sup> Fung Yu-Lan, *A Short History of Chinese Philosophy: A Systematic Account of Chinese Thought from Its Origins to the Present Day*, translated by Derk Bodde (New York: Free Press, 1948), pp.30–31.

<sup>14</sup> George Coedès, *The Indianized States of Southeast Asia*, edited by Walter F. Vella and translated by Sue Brown Cowing (Honolulu: University of Hawaii Press, 1996).

<sup>15</sup> David C. Kang, *East Asia before the West: Five Centuries of Trade and Tribute* (New York: Columbia University Press, 2010), p.52.

<sup>16</sup> Prabha Sridevan, “Intellectual Property in the Ancient Indian Texts” in Calboli and Ragavan (eds), *Diversity in Intellectual Property* (2015).

<sup>17</sup> Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford: Oxford University Press, 2011), p.22.

<sup>18</sup> Shyamkrishna Balganesha, “Gandhi and Copyright Pragmatism” (2013) 101 Calif. L. Rev. 1705.



Shubha Ghosh utilised the debates on duty in ethical and religious thought in the Hindu text *The Bhagavad Gita* to advance his proposal for a duty-based justification for intellectual property rights.<sup>19</sup>

In sum, Asians can think, and many different—and at times rival—schools of philosophy originated in Asia. In the past two decades, commentators have paid growing attention to the relationship between Confucianism and intellectual property rights, due in large part to the massive piracy and counterfeiting problems in China and the sadly seductive nature of using cultural barriers to account for these problems. Nevertheless, the discussion of Asian philosophy in the intellectual property context remains limited. If history is any guide, Asians will continue to think and think for themselves. The more difficult question, however, is what insights Asian philosophy can provide into our study of intellectual property rights and our effort to formulate legal and policy reforms.

## Yin and Yang

In this article, I do not seek to revisit the debate on intellectual property and Confucianism. Instead, I want to introduce a different school of Chinese philosophy that Sima Qian listed among the six dominant schools in the *Historical Records*: Yin-Yang.

As far as I am aware, no scholar in either the East or the West has ever explored the nexus between intellectual property rights and the Yin-Yang school of philosophy in an English-language publication. So, the exploration here is necessarily preliminary and incomprehensive. For a topic of first impression, the short length of this article also presents some challenge. Nevertheless, it is my hope that the discussion here will provoke you to think more deeply about the alternative ways to address the ongoing intellectual property challenges confronting both emerging economies and the digital environment. If this article can disrupt the existing discourse on intellectual property developments in Asia or get judges, policy makers and commentators to rethink their values, assumptions, worldviews and philosophical predispositions, the article will have done its job.

Yin-Yang is one of the most longstanding and influential schools of Chinese philosophy. As Chan Wing-Tsit described:

“The Yin Yang doctrine is very simple but its influence has been extensive. No aspect of Chinese civilization—whether metaphysics, medicine, government, or art—has escaped its imprint. In simple terms, the doctrine teaches that all things and events are products of two elements, forces, or principles: Yin, which is negative, passive, weak and destructive, and yang, which is positive, active, strong, and constructive.”<sup>20</sup>

While “femininity, passivity, cold, darkness, wetness, softness” are yin, “masculinity, activity, heat, brightness, dryness, hardness” are yang.<sup>21</sup>

Zou Yan (305–240 BC) “is often mentioned as the representative thinker of this school, but his work is lost and all that we have about him is a brief account of his life and thought in the [*Historical Records*]”.<sup>22</sup> The paired concepts of yin and yang, however, appeared in literature before Zou’s time, such as *Zuozhuan*, *Laozi*, *Zhuangzi* and *Xunzi*.<sup>23</sup> Book 17 of *Xunzi*, for instance, declared: “Those charged with recording the Yin and Yang observe their interaction and can bring about order” (*suo zhi yu yinyangzhe / yi qi jian he zhi keyi zhuzhe yi*).<sup>24</sup> Notwithstanding these allusions, the discussion of the yin-yang concept, curiously, cannot be “found in early Confucian texts such as the *Analects*, *Mengzi*, *The Great Learning* [*Daxue*], or

<sup>19</sup> Shubha Ghosh, “Duty, Consequences, & Intellectual Property” (2013) 10 U. St. Thomas L.J. 801.

<sup>20</sup> Chan Wing-Tsit, *A Sourcebook in Chinese Philosophy* (Princeton: Princeton University Press, 1963), p.244.

<sup>21</sup> Fung, *A Short History of Chinese Philosophy* (1948), p.138.

<sup>22</sup> Chan, *A Sourcebook in Chinese Philosophy* (1963), p.244.

<sup>23</sup> Chan, *A Sourcebook in Chinese Philosophy* (1963), p.244.

<sup>24</sup> Robin R. Wang, *Yinyang: The Way of Heaven and Earth in Chinese Thought and Culture* (Cambridge: Cambridge University Press, 2012), p.1.

*Zhongyong* [*The Doctrine of the Mean*], and there is only one mention [of the concept] in ... *Daodejing* [*The Book of the Way*].”<sup>25</sup>

Thus far, the Yin-Yang school of philosophy has been largely under-researched, as “its thought and practices have been ignored in academic studies as a result of the limited sources and its difficulty and obscurity”.<sup>26</sup> Nevertheless, the basic insight about the yin-yang pairing, or juxtaposition, of “complementary opposites”<sup>27</sup> is well-known in both the East and the West. Indeed, “[b]ecause yin and yang are the most commonly known concepts from Chinese philosophy, they have practically become English words themselves”.<sup>28</sup>

The correlative thinking espoused in the Yin-Yang school of philosophy has considerable appeal to both a general and specialised audience. In a carefully analysed and well-documented book, Robin Wang outlined the six different relationships within the yin-yang cosmology.<sup>29</sup> The first relationship is *maodun* (contradiction and opposition). As Professor Wang explained:

“Although yinyang thought may prompt us to think of harmony, interconnection, and wholeness, the basis of any yinyang distinction is difference, opposition, and contradiction. Any two sides are connected and related, but they are also opposed in some way, like light and dark, male and female, forceful and yielding. It is the tension and difference between the two sides that allows for the dynamic energy that comes through their interactions. It is also this difference that enables yinyang as a strategy—to act successfully, we must sometimes be more yin and sometimes more yang, depending on the context.”<sup>30</sup>

The second relationship is *xiangyi* (interdependence). A key understanding of this relationship is that “[o]ne side of the opposition cannot exist without the other”—for example, “[o]ne cannot have a concept of ‘good’ without there existing a concept of ‘bad’”.<sup>31</sup> Notwithstanding this key understanding, “the interdependence of opposites does not simply refer to the relativity of our concepts, but also to how things themselves exist, grow, and function”.<sup>32</sup> Inherent in this interdependence is the need for rotation, or alteration, between yin and yang. Although the sun may embody yang, which “originally meant sunshine, or what pertains to sunshine and light”,<sup>33</sup> it must set every day to give way to yin before rising again the next morning.

The third relationship is *huan* (mutual inclusion). In Professor Wang’s words:

“If yin depends on yang, then yang is always implicated in yin; in other words, yin cannot be adequately characterized without also taking account of yang. The same is true of yang—it necessarily involves yin.”<sup>34</sup>

Thus, “even something that is strongly yang can be considered yin in some relations”.<sup>35</sup> Moreover, because of the constant rotation or alteration, “yang always holds some yin and yin holds some yang”.<sup>36</sup> In his book, Professor Wang used the cycle of four seasons to illustrate this mutually inclusive relationship:

<sup>25</sup> Wang, *Yinyang* (2012), p.32.

<sup>26</sup> Wang, *Yinyang* (2012), p.33.

<sup>27</sup> Cheng Chung-Ying, “Chinese Metaphysics as Non-Metaphysics: Confucian and Taoist Insights into the Nature of Reality” in Robert E. Allinson (ed.), *Understanding the Chinese Mind: The Philosophical Roots* (Oxford: Oxford University Press, 1991), p.177.

<sup>28</sup> Wang, *Yinyang* (2012), p.1.

<sup>29</sup> Wang, *Yinyang* (2012), pp.7–12.

<sup>30</sup> Wang, *Yinyang* (2012), p.8.

<sup>31</sup> Wang, *Yinyang* (2012), p.9.

<sup>32</sup> Wang, *Yinyang* (2012), p.9.

<sup>33</sup> Fung, *A Short History of Chinese Philosophy* (1948), p.138.

<sup>34</sup> Wang, *Yinyang* (2012), p.9.

<sup>35</sup> Wang, *Yinyang* (2012), p.9.

<sup>36</sup> Wang, *Yinyang* (2012), p.9.

“[S]ummer is the most yang of the seasons, yet it contains a yin force which will begin to emerge in the summer, extend through the fall, and reach its culmination in the winter. Winter is the highest stage of yin, yet it unfolds a yang force that will attain its own full swing though spring to summer.”<sup>37</sup>

The fourth relationship is *jiaogan* (interaction or resonance). As Professor Wang reminded us: “Each element influences and shapes the other. If yin and yang are interdependent and mutually inclusive, then a change in one will necessarily produce a change in the other.”<sup>38</sup> A case in point concerns the interactions between metal, wood and fire (three of the Five Elements in Chinese thought): “metal can conquer wood, however, wood can generate fire, which controls metal”.<sup>39</sup> As a matter of strategy, *jiaogan* is both important and somewhat counterintuitive, as it suggests that “one can influence any element by addressing its opposite”.<sup>40</sup>

The fifth relationship is *hubu* (complementarity or mutual support). As Professor Wang declared:

“[E]ach side supplies what the other lacks. Given that yin and yang are different but interdependent, properly declaring what a situation often requires supplementing one with the other, which is a way of achieving the appropriate balance between the two.”<sup>41</sup>

The final relationship is *zhuanhua* (change and transformation). According to Professor Wang, “One side becomes the other in an endless cycle. Yinyang thought is fundamentally dynamic and centers on change.”<sup>42</sup> Within the yin-yang cosmology, change is perpetual, and “[r]eversal ... [remains] a constant theme”.<sup>43</sup> As Jack Balkin observed in regard to the *Book of Changes*, which not only utilises yin-yang thinking but also provides a deep understanding of life’s changes:

“The basic lesson of [this book] is that everything changes. Good times turn to bad, and bad times eventually improve. Even during the most peaceful and prosperous conditions, difficulties, decay, and evil are merely held in check and are never completely eliminated.”<sup>44</sup>

Taken together, these six disparate relationships reveal the ambition of the Yin-Yang school of philosophy. Representing some of the earliest Chinese attempts to “[work] out a metaphysics and a cosmology”,<sup>45</sup> this school seeks to “creat[e] a truly inclusive system of thought—a system that would embrace and explain the phenomena of the entire universe”.<sup>46</sup> Instead of providing guideposts for self-cultivation and focusing on the way of life—as Confucianism does—the Yin-Yang school sheds light on the “Way of Heaven” or the “Way of Earth”.<sup>47</sup>

This school of thought resonates particularly well with Asian culture. Classified by Edward Hall and other commentators as “high-context”, this culture demands a sophisticated understanding of contexts, relationships, interactions and contingencies.<sup>48</sup> Although it is hard to make cross-cultural comparisons without avoiding convenient generalisations and stereotypes, psychological research has shown that Asians “tended to be more ‘holistic’, showing greater attention to context, a tolerance for contradiction and less

<sup>37</sup> Wang, *Yinyang* (2012), pp.9–10.

<sup>38</sup> Wang, *Yinyang* (2012), p.10.

<sup>39</sup> Wang, *Yinyang* (2012), p.38. The Five Elements (*wuxing*) are water, fire, wood, metal and earth.

<sup>40</sup> Wang, *Yinyang* (2012), p.10.

<sup>41</sup> Wang, *Yinyang* (2012), p.11.

<sup>42</sup> Wang, *Yinyang* (2012), p.11.

<sup>43</sup> Wang, *Yinyang* (2012), p.11.

<sup>44</sup> Jack M. Balkin, *The Laws of Change: I Ching and the Philosophy of Life* (New York: Schocken Books, 2002), p.197.

<sup>45</sup> Chan, *A Sourcebook in Chinese Philosophy* (1963), p.245.

<sup>46</sup> Fung Yu-Lan, *A History of Chinese Philosophy* (Princeton: Princeton University Press, 1983), Vol.2, p.131.

<sup>47</sup> A. C. Graham, *Yin-Yang and the Nature of Correlative Thinking* (Singapore: Institute of East Asian Philosophies, 1986), p.31.

<sup>48</sup> As Edward Hall defined, “A high-context ... communication or message is one in which most of the information is either in the physical context or internalized in the person, while very little is in the coded, explicit, transmitted part of the message.” Edward T. Hall, *Beyond Culture* (New York: Doubleday, 1976), p.79.

dependence on logic”.<sup>49</sup> By contrast, “Westerners were more ‘analytic’, avoiding contradiction, focusing on objects removed from their context, and more reliance on logic”.

The Yin-Yang school of philosophy is also ideal for addressing complex challenges in the intellectual property field. The reasons are twofold. First, intellectual property law and policy is fast-evolving, especially in the past few decades. Because this school of thought was designed with the process of perpetual change in mind, it is especially well-equipped to keep pace with the rapid developments in this area. As Professor Wang observed:

“The importance of yinyang lies in the sense of working with uncertainty. Uncertainty as a worldview calls for a mechanism or system to negotiate it, and yinyang fills this conceptual role.”<sup>50</sup>

Secondly, the Yin-Yang school of philosophy “was not only a source of conceptualization but also a practical guide or strategy”.<sup>51</sup> It therefore lends itself to providing new ideas for future intellectual property law and policy. Although this philosophical school seems to be characterised by uncertainty, indeterminacy and instability, its outlook is actually “dynamic and not static”.<sup>52</sup> As Professor Chan explained:

“The emphasis is on principles and laws of operation. ... And the end is an ordered nature rather than chaos. In point of process, there is contradiction as well as harmony, and in point of reality, there is unity in multiplicity. The apparent dualism and pluralism are, in each case, a dynamic monism through the dialectic.”<sup>53</sup>

In sum, the Yin-Yang school of philosophy does not speak to how one should live one’s life or how one could become a *junzi* (a gentleman or superior person in the Confucian world). Instead, it explains the shape of the world order and provides what Benjamin Schwartz called “correlative cosmology” or “correlative anthropocosmology”.<sup>54</sup> From an intellectual property standpoint, the primary takeaway of the Yin-Yang school of philosophy is its insights into the different relationships within the intellectual property order—whether domestic or global. Compared with the works of Locke, Hegel, Kant and other Western philosophers, however, the Yin-Yang school speaks rather little about the nature or justification of intellectual property rights.

## Correlative thinking

Although the Yin-Yang school of philosophy may be unfamiliar to many Western readers, its dualistic mindset and correlative mode of thinking<sup>55</sup> bear very strong resemblance to two lines of scholarship that have slowly emerged in the intellectual property field.

The first line of scholarship concerns the study of the intellectual property system as a complex adaptive system, or a complex ecosystem, which often utilises complexity theory and systems thinking. As J.B. Ruhl reminded us:

“The great lesson of dynamical systems theory for law reform ... is that it is the system that counts as much as the rules, and that we cannot effectively change only one variable of that equation and expect the others to remain static. *Ceteris paribus* doesn’t exist. Our legal institutions, however, have become prolific producers of rules of conduct, and our legal theory has focused for the most part on

<sup>49</sup> Mahbubani, *Can Asians Think?* (2009), p.10.

<sup>50</sup> Wang, *Yinyang* (2012), p.55.

<sup>51</sup> Wang, *Yinyang* (2012), p.19.

<sup>52</sup> Chan, *A Sourcebook in Chinese Philosophy* (1963), p.245.

<sup>53</sup> Chan, *A Sourcebook in Chinese Philosophy* (1963), p.245.

<sup>54</sup> Benjamin I. Schwartz, *The World of Thought in Ancient China* (Cambridge, MA: Belknap Press of Harvard University Press, 1985), p.350.

<sup>55</sup> On this mode of thinking, see Graham, *Yin-Yang and the Nature of Correlative Thinking* (1986).

divining the meta-rules to explain those rules. We need some attention to the system at the structural level.”<sup>56</sup>

In Professor Ruhl’s view, injecting systems thinking into the study of law and legal reform is important:

“If society evolves in response to changes in law, and vice versa, then law and society must co-exist in an evolving system. Each needs the other to define itself.”<sup>57</sup>

To some extent, the interactions between the different components in a complex system are similar to what the Yin-Yang school of philosophy has taught us about *xiangyi* (interdependence) and *jiaogan* (interaction or resonance). This similarity is understandable considering that “[y]inyang thought has been a kind of complexity thinking, in which the whole is perceived through multiple interactions”.<sup>58</sup>

Like the Yin-Yang school of philosophy, complexity theory and systems thinking capture “the complex manner in which ... components interact with one another” in an integrated system.<sup>59</sup> As meteorologist Edward Lorenz put it succinctly, the flap of a butterfly’s wings in Brazil could set off a tornado in Texas.<sup>60</sup> Although complex systems have governing meta-principles, we may not be able to “find them by slicing up the system into smaller parts”.<sup>61</sup> Thus, it is important for us to develop a holistic perspective of the system. Such a perspective will allow us to focus on the interactions among the different components and thereby develop “a greater appreciation of the forces at play in the interaction[s]”.<sup>62</sup>

Secondly, complexity theory and systems thinking enable us to focus on the self-correction mechanisms within the system, thereby inviting us to focus on adaptiveness and to locate the tipping point at which the system goes from order to chaos. As Stuart Kauffman observed:

“[C]omplex systems constructed such that they are poised on the boundary between order and chaos are the ones best able to adapt by mutation and selection. Such poised systems appear to be best able to coordinate complex, flexible behavior and best able to respond to changes in their environment.”<sup>63</sup>

Thirdly, complexity theory and systems thinking highlight the interactions among the different components of the system. It reminds us that laws and policies, including intellectual property laws and policies, may have spillover effects and unintended consequences. A case in point is the widely criticised anti-circumvention provision of the US Digital Millennium Copyright Act of 1998.<sup>64</sup> Although this ill-drafted provision was initially designed to protect the technological measures deployed by copyright holders, it has since been repeatedly misused to stifle innovation and competition over such products as printer toner cartridges, garage door openers, electronic pets and voting machines.<sup>65</sup> The provision has also upset the historical balance between copyright interests and access to information, thus raising serious concerns about free speech, privacy, academic freedom, learning, culture and democratic discourse.

<sup>56</sup> J.B. Ruhl, “Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State” (1996) 45 Duke L.J. 849, 916–917.

<sup>57</sup> Ruhl, “Complexity Theory as a Paradigm for the Dynamical Law-and-Society System” (1996) 45 Duke L.J. 849, 851.

<sup>58</sup> Wang, *Yinyang* (2012), p.14.

<sup>59</sup> Daniel F. Spulber and Christopher S. Yoo, “On the Regulation of Networks as Complex Systems: A Graph Theory Approach” (2005) 99 Nw. U. L. Rev. 1687, 1693.

<sup>60</sup> Edward Lorenz “describes a Brazilian butterfly that by beating its wings creates a movement of air that by joining with other currents transforms the weather in Texas”. Paul D. Carrington, “Butterfly Effects: The Possibilities of Law Teaching in a Democracy” (1992) 41 Duke L.J. 741, 743 (quoting Edward Lorenz, “Predictability: Does the Flap of a Butterfly’s Wings in Brazil Set Off a Tornado in Texas?”, Address to the Annual Meeting of the American Association for the Advancement of Science in Washington, DC, December 29, 1979).

<sup>61</sup> Ruhl, “Complexity Theory as a Paradigm for the Dynamical Law-and-Society System” (1996) 45 Duke L.J. 849, 893.

<sup>62</sup> Ruhl, “Complexity Theory as a Paradigm for the Dynamical Law-and-Society System” (1996) 45 Duke L.J. 849, 853.

<sup>63</sup> Stuart A. Kauffman, *The Origins of Order: Self-Organization and Selection in Evolution* (New York: Oxford University Press, 1993), p.29.

<sup>64</sup> For criticisms of this provision, see Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: MIT Press, 2007); Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001), pp.122–145; Ian R. Kerr, Alana Maurushat and Christian S. Tacit, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002) 34 Ottawa L. Rev. 7; Peter K. Yu, “Anticircumvention and Anti-anticircumvention” (2006) 84 Denv. U. L. Rev. 13.

<sup>65</sup> Peter K. Yu, “P2P and the Future of Private Copying” (2005) 76 U. Colo. L. Rev. 653, 725–726.

The second line of scholarship that bears strong resemblance to the correlative thinking espoused in the Yin-Yang school of philosophy is the emerging discussion of intergenerational equity in the intellectual property context. In his book on intellectual property justifications, Robert Merges discussed “intergenerational considerations”.<sup>66</sup> In November 2010, the University of Wisconsin Law School also held an interesting symposium on “Intergenerational Equity and Intellectual Property”.<sup>67</sup> As Shubha Ghosh, one of the event’s organisers, observed:

“At the surface, intellectual property law promotes progress, incentivizes invention and creation, supports innovation, leads to economic growth and development, and enriches the public domain. Depending on whom you ask, copyright, patent, trade secret, trademark, and related doctrines aid in reaching one or more of these goals. What these goals have in common is some notion of the future. Certainly all law aims to make a better world, but intellectual property has as its objective the dissemination of new products, ideas, services, and technologies that serve present and future generations. With concepts of prior art and public domain, intellectual property serves as a bridge between past and present with the artifacts of the present as tools for the future.”<sup>68</sup>

In the United States, for instance, the constitutional clause that granted Congress the enumerated power to enact copyright and patent laws focuses on the efforts “to promote the Progress of Science and useful Arts”.<sup>69</sup> To a large extent, intellectual property law and policy—in the United States and elsewhere—has always been about intergenerational equity.

A specific area of intellectual property law and policy that has prominently featured intergenerational equity questions concerns the protection of genetic resources, traditional knowledge and traditional cultural expressions. Although such protection aims to provide both economic and non-economic benefits to the present members of traditional and indigenous communities, it also underscores the need for preservation and conservation of cultural heritage<sup>70</sup> as well as the continued, dynamic development of these communities. As Madhavi Sunder reminded us:

“Traditional people move, intermarry, share ideas, and modify their skills and products to the shifting demands of the market and their culture. These activities are not merely strategic and pragmatic, but are evidence of a healthy and dynamic culture.”<sup>71</sup>

The protection of genetic resources, traditional knowledge and traditional cultural expressions is as much about the present members of indigenous and traditional communities as it is about their future members. It is therefore no surprise that these communities, along with developing country governments and nongovernmental organisations, were relieved to learn about the recent renewal of the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at this year’s General Assembly of the World Intellectual Property Organization (WIPO).<sup>72</sup>

Another area of intellectual property law and policy that has made intergenerational equity questions salient concerns the debates involving intellectual property and sustainable development. Although this mode of development did not garner major international attention until after the 1992 Earth Summit in Rio de Janeiro, the Yin-Yang school of philosophy—which “offers a normative model with balance, harmony, and sustainability as ideals”—provides important insight into sustainable development.<sup>73</sup> Indeed,

<sup>66</sup> Merges, *Justifying Intellectual Property* (2011), pp.281–286.

<sup>67</sup> Symposium “Intergenerational Equity and Intellectual Property” [2011] Wis. L. Rev. 103–562.

<sup>68</sup> Shubha Ghosh, “Foreword: Why Intergenerational Equity” [2011] Wis. L. Rev. 103, 103.

<sup>69</sup> US Constitution art.I s.8 cl.8.

<sup>70</sup> Peter K. Yu, “Cultural Relics, Intellectual Property, and Intangible Heritage” (2008) 81 Temp. L. Rev. 433, 471–473.

<sup>71</sup> Madhavi Sunder, “The Invention of Traditional Knowledge” (Spring 2007) 70 Law & Contemp. Probs. 97, 109.

<sup>72</sup> Catherine Saez and William New, “WIPO Assembly Extends Talks on Traditional Knowledge, Design; Sets Policy for New Offices”, available at <http://www.ip-watch.org/2015/10/15/wipo-assembly-extends-talks-on-traditional-knowledge-design-sets-policy-for-new-offices/> [Accessed November 19, 2015].

<sup>73</sup> Wang, *Yinyang* (2012), p.3.

the relationship between nature and man, or between heaven and humanity, has been a longstanding focus of Chinese thought.<sup>74</sup> A case in point is the concept of *tianren ganying* that noted Chinese philosopher Dong Zhongshu (179–104 BC) advanced to describe “the resonance between heaven and humanity”.<sup>75</sup>

Examples of the debates involving intellectual property and sustainable development are those concerning intellectual property and climate change<sup>76</sup> as well as those addressing the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Convention on Biological Diversity.<sup>77</sup> Viewed from a sustainable development perspective, the key question in the intellectual property debate is not whether we should have existing laws and policies, or even whether we should have an intellectual property system in the first place. Rather, it is what mix of laws and policies—intellectual property or otherwise—would best enable us to achieve the sustainable development of creativity and innovation. Specifically, it is about how laws and policies can be brought together to “meet our current needs while preserving the potential for future generations to meet their own needs”.<sup>78</sup>

It is therefore no surprise that policy makers and commentators have begun to explore how to promote creativity and innovation by using alternative arrangements outside the intellectual property system.<sup>79</sup> In her recent report on patent policy and the right to science and culture, the UN Special Rapporteur in the Field of Cultural Rights also noted the need for these arrangements in addition to policy space and flexibilities:

“Particularly in areas characterized by high social need but low ability to pay, alternative policies for incentivizing technological development are important, but remain too scarce to meet human rights objectives, including the right to health. Models include government grants and procurements, advance purchase commitments, tax incentives for research and development, prizes and other means. These mechanisms should contain provisions on access and be empirically evaluated to gauge how well they meet the needs of the population.”<sup>80</sup>

## Lessons and illustrations

In most intellectual property debates, the central question is how to strike an appropriate balance between proprietary interests and public access needs. While proprietary interests are on one end of this spectrum, public access needs are on the other end. Oftentimes, the balancing task is conducted in economic terms, and the goal is to strike an optimal balance between the two ends. The use of cost-benefit analyses to locate this balance is especially common following the rise of economic analysis of intellectual property law and policy in the United States and other parts of the world.<sup>81</sup>

Finding a compromise on a linear continuum, however, is not the only way to locate this balance. Nor is it the best way to do so. For many policy makers, commentators and nongovernmental organisations, such an approach is not only unsatisfactory but also overly simplistic. As Daniel Gervais rightly reminded

<sup>74</sup> Chan, *A Sourcebook in Chinese Philosophy* (1963), p.246.

<sup>75</sup> Wang, *Yinyang* (2012), p.94.

<sup>76</sup> E.g. Joshua D. Sarnoff (ed.), *Research Handbook on Intellectual Property and Climate Change* (Cheltenham: Edward Elgar Publishing, 2016) (forthcoming).

<sup>77</sup> Paragraph 19 of the Doha Ministerial Declaration called on the Council for TRIPS “to examine ... the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore”.

<sup>78</sup> Peter K. Yu, “Intellectual Property and the Information Ecosystem” [2005] Mich. St. L. Rev. 1, 16.

<sup>79</sup> E.g. Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge: Cambridge University Press, 2010), pp.133–283.

<sup>80</sup> Special Rapporteur in the Field of Cultural Rights, “Report of the Special Rapporteur in the Field of Cultural Rights” (2015) U.N. Doc. A/70/279, para.91 (Farida Shaheed).

<sup>81</sup> E.g. William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press of Harvard University Press, 2003).

us, “Balance ... is not, contrary to what one often reads or hears in policy debates concerning intellectual property, a simple axis with rights holders at one end and users of intellectual property on the other.”<sup>82</sup>

The correlative mode of thinking espoused in the Yin-Yang school of philosophy does provide an attractive alternative. Viewed through a yin-yang lens, the task at hand is no longer about how to locate the balance on a linear continuum—perhaps, with mathematical equations. Instead, the task is about striking an appropriate non-linear, dynamical balance within a pluralistic order—that is, how we can shape the relationships between the different actors, interests and forces, knowing full well that all of these components will continue to coexist and that each of them may exert influence on one another to varying degrees at different times and in disparate contexts. After all, the Yin-Yang school of philosophy focuses on the “condition[s] in which there exist two opposite but related and interdependent ideas or objects”.<sup>83</sup> As Professor Wang observed, “[b]ecause of [the] dependence on context, a single thing can be yin in one way and yang in another”.<sup>84</sup>

Given the potential for uncertainty, indeterminacy and instability, the Yin-Yang school of philosophy may not offer immediate appeal to economists, lawyers, judges, policy makers and commentators. Nevertheless, this philosophical school may shed light on ways to address the ongoing intellectual property challenges confronting both emerging economies and the digital environment. To help us conceptualise how this school of thought can target these complex challenges, this article introduces two different exhibits.

### *Emerging economies*

The first exhibit concerns the rapid intellectual property developments in large middle-income countries. Although the developments in these countries are arguably promising, they have been largely uneven due to the countries’ vast sizes, complex economies and sometimes conflicting laws and policies.<sup>85</sup> Cases in point are Brazil, China and India.

In regard to Brazil, Nobel Laureate Michael Spence noted the country’s “dual economy”, which consists of “a relatively rich one whose growth is constrained by the normal forces that constrain the growth of relatively advanced economies, and a poor one where the early-stage growth dynamics ... just didn’t start, owing to its separation from the modern domestic economy and the global economy”.<sup>86</sup> With respect to China, commentators have discussed how the economic and technological developments in the major cities and the coastal regions far exceed those in the inner and rural areas.<sup>87</sup> As I noted in an earlier work, China should be “recognize[d] ... as a ‘country of countries,’ rather than a homogenous one”.<sup>88</sup> Finally, pertaining to India, Fareed Zakaria reminded us that the country “might have several Silicon Valleys, but it also has three Nigerias within it—that is, more than 300 million people living on less than a dollar a day”.<sup>89</sup>

Consider China more specifically. Even with several overhauls of its intellectual property system and a decade-and-a-half-long membership to the World Trade Organization, the country remains the hotbed of piracy and counterfeiting. As the International Trade Commission noted in its 2011 report:

<sup>82</sup> Daniel J. Gervais, “TRIPS and Development” in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era*, 1st edn (Oxford: Oxford University Press, 2007), p.49.

<sup>83</sup> Wang, *Yinyang* (2012), p.3.

<sup>84</sup> Wang, *Yinyang* (2012), p.7.

<sup>85</sup> Peter K. Yu, “The Middle Intellectual Property Powers” in Randall Peerenboom and Tom Ginsburg (eds), *Law and Development in Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge: Cambridge University Press, 2014), p.98–99.

<sup>86</sup> Michael Spence, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (New York: Farrar, Straus and Giroux, 2011), p.204.

<sup>87</sup> Peter K. Yu, “Intellectual Property, Economic Development, and the China Puzzle” in Gervais (ed.), *Intellectual Property, Trade and Development* (2007), p.203.

<sup>88</sup> Peter K. Yu, “From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China” (2006) 55 Am. U. L. Rev. 901, 963.

<sup>89</sup> Fareed Zakaria, *The Post-American World* (New York: W.W. Norton, 2008), p.133.



“firms in the U.S. [intellectual property]-intensive economy that conducted business in China in 2009 reported losses of approximately \$48.2 billion in sales, royalties, or licence fees due to [intellectual property rights] infringement in China”.<sup>90</sup>

In its latest *Global Software Survey*, the Business Software Alliance also estimated that, China had a rather disappointing unlicensed software rate of 74 per cent in 2013, with a total commercial value of about \$8.767 billion.<sup>91</sup>

Nevertheless, there is no denying that China has now slowly emerged as an innovative power. According to the latest WIPO statistics, the country had the world’s third largest volume of applications under the Patent Cooperation Treaty in 2014, behind only the United States and Japan.<sup>92</sup> Among all the corporate applicants, Huawei Technologies and ZTE Corporation had the largest and third largest number of applications, respectively. In the same period, China also ranked seventh in filing international trademark applications under the Madrid Agreement Concerning the International Registration of Marks and its related protocol. With 20,309 designations, China was the world’s “most designated member country in international registrations” within the Madrid System.

Given these two drastically different pictures, it is no surprise that China critics have continued to emphasise the country’s massive piracy and counterfeiting problems. It is also understandable why China defenders—or apologists, as these critics would call them—have underscored the country’s dramatic progress in recent intellectual property reforms. Because these two rival camps often talk past each other, they have thus far failed to work together to come up with solutions that will help strengthen intellectual property protection and enforcement in the country. They also do not realise that their view only captures one side of the coin—be it the promising or less attractive one.

The Yin-Yang school of philosophy, however, will reconcile these two seemingly contradicting views. Instead of determining which camp is right, it reminds both camps that their views, while somewhat contradictory, can be equally valid. After all, whether a certain view is valid depends largely on the context in which the country’s intellectual property reforms are being assessed. As in all things within the yin-yang cosmology, views on these reforms are highly context-dependent.

In the near future, China is likely to emerge as a highly innovative power while at the same time remaining as the world’s biggest pirate nation.<sup>93</sup> Such development is possible considering the country’s vast size, political and economic complexities, and often internally inconsistent laws and policies. To provide support for this disturbing forecast, consider the 2014 figures on invention patents provided by the State Intellectual Property Office in China. Jiangsu, Shandong and Guangdong provinces—the three provinces with the largest volumes of home applications—had a total of 146,660, 77,298 and 75,147, respectively.<sup>94</sup> Meanwhile, Gansu, Yunnan and Jiangxi provinces had a total of only 4,986, 4,732 and 4,688, respectively. These figures were slightly over one-twentieths of the figure in Guangdong or Shandong province and one-fortieths of the figure in Jiangsu province. Given these highly contrasting statistics, it is easy to see why the slow-growing provinces are more reluctant to embrace intellectual property reforms than their fast-growing counterparts.

To further complicate matters, although history has seen countries crossing over from the less respectful side of the intellectual property divide to the more promising one—the United States, Japan and South

<sup>90</sup> US International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy* (Washington, 2011), p.xiv.

<sup>91</sup> Business Software Alliance, *The Compliance Gap: BSA Global Software Survey* (Washington, 2014), p.4.

<sup>92</sup> World Intellectual Property Organization, “Telecoms Firms Lead WIPO International Patent Filings”, available at [http://www.wipo.int/pressroom/en/articles/2015/article\\_0004.html](http://www.wipo.int/pressroom/en/articles/2015/article_0004.html) [Accessed November 19, 2015].

<sup>93</sup> On China’s rise as an innovative power, see Shaun Rein, *The End of Cheap China: Economic and Cultural Trends That Will Disrupt the World* (Hoboken: John Wiley & Sons Inc, 2012); Peter K. Yu, “The Rise and Decline of the Intellectual Property Powers” (2012) 34 *Campbell L. Rev.* 525, 529–532; Richard P. Suttmeier and Yao Xiangkui, “China’s IP Transition: Rethinking Intellectual Property Rights in a Rising China” (2011) The National Bureau of Asian Research, NBR Special Report No.29.

<sup>94</sup> State Intellectual Property Office, “Table 2 Distribution of Applications for Inventions Received from Home 2014”, available at [http://english.sipo.gov.cn/statistics/2014/12/201502/t20150204\\_1071540.html](http://english.sipo.gov.cn/statistics/2014/12/201502/t20150204_1071540.html) [Accessed November 19, 2015].

Korea being some of the more notable instances<sup>95</sup>—no country has ever stayed on both ends of the spectrum at the same time. If my forecast is indeed correct—that China will emerge as a highly innovative power while at the same time remaining as the world’s biggest pirate nation—we will need to come up with new theories, concepts, vocabularies and even schools of thought to address this unforeseen situation.

To some extent, the challenges confronting China—and, for that matter, other large, middle-income countries (such as Brazil, India and Indonesia)—are not that different from what the world experienced in the past two decades following the adoption of the TRIPS Agreement. The protection and enforcement levels built into this one-size-fits-all—or, more precisely, super-size-fits-all—regime simply do not provide equal benefits to developed, developing and least developed countries. The only difference in the China case is that the contradictions now occur within the national intellectual property system, as opposed to the global TRIPS-based system. Striking an appropriate nationwide balance within the Chinese intellectual property system has indeed been difficult.<sup>96</sup>

### *The digital environment*

The second exhibit concerns internet users, a key group of stakeholders in the information society, or what some have called the complex digital ecosystem. Commentators have lamented how traditional copyright doctrines have overlooked the important interests of consumers and internet users.<sup>97</sup> As Julie Cohen put it bluntly, “copyright is first and foremost a law of authors’ rights”.<sup>98</sup>

In recent years, however, judges, policy makers and commentators have slowly embraced laws, policies and proposals addressing the important needs of users, especially in the digital environment. For example, the Canadian Supreme Court led the way by introducing “users’ rights” in *CCH Canada Ltd v Law Society of Canada* more than a decade ago.<sup>99</sup> Quoting David Vaver’s scholarship, Chief Justice McLachlin declared: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”<sup>100</sup> In the Canadian Copyright Modernization Act, the country’s recently revised statute, Canada further introduced a special exception for the development of non-commercial user-generated content.<sup>101</sup> Building on this particular provision, internet user groups in Hong Kong have also advocated the introduction of an exception for non-profit-making user-generated content as part of the ongoing digital copyright reform.<sup>102</sup>

The rethinking of the role of internet users in the complex digital ecosystem is highly important because users are no longer passive consumers, as those found in the pre-internet days. Instead, they are now part of a large and highly diverse group, consisting of bloggers, vloggers, fanfic writers, mash-up artists, video producers, citizen journalists, cultural critics, media commentators and product reviewers. They have actively participated in the creative process, leading some commentators to describe them as “prosumers”.<sup>103</sup> As Don Tapscott and Anthony Williams described in the music context:

<sup>95</sup> Peter K. Yu, “The Global Intellectual Property Order and Its Undetermined Future” (2009) 1 WIPO J. 1, 13.

<sup>96</sup> Peter K. Yu, “Intellectual Property Geographies” (2014) 6 WIPO J. 1, 3–4.

<sup>97</sup> E.g. Joseph P. Liu, “Copyright Law’s Theory of the Consumer” (2003) 44 B.C. L. Rev. 397.

<sup>98</sup> Julie E. Cohen, “The Place of the User in Copyright Law” (2005) 74 Fordham L. Rev. 347, 348.

<sup>99</sup> *CCH Canada Ltd v Law Society of Canada* [2004] SCC 13.

<sup>100</sup> *CCH Canada Ltd v Law Society of Canada* [2004] SCC 13 at [48].

<sup>101</sup> Canadian Copyright Modernization Act 2012 s.29.21. On this provision, see Teresa Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law” in Michael A. Geist (ed.), *The Copyright Pentology: How the Supreme Court of Canada Shoot the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).

<sup>102</sup> Peter K. Yu, “Can the Canadian UGC Exception Be Transplanted Abroad?” (2014) 26 Intell. Prop. J. 175.

<sup>103</sup> E.g. Don Tapscott, *Grown up Digital: How the Net Generation Is Changing Your World* (New York: McGraw-Hill, 2009), pp.208–212; Don Tapscott and Anthony D. Williams, *Wikinomics: How Mass Collaboration Changes Everything* (New York: Portfolio, 2006), pp.124–150. This term was coined by Alvin Toffler, *The Third Wave* (New York: William Morrow, 1980), pp.265–288.

“[R]emixing music is not about copying artistic works; it’s about modifying, embellishing, appending, reinventing, and mashing them together with other elements. Most of all, remixing music is about being a producer, participating in the creative enterprise, and sharing your creations with others.”<sup>104</sup>

The understanding of the “prosumer” concept—and “the [blurring] gap between producers and consumers”<sup>105</sup>—is particularly relevant to our discussion of the Yin-Yang school of philosophy. Viewed through a yin-yang lens, internet users are neither producers nor consumers. Instead, they are both producers and consumers at the same time. Whether they play the roles of producers or consumers will largely depend on the type of situation involved.

The variations in these situations immediately bring to mind Julie Cohen’s concept of the “situated user”. As she explained:

“Unlike the economic user [who enters the market with a given set of tastes in search of the best deal], the situated user is more than a narrow, self-interested consumer; unlike the romantic user [whose life is an endless cycle of sophisticated debates about current events, discerning quests for the most freedom-enhancing media technologies, and home production of high-quality music, movies and open-source software], ... she knows when to sit back, have a beer, and fire up the TiVo. Unlike the postmodern user [who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative], the situated user has the capacity and the will to link her own creative projects aspirationally to larger dreams of artistic and personal progress.”<sup>106</sup>

In Professor Cohen’s view, copyright law and policy needs to pay greater attention to these situated users “because neither [their] tastes nor [their] talents are so well formed”.<sup>107</sup> As a result, “[b]oth [their] patterns of consumption and the extent and direction of [their] own authorship will be shaped and continually reshaped by the artifacts, conventions, and institutions that make up [their] cultural environment”.<sup>108</sup> To help accommodate the needs and interests of these situated users, Professor Cohen advanced the following proposal:

“Copyright should recognize the situated, context-dependent character of both consumption and creativity, and the complex interrelationships between creative play, the play of culture, and progress, and should adjust its baseline rules—not simply its exceptions—accordingly. Scholars and policy makers should ask how much latitude the situated user needs to perform her functions most effectively, and how the entitlement structure of copyright law might change to accommodate that need. In particular, they should be prepared to ask whether the situated user is well served by the current copyright system of broad rights and narrow, limited exemptions, or whether she would be better served by a system that limits the rights of copyright owners more narrowly in the first instance.”<sup>109</sup>

Thus far, most of the literature on user-generated content or user-based activities has focused on copyright law and cyberspace, due in large part to the wide use of the internet and other digital technologies as well as the proliferation of parodies, remixes and mash-ups. However, recent developments in 3D printing technology and synthetic biology have suggested that user-based activities in the intellectual property context should not be limited to copyright and cyberspace alone. As these new technologies become more affordable and publicly accessible, the activities they generate will affect other areas of intellectual property

<sup>104</sup> Tapscott and Williams, *Wikinomics* (2006), pp.137–138. On remix, see Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).

<sup>105</sup> Tapscott and Williams, *Wikinomics* (2006), p.125.

<sup>106</sup> Cohen, “The Place of the User in Copyright Law” (2005) 74 *Fordham L. Rev.* 347, 372.

<sup>107</sup> Cohen, “The Place of the User in Copyright Law” (2005) 74 *Fordham L. Rev.* 347, 349.

<sup>108</sup> Cohen, “The Place of the User in Copyright Law” (2005) 74 *Fordham L. Rev.* 347, 349.

<sup>109</sup> Cohen, “The Place of the User in Copyright Law” (2005) 74 *Fordham L. Rev.* 347, 374.

law, including trademarks, patents and industrial designs.<sup>110</sup> As a result, intellectual property theories will have to be prepared to account for a more complex, and at times contradicting, role of users.

The two exhibits in this section have highlighted the growing complexity of the ongoing intellectual property challenges confronting both emerging economies and the digital environment. Although it is tempting for judges, policy makers and commentators to categorise their difficult policy choices as binary—for example, between protection and access, between costs and benefits and between control and convenience—yin-yang thinking suggests that binary choices may not adequately capture the challenges confronting these decision makers. Instead, they may need to think more deeply about the relationships between the varying players, interests and forces as well as how to shape these relationships in an effort to strike an appropriate non-linear, dynamical balance in a pluralistic order. As James Boyle reminded us: “The relationship between the public domain and the restrictions around it is ... a complex dynamic equilibrium, not a simplistic binary choice.”<sup>111</sup>

## Conclusion

Although Locke, Hegel, Kant, Marx, Rawls and Nozick have been repeatedly cited in intellectual property literature to either provide justifications for intellectual property rights or to critique these justifications, questions involving intellectual property philosophy are wide-ranging and multi-faceted. This article, while brief and preliminary, aims to point out that many other schools of philosophy exist to provide insight into the ongoing intellectual property challenges concerning both emerging economies and the digital environment. Having a focus on contexts, relationships and adaptiveness as well as a high tolerance for contradictions, Asian philosophy is particularly attractive in this respect. It is my hope that this article will nicely complement the other articles in this special issue—which cover a broad spectrum of topics, ranging from metaphysics to Lockean justifications to moral philosophy. I hope you will enjoy this issue.

<sup>110</sup> E.g. Deven R. Desai and Gerard N. Magliocca, “Patents, Meet Napster: 3D Printing and the Digitization of Things” (2014) 102 Geo. L.J. 1691; Lucas S. Osborn, “Regulating Three-Dimensional Printing: The Converging Worlds of Bits and Atoms” (2014) 51 San Diego L. Rev. 553.

<sup>111</sup> James Boyle, “Foreword: The Opposite of Property?” (Winter/Spring 2003) 66 Law & Contemp. probs. 1, 12.

# The Metaphysics of Intellectual Property

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☞ Intellectual property; Jurisprudence

## Metaphysics and the nature of intellectual property

“Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.”— Justice Joseph Story<sup>1</sup>

Metaphysics is the branch of philosophy that deals with what something is and the nature of its existence. It helps to explain the world in which humans live, and it helps to underpin human interpretations and applications of knowledge. In his famous 19th Century reference to the seeming evanescence found in some of intellectual property law’s prominent doctrines, Justice Story signalled the importance of metaphysics to an understanding of this area of law. That is, without a philosophical appreciation of how the law is constructed and what it consists of, the law of patents and copyright—and also of trademarks, designs and other forms of intellectual property—can be very difficult to understand or use effectively. Without mindfulness of its metaphysics, the law risks incoherence and internal inconsistencies.

Applied to intellectual property law, metaphysics considers the nature and form of intellectual property and the essence of its constituent parts.<sup>2</sup> It looks at how intellectual property exists, the shape it takes and the constitutive properties of intellectual property laws.<sup>3</sup> In a sense, metaphysics asks “what is special about intellectual property law?” or “what gives intellectual property law a distinct identity?” Particular discussions about how to answer these sorts of metaphysical or ontological<sup>4</sup> questions may include reference to the imaginary nature of intellectual property objects,<sup>5</sup> the ways in which legal concepts construct these objects, the typical structure of intellectual property doctrines, and any environmental or familial characteristics of intellectual property laws.

Metaphysics’ concern with what “intellectual property” is contrasts with other philosophical methods found in the jurisprudence of intellectual property, such as epistemological explorations of the justifiability of beliefs about intellectual property<sup>6</sup>; political philosophy explorations of the role of intellectual property

\* This article draws and builds on a metaphysical approach to understanding intellectual property law that was published in Alexandra George, *Constructing Intellectual Property* (Cambridge: Cambridge University Press, 2012). The images included are reprinted with permission under Bigstock’s Standard Licence.

<sup>1</sup> *Folsom v Marsh* 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No.4,901).

<sup>2</sup> This line of analysis draws on the branch of metaphysics known as “epistemological essentialism”. This argues that, to have a particular identity, an object must necessarily consist of essential characteristics or properties. Seeking to identify such traits would fall within the field of epistemological essentialism.

<sup>3</sup> To the extent that such properties are abstract constructs that exist only as legal terms, the analysis falls within the branch of metaphysical essentialism known as “nominalism”. This draws on the school of “Platonic realism”, which argues that universals (i.e. properties necessary to a thing’s existence) can be ideas or concepts.

<sup>4</sup> Ontology is a sub-branch of metaphysics that is concerned with the nature of existence, what exists and categories into which things that exist can be organised. The terms “ontology” and “metaphysics” are commonly used interchangeably. Barry Smith, “Ontology” in Luciano Floridi (ed.), *Blackwell Guide to the Philosophy of Computing and Information* (Oxford: Blackwell, 2003).

<sup>5</sup> This line of analysis draws on the branch of metaphysics and epistemology (the latter term describing the study of knowledge and rational belief) known as “idealism”. This argues that reality is comprised of ideas or thoughts. It also draws on phenomenology, which describes objects in terms of the ways in which they are observed, experienced or dealt with by human consciousness.

<sup>6</sup> An example might be assessment of the Lockean, Hegelian and economic theories that are often provided as justifications for intellectual property laws. Another epistemological approach involves empirical research that infers knowledge *a posteriori* from analysed data.

law—and its concomitant rights—in mediating between the individual and society; or normative explorations of how intellectual property laws can be implemented to reflect underlying moral or political values.

In outlining a metaphysical approach to the study of intellectual property law, this article considers the nature of intellectual property from various perspectives. First, it surveys common approaches to the definition of “intellectual property”. Secondly, it examines the “imaginary”, legally constructed nature of both intellectual property laws and the objects they regulate. Thirdly, it takes a structural approach to examine the constituent properties that are typically used by the law to build intellectual property doctrines. Fourthly, it suggests that, as the term “intellectual property” is used in ways that tend to embrace legal doctrines falling outside the typical structural framework, a useful method to extend exploration of the metaphysics of this area of law may be to adopt a contextual or “family resemblance” approach to explain what intellectual property is and the nature of its existence. Finally, the article closes with an exploration of challenges to the intellectual property law framework that are emerging in the face of technological advances, as well as a prediction as to how intellectual property’s metaphysical nature is likely to respond.

## Defining “intellectual property”

If metaphysics deals with what something is and the nature of its existence, what is intellectual property? This section finds that the typical answers are somewhat unsatisfactory.

“Intellectual property” is a “contested concept” in that it does not have a precise definition. Yet it is widely understood to convey an agreed meaning. For example, few would doubt that intellectual property is worth billions of dollars worldwide or that some of the most valuable assets of the most successful corporations are “intellectual property”. Coca-Cola and Pepsi, Apple and Samsung, Mickey Mouse, “Just do it” and the Nike “Swoosh”, Viagra and Cialis, the FIFA World Cup and Harry Potter: all connote “intellectual property”, and each is extremely valuable. But what is this thing we call intellectual property?

While the term “intellectual property” has no settled definition, it is commonly described in imprecise—yet nonetheless generally accepted—ways that are not mutually exclusive. Each of these descriptions seems rather abstract, and none provides a full and satisfactory definition in itself. For example:

- *Enumerated approaches* contend that intellectual property law is made up of copyright law, trademark law, design law, patent law etc. Each of these areas of law is generally considered to be an “intellectual property” doctrine because it awards property rights over abstract objects associated with tangible things—ideas or thoughts. This is a very common methodology, and it is used by many governmental and international intellectual property authorities to describe what “intellectual property” means.<sup>7</sup>

However, enumerated approaches do not explain the conceptual framework or other features that characterise intellectual property. They do not capture any essential or typical characteristics of intellectual property laws or objects, and they ultimately fail to explain determinative criteria that have led to the enumerated doctrines being listed under the intellectual property umbrella.

- *Property approaches* contend that intellectual property is a type of property. While it is legally correct to say that intellectual property laws bestow “property” rights that owners can enforce against other people, many things are classified as “property”, and the term in itself says little about the nature of its subject matter. Adding the adjective “intellectual”

<sup>7</sup> The website of the World Intellectual Property Organization, for example, states: “Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.” World Intellectual Property Organization, “What is Intellectual Property?”, available at <http://www.wipo.int/about-ip/en/> [Accessed November 4, 2015].

suggests the property is intangible in nature, thus adding uncertainty to what “form” it takes.<sup>8</sup> As the law could theoretically recognise any sort of object as “property” to which rights attach, the term “property” is arguably so broad as to become almost meaningless for the purposes of definition.

In any event, the nature of property itself is very contested. If it is difficult to say what “property” is, and if people cannot agree on what it is, how useful is the notion of property—or of an “intellectual” type of property—as a definitional tool?

- Related to both the enumerated and property approaches, *rights approaches* contend that intellectual property is a bundle of (property) rights that can be exerted over the creations of human minds. Used in this way, people talk about intellectual property rights, or IPRs, which vary according to whether they are copyright rights, trademark rights, design law rights, patent rights or rights attaching to other “sui generis” intellectual property doctrines.<sup>9</sup> However, IPRs are just part of what is meant by “intellectual property”. “Intellectual property” can be used as an umbrella term to describe areas of law that create “intellectual property” (i.e. a legally constructed object being regulated) and the “rights” are the legal rules setting out who has permission to do what in relation to that property. But what does this tell us about the underlying nature of the objects of those intellectual property laws or rights?
- A *stipulative approach* contends that intellectual property is whatever the law says or stipulates it is. It may be that it was politically expedient to call something “intellectual property” (e.g. to appear to meet treaty requirements). However, this does not in itself tell us much about the nature of that group of legal doctrines or what is distinctive about what they regulate.
- An *intuitive approach* uses an “I know it when I see it” method of defining something as intellectual property. This is problematic because it is very superficial: it depends on impressions rather than deep investigations to find similarities between various legal doctrines. If something is classified as “intellectual property”, this may simply be because law-makers intuitively felt that it was like other laws known as “intellectual property” (e.g. because it referred to creations of the human mind) and was thus grouped with them.<sup>10</sup> Like stipulative approaches, an intuitive approach suffers from the weakness that it does not in itself tell us much about the nature of those legal doctrines or what is distinctive about them.

Another difficulty with these types of definitional approaches is that they do not cover all creations of the human mind. Many thoughts and inventions are excluded from intellectual property’s ambit, either because they fail to meet relevant criteria (e.g. they are insufficiently new, distinctive or original), they are excluded on public policy grounds (e.g. human beings are generally excluded from being owned as intellectual property) or because they have not been generally accepted as falling under the intellectual property umbrella (e.g. heraldic symbols, ephemeral dance performances, and—traditionally—many forms of indigenous knowledge).<sup>11</sup> What sets them apart from intellectual property?

<sup>8</sup> For a discussion of the weaknesses of defining intellectual property according to its intangibility, see Wendy Gordon, “Intellectual Property Law” in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003), p.618.

<sup>9</sup> Sui generis doctrines arise when intellectual property-like laws are created to cover situations not already covered by other intellectual property laws. They are typically governed by the same administrative and/or judicial systems established with respect to intellectual property law (and can thus be distinguished from other intellectual property-like doctrines such as heraldry, animal brands and registered standards). Examples of sui generis doctrines include database rights (e.g. the EU Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases) and patent-like laws covering plant breeders’ rights or plant variety rights.

<sup>10</sup> An example in some jurisdictions may be “traditional knowledge” or “cultural heritage” laws, which may regulate some of the same sorts of things as intellectual property laws. However, these doctrines tend not to be typified by similar structural frameworks to intellectual property laws, and they tend to offer different types of regulation.

<sup>11</sup> Note that “traditional knowledge” is increasingly being brought under the “intellectual property” banner. At the time of writing, the World Intellectual Property Organization is working towards the conclusion of international treaties to govern genetic resources, traditional knowledge and

Ultimately, intellectual property—like other creations of law—is simply what law-makers define or stipulate it to be. In practice, this encompasses aspects of each of the definitions above, with lawyers turning to statutes and case law to work out what objects law-makers have determined to fall within the definitions of copyright, trademark, design, patent and other intellectual property laws, and what rights attach to those objects. While this generally provides a workable method of using intellectual property law in practice, it does not tell us why law-makers have classified things as falling within or outside the bounds of “intellectual property”. Thus, it does not solve philosophical debates about the nature of intellectual property. Nor does it necessarily result in the internal consistency within intellectual property laws that could be produced by adhering to a coherent metaphysical framework.

For a more satisfactory approach to the metaphysics of intellectual property, an alternative approach is arguably needed. A helpful way of commencing such analysis may be to think about what is typical of intellectual property laws, how they are alike and whether the term “intellectual property” is used to refer to any unique features that set certain laws (or their objects of regulation) apart from other areas of law. The next two sections thus discuss the characteristic “intellectual”—or intangible, incorporeal, abstract or imaginary—nature of intellectual property doctrines and, flowing from that, the typical framework used to construct intellectual property’s most prominent doctrines of copyright, trademark, patent and design law.

## Intellectual property objects as imaginary legal constructs

If “intellectual property” is a contested concept, what is the nature of intellectual property’s existence?

### *“Intellectual property” as a legal construct*

Intellectual property is an institutional fact and a product of law. Delete the law, and the intellectual property would cease to exist. The underlying physical object to which intellectual property attaches may well still exist, but the intangible legal object created by intellectual property law—like the legal rights that attach to that object—is dependent on the law for its existence.<sup>12</sup> There could still be inventions, brands and literature even if there were not patent, trademark and copyright laws to give the creators of these things (and their successors in title) property rights in their creations, but the patent, trademark and copyright rights that attach to them would disappear.

More specifically, it can be said that intellectual property laws create “intellectual property”. That is, the objects that are regulated by intellectual property laws are brought into existence by those laws, as are the rights that then attach to those objects. As intellectual property laws are not naturally occurring but are brought into existence by human beings,<sup>13</sup> the legal system creates both intellectual property law and the objects of its regulation.<sup>14</sup> Legal concepts are the building blocks of the objects and rights that comprise intellectual property.<sup>15</sup> Thus, remove the law, and the intellectual property will disappear.

traditional cultural expressions. For further information, see the website of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, available at <http://www.wipo.int/tk/en/igc/> [Accessed November 4, 2015].

<sup>12</sup> Analysis of this facet of intellectual property law may fall within the branch of philosophy known as “metaphysical realism”. This holds that objects have no independent reality but exist only relative to other things.

<sup>13</sup> This view accords with the views of the philosophical school known as “Legal Realism”, which holds that all law is created by human beings.

<sup>14</sup> This contrasts with many other areas of law in which the legal system creates the law but the objects of the law’s regulation are objects (e.g. a house, a car or a horse) or behaviours (e.g. punching or killing someone, or driving at 90km/h) that exist independently of the law. While these objects or behaviours may be subject to legal definitions, those definitions tend to describe existing objects rather than creating imaginary adjuncts to those objects. However, intellectual property is not the only area of law to create and regulate its objects. Others include the law relating to corporations and financial instruments.

<sup>15</sup> This idea coincides with views held in “epistemological relativism” or “cognitive relativism”, which argues that human knowledge of the world is affected by—or relative to—human mental constructs.



### *Demarcating property around imaginary objects*

Whereas “real property” law essentially involves putting fences around land, deciding who owns the land on either side of the fence and working out what those owners are allowed to do with that land, intellectual property law involves putting imaginary fences around imaginary territory—which then constitutes property. The fences are legal boundaries that demarcate the limits of material that exists in human imaginations. They are constructed by applying legal concepts to physical conditions. While the territory demarcated by this process is imaginary, its legal application and enforcement can have very real and significant social and economic consequences.

Used in this context, the word “imaginary” does not imply that the territory and fences do not exist. Rather, they exist in human minds, in our collective legal imaginations. They exist not as physically measurable objects, though the concepts that create them are applied to underlying tangible objects from which the resulting intellectual property object cannot be separated. While consistent application of the legal concepts tends to result in relatively homogenous outcomes, a key difficulty in applying intellectual property law is deciding where those imaginary fences should be placed. How do you place fences around ideas?

The answer is that the fences are placed by applying conceptual legal tools to survey the imaginary object and demarcate its limits. These conceptual tools—such as notions of creatorship, originality or novelty, documented form or fixation (each of which is discussed below)—allow intellectual property professionals to answer the preliminary question of where to place the intangible fences around the ideas, information, knowledge and symbols that underlie objects of “intellectual property”. Concepts are employed when determining and demarcating the “subsistence” of a copyright object, “goodwill” in passing off, and the registrability of trademarks, patents and designs. Once this has been done, the demarcated imaginary territory is known as the “intellectual property”, over which rights can be applied and enforced.

To illustrate, patent owners demarcate the imaginary objects that will become their property by recording in “specifications” their instructions about how to make an invention. The invention has a physical form, but the property boundaries are charted by the way the invention is described in the specifications. Trademark owners likewise demarcate the boundaries of their property in the representation included in their registration application. Similarly, by applying the idea-expression dichotomy, copyright owners gain property rights over the material form in which an idea is expressed.

Difficulties arise when it comes to assessing the location of the boundaries. As there is not a precise correlation between the documented form and the property (the latter being more extensive than the former because it encompasses sufficiently similar objects), it is not possible to set out the precise scope of an intellectual property object except when assessing it relative to other objects.

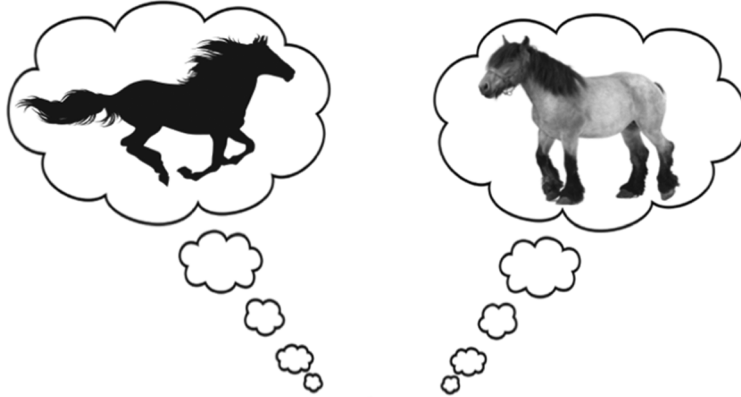
In intellectual property law, difficulties over boundaries tend to happen in two contexts. First, they occur during the registration process for trademarks, patents and designs, when applications may be rejected if they encroach on the territory of an existing intellectual property object. Secondly, they occur when one intellectual property holder claims that someone else has infringed its rights by encroaching on its intellectual territory. In both situations, any contests about the scope of the intellectual property object will be measured according to the way an idea has been set out by the creator’s documented form. As will be examined below, this may take the form of fixation in copyright, specifications in designs and patents, and a trademark’s (graphical) representation. It will therefore be appraised according to the connection between the intangible intellectual property and the tangible object with which it is associated.

### *Intellectual property’s nexus between the imaginary and the tangible*

In placing the fences that demarcate the limits of an object of intellectual property, the law creates a nexus between a tangible object and the imaginary legal boundary.

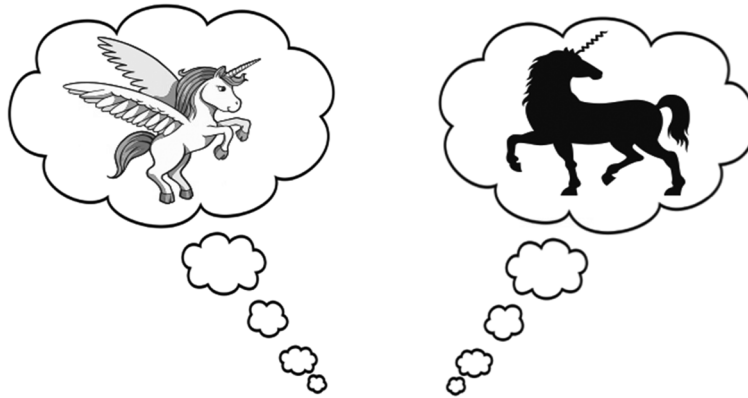
It is difficult to measure imaginary things, and it is difficult to be sure that different people are conjuring the same things in their imaginations. Yet that is what is required for intellectual property law to operate.

Suppose you ask two friends to imagine “a horse”. Will they imagine the same thing? Even if they imagine the same horse, will they imagine it in the same way?



**Horse<sup>16</sup>**

At least a horse is a physically existing object, so the two friends could both be shown the same horse, and each could describe what she or he sees. Even if they describe the horse from different perspectives, it is likely to have the same physical traits and dimensions in both descriptions. However, if the friends are asked to imagine “a unicorn”, it will be even harder for them to imagine the same thing as unicorns exist only in human imaginations—they cannot be physically surveyed.



**Unicorn<sup>17</sup>**

Just as it is difficult for one person to know that the horse or unicorn she is imagining is the same as the horse or unicorn her friend is imagining in this situation, it is difficult to be sure that two people are imagining the same thing when they think of an intellectual property object.

<sup>16</sup> Image attributions: Gelpi/Bigstock.com; Are Kamura/Bigstock.com; Life on White/Bigstock.com.

<sup>17</sup> Image attributions: Gelpi/Bigstock.com; MisterElements/Bigstock.com; Vectorhead/Bigstock.com.

Intellectual property professionals spend much time and effort trying to ensure that each of the imaginary objects that are being described can be identified consistently and accurately by different people. This is important in intellectual property contracts and licence agreements (where the scope of the object being agreed upon must be set out with sufficient clarity), as well as in intellectual property litigation and the avoidance thereof (where the scope of the intellectual property object being fought over must be established).

Much of the skill involved in using intellectual property law is related to being able to work out when copyright subsists or when trademarks, designs or patents will be registrable. However, the metaphysical nature of intellectual property objects means it is often impossible to give a definite answer as to whether copyright subsists before a court is asked to make a judgment on this point. Likewise, it can be difficult for a lawyer, patent- or trademark-attorney to predict whether or not a patent, design or trademark will be registrable before the Registry is asked to examine the application and determine this point. Sometimes contracts and licence agreements end up being the subject of litigation because the scope of the intellectual property material had not been set out with sufficient clarity and disagreement has arisen between the parties as to where the boundaries lie. Sometimes infringement situations arise when parties had different perceptions of the scope of the intellectual property object. Often it is simply not possible to know exactly where the boundaries of an intellectual property object lie until a governmental registry office determines these boundaries during an application for registration or until a court has been asked to determine the outcome of a dispute.

Registry offices—such as the European Patent Office (EPO), the Intellectual Property Office UK, IP Australia, the Office for Harmonisation in the Internal Market (OHIM), or the US Patent and Trademark Office (USPTO)—assess the boundaries of intellectual property objects when they determine whether approving an application would have the effect of a newly registered intellectual property object encroaching on territory already enclosed by pre-existing intellectual property objects. The registration authority will then conduct formalities, such as an examination of the application, before deciding whether to grant property rights. Once the patent, design or trademark has been registered (and certified, if necessary), the owner can enforce those rights. In turn, courts are frequently called upon to adjudicate on the boundaries of intangible intellectual property objects in infringement cases concerning disputes over similar material. Whether such boundaries have even come into existence can be argued in cases in which it is claimed that the purported intellectual property object is too similar to a pre-existing object (which may or may not be recognised as intellectual property). This may be raised in a case to invalidate an intellectual property object that has been improperly registered or as a defence to a claim of infringement by a purported intellectual property holder.

When assessing the scope of an alleged intellectual property object, the boundaries around the object, in a particular instance, can only be assessed by reference to other similar objects (which may or may not themselves be recognised as intellectual property objects). This means that, even after a registrar or court has determined the boundaries of a piece of intellectual property in one context, it is a ruling that applies only in the case at hand; the location of the boundaries more generally can remain uncertain. For example, suppose you write song lyrics that are protected by copyright law. If someone else comes along and writes similar lyrics, a court can determine whether they are so similar that they infringe your copyright, and the dispute can be resolved with respect to the set of facts in that particular case.<sup>18</sup> Suppose that another person then comes along and writes poetry that you think is very similar to your lyrics. In order to find out whether the poetry is infringing copyright in your lyrics, you will need to go to court again, this time against the poet. If you keep discovering and challenging similar words that you believe infringe your rights, this process could go on indefinitely. In the sense that the lyrics' copyright boundaries are always dependent

<sup>18</sup> Note, however, that appellate courts sometimes overturn the findings of lower courts after arriving at different conclusions about the scope of the property.

on what they are being assessed against, there are an infinite number of ways in which they could be encroached upon and infringed.

Thus, a metaphysical characteristic of intellectual property objects is that they are intrinsically difficult to survey and their full scope is always to be determined.

## **The structure of intellectual property laws**

If the definition of “intellectual property” is a contested concept, and if the scope of legally constructed intellectual property objects seems evanescent and infinitely measurable, what alternative approaches can help to identify what intellectual property is? This section suggests that analysing the constituent properties that are typically used by the law to build intellectual property doctrines—and their objects of regulation—is a helpful method of characterising the nature of intellectual property. The following discussion thus surveys typical structural features of intellectual property.

### *Method of creating the object regulated by intellectual property law*

An object of intellectual property law can be brought into existence in one of two ways.

One method is automatic; it occurs when an object of intellectual property regulation is created by complying with a list of requirements. Once these preconditions are met, property in the object is said to “subsist” (in the case of copyright) or is legally acknowledged to exist (e.g. if goodwill is found to be established in a passing off case, the effect is that an intellectual property object has been legally acknowledged to exist). Rights over this property can then be enforced by the owner in court. Intellectual property laws that create their objects of regulation in this way include copyright and, in some jurisdictions, designs and passing off, and breach of confidence.

Another method of creating an intellectual property object is through registration. Governmental intellectual property offices register property interests in objects that can be protected by intellectual property laws. Someone who wants to have a patent over an invention, an industrial design right over the appearance of an object, or a trademark to brand their goods or services in the market, can apply to their relevant governmental intellectual property authority for registration of the patent, design or trademark. By granting registration—and thus creating an item with respect to which property rights can be enforced—the legal system acknowledges that an object of intellectual property has come into existence.

Either way, the structure of what is recognised as intellectual property will have been constructed through the application of conceptual tools.

### *Conceptual tools used to create intellectual property objects*

In considering whether an intellectual property object subsists or is registrable, the following questions are normally asked: (i) Who was the *creator* of the material? (ii) Is the material sufficiently *creative*? and (iii) Has the purported intellectual property object been fixed in a *documented form*? These inquiries are used to define the imaginary boundaries separating one object of intellectual property from other objects of intellectual property, and separating intellectual property objects from unowned intellectual material that can be found in the “commons” or “public domain”.

Once these boundaries have been determined and have legal force, the intellectual property holder can exercise rights over the material that falls within them (though, as noted above, the location of those boundaries may be contentious). That person may also sue others who infringe those rights.

The rest of this section summarises concepts typically used to build intellectual property objects. Thanks to their appearance in international treaties, these concepts are relatively standardised worldwide, though

the terminology used (and the ways in which that terminology is applied or interpreted) may vary from jurisdiction to jurisdiction.

*Creator.* The person who creates the material that is to be protected as intellectual property is important in each intellectual property doctrine, where this person is described as follows:

<i>Intellectual Property Doctrine</i>	Copyright	Design	Patent	Trademark
<i>The Creator</i>	Author	Designer	Inventor	First commercial user or first registrant

Ownership of objects of intellectual property law is traced back to the original creator. Usually, the creator is the first owner of the intellectual property object. However, sometimes an employer or other person may be the first owner (e.g. because of a contract that has been entered into or the operation of a will). Assignment can have the effect of transferring ownership of intellectual property to someone other than the creator, and licensing can result in non-creators becoming intellectual property rights “holders”.

*Creativity.* Each intellectual property doctrine awards property rights over “new”, “original” or “distinctive” contributions by a creator.

The degree of creativity required before intellectual property will be recognised is described in the various intellectual property doctrines as follows:

<i>Intellectual Property Doctrine</i>	Copyright	Design	Patent	Trademark
<i>Creativity Requirement</i>	Original	Novel	Novel & inventive step/non-obvious	Distinctive

*Documented form.* For the most part, intellectual property laws protect the documented way in which an idea, invention or commercial symbol is recorded.

Specific terminology is used within each intellectual property doctrine to describe the requirement that the subject matter being regulated by the law be evidenced in a fixed or documented form. This terminology tends to be as follows:

<i>Intellectual Property Doctrine</i>	Copyright	Design	Patent	Trademark
<i>Documented Form</i>	Material Form or Fixation	Graphical Representation	Claims within the specifications	(Graphical) representation

### *Rights attaching to intellectual property objects*

Once the law has created a way of delineating the object to be regulated as intellectual property, it attaches rights to that object. These rights are similar across the different areas of intellectual property laws, and they tend to fall into two overlapping categories: (i) rights to use the intellectual property object; and (ii) rights to exclude or prevent others from using the intellectual property object.

Rights form an important part of each intellectual property law as they determine what people can do with their intellectual property. Intellectual property laws establish what rights are acquired upon subsistence or registration of the intellectual property object. These provisions are often duplicated in establishing what constitutes infringement of those rights.

### *Utility of a structural approach to the metaphysics of intellectual property law*

This kind of structural approach has obvious strengths when seeking to analyse what intellectual property is and the nature of its existence. However, while it is arguably important to consider this structure when describing the nature and existence of “intellectual property”, is it sufficient? When other legal or quasi-legal doctrines—such as hallmarks, guild marks, animal brands, coats of arms and trading standards—typically have a comparable structure to that outlined above, but are not typically identified as doctrines of “intellectual property” law, could an additional explanatory approach be of assistance?

### **Intellectual property in context: A family of laws**

Thus far, a metaphysical analysis has suggested the meaning of “intellectual property” is legally constructed but immeasurably contested. The structure of intellectual property is characterised by its conceptually constructed framework and, while the scope of intellectual property objects seems perpetually pliant due to their inherent intangibility, they can have a sufficiently certain existence to be roughly identifiable and, in some cases, extremely valuable.

But does this analysis break down if that description does not accommodate all of the legal doctrines that are commonly regarded as “intellectual property” or if it does accommodate doctrines that legal systems routinely leave out of intellectual property’s administrative ambit? In other words, does “intellectual property” fall victim to the ancient metaphysical “problem of universals”, concerning whether all instances of a thing must display certain universal characteristics. In the current context, such concerns give rise to questions about whether intellectual property—either viewed an intellectual property object or as a collection of intellectual property doctrines more generally—does in fact have finite, definable general truths and common essential characteristics (“essences”). Or is it just a flexible product of language? If the former, what other essences set it apart from things that are not considered to be intellectual property? If the latter, how can we realistically hope to say what intellectual property is or describe the nature of that existence?

A persuasive answer may come from asking a further question that references the work of several legal and linguistic philosophers. That is, does a metaphysical investigation of “intellectual property” need to produce a firm definition, and must it be able to be explicated in ubiquitous detail for it to be useful? Or can we adequately describe what intellectual property is, and the nature of its existence, without pointing to universally applicable characteristics and rules? An approach based on the sorts of analyses found in H.L.A. Hart’s notion of contextual definition and Ludwig Wittgenstein’s idea of “family resemblance” suggests the latter option is viable.

Oxford jurist Hart discussed the use of legal terms such as “law”, “corporation” and “rights”, each of which suggests meaning but does not have a naturally occurring counterpart in the physical world with reference to which it can be described. In defining such concepts, Hart suggested that such words serve an “operative” purpose by describing a function, and they can be distinguished from “descriptive” terms that correlate with a thing. In order to understand the function of operative concepts, Hart suggested it is necessary to investigate the context in which they are used.<sup>19</sup> Application of this contextual approach would ask us to consider the environment in which intellectual property laws are used and the functions they are expected to serve.

Responses to such an investigation point to the function of intellectual property as a legal mechanism for social ordering. In summary, intellectual property laws are used to create a dichotomy between “legal” and “illegal” with respect to items law-makers have chosen to “protect”. The law defines the scope of the

<sup>19</sup> H.L.A. Hart, “Definition and Theory in Jurisprudence” (1954) 70 L.Q. Rev. 37, 56. This coincides with the suggestion of American philosopher Richard Rorty that language is understood according to its context: Richard Rorty, “Texts and Lumps” in *Objectivity, Relativism and Truth: Philosophical Papers* (Cambridge: Cambridge University Press, 1991), Vol.1.

object to which the dichotomy will apply and—once debates are complete over if and where the boundaries lie—whether or not a parallel physical item is “legal” depends on its context and whether it has been created by, or with the authorisation of, the intellectual property owner. If it has, it is legal; if not, it is likely to be illegal (exceptions such as “fair use” in copyright law add extra steps to be considered before reaching this conclusion). Whether physically identical objects are “legal” or “illegal” depends on their provenance. If they have been authorised by the intellectual property owner, they are considered to be authentic and “legal”. If not, they are fakes, copies, knock offs, counterfeits or pirated.

What, then, is the difference between the sorts of things that intellectual property law deems inauthentic and the sorts of fakes and copies that lie outside intellectual property’s ambit?

In his book *Philosophical Investigations*, Ludwig Wittgenstein suggested that adequate definition is not dependent on the identification of “essences”—essential characteristics that can be thought of as necessary (but not necessarily sufficient)—for the identification of things falling into a particular class or classifications.<sup>20</sup> Instead, the things in a class may be identified by a “family resemblance”, such as the comparable roles they play in society. If a common feature of “intellectual property” doctrines is the roles they play in society, identifying the nature of these roles can tell us much about the nature of intellectual property.

If the function of intellectual property laws is to classify objects according to their authenticity, what role do such laws play in society? It is here that epistemological, political philosophical and normative explanations for intellectual property work hand-in-hand with metaphysical analyses to help explain the nature of intellectual property. For example, it might be concluded that the social, political or economic role of copyright, patent, design and trademark laws is to encourage creators to invest in designing or making creative new documented forms that might be of cultural or economic value. Or it might be concluded that the social, political or economic role of copyright, patent, design and trademark laws is to reward creators for designing or making creative new documented forms that benefit society. And so on. Whatever the conclusion(s) reached about the social role that intellectual property doctrines play, those with similar roles can be bundled together as having a “family resemblance”, which in turns assists with an elaboration of the nature of “intellectual property”.

Incorporating these sorts of contextual or environmental approaches arguably increases the sophistication of the metaphysical analysis outlined earlier. Rather than looking at intellectual property only in its own terms (e.g. by examining its internal structure), it looks at intellectual property from the external perspective of the social environment in which it operates. This helps to draw a much fuller picture of what intellectual property is and the nature of its existence.

## Potential challenges to the metaphysics of intellectual property law

The analysis thus far has left us with a complex picture of “intellectual property” as a contested concept whose meaning can perhaps be best explained by a two-part study involving:

- (i) an *internal analysis* of legal doctrines that create imaginary objects that are created by the application of concepts—such as creatorship, creativity and a documented form—and that are demarcated by reference to physical objects; and
- (ii) an *external analysis* of the context in which intellectual property laws are created and the roles they play (or are expected to play) in society.

This raises a final metaphysical question: are the meaning and nature of “intellectual property” immutable, or do they morph over time?

<sup>20</sup> Ludwig Wittgenstein, *Philosophical Investigations*, translated by G.E.M. Anscombe (New York: Macmillan, 1953).

Intellectual property laws have changed tremendously throughout history. While the first intellectual property legislation was arguably the Venetian Patent Statute 1474, many contemporary intellectual property laws can be traced directly to the Paris Convention for the Protection of Industrial Property 1883 (now covering patents, designs and trademarks) and the Berne Convention for the Protection of Literary and Artistic Works 1886 (copyright). Substantial differences can be found between the laws in place around the time those conventions were first concluded and the intellectual property laws in place now. However, if assessed by their structure or the roles they play in the legal system, it is arguable that intellectual property's fundamental conceptual tools, framework and functions have remained relatively stable over time. Despite all the technological advances over the 130 or so years since those treaties were concluded, there has been a steady requirement of a creator, sufficient creativity, fixation in a documented form, and a steady pattern of similar rights being awarded over legally created intellectual property objects.

Many intellectual property laws are described as “technology neutral” because their core principles can be applied to any field of technology. For example, where a “sound recording” is protected in copyright law, it may take the form of any technology in which sound can be recorded, such as a cardboard punch card, an LP record, a cassette tape, a compact disc, an MP3 or some future medium on which sound recordings can be stored.<sup>21</sup> Similarly, patents are given for inventions regardless of what sort of technology is employed to make them. With the exception of a small number of inventions that would be against public policy (such as those involving patenting of humans or of illegal inventions), all sorts of technologies can be patented so long as they meet the standard criteria for patentability. These criteria have existed for many years and employ the use of legal concepts to determine whether an item is patentable and, if so, the scope of its monopoly.

Could new disruptive technological developments shake the foundational legal concepts that are used to construct intellectual property objects?<sup>22</sup> Predictions that “the singularity is near”,<sup>23</sup> that scientists will soon be able to map every synaptic and neuronal connection in the human brain,<sup>24</sup> and that soon “humans will be able to upload their entire minds to computers and become digitally immortal”<sup>25</sup> sound transformative. Would scanning and mapping the contents of human minds or brains, or backing that “copy” of a person's thoughts and memories up to a computer, challenge fundamental premises underpinning copyright law? What would happen to the idea-expression dichotomy if all human ideas could be automatically mapped in material form by scanning and recording brain waves? Could the fixation requirements survive? The answer is arguably “yes”, fixation could survive such a development if the brain itself became recognised as sufficient documented form. The intangibility of intellectual property, and its conceptually constructed nature, means “intellectual property” is sufficiently adaptable to withstand these challenges.

If history is a guide, it seems likely that tweaks will be applied, and intellectual property law's concepts will gradually evolve in response to disruptive technologies. For example, where it was once required that documented forms be created by a human being to be recognised as intellectual property, technological advances have led (in some jurisdictions) to computer-generated works being recognised as intellectual property. Technological singularity may in turn lead to recognition of a cyborg as a creator in its own right. If so, such changes would probably not alter what intellectual property is or the nature of its existence.

<sup>21</sup> E.g. Copyright Act 1968 (Australia).

<sup>22</sup> An early elaboration of these ideas was outlined in Alexandra George, “Propertizing the Immaterial: The Commodification of Valuable Intangibles” in Eugene de Klerk and Rachel Moffat (eds), *Material Worlds* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2007), pp.134–147.

<sup>23</sup> Ray Kurzweil, *The Singularity Is Near: When Humans Transcend Biology* (New York: Viking, 2005). “Technological singularity” refers to the potential merging of humans and machines as parts of human bodies are repaired, augmented or replaced by artificial body parts and computers.

<sup>24</sup> See, for example, the work done by the firm Brain Backups (<http://www.brainbackups.com/>).

<sup>25</sup> Victoria Wollaston, “We'll Be Uploading Our Entire Minds to Computers by 2045 and Our Bodies Will Be Replaced by Machines within 90 Years, Google Expert Claims”, *Daily Mail Australia*, June 20, 2013, available at <http://www.dailymail.co.uk/sciencetech/article-2344398/Google-futurist-claims-uploading-entire-MINDS-computers-2045-bodies-replaced-machines-90-years.html> [Accessed November 4, 2015].



American psychologist and philosopher William James famously commented that “[m]etaphysics means nothing but an unusually obstinate effort to think clearly”<sup>26</sup> and to understand the theoretical confusions that can arise around intellectual disciplines. Understanding the metaphysics of intellectual property involves thinking clearly about the extent to which it is a legally constructed artifice,<sup>27</sup> the extent to which it is infinitely malleable, and what its context and environment tell us about its characteristics. While intellectual property laws might be buffeted by technological change, ongoing attention to the metaphysics of intellectual property may help to protect—and improve—their coherence in the future. Meanwhile, thinking clearly about the nature of the imaginary objects created by intellectual property laws might help to improve chances that these laws produce the outcomes that law-makers intend.

<sup>26</sup> William James, *The Principles of Psychology* (New York: Cosimo, 2013), Vol.1, p.145.

<sup>27</sup> This sentiment paraphrases the words of American poet Wallace Stevens, who wrote: “To regard the imagination as metaphysics is to think of it as part of life, and to think of it as part of life is to realise the extent of artifice. We live in the mind”. Wallace Stevens, “Imagination as Value” in *The Necessary Angel: Essays on Reality and the Imagination* (New York: Vintage, 1965), p.140.

# Lockean Foundations of Intellectual Property

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☞ Freedom of expression; Intellectual property; Jurisprudence

Most of us would recoil at the thought of shoplifting a ballpoint pen from a bookstore, and yet many do not hesitate to copy software or music worth thousands of dollars without paying for it. When challenged, replies like “I wouldn’t have purchased the software anyway” or “they still have their copy” are given to try to quell the sinking feeling that something ethically wrong has occurred.

One way of understanding these replies is to take them to suggest a real difference between intellectual property and physical or tangible property. My use of your intellectual property does not interfere with your use of it, whereas this is not the case for most tangible goods. Justifying intellectual property in light of this feature raises deep questions and has led many to question the idea of owning “soft” goods.

Anglo-American systems of intellectual property are typically modelled as utilitarian.<sup>1</sup> It is argued that adopting the systems of copyright, patent and trade secret leads to an optimal amount of intellectual works being produced and a corresponding optimal amount of social utility. Granting use, possession and control rights to both ideas and expressions of ideas is important as an incentive for the production of intellectual works.

Many utilitarians argue that private ownership of *physical* goods is justified because of the tragedy of the commons or problems with efficiency. Systems of private property are more efficient, or so it is argued, than systems of common ownership. It should be clear that this way of arguing is also based on providing incentives. Owners of physical goods are given an incentive to maintain or increase the value of those goods because the costs of waste and the like are internalised. The incentives-based utilitarian argument for systems of intellectual property protection is very similar. In this case, the government grants rights as an incentive for the production of intellectual works, and production of this sort, in turn, maximises social progress.

I have argued at length that incentives-based utilitarian arguments for systems of intellectual property are untenable.<sup>2</sup> Beyond the problems that numerous others and I have noted, there is the following worry: when viewed as state-created legal instruments, detached from moral foundations, the institutions of copyright, patent, trademark and trade secret are generally viewed as tools deployed and used by the

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<sup>1</sup> Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton: Princeton University Press, 1962); US National Patent Planning Commission, *The American Patent System: Report of the National Patent Planning Commission* (Washington, 1943), pp.783–784; US President’s Commission on the Patent System, *To Promote the Progress of Useful Arts in an Age of Exploding Technology: Report by United States President’s Commission on the Patent System* (Washington, 1966); Patrick Croskery, “Institutional Utilitarianism and Intellectual Property” (1993) 68 Chi.-Kent L. Rev. 631; Edwin C. Hettinger, “Justifying Intellectual Property” in Adam D. Moore (ed.), *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham: Rowman and Littlefield, 1997); Roger Miners and Robert Staaf, “Patents, Copyrights, and Trademarks: Property or Monopoly?” (1990) 12 Harv. J.L. & Pub. Pol’y 911; S. Chesterfield Oppenheim, “A New Approach to Evaluation of the American Patent System” (1951) 33 J. Pat. & Trademark Off. Soc’y 555; Tom G. Palmer, “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects” in Adam D. Moore (ed.), *Information Ethics* (2005), p.123; Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach” in Adam D. Moore (ed.), *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham: Rowman and Littlefield, 1997).

<sup>2</sup> Moore, *Intellectual Property and Information Control* (2004), pp.37–71; Adam D. Moore, “Intellectual Property, Innovation, and Social Progress: The Case against Incentives Based Arguments” (2003) 26 Hamline L. Rev. 602.

economically advantaged. Such arrangements appear to be unjustified while at the same time protecting wealth, status and privilege.

For example, consider the recent uproar when Turing Pharmaceuticals acquired the rights to distribute Daraprim, a drug used to treat toxoplasmosis.<sup>3</sup> In late summer 2015, Turing Pharmaceuticals raised the price from \$13.50 per pill to \$750 per pill. Widely criticised and after much public outcry, the price was lowered again. Along the way, however, came the calls for dismantling systems of intellectual property protection, especially patents. Similar calls related to copyright came after the Aaron Swartz tragedy.<sup>4</sup>

I will argue that intellectual property rights are no different than rights to “lives, liberties, and estates”—that is, intellectual property rights should not be seen as state-created entities offered as an inducement to bring forth new knowledge. The upshot of viewing intellectual property rights as state-created monopolies, far too often controlled by the powerful and well connected, is the seemingly pervasive opinion that systems of intellectual property represent the mafia family on a global scale. In my view, to be justified and to warrant worldwide coercion, systems of intellectual property should be grounded in a Lockean theory of property—a theory that acknowledges and protects the natural rights of authors and inventors. After presenting a Lockean argument, I will consider, and ultimately reject, several common objections to intellectual property.

## Lockean foundations for intellectual property

John Locke argued that individuals are entitled to control the fruits of their labour. Labouring, producing, thinking and persevering are voluntary, and individuals who engage in these activities are entitled to what they produce. Subject to certain restrictions, rights are generated when individuals mix their labour with an unowned object. “The root idea of the labor theory is that people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry.”<sup>5</sup> The intuition is that the person who clears land, cultivates crops, builds a house, nurtures livestock or creates a new invention obtains property rights by engaging in these activities.

Locke begins with the view that individuals own their own bodies and labour—that is, they are self-owners.<sup>6</sup> When an individual labours on an unowned object, her labour becomes infused in the object, and, for the most part, the labour and the object cannot be separated. The idea is that there is a kind of expansion of rights. We each own our labour, and when that labour is mixed with objects in the commons, our rights are expanded to include these goods.

Locke’s argument is not without difficulties.<sup>7</sup> David Hume argued that the idea of mixing one’s labour is incoherent—actions cannot be mixed with objects.<sup>8</sup> Nozick asked “[W]hy isn’t mixing what I own with what I don’t own a way of losing what I own rather than a way of gaining what I don’t?”<sup>9</sup> P.J. Proudhon argued that, if labour was important, the second labourer should obtain a property right in an object as reliable as the first labourer.<sup>10</sup> Jeremy Waldron and others have argued that mixing one’s labour with an unowned object should yield more limited rights than rights of full ownership?<sup>11</sup> Another worry is what constitutes the boundary of one’s labour. If one puts up a fence around ten acres of land, does one come to own all of the land within or merely the fence and the land on which it sits?<sup>12</sup> Finally, if the skills, tools

<sup>3</sup> Hadley Malcolm and Liz Szabo, “Turing Pharma CEO Recedes from Public after Backtracking on Drug Price Hike”, *USA Today*, September 24, 2015.

<sup>4</sup> Marcella Bombardieri, “The Inside Story of MIT and Aaron Swartz”, *Boston Globe*, March 30, 2014.

<sup>5</sup> Lawrence C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), p.32.

<sup>6</sup> There are several distinct strands to the Lockean argument. Becker, *Property Rights: Philosophic Foundations* (1977), pp.32–56.

<sup>7</sup> A. John Simmons voices these problems in *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), pp.267–269.

<sup>8</sup> David Hume, *Treatise of Human Nature*, s.3.2.3. See also Jeremy Waldron, “Two Worries about Mixing One’s Labor” (1983) 33 *Phil. Q.* 37, 40.

<sup>9</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p.175.

<sup>10</sup> P.J. Proudhon, *What Is Property?* (New York: Howard Fertig, 1966) (1867), p.61. See also John Plamenatz, *Man and Society* (London: Longmans, Green, 1963), p.247.

<sup>11</sup> Geraint Perry, *John Locke* (London: Allen & Unwin, 1978), p.52; Waldron, “Two Worries about Mixing One’s Labor” (1983) 33 *Phil. Q.* 37, 42.

<sup>12</sup> Nozick, *Anarchy, State, and Utopia* (1974), p.174, Thomas Mautner, “Locke on Original Appropriation” (1982) 19 *Am. Phil. Q.* 261.

and inventions used in labouring are social products, should society not have some claim on the labourer's property?<sup>13</sup>

Among defenders of Lockean-based arguments for private property, these challenges have not gone unnoticed.<sup>14</sup> Rather than rehearse these points and counterpoints, I would like to present a modified version of the Lockean argument—one that does not so easily fall prey to the objections mentioned above.

We may begin by asking how property rights to unowned objects are generated. This is known as the problem of original acquisition, and a common response is given by John Locke:

“For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is *enough and as good left for others*.”<sup>15</sup>

Locke claims that so long as the proviso that enough and as good is left for others is satisfied, an acquisition is of prejudice to no one.<sup>16</sup>

Suppose that mixing one's labour with an unowned object creates a prima facie claim against others not to interfere that can only be overridden by a comparable claim. The role of the proviso is to provide one possible set of conditions where the prima facie claim remains undefeated.<sup>17</sup> Another way of stating this position is that the proviso in addition to X, where X is labour, first occupancy or some other weak claim-generating activity, provides a sufficient condition for original appropriation.

Justification for the view that labour or possession may generate prima facie claims against others could proceed along several lines. First, labour, intellectual effort and creation are generally voluntary activities that can be unpleasant, exhilarating and everything in between. That we voluntarily do these things as sovereign moral agents may be enough to warrant non-interference claims against others.

A second, and possibly related, justification is based on merit. Sometimes individuals who voluntarily do or fail to do certain things deserve some outcome or other. Thus, students may deserve high honour grades, and criminals may deserve punishment. When notions of desert are invoked, claims and obligations are made against others—these non-absolute claims and obligations are generated by what individuals do or fail to do. Thus, in fairly uncontroversial cases of desert, we are willing to acknowledge that weak claims are generated, and if desert can properly attach to labour or creation, then claims may be generated in these cases as well.

Finally, a justification for the view that labour or possession may generate prima facie claims against others could be grounded in respect for individual autonomy and sovereignty. As sovereign and autonomous agents, especially within the liberal tradition, we are afforded the moral and legal space to order our lives as we see fit. As long as respect for others is maintained, we are each free to set the course and direction of our own lives, to choose between various lifelong goals and projects, and to develop our capacities and talents accordingly. Simple respect for individuals would prohibit wresting from their hands an unowned object that they acquired or produced. I hasten to add that, at this point, we are trying to justify weak non-interference claims, not full-blown property rights. Other things being equal, when an individual labours to create an intellectual work, then weak presumptive claims of non-interference have been generated on grounds of labour, desert or autonomy.

The underlying rationale of Locke's proviso is that, if no one's situation is worsened, then no one can complain about another individual appropriating part of the commons. If no one is harmed by an acquisition

<sup>13</sup> Ruth Grant, *John Locke's Liberalism* (Chicago: University of Chicago Press, 1987), p.112; John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971), p.104; Hettinger, “Justifying Intellectual Property” in Moore (ed.), *Intellectual Property* (1997), pp.22–26.

<sup>14</sup> Simmons, for example, provides a complex analysis of Lockean property theory and attempts to answer many of these problems. A. John Simmons, *The Lockean Theory of Rights* (1992).

<sup>15</sup> John Locke, *Second Treatise of Government* (1689), s.27 (emphasis added).

<sup>16</sup> Locke, *Second Treatise of Government* (1689), ss.33, 34, 36, 39.

<sup>17</sup> This view is summed up nicely by Clark Wolf, “Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations” (1995) 105 *Ethics* 791.

and one person is bettered, then the acquisition ought to be permitted. In fact, it is precisely because no one is harmed that it seems unreasonable to object to what is known as a Pareto-superior move.<sup>18</sup> Thus, the proviso can be understood as a version of a “no harm, no foul” principle.

Before continuing, I will briefly consider the plausibility of a Pareto-based proviso as a moral principle. First, to adopt a less-than-weak Pareto principle would permit individuals, in bettering themselves, to worsen others. Such provisos on acquisition are troubling because, at worst, they may open the door to predatory activity and, at best, they give anti-property theorists the ammunition to combat the weak presumptive claims that labour and possession may generate. Part of the intuitive force of a Pareto-based proviso is that it provides little or no ground for rational complaint. Moreover, if we can justify intellectual property rights with a more stringent principle, a principle that is harder to satisfy, then we have done something more robust, and perhaps more difficult to attack, when we reach the desired result.

To require individuals, in bettering themselves, to better others is to require them to give free rides.<sup>19</sup> In the absence of social interaction, what reason can be given for forcing one person, if she is to benefit herself, to benefit others?<sup>20</sup> If, absent social interaction, no benefit is required, then why is such benefit required within society? The crucial distinction that underlies this position is between worsening someone’s situation and failing to better it. I take this intuition to be central to a kind of deep moral individualism.<sup>21</sup> Moreover, the intuition that grounds a Pareto-based proviso fits well with the view that labour and possibly the mere possession of unowned objects creates a prima facie claim to those objects. Individuals are worthy of a deep moral respect, and this grounds a liberty to use and possess unowned objects.

Assuming a just initial position and that Pareto-superior moves are legitimate, there are two questions to consider when examining a Pareto-based proviso.<sup>22</sup> First, what are the terms of being worsened? This is a question of scale, measurement or value. An individual could be worsened in terms of subjective preference satisfaction, wealth, happiness, freedoms, opportunities etc. Which of these count in determining bettering and worsening (or do they all)? Secondly, once the terms of being worsened have been resolved, which two situations are we going to compare to determine if someone has been worsened? Is the question one of how others are now, after my appropriation, compared to how they would have been were I absent or had I not appropriated, or compared to some other state? This is known as the baseline problem.

In principle, the Lockean theory of intellectual property being sketched is consistent with a wide range of value theories.<sup>23</sup> So long as the preferred value theory has the resources to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds. For now, I will assume an Aristotelian eudaimonist account of value exhibited by the following theses is correct<sup>24</sup>:

<sup>18</sup> One state of the world,  $S_1$ , is Pareto-superior to another,  $S_2$ , if and only if no one is worse off in  $S_1$  than in  $S_2$  and if at least one person is better off in  $S_1$  than in  $S_2$ .  $S_1$  is *strongly* Pareto-superior to  $S_2$  if everyone is better off in  $S_1$  than in  $S_2$  and *weakly* Pareto-superior if at least one person is better off and no one is worse off.  $S_1$  is Pareto-optimal if no state is Pareto-superior to  $S_1$ , *strongly* Pareto-optimal if no state is *weakly* Pareto-superior to it, and *weakly* Pareto-optimal if no state is *strongly* Pareto-superior to it. Throughout this essay, I will use Pareto-superiority to stand for *weak* Pareto-superiority. Adapted from G.A. Cohen, “The Pareto Argument for Inequality” (1995) 12 Soc. Phil. & Pol’y 160. The “Pareto” condition is named after Vilfredo Pareto (1848–1923), an Italian economist and sociologist.

<sup>19</sup> I have in mind Nozick’s Robinson Crusoe case in *Anarchy, State, and Utopia* (1974), p.185.

<sup>20</sup> The distinction between worsening someone’s position and failing to better it is a hotly contested moral issue. E.g., David P. Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986) p.204; Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989).

<sup>21</sup> This view is summed up nicely by Anthony Fressola: “Yet, what is distinctive about persons is not merely that they are agents, but more that they are rational planners—that they are capable of engaging in complex projects of long duration, acting in the present to secure consequences in the future, or ordering their diverse actions into programs of activity, and ultimately, into plans of life.” Anthony Fressola, “Liberty and Property” (1981) 18 Am. Phil. Q. 320.

<sup>22</sup> One problem with a Pareto condition is that it says nothing about the initial position from which deviations may occur. If the initial position is unfair, then the Pareto condition allows those who are unjustly better off to remain better off. This is why the problem of original acquisition is traditionally set in the state of nature or the commons. The state of nature supposedly captures a fair initial starting point for Pareto improvements.

<sup>23</sup> It has been argued that subjective preference satisfaction theories fail to give an adequate account of bettering and worsening. Donald C. Hubin and Mark Lambeth, “Providing for Rights” (1988) 27 Dialogue: Can. Phil. Rev. 489.

<sup>24</sup> The following sketch of a theory of value is offered as a plausible contender for the correct account of bettering and worsening and should be taken as an assumption. Moreover, aside from being intuitive in its general outlines, the theory fits well with the moral individualism that grounds both a Pareto-based proviso and the view that liberty rights entail weak presumptive claims to objects.

1. Human well-being or flourishing is the sole standard of intrinsic value.
2. Human persons are rational project pursuers, and well-being or flourishing is attained through the setting, pursuing and completion of life goals and projects.<sup>25</sup>
3. The control of physical and intellectual objects is valuable. At a specific time, each individual has a certain set of things she can freely use and other things she owns, but she also has certain opportunities to use and appropriate things. This complex set of opportunities, along with what she can now freely use or has rights over, constitutes her position materially. This set constitutes her level of material well-being.

While it is certainly the case that there is more to bettering and worsening than an individual's level of material well-being, including opportunity costs, I will not pursue this matter further at present. Needless to say, a full-blown account of value will explicate all the ways in which individuals can be bettered and worsened with reference to acquisition.<sup>26</sup>

Lockeans as well as others who seek to ground rights to property in the proviso generally set the baseline of comparison as the state of nature. The commons or the state of nature is characterised as that state where the moral landscape has yet to be changed by formal property relations. Indeed, it would be odd to assume that individuals come into the world with complex property relations already intact with the universe. Prima facie, the assumption that the world is initially devoid of such property relations seems much more plausible. The moral landscape is barren of such relations until some process occurs. It is not assumed that the process for changing the moral landscape the Lockean would advocate is the only justified means to this end.<sup>27</sup>

For now, assume a state of nature situation where no injustice has occurred and where there are no property relations in terms of use, possession or rights. All anyone has in this initial state are opportunities to increase her material standing. Suppose Fred creates an intellectual work and does not worsen his fellows—alas, all they had were contingent opportunities—and Fred's creation and exclusion adequately benefits them in other ways. After the acquisition, Fred's level of material well-being has changed. Now he has a possession that he holds legitimately, as well as all of his previous opportunities. Along comes Ginger who creates her own intellectual work and considers whether her exclusion of it will worsen Fred. But which two situations should Ginger compare? Should the acquisitive case (Ginger's acquisition) be compared to Fred's initial state (where he had not yet legitimately acquired anything), his situation immediately before Ginger's taking, or some other baseline? If bettering and worsening are to be cashed out in terms of an individual's level of well-being with opportunity costs and this measure changes over time, then the baseline of comparison must also change. In the current case, we compare Fred's level of material well-being when Ginger possesses and excludes an intellectual work to his level of well-being immediately before Ginger's acquisition.<sup>28</sup>

A slightly different way to put this Lockean argument for intellectual property rights is:

**Step One: The generation of prima facie claims to control—**

Suppose Ginger creates a new intellectual work, creation, effort etc. yield her prima facie claims to control (similar to student desert for a grade).

<sup>25</sup> For similar views, see Aristotle, *Nicomachean Ethics*, bks I and X; Immanuel Kant, *The Fundamental Principles of the Metaphysics of Morals* (1785), academy edn; Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987); R.B. Perry, *General Theory of Value* (New York: Longmans, Green, 1926); Rawls, *A Theory of Justice* (1971), Ch.VII; Henry Sidgwick, *Methods of Ethics*, 7th edn (London: Macmillan, 1907).

<sup>26</sup> For a defence of this view of moral value, see Adam D. Moore, "Values, Objectivity, and Relationalism" (2004) 38 *J. Value Inquiry* 75.

<sup>27</sup> There may be many others such as consent theories, consequentialist theories, social contract theories, and theories of convention.

<sup>28</sup> For a defence of this baseline, see Adam D. Moore, "A Lockean Theory of Intellectual Property Revisited" (2012) 50 *San Diego L. Rev.* 1070.

**Step Two: Locke's proviso—**

If the acquisition of an intellectual object makes no one (else) worse off in terms of their level of well-being compared to how they were immediately before the acquisition, then the taking is permitted.

**Step Three: From prima facie claims to property rights—**

When are prima facie claims to control an intellectual work undefeated? Answer: when the proviso is satisfied. Alas, when no one else has been worsened, who could complain?

**Conclusion:**

So long as no harm is done, and the proviso is satisfied, the prima facie claims that labour and effort may generate turn into property claims.

**Illustrations**

Suppose Fred appropriates a grain of sand from an endless beach and paints a lovely, albeit small, picture on the surface. Ginger, who has excellent eyesight, likes Fred's grain of sand and snatches it away from him. On this interpretation of Locke's theory, Ginger has violated Fred's weak presumptive claim to the grain of sand. We may ask, what legitimate reason could Ginger have for taking Fred's grain of sand, rather than picking up her own grain of sand? If Ginger has no comparable claim, then Fred's prima facie claim remains undefeated. An undefeated prima facie claim can be understood as a right.<sup>29</sup>

Consider a different case. After weeks of effort and numerous failures, suppose I come up with an excellent recipe for spicy Chinese noodles—a recipe that I keep in my mind and do not write down. Would anyone argue that I do not have at least some minimal moral claim to control the recipe? Suppose that you sample some of my noodles and desire to purchase the recipe. Is there anything morally suspicious with an agreement between us that grants you a limited right to use my recipe provided that you do not disclose the process? You did not have to agree to my terms, and no matter how tasty the noodles are, you could eat something else. Here at the micro-level, we get the genesis of moral claims to intellectual works independent of social progress arguments. Like other rights and moral claims, effective enforcement or protection may be a matter left to governments. But protection of rights is one thing, while the existence of rights is another.

A common mistake about baseline worries and harming is illustrated by the following case. What if a perverse inventor creates a genetic enhancement technique that cures cancer, but decides to keep the technique secret or charge excessive prices for access? Those individuals who had no chance to survive before the creation now have a chance and are worsened because of the perverse inventor's refusal to let others use the machine.

The baseline this case implies cannot be correct. On this view, to determine bettering and worsening, we compare how individuals are before the creation of some value (in this case, the genetic enhancement technique) to how they would be if they possessed or consumed that value. But we are all worsened in this respect by any value that is exclusively held. I am worsened by your exclusive possession of your car because I would be better off if I exclusively controlled the car, even if I already owned hundreds of cars. If this were the correct comparison, then my exclusive possession of my heart (a value) would worsen others who did not have possession and an exclusive title. Any individual, especially one with a faulty heart, would be better off if he or she held title to my heart compared to anyone else's holding the title.

<sup>29</sup> For a defence of this view of rights, see Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton University Press, 1986); George W. Rainbolt, "Rights as Normative Constraints" (1993) 53 *Phil. & Phenomenological Res.* 93.

Moreover, this would be true independent of anyone's choices. Imagine that you voluntarily toss your dinner into a vat of acid and then complain to me that I am worsening you because I, who happen to have two dinners, refuse to give you one. Clearly this account of the baseline makes the notions of bettering and worsening too broad. Simple failures to benefit cannot constitute morally relevant worsenings that may in turn justify moral or legal sanctions.

If correct, this account justifies moral claims to control intellectual property like genetic enhancement techniques, movies, novels or information. Independent from incentives-based social-progress arguments when an individual creates an intellectual work and fixes it in some fashion, then labour and possession create a prima facie claim to the work. Moreover, if the proviso is satisfied, the prima facie claim remains undefeated, and moral claims or rights are generated.

## General problems for intellectual property

Assuming the account offered so far is compelling, there are several general arguments against intellectual property and systems of intellectual property protection to consider. Addressing these general challenges is important because it could be the case that intellectual property rights are easily overridden by competing moral claims.

### *The non-rivalrous argument: But they still have their copy!*

As noted in the opening, a common argument given by scholars who defend "free access" is that making a copy does not deprive anyone of their possessions. Intangible works are non-rivalrous, meaning that they can be used and consumed by many individuals concurrently. Edwin Hettinger argues:

"The possession or use of an intellectual object by one person does not preclude others from possessing or using it as well. If someone borrows your lawn mower, you cannot use it, nor can anyone else. But if someone borrows your recipe for guacamole, that in no way precludes you, or anyone else, from using it. This feature is shared by all sorts of intellectual objects. ...

This characteristic of intellectual objects grounds a strong prima facie case against the wisdom of private and exclusive intellectual property rights. Why should one person have the exclusive right to possess and use something that all people could possess and use concurrently? ... [T]he unauthorized taking of an intellectual object does not feel like theft."<sup>30</sup>

Consider a more formal version of this argument:

- P1.** If a tangible or intangible work can be used and consumed by many individuals concurrently (non-rivalrous), then access and use should be permitted.
- P2.** Intellectual works falling under the domains of copyright, patent and trade secret protection are non-rivalrous.
- C3.** So it follows that there is an immediate prima facie case against intellectual property rights or for allowing access to intellectual works.

The weak point in this argument is the first premise—especially given that the second premise is generally true.<sup>31</sup> Consider sensitive personal information. It seems patently false to claim that just because this information can be used and consumed by many individuals concurrently that there is a prima facie moral claim that this be so. Snuff films, obscene pornography, information related to national security, personal financial information and private thoughts are each non-rivalrous. Nevertheless, this fact does not, by itself, generate prima facie moral claims for access and use.

<sup>30</sup> Hettinger, "Justifying Intellectual Property" in Moore (ed.), *Intellectual Property* (1997), p.30.

<sup>31</sup> Some kinds of information (e.g. stock tips) are rivalrously consumed.



In summary, the claim that access should be allowed and perhaps promoted for goods that are non-rivalrous is without merit. Intangible works of all sorts, including sensitive personal information, financial records and information related to national security, are non-rivalrous. It may even be the case that our bodies could be non-rivalrously used by others. Nevertheless, this feature of most intangible goods and some tangible goods does not obviously justify such use.

### *The free speech argument against intellectual property*

A prominent and widespread argument against legal protection of intellectual property is that these systems are inconsistent with our commitment to freedom of thought and speech.<sup>32</sup> For example, consider how the Church of Scientology has used copyright and other legal protections to restrict access to their religious views.<sup>33</sup> According to this objection, intellectual property rights are troublesome because they limit access to and uses of intellectual works. This sort of restriction impoverishes the commons of thought and discussion. Lawrence Lessig writes:

“*Gone with the Wind* was published in 1936 ... and the copyright would have expired in 1992. ... But because of extensions ... that copyright [has] now [been] extended. ... In 2001, Alice Randall tried to publish ... a parody ... called *The Wind Done Gone* ... and the Mitchell estate ... brought a federal lawsuit to stop its publication. ...

To most people, this is plainly absurd. *Gone with the Wind* is an extraordinarily important part of American culture; at some point the story should be free for others to take and criticize in whatever way they want.”<sup>34</sup>

The problem with this objection to intellectual property should be obvious. By allowing robust control with specific limits (fair use, the idea/expression distinction and sunsets on rights), we enhance rather than impoverish the commons of thought and discussion. To put the point another way, a system that allows initial restricted access incentivises authors and inventors to create intellectual works. These works are then published or distributed, and the result is an enhanced commons of thought and discussion. Simply put, we get more to talk about and build upon by adopting a system of intellectual property.

Moreover, consider the contentious, yet established, idea/expression rule of copyright.<sup>35</sup> Copyright only applies to fixed expressions, not to ideas that may make up a fixed expression. For example, I may read Einstein’s original articles on special and general relativity, express his ideas in my own words and obtain a copyright in my expression. Sure, I may be guilty of plagiarism, but so long as my expressions are not copied from, or substantially similar to, Einstein’s original, I can obtain a copyright.

If correct, the primary thrust of the free speech argument against intellectual property rights misses an important point. Aside from fair use, the idea/expression distinction in copyright provides a way for ideas to have an impact independent of how authors control their intellectual works. While it is true that a specific expression and substantially similar artefacts may be controlled and restricted, the ideas that make up the work are (in most cases) free for anyone to consider; information storehouses, like libraries and now the web, ensure that access is widespread.

<sup>32</sup> E.g., James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (New York: Penguin Press, 2004); Hettinger, “Justifying Intellectual Property” in Moore (ed.), *Intellectual Property* (1997), p.30; Melville Nimmer, “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?” (1970) 17 UCLA L. Rev. 1180; Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1992) 68 Chi.-Kent. L. Rev. 841, 866; John Perry Barlow, “The Economy of Ideas: A Framework for Rethinking Patents & Copyrights in the Digital Age (Everything You Know about Intellectual Property Is Wrong)”, *Wired*, March 1994.

<sup>33</sup> *Church of Scientology International v Fishman and Geertz* CV 91-6426, (HLH (Tx), US District Court for the Central District of California.

<sup>34</sup> Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), pp.198–199.

<sup>35</sup> US Copyright Act 1976 s.102(b) states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

Finally, it is not at all clear that free speech is so presumptively weighty that it nearly always trumps other values. Shouting at someone over a bullhorn all day is not something we would countenance as protected free speech. Hate speech, obscene expressions, sexual harassment and broadcasting private medical information about others are each examples of speech that we are willing to limit for various reasons. Perhaps intellectual property rights can be viewed in this light.

### *The social nature of intellectual works argument against intellectual property*

According to the “social nature of intellectual works” argument, intellectual property unjustly benefits authors and inventors by allowing individuals monopoly control over what is a social product. Proponents of this “shared culture” view would have us imagine that allowing intellectual property rights is like giving the person who places the last brick in a “public works” dam exclusive ownership of the dam. This view is widespread, and virtually every attack on intellectual property includes some version.<sup>36</sup>

But like the defender of the first cause argument for the existence of God who rides the principle of sufficient causation to a certain point and then conveniently abandons it (every event or object needs a sufficient cause and nothing is self-caused *except* God), the proponents of the “shared culture” view are guilty of a similar trick. “Shared culture” or the social nature of intellectual property view is sufficient for undermining intellectual property rights or robust control of intellectual works, but conveniently not strong enough to undermine student desert for a grade, criminal punishment or other sorts of moral evaluation.

Additionally, it is doubtful that the notion of “society” employed in this view is clear enough to carry the weight that the argument demands. In some vague sense, we may know what it means to say that Lincoln was a member of American *society* or that Aristotle’s political views were influenced by ancient Greek *society*. Nevertheless, the notion of “society” is conceptually imprecise—one to which it would be dubious to attach ownership or obligation claims. Those who would defend this view would have to clarify the notions of “society” and “social product” before the argument could be fully analysed.

But suppose for the sake of argument that supporters of this view come up with a concise notion of “society” and “social product”. We may ask further, why think that societies can be *owed* something or that they can *own* or *deserve* something?<sup>37</sup> Surely, it does not follow from the claim that X is a social product that society owns X. Likewise, it does not follow merely from the claim that X is produced by Ginger, that Ginger owns X—for example she could be working for Fred. It is true that interactions between individuals may produce increased market values or add to the common stock of knowledge. What may be denied is that these by-products of interaction, market value and shared information, are in some sense owned by society or that society is owed for their use. This should not be assumed without argument. It is one thing to claim that information and knowledge is a social product—something built up by thousands of individual contributions—but quite another to claim that this knowledge is owned by society or that individuals who use this information owe society something in return.<sup>38</sup>

Suppose that Fred and Ginger, along with numerous others, interact and benefit me in the following way. Their interaction produces knowledge that is then freely shared and allows me to create some new value, V. Upon creation of V, Fred and Ginger demand that they are owed something for their part. But what is the argument from third party benefits to demands of compensation for these benefits? Why think

<sup>36</sup> See, for example, the works of John Perry Barlow, James Boyle, Arthur Kuflik and Lawrence Lessig.

<sup>37</sup> Do notions of *ownership*, *owing* or *deserving* even make sense when attached to the concept of society? If so and if different societies can *own* knowledge, do they not have the problem of original acquisition? See Nozick, *Anarchy, State, and Utopia* (1974), p.178. Seana Shiffrin’s interpretation of Locke’s theory of property appears to fall prey to this worry. Seana Valentine Shiffrin, “Lockean Argument for Private Intellectual Property” in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001), p.138.

<sup>38</sup> Lysander Spooner argued that one’s culture or society plays almost no role in the production of ideas: “Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation, than a thought. It originates in the mind of a single individual. It can leave his mind only in obedience to his will. It dies with him, if he so elect.” Lysander Spooner, “The Law of Intellectual Property: Or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas” in Charles Shively (ed.), *The Collected Works of Lysander Spooner* (Weston: M&S Press, 1971), p.58.

that there are “strings” attached to freely shared information? And if such an argument can be made, it would seem that burdens create reverse demands. Suppose that the interaction of Fred and Ginger produces false information that is freely shared. Suppose further that I waste 10 years trying to produce some value based in part on this false information. Would Fred and Ginger, or society, owe me compensation?

The position that “strings” are attached in this case runs parallel to Robert Nozick’s benefit “foisting” example. In Nozick’s case, a benefit is foisted on someone and then payment is demanded. This seems an accurate account of what is going on in this case as well. As Nozick writes:

“One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this. If you may not charge and collect for benefits you bestow without prior agreement, you certainly may not do so for benefits whose bestowal costs you nothing, and most certainly people need not repay you for costless-to-provide benefits which yet *others* provided them. So the fact that we partially are “social products” in that we benefit from current patterns and forms created by the multitudinous actions of a long string of long-forgotten people, forms which include institutions, ways of doing things, and language, does not create in us a general free floating debt which the current society can collect and use as it will.”<sup>39</sup>

Arguably common knowledge and “shared culture” are the synergistic effects of individuals freely interacting. If a thousand of us *freely* give our new and original ideas to all of humankind, it would be illicit for us to demand compensation, after the fact, from individuals who have used our ideas to create things of value. It would even be more questionable for individuals 10 generations later to demand compensation for the ideas that we freely gave. Lysander Spooner puts the point succinctly:

“*What* rights society have, in ideas, which they did not produce, and have never purchased, it would probably be very difficult to define; and equally difficult to explain *how* society became possessed of those rights. It certainly requires something more than assertion, to prove that by simply coming to a knowledge of certain ideas—the products of individual labor—society acquires any valid title to them, or, consequently, any *rights* in them.”<sup>40</sup>

But once again, suppose for the sake of argument the defender of this view can justify societal ownership of general pools of knowledge and information. Nevertheless, it could be argued that we have already paid for the use of this collective wisdom when we pay for education and the like. When a parent pays for a child’s education, through fees or taxation, it would seem that the information—part of society’s common pool of knowledge—has been fairly purchased. And this extends through all levels of education and even to individuals who no longer attend school.

Finally, in many contexts where privacy interests are at stake, for example, an appeal to the social nature of intellectual property and information seems unconvincing—assuming that this view can be saved from the points already discussed. The fact that sensitive personal information about an individual’s medical history is a social product may have little force when it comes to questions of access and control. This is also true of information related to national security and financial information.

## Conclusion

As noted in the opening, it seems that adherence to an incentives-based social progress foundation for institutions of intellectual property has given way to the view that economically privileged elites shape our policy. How else could one interpret the US case of *Eldred v Ashcroft* which challenged the 20-year extension of copyright protection provided by the Sonny Bono Copyright Term Extension Act of 1998?<sup>41</sup>

<sup>39</sup> Nozick, *Anarchy, State, and Utopia* (1974), p.95.

<sup>40</sup> Spooner, “The Law of Intellectual Property” in Shively (ed.), *The Collected Works of Lysander Spooner* (1971), p.103.

<sup>41</sup> *Eldred v Ashcroft* 537 U.S. 186 (2003).

In *Eldred*, 17 prominent economists, including five Nobel laureates, claimed that adding 20 years to copyright protection would have little impact on incentives to create.<sup>42</sup> The Supreme Court ignored the views of these economists and simply extended copyright protection. If we continue down the road of economic privilege, then we risk undermining both the institutions and the very idea of intellectual property. This would explain the current attitudes about copying and piracy.

Locke wrote:

“Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst.”<sup>43</sup>

Given allowances for independent creation and that the frontier of intellectual property is practically infinite, the case for Locke’s water-drinker and the author or inventor are quite alike. Once a plausible measure and baseline are adopted, we are in a position to consider the actual contributions of authors and inventors. In most cases, we are bettered by these intellectual efforts even when we are denied immediate access. Perhaps less controversially, we are at least not worsened by these activities. In any case, by working out the theoretical underpinnings of a Lockean theory of intellectual property, we may provide a defensible moral foundation for systems of copyright, patent and trade secret protection. Intellectual property is not theft; rather, it reflects our commitments to innovative activity and to protecting the natural rights of authors and inventors.

<sup>42</sup> Stan J. Liebowitz and Stephen Margolis, “Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects” (2005) 18 Harv. J.L. & Tech. 435.

<sup>43</sup> Locke, *Second Treatise of Government* (1689), s.33.

# Three Arguments on Locke, Authorship, Communication and Solitude

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☞ Copyright; Intellectual property; Jurisprudence

## Introduction

When authors and artists create, they bring into the creative process two kinds of properties: those that exclusively belong to them and those that they acquired by virtue of their membership in a certain social order. Every copyrighted work is a merger of both kinds of properties. Once authors and artists combine these properties and express their creative talent, they deserve rights commensurate with their efforts. A common justification to these rights is the understanding that humans possess natural property rights in their body and personality's creative efforts. Protection of such rights forms a constitutive aspect in the "well-being and fulfillment of human persons and the communities they form".<sup>1</sup> The ubiquity of this view in intellectual property scholarship is overtly justified on Lockean grounds.

John Locke is the most celebrated political philosopher in intellectual property discourses. Scholars steadfastly embrace Locke's labour theory of property as a justification to intellectual property rights and their limits.<sup>2</sup> In this way, scholars leave many of Locke's writings unexplored, constructing incomplete Lockean arguments. For example, Locke's theories on the origin of knowledge, social relations and communication challenge common understandings of his vision on ownership of cultural and intellectual properties.<sup>3</sup> In this article, I continue and argue that the Lockean theory of natural property rights requires attention to other parts of his political and epistemological theories before employing Locke to justify claims to "promote the Progress of Science and the useful Arts".<sup>4</sup>

In this article, I aim to examine three Lockean arguments relevant to ownership of intellectual properties, with a focus on copyrighted materials. The arguments emphasise Locke's view on the dissemination of knowledge, the importance of stable social bonds, friendship and communication. Detaching these arguments from Locke's wider theory is, I claim, a misunderstanding in the moral standing of his political theory on property rights and social duties. The arguments I discuss provide new insights and refine existing claims that scholars have developed on how Locke would define who is an author and how much copyright authors are eligible to receive. This article does not aim to provide an exhaustive treatment of these arguments; rather, it introduces and invites them to the debate on how to more accurately understand John Locke's theories and their applicability to contemporary intellectual property.

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<sup>1</sup> Robert P. George, "Natural Law" (2008) 31 Harv. J.L. & Pub. Pol'y 171, 172.

<sup>2</sup> E.g. Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar Publishing, 2011), pp.67–103; Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011), pp.31–67; Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 Yale L.J. 1533; Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Geo L.J. 287; Adam D. Moore, "A Lockean Theory of Intellectual Property Revisited" (2012) 49 San Diego L. Rev. 1069; Seana V. Shiffrin, "Lockean Arguments for Private Intellectual Property" in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001); Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 Chi.-Kent L. Rev. 841.

<sup>3</sup> Lior Zemer, "The Making of a New Copyright Lockean" (2006) 29 Harv. J.L. & Pub. Pol'y 891.

<sup>4</sup> US Constitution art.I s.8 cl.8.

This article begins by describing the three arguments. It discusses Locke's three inalienable natural rights—namely, life, liberty and property—and how they relate to learning and the dissemination of knowledge. The article then explores the epistemological aspects of creative personalities and their need to communicate with other personalities. Prior to its conclusion, the article emphasises Locke's fundamental importance on preserving communication—with friends, scholars and strangers—as a basic human value.

### Three arguments

In his earliest work, *Essays of the Laws of Nature* published in 1663, Locke asserts that social ties and trust define the bonds in society and that they cannot be justified on grounds of utility because, if this is so, “all justice, friendship, and generosity are taken away from life”.<sup>5</sup> Contemporary copyright scholars are divided: some favour utilitarian justifications to copyright while others embrace social and communitarian principles of creation and ownership. Scholars who belong to the former circle treat “works of authorship as fungible commodities”<sup>6</sup> and as the exclusive domain of creators. They argue that property rights secure authors and artists an adequate reward to their efforts and provide social wealth to the public. Scholars who reject these arguments claim that utilitarian justifications have become too strong<sup>7</sup> and protect only convenient aspects of the creative process.<sup>8</sup> Locke was aware that utility is able to protect only limited aspects of ownership and that a balanced system of property allocation requires a communicative and social understanding of creation and ownership.

Locke's theories of property, knowledge, friendship and communication, which I explore in this article, confirm that the creative individuals' ability to express their personality, internalise external social processes and alter cultural symbols is not unlimited. It requires a flexible and continued access right to knowledge and that only stable social relations and communicative opportunities can facilitate this right. For example, Locke writes that reading improves the understanding, but

“[t]he improvement of the understanding is for two ends: first our own increase of knowledge; secondly, to enable us to deliver and make out that knowledge for others. The latter of these, if it be not the chief end of study in a gentlemen, yet it is at least equal to the other, since the greatest part of his business and usefulness in the world, is by the influence of what he says, or writes to others.”<sup>9</sup>

Human development is dependent, amongst other, on social interaction, communication and knowledge. Without the diffusion of knowledge, many social interactions, personal developments and creative expressions would be a right reserved solely to the elite and powerful. The right to access and consume knowledge is closely related to the natural rights of property or liberty. If natural law identifies principles of right action and requires “a respect for rights people possess simply by virtue of their humanity—rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect, but to the extent possible, also to protect”—then enclosure of knowledge through the allocation of exclusive

<sup>5</sup> John Locke, *Essays on the Laws of Nature*, edited by W. Von Leyden (Oxford: Clarendon Press, 1954), pp.212–213.

<sup>6</sup> Locke, *Essays on the Laws of Nature*, edited by Leyden (1954), p.24. The utilitarian justification for intellectual property regimes can be traced back to the first modern copyright law, the Statute of Anne 1710 (“An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies, during the Times therein mentioned”).

<sup>7</sup> Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford University Press, 2010), p.xiii (“American copyright law rewards economic incentives almost exclusively.”).

<sup>8</sup> Madhavi Sunder, “IP” (2006) 59 Stan. L. Rev. 257, 263 (“[T]raditional law and economics analysis fails to capture fully the struggles at the heart of... intellectual property law.”).

<sup>9</sup> John Locke, *Some Thoughts Concerning Reading and Study for a Gentlemen* (1703) reprinted in Mark Goldie (ed.), *Locke: Political Essays* (Cambridge: Cambridge University Press, 1997). The importance of disseminating knowledge, communication and the place of the audience in Locke's writings is also evident in his statement: “When a man speaks to another, it is that he may be understood; and the end of Speech is, that those Sounds, as Marks, may make known his Ideas to the Hearer.” John Locke, *Essay Concerning Human Understanding*, edited by Peter H. Niddich (Oxford: Clarendon Press, 1975) (1690), bk.III, Ch.ii, s.2. All subsequent references to the Essay are by book, chapter and section.

property rights in copyrighted works affects the basic natural right humans have “simply by virtue of their humanity”.<sup>10</sup>

James Harris defined natural rights as rights grounded in the “interaction between the formal and substantive requirements of *just treatment* and the *fact of the world*”.<sup>11</sup> The three arguments that I develop in this article aim to justify this claim on Lockean grounds. The first argument holds that the trinity of natural rights—life, liberty and property—inherently includes the right to learn and consume knowledge, as well as the duty to not stifle learning and dissemination of knowledge. The second argument claims that personalities talk amongst each other. By this, I mean that individuals communicate and interact in society and collectively create ideas which they then consume. This process makes the creative act a puzzle of interactions and contributions from sources other than the author himself. The third argument takes Locke’s approach to communication with friends and strangers and shows that, for him, communication is fundamental to human flourishing and, based on his epistemology, to defining the appropriate boundaries of the creative act and ownership of intellectual properties. I will show that Locke’s approach to communication—considered an “heirloom from the liberal tradition beginning with Locke”,<sup>12</sup> especially his distinction between ordinary and complex communication—is fundamental to discourses on the limits to what authors and artists can claim to have created and deserve to own.

## Life, liberty, property *and* learning

A triangle of inalienable natural rights—life, liberty and property<sup>13</sup>—guides Locke in constructing his theory of a stable and just civil society.<sup>14</sup> Protection for these rights was unavailable in the pre-social society where members were not equal commoners or allies, but fierce competitors for the same resources without rules regulating conducts.<sup>15</sup> In his theory, Locke is committed to the preservation of basic human requirements, including happiness,<sup>16</sup> ownership of body and soul and their laborious expressions,<sup>17</sup> social duties and accumulation of knowledge.<sup>18</sup> Copyright laws translate these Lockean interests into legal rights and duties. Although we were born equal and given the world collectively, we are bound to give up part of our liberties in order to reward and incentivise those who create social value. Once one creates value, common property transforms into a private entity, and the liberty of others to access the creation is restricted.<sup>19</sup> On copyright terms, access to works protected under copyright laws is restricted in order to allow owners to sell, license or donate these works as part of their right to exclude others from using the work while it is under legal protection.

In order to justify this proprietarisation process, Locke argues that labour provides the ownership title to property.<sup>20</sup> Mixing labour with, and producing added value to, commonly owned resources justifies the

<sup>10</sup> George, “Natural Law” (2008) 31 Harv. J.L. & Pub. Pol’y 171.

<sup>11</sup> James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), pp.183, 213.

<sup>12</sup> John Durham Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 397.

<sup>13</sup> John Locke, *Second Treatise of Government* (1689) reprinted in John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1967), Ch.ix, s.123. All subsequent references to the *Second Treatise of Government* are by book and section. See also Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.xxviii, s.9 (using the trinity “Lives, Liberties and Possessions”).

<sup>14</sup> Peter S. Menell, “Intellectual Property and the Property Rights Movement” (2007) 30 *Regulation* 36, 38.

<sup>15</sup> In this society, “everyone has the executive power of the law of nature”. Locke, *Second Treatise of Government* (1689), Ch.ii.

<sup>16</sup> John Locke, *Understanding* (1677) reprinted in Goldie (ed.), Locke (1997).

<sup>17</sup> Locke, *Second Treatise of Government* (1689), Ch.v, s.27 (“Though the Earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.”).

<sup>18</sup> In *Labour*, Locke highlights the advantages of labour and its importance for human happiness and acknowledges the need for “more knowledge, peace, health and plenty”. John Locke, *Labour* (1693) reprinted in Goldie (ed.), Locke (1997).

<sup>19</sup> Hughes, “The Philosophy of Intellectual Property” (1988) 77 *Geo L.J.* 287, 305–310 (providing that the value-added constitutes a contribution that warrants the conferment of property rights).

<sup>20</sup> Locke, *Second Treatise of Government* (1689), Ch.v, s.27 (“Whatsoever then he removes from out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.”).

integration of a physical object into the labourer's realm, the *suum*.<sup>21</sup> This, however, does not grant the person an exclusive right in his laborious properties without considering the rights and needs of other commoners. Ownership of the mixed property is conditioned on the requirement that takings from common resources meet the provisos of not depleting or misusing its resources,<sup>22</sup> and allowing people in need to access the newly created resource.<sup>23</sup>

Note that property is an open-ended category which is not confined to physical objects or items necessary for basic sustenance such as moss and leaves<sup>24</sup> “gathered from the Trees in the Wood”,<sup>25</sup> or bread, wine, cloth, bricks, masts, ropes and tar that people make.<sup>26</sup> Property includes expressions of personality and talent. It includes what “Men have in their Persons as well as Goods”.<sup>27</sup> Men labour on their person through interaction in society and create valuable commodities in which their incorporeal *person* is vested. Therefore, a labourer has a legitimate claim to property in the expression of his *person* grounded in intangible creations such as art and inventions.<sup>28</sup> As Locke writes:

“From all which it is evident, that though the things of Nature are given in common, yet Man (by being Master of himself, and Proprietor of his own person, and the Actions or Labour of it) had still in himself the great Foundation of Property; and that which made up the great part of what he applied to the Support or Comfort of his being, when *Invention and Arts had improved the conveniences of Life*, was perfectly his own, and did not belong in common to others.”<sup>29</sup>

Copyright laws protect the expressions of talented personalities embedded in “Invention and Arts” that improve “the conveniences of Life”. This legal protection ensures happiness and self-fulfilment. As Locke contends: “The business of men being” is “to be happy in this world by the enjoyment of the things of nature subservient to life, health, ease, and pleasure”.<sup>30</sup> In other words, human happiness requires a private realm where certain “conveniences of life”<sup>31</sup> are protected, and, except for traditional properties such as land and chattels, these include intellectual properties. Ownership of these properties rewards “the proper enjoyment of our bodies and the highest perfection of that, and the other of our souls”.<sup>32</sup> Again, this enjoyment is part of what the trinity—life, liberty and property—covers.

However, no labourer creates *ex nihilo*. Reaching a social condition that allows one to claim rewards for the laborious expressions of one's body and soul requires access to knowledge and information, apart

<sup>21</sup> The *suum* means what belongs to a person is what is one's own. For a brief explanation of the term “*suum*”, see Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991), pp.169–173. As Simmons writes: “mixing labor is not a way of losing our labor. ... Our labor extends our selves ... into the natural world. Our purposive activities are inseparable from ourselves.” A. John Simmons, “Makers' Rights” (1998) 2 J. Ethics 197, 211.

<sup>22</sup> Locke introduces two provisos, which must be fulfilled before a valid claim to property is recognised. The first is the “no spoliation” Proviso, which legitimates taking from the common if the taker does not let the thing go to waste. The second is the “enough and as good” Proviso, holding that a man has a right to appropriate from the common as long as there is “enough, and as good, left in common for others”. Locke, *Second Treatise of Government* (1689), Ch.v, s.27. For a recent analysis of the Provisos, see Merges, *Justifying Intellectual Property* (2011), pp.48–61.

<sup>23</sup> While most scholars emphasise the Provisos as social conditions impeding upon appropriation, there are scholars who see the charity principle as the focal point of Locke's property theory. Jeremy Waldron explains the principle: “A man in need has ‘a right’ to another's surplus goods: indeed Locke twice talks of his having ‘a title’ in a way that suggests that this too is to be regarded as a property entitlement.” Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002), p.180. On the application of the principle to intellectual property, see Merges, *Justifying Intellectual Property* (2011), pp.61–67. Merges writes that the main advantage in the charity principle is that an increase in “the autonomy and sustainability of the poorest will reduce their claim on the title of others who hold valuable IP rights”. Merges, *Justifying Intellectual Property* (2011), p.66.

<sup>24</sup> Locke, *Second Treatise of Government* (1689), Ch.v, s.42.

<sup>25</sup> Locke, *Second Treatise of Government* (1689), Ch.v, ss.28, 31, 46.

<sup>26</sup> Locke, *Second Treatise of Government* (1689), Ch.v, ss.42–43.

<sup>27</sup> Locke, *Second Treatise of Government* (1689), Ch.xv, s.173. As Gordon Schochet explains: “What appears to tie [Locke's] differing usages is that property refers to personal ownership that either comprehends or emanates from the self, be it the necessary goods, land—especially land—and money of the state of nature or the life, liberty and estate of civil society.” Gordon Schochet, “‘Guards and Fences’: Property and Obligation in Locke's Political Thought” (2000) 21 Hist. Pol. Thought 365, 379.

<sup>28</sup> Although not every labourer will become a creative being, the Provisos will save him from being deprived of the opportunity.

<sup>29</sup> Locke, *Second Treatise of Government* (1689), Ch.v, s.44 (emphasis added).

<sup>30</sup> Locke, *Understanding* (1677).

<sup>31</sup> Locke, *Understanding* (1677).

<sup>32</sup> Locke, *Understanding* (1677).



from labour and self-ownership. Therefore, Locke argues that we, as a group of commoners, have rights in certain conveniences of life that are necessary to “improve our knowledge”.<sup>33</sup> A key element in this Lockean argument is his commitment to learning that facilitates the freedom to use and accumulate knowledge. Locke expressed this commitment in various writings. One of the major writings in which Locke insists on the right to access knowledge and the right to learning is his 1694 letter, *Liberty of the Press*. In that letter, he criticises the Licensing Act of 1662 and tells us that he was aware of the tensions inherent in any regime of authorial rights.<sup>34</sup> In particular, he is sensitive to the social and economic impact that a long-term right will have on authors as well as on ordinary members of the community. In his letter, Locke combines arguments for social partnerships, social exchange, economic equality and recognition of the right to communicate. As Raymond Astbury explains:

“In his Memorandum, though Locke spelt out in detail the ill-effects on the book trade, and on authors and readers, of the monopoly system and the powers, and the abuse of power, of the Stationers’ Company, most of his complaints reveal directly or by implication his concern for the intellectual, economic, and social freedoms of the individual ... and he linked [his statement] to an implied defence of the *right to communicate* new philosophical and scientific truths.”<sup>35</sup>

In other short writings, Locke reiterates “the end of knowledge practice or communication”,<sup>36</sup> especially for the scholar and the gentlemen,<sup>37</sup> and that every system of regulation should “enable us to *deliver* and make that *knowledge to others*”.<sup>38</sup> The life, liberty and happiness of members of the public, apart from the labourer himself, is dependent on this delivery of knowledge.

Any system that allows exclusive control over authorial rights introduces burdens on the public. It limits the public’s access to information and risks impeding intellectual, creative and social development. The trinity—life, liberty and property<sup>39</sup>—would have less impact and meaning if the encouragement of learning and dissemination of knowledge were not secured. The interrelationship between this trinity, human happiness and enjoyment of body and soul makes the encouragement of learning inevitable. Intellectual closure in the name of protecting a guild of owners and publishers is an assault on basic human needs, such as learning and access to knowledge. In the words of Locke: “That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning.”<sup>40</sup> For Locke, the concept of *limited* rights in authorial works is a plausible legal invention. Although authorial rights secure “trade, liberty, and property”,<sup>41</sup> they should not do so at the expense of limiting learning, diffusion of knowledge and communicative exchanges between commoners.

## Personalities talk

In *An Essay Concerning Human Understanding*,<sup>42</sup> Locke aims to mediate between the “individuality of mind and the commonality of discourse”<sup>43</sup> and to explain the advents of social life and the importance of vibrant spaces for complex and mutually rewarding social exchanges. The *Essay* continues Locke’s explanation on why social bonds and communication as well as knowledge and learning are fundamental

<sup>33</sup> Locke, *Understanding* (1677).

<sup>34</sup> John Locke, *Liberty of the Press* (1695) reprinted in Goldie (ed.), Locke (1997).

<sup>35</sup> Raymond Astbury, “The Renewal of the Licensing Act in 1693 and Its Lapse in 1695” (1978) 33 *The Library* 296, 308 (emphasis added).

<sup>36</sup> John Locke, *Study* (1677) reprinted in Goldie (ed.), Locke (1997).

<sup>37</sup> While the former is expected to spend most of his time on manual labour, the latter spends most of his time on knowledge accumulation. Locke, *Labour* (1693).

<sup>38</sup> Locke, *Some Thoughts Concerning Reading and Study for a Gentleman* (1703).

<sup>39</sup> Locke, *Second Treatise of Government* (1689).

<sup>40</sup> Locke, *Liberty of the Press* (1695). And “[b]y this Act, England loses in general, scholars in particular are ground [down] and nobody gets [anything] but a lazy ignorant Company of Stationers”. Locke, *Liberty of the Press* (1695).

<sup>41</sup> Locke, *Liberty of the Press* (1695).

<sup>42</sup> Locke, *Essay Concerning Human Understanding* (1690).

<sup>43</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 388.

human values. Rejecting the possibility of innateness,<sup>44</sup> Locke designs an epistemological theory of knowledge production revolving around principles of individuality, communication, social experiences and collaboration. Central to his theory of knowledge is his definition of “ideas”, which are the defining components of “the materials of Reason and Knowledge”.<sup>45</sup> He draws a distinction between simple and complex ideas and explains their importance for different moments in the social process.

Simple ideas are a pre-condition for complex ideas. A simple idea is “asocial and alinguistic”<sup>46</sup> and owes its existence to experience.<sup>47</sup> It is an idea that is “being each in it self uncompounded, contains in it nothing but *one uniform Appearance*, or Conception in the Mind, and is not distinguishable into different *Ideas*”.<sup>48</sup> For example, “*Yellow, White, Heat, Cold, Soft, Hard, Bitter, Sweet ...*”.<sup>49</sup> Man gains access to these ideas through experiencing the senses. Simple ideas are pure, and “language, society, and culture corrupt that purity”.<sup>50</sup> For some, this indicates that Locke’s emphasis on the senses empowers the individual and “minimize[s] the social and intersubjective aspects of human knowing”.<sup>51</sup> As such, it may justify the authors’ expectations of exclusive rights in their creative expressions. However, while Locke individuates aspects of idea formation, he provides three ways by which complex ideas—the source of real knowledge—are formed:

“1. By Experience and *Observation* of things themselves. Thus, by seeing two Men wrestle or fence, we get the *Idea* of wrestling or fencing. 2. By *Invention*, or voluntary putting together of several simple Ideas in our own Minds: So he that first invented Printing or Etching, had an *Idea* of it in his Mind before it ever existed. 3. Which is the most usual way, by *explaining the names* of Actions we never saw, or Notions we cannot see; and by enumerating, and thereby, as it were, setting before our Imaginations all those *Ideas* which go to the making them up, and are the constituent parts of them.”<sup>52</sup>

While in constructing simple ideas, the mind is passive; when complex ideas are constructed, the mind becomes active in taking and assembling simple ideas into a combination.<sup>53</sup> That is, the intersubjective reality of complex ideas discounts the individual nature of idea formation and introduces social commitments on the part of individuals. Authors and artists are obligated to recognise their dependency on others as a determinant and limitation of their ownership expectations. Authorial and artistic personalities need to communicate in order to develop into such personalities. This communication takes place in different ways—for example, by exchanging and consuming ideas and other social properties from others.

Copyright protects complex ideas that display sufficient originality and creativity.<sup>54</sup> In their simple outfit, ideas would mean an immature abstraction that resides in the person’s mind. Complex ideas emerge from collective social discourse.<sup>55</sup> In 17th-century philosophical writing, discourse was both inner and outer.<sup>56</sup> Internal ideas create internal discourse that derives from the senses and language and facilitates outer discourse through the use of words. Words are “sensible marks of ideas, and the ideas they stand

<sup>44</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.i, s.2. It should be noted that Locke accepts that “there are natural tendencies imprinted on the minds of men ... but this makes nothing for innate characters on the mind, which are to be the principles of knowledge, regulating our practice”. Locke, *Essay Concerning Human Understanding* (1690), bk.I, Ch.iii, s.3.

<sup>45</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.i, s.2.

<sup>46</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 389.

<sup>47</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.i, s.25.

<sup>48</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.ii, s.1.

<sup>49</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.i, s.3.

<sup>50</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 389.

<sup>51</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 390.

<sup>52</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.xxii, s.9.

<sup>53</sup> Vere Chappell, “Locke’s Theory of Ideas” in Vere Chappell (ed.), *The Cambridge Companion to Locke* (Cambridge: Cambridge University Press, 1994), p.37 (“In this process of creating new complex ideas, the mind is no longer merely passive. Instead it actively exerts itself, operating upon the ideas it has to make the new ones.”).

<sup>54</sup> *Feist Publications v Rural Telephone Service Co* 499 U.S. 340, 345 (1991).

<sup>55</sup> However, Adam Moore argued that this fact should not make pools of knowledge subject to societal ownership. Moore, “A Lockean Theory of Intellectual Property Revisited” (2012) 49 San Diego L. Rev. 1069, 1098.

<sup>56</sup> Ian Hacking, *Why Does Language Matter to Philosophy* (Cambridge: Cambridge University Press, 1975), p.16.

for are their proper and immediate signification”.<sup>57</sup> Words externalise inner ideas known solely to the person himself. The purpose of words is to convey ideas that reside in the minds of speakers and constitute “marks of the ideas in the minds also of other men with whom they communicate”.<sup>58</sup> There are certain social patterns and basic ideas that we must share and communicate if we endeavour to enable others to understand the ideas we express. Language, on this account, is secondary to ideas because, without ideas, words would be “mere noises and sounds”.<sup>59</sup> Language facilitates communication of thoughts:

“Man, though he have great Variety of Thoughts, and such, from which others, as well as himself might receive Profit and Delight; yet they are all within his own Breast, invisible and hidden from others, nor can themselves be made to appear. The Comfort and Advantage of Society, not being to be had without Communication of Thoughts, it was necessary, that Man should find out some external sensible Signs, whereby those invisible Ideas, which his thoughts are made up of, might be made known to others.”<sup>60</sup>

Communication through words has a civil and philosophical meaning. The latter is for the sake of finding scientific “certain and undoubted truths,” while the former stands for serving “the upholding common conversation and commerce about the ordinary affairs and conveniences of civil life, in the societies of men one amongst the other”.<sup>61</sup> I already noted that, for Locke, art and invention are part of the set of the basic conveniences of life. On the one hand, simple ideas stand for words upon which we ought to agree in order to not fall into misunderstandings and social stalemates.<sup>62</sup> On the other hand, “one man’s complex idea seldom agrees with another’s and often differs from his own, from that which he had yesterday, or will have to-morrow”.<sup>63</sup>

Complex ideas, as combined structures of internal ideas and external resources, define the copyright process. Authors agree on general creative structures, linguistic patterns, words, names, places and sometimes even characters. Although they use similar scenes in particular genres, the translation of these general patterns and structures through the combination of others’ thoughts will cause their work to go beyond these general and unprotectable templates. Both simple and complex ideas, expressed through words, are “serviceable to the end of communication”.<sup>64</sup>

Human personalities talk. It is not a simple communication between individuals. It signifies a complex interaction involving the person’s inner parts. This is an undisputable conclusion drawn from Locke’s theory of knowledge and social relations. If personalities were unable to communicate—whether directly through real dialogues with others or indirectly through understanding others by virtue of knowing and recognising the multiple sites of social experiences—there would be no knowledge. For Locke, communication is a key resource for developing basic abilities that creative beings need, and social life is a web of intensive social experiences taking place in social and cultural spaces that transform man’s basic inclinations into real abilities necessary to think, communicate, react to nature and create knowledge.<sup>65</sup> This, I should stress, does not reap the individual of his private rights. Each creative person brings a new message to the social process and improves it in a particular way.<sup>66</sup> What Lockean communication does

<sup>57</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ii, s.1.

<sup>58</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ii, s.1.

<sup>59</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 390. Words with no ideas, Locke writes, are open to abuse. Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.x, s.1.

<sup>60</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ii, s.1; bk.III, Ch.ix, s.1.

<sup>61</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ix, s.3.

<sup>62</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ix, s.6.

<sup>63</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ix, s.6.

<sup>64</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.ix, s.6.

<sup>65</sup> As Roger Woolhouse explains: Locke’s “claim is, rather, that all ideas, all the materials out of which knowledge is fashioned by our reason, are derived from experience”. Roger Woolhouse, “Locke’s Theory of Knowledge” in Chappell (ed.), *The Cambridge Companion to Locke* (1994), p.149.

<sup>66</sup> As Walter Hamilton asserts: “Locke never disassociates property from the personality of which it is an expression; because it is the creation of man it has the sacredness which he attaches to human life itself.” Walter H. Hamilton, “Property—According to Locke” (1932) 41 Yale L.J. 864, 868.

is to “rescue the individual from solipsism”.<sup>67</sup> The right to communicate is as strong as the natural right: as “sociable creatures”,<sup>68</sup> commoners need communication by virtue of their humanity.

By protecting freedom of speech—under the US First Amendment, for example—the copyright system maintains this right and the marketplace of ideas at the same time. Such protection is fundamental because it facilitates “self-realization”<sup>69</sup> and allows “individual self-fulfillment and participation in change”.<sup>70</sup> Locke explains how communication creates personalities, social bonds and self-realisation and makes a stable social order possible. More importantly, for this, Locke is not contemplating simple talk only, but a more complex and shared mode of talking:

“The very idea of communication suggests that when people speak, they must do something more than just speak: they must bare their souls, reveal their hearts, make outer what is inner. For Locke, mere talk is clearly not sufficient: he demands something higher, the communication of thoughts.”<sup>71</sup>

This higher requirement, as the next section will show, is a call for true communication between fellow commoners, regardless of their civic status.

## The value of strangers

Communication, for Locke, is not only a process from which ideas take their final form; it is also an *essential* human activity. Locke had a clear idea of the fundamentality of conversation as a social act. He draws a distinction between simple talk like conversation and transient exchanges on the one hand and advanced communication such as critical dialogues on the other. As Richard Yeo explains:

“Locke wanted to retain the advantages of close friendships among scholars; but as a member of the Royal Society of London, he also welcomed the more open civility that encouraged fruitful contacts with foreign correspondents and with learned gentlemen and skilled artisans encountered on travels. By recognizing this spectrum of conversations, often mirroring different degrees of friendship, we can gain some insight into the importance Locke placed on both critical dialogue with trusted friends and more transient exchanges with strangers.”<sup>72</sup>

Conversation, as a kind of communicative act, was an activity that Locke cherished. It is a need for both the human community and the individuals comprising it. “Mankind”, he wrote

“is supported in the ways of virtue or vice by the society he is of, and the conversation he keeps, example and fashion being the great governors of this world”.<sup>73</sup>

An inability to converse is a great limit on Man. In a letter to Edward Clark, Locke expresses his fears related to his loss of hearing and writes:

“I have been little better than out of the world these twelve months by a deafness that in great measure shut me out of conversation.”<sup>74</sup>

<sup>67</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 392.

<sup>68</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.i, s.1.

<sup>69</sup> Martin H. Redish, “The Value of Free Speech” (1982) 130 U. Pa. L. Rev. 591, 593.

<sup>70</sup> Edwin C. Baker, “Scope of the First Amendment Freedom of Speech” (1978) 25 UCLA L. Rev. 964, 990.

<sup>71</sup> Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 Q.J. Speech 387, 392.

<sup>72</sup> Richard Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 16.

<sup>73</sup> John Locke, *Philanthropy* (1675) reprinted in Goldie (ed.), *Locke* (1997).

<sup>74</sup> Letter from John Locke to Edward Clarke, November 30, 1702, reprinted in E.S. de Beer (ed.), *The Correspondence of John Locke* (Oxford: Clarendon Press, 1979), Vol.VIII, No.3223. Locke feared deafness because he believed conversation “to be one of the great channels and benefits of friendship”. Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 11–12.

Locke endorsed humanist values of communication, good conversation and company, and conveying thoughts to, and sharing ideas with, others. Conversations cure solitude. Locke feared solitude<sup>75</sup> and the consequences of educational fixations. Communication, for Locke, was a means to improve himself. It was an enjoyable and knowledge-seeking act essential for the unbiased pursuit of truth. Man must converse with others<sup>76</sup> because those who

“converse but with one sort of men, they read but one sort of books, they will not come in the hearing but of one sort of notions: the truth is, They canton out to them selves a little Goshen in the intellectual world where light shines ... but the rest of that vast expansum they give up to night and darkness, and so avoid coming near it.”<sup>77</sup>

This is “the reason why some men of study and thought that reason right and are lovers of truth doe make noe great advances in their discoverys of it”<sup>78</sup>. Men need diverse conversational opportunities and habits. Conversing with others is imperative for human development

“[b]ut since we cannot accustom ourselves to converse with strangers, and persons of quality, without being in their company, nothing can cure this part of ill-breeding, but change and variety of company, and that of persons above us”<sup>79</sup>.

Locke draws a distinction between conversing with strangers and friends that sheds further light on his commitment to preserving social channels for good communication. For Locke, intellectual exchanges and dialogical experiences were crucial for human development, and this requires communication with “large numbers of people in different places, thereby requiring individuals to reach beyond the circle of close and intimate friends”<sup>80</sup>. Locke trusted friends as a source for real knowledgeable insights. True, conversing with strangers of different classes—peasants, artisans, craftsmen, clerics, historians, government officials and physicians—is different, given the limitations on knowing and trusting the stranger. However, such conversation is important and rewarding.<sup>81</sup>

For Locke, conversing with strangers has two complementary meanings: first, exchanges in which he sought

“information from strangers about various empirical matters ... and second, those conversations he took as evidence of local customs, values, religious beliefs, and cultural practices”<sup>82</sup>.

Both allowed him to collect valuable information through ordinary exchanges. Conversing with strangers furnishes the person’s mind with otherwise inaccessible information. It may also bring the truth closer to the conversant as well as introduce him to new friends who will make a decisive impact on him and his future works. However, for Locke, friends are the most reliable persons on whom to rely on searching for

<sup>75</sup> In the *Essay*, Locke wrote: “Solitude many man have sought and been reconciled to: but nobody that has the least thought or sense of a man about him, can live in society under the constant dislike and ill opinion of his familiars, and those he converses with. This is a burden too heavy for human sufferance”. Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.xxviii, s.12.

<sup>76</sup> Conversing with others is essential for the sake of experience. In a letter to Edward Clarke, Locke wrote that good education “is not the product of some superficial thoughts, or much reading; but the effect of experience and observation in a man, who has lived in the world with his eyes open, and conversed with men of all sorts”. John Locke, *Some Thoughts Concerning Education* (1693), s.94.

<sup>77</sup> John Locke, *Of the Conduct of the Understanding* (1697) reprinted in *The Works of John Locke* (London, 1812), Vol.III, s.3.

<sup>78</sup> John Locke, *Of the Conduct of the Understanding* (1697).

<sup>79</sup> Locke, *Some Thoughts Concerning Education* (1693), s.142.

<sup>80</sup> Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 36.

<sup>81</sup> Although Locke treated the gentleman and the learned man as unique individuals, different from the peasant and the artisan—for example, with regard to the time each should invest in reading and learning—communicating with members of different social groups was inevitable to the pursuit of truth, to an understanding of human conduct and to accumulating knowledge. Locke, *Study* (1677) (emphasis added).

<sup>82</sup> Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 26. In fact, Locke wrote that sometimes one needs to converse with “a smith or a jeweler” that “commonly knows better than a philosopher” in a particular field. Locke, *Essay Concerning Human Understanding* (1690), bk.II, Ch.23, s.3.

truth. Locke's close interactions with Lady Masham<sup>83</sup> and William Molyneux, among others, confirms that this was so. The latter had stimulated Locke's ideas and convinced him to make changes to his major work—the *Essay*. The relations between Locke and Molyneux also confirm that genuine conversation—one that affects ideas and embeds in expressions—can be held at a distance, as they had never met in person. So intense was their relationship that, for Locke, Molyneux was a “lover of truth”—a title Locke reserved for “judicious friend[s]”.<sup>84</sup>

Locke acknowledges the importance of advanced and diverse communications as the definite resources for truth. His understanding of arts and inventions as complex ideas emanating from experiences draws on the notion that authors and inventors need complex communicative opportunities, in addition to ordinary or planned conversations, for the generation of creative wealth. This means that others—either friends or strangers—form a part in every work resulting from these experiences. I am aware that the Lockean reading I offer here would meet with criticism from those commentators who see Locke as the master of possessive or semiotic individualism.<sup>85</sup> I base this claim on Locke's approaches to communication, ownership, knowledge and idea creation. From Locke's writings, we learn that communication is valuable and comes in different levels. Sometimes it is more than a mere exchange of words or views; rather, it is a thorough introduction to another's inner processes, whereby one listens and absorbs in order to eliminate patterns of educational fixations and prevent the stifling of human progress.

It should be noted that, for Locke, communicative acts are a fundamental supplement to reading books. Locke conversed with books as well as with people,<sup>86</sup> in the sense of absorbing literary messages and scientific insights. There are different books Man should read, from those written by ancient lawyers, “books of travel”,<sup>87</sup> chronology, readings of history that “help to give an insight into [human nature]”, to poetical and dramatic books of pleasure and delight, and dictionaries which are necessary for the “gentlemen's study”.<sup>88</sup> These books are the result of their authors' exposure to the ideas of others in the process of assembling and developing new complex ideas. Limits to what one can come to exclusively own, as Locke wrote in *Liberty of the Press*,<sup>89</sup> ensure wide communicative experiences with fellow gentlemen and strangers that make these books possible. If communication were not as diverse as possible, readers would end up reading commonplace arguments. Locke criticised the politics of education through books that are filled with a “stock of borrowed and collected arguments”.<sup>90</sup> This kind of education risks producing the “worst conversation partner”,<sup>91</sup> which is “the topical man”.<sup>92</sup> Diverse books spread knowledge and ignite new communications. They express the web of communicative experiences authors encounter with others and need for further creating works of personal and social value.

<sup>83</sup> Jacqueline Broad, “A Woman's Influence? John Locke and Damaris Masham on Moral Accountability” (2006) 67 *J. Hist. Ideas* 489 (discussing the influence of Locke's friendship with Lady Masham on his revisions of the *Essay*).

<sup>84</sup> Letter from Locke to Molyneux, April 26, 1695, reprinted in de Beer (ed.), *The Correspondence of John Locke* (1979), Vol. V, No. 1887.

<sup>85</sup> C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1972); Peters, “John Locke, the Individual, and the Origin of Communication” (1989) 75 *Q.J. Speech* 387, 396 (“Locke's defense of the individual as a private property holder simply leaves him without good ways to talk about the sources of public order or community.”). Cf. James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980) (advocating a collectivist Locke).

<sup>86</sup> Letter from Damaris Masham to Jean Le Clerc, January 12, 1705, reprinted in Maria Grazia and Mario Sina (eds), *Epistolario* (Firenze: L.S. Olschki, 1991), Vol. II, p. 497 and referred to in Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 12.

<sup>87</sup> Locke, *Some Thoughts Concerning Reading and Study for a Gentleman* (1703). See also Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 25–27.

<sup>88</sup> Locke, *Some Thoughts Concerning Reading and Study for a Gentleman* (1703).

<sup>89</sup> Locke, *Liberty of the Press* (1695).

<sup>90</sup> John Locke, *Of Study* (1677) in MS. Locke f.2, p.123, quoted in Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 18; Richard Yeo, “John Locke's ‘Of Study’ (1677): Interpreting an Unpublished Essay” (2003) 3 *Locke Stud.* 147.

<sup>91</sup> Yeo, “John Locke on Conversation with Friends and Strangers” (2009) 26(2) *Parergon* 1, 18.

<sup>92</sup> Locke, *Of Study* (1677).

## Conclusions

In order to produce, preserve and gain access to knowledge while avoiding the emergence of the “topical man”,<sup>93</sup> the right to communicate must be treated as a natural right vested in us by virtue of our humanity as “sociable creatures”.<sup>94</sup> For its realisation, the right to communicate requires an ideology in which principles of social exposure, communicative abilities and opportunities are recognised. For its enforcement, the right to communicate depends on the balance between competing factors which include, in the realm of creative expressions, the recognition of limited property rights for owners of art, literature and drama and ensuring that the public domain is not depleted of its defining resources.

The right to communicate cannot be the subject of a rigid set of rules regulating the properties of cultural and social existence. The three Lockean arguments I present justify the claim embedded in critical approaches to intellectual property—the claim that

“[o]ur integral good includes our bodily well-being, but also our intellectual, moral, and spiritual well-being. We are individuals, but friendship and sociability are constitutive aspects of our flourishing.”<sup>95</sup>

<sup>93</sup> Locke, *Of Study* (1677).

<sup>94</sup> Locke, *Essay Concerning Human Understanding* (1690), bk.III, Ch.i, s.1.

<sup>95</sup> George, “Natural Law” (2008) 31 *Harv. J.L. & Pub. Pol’y* 171, 172.

# The Participation Right as a Human Right in Intellectual Property

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☞ Access; Human rights; Intellectual property; International law; Jurisprudence; Public interest

The idea of a just balance between the claims of owners or holders of intellectual property (IP) to protection and those concerning the public access or share in the intellectual object is pretty much a constant theme in IP theory.<sup>1</sup> But it is one that is increasingly vulnerable to betrayal. One source of this vulnerability may be the way economic realpolitik plays out in international trade negotiations.<sup>2</sup> Another source are difficulties in understanding the nature of interests in public access as represented by rights. How are they “rights”? How may a “right” be vested in everyone? If so vested, how is it to be controlled and exercised? Doubts and difficulties with an adequate solution to the last two questions can lend support to the rejection of any conceptualisation of such interests as “rights”: they are only “privileges”—a freedom that is enjoyed only because no one has a juridical right of exclusion or control over the matter.<sup>3</sup> If they are only privileges, they are easy prey to the argument that they must give way to the rights of creators and inventors as well as their investors.

IP and the public interest in its objects are more often discussed in consequentialist terms.<sup>4</sup> I want to suggest here a way of thinking about the public interest in terms of participation rights. Not in the first place as legal participation rights, but as moral participation rights in the background moral justificatory underpinnings of IP rights (IPRs)—that is, as rights that persons who claim IPRs and the legitimacy and rightfulness of their protection ought to recognise and acknowledge as concomitant of their claims. Although these ideas are moral in origin, it will be suggested they must, and in fact do, find expression in IP laws in a variety of ways. The moral idea of a participation right has different degrees and means of expression. It will have ramifications for the ways in which these avenues of expression are to be treated and understood.

The core of the idea of this moral right of all to participation in IP objects is that any claim to have IPRs and to their maintenance, protection and enforcement presupposes a moral claim to cooperation by all in a scheme that recognises such claims as rights in some way. It also presupposes that such claims are intelligible only in a context where participation interests are recognised primarily as rights in the first place. I suggest this idea is embodied in art.27(1) of the Universal Declaration of Human Rights (UDHR).

This article will proceed in three stages: first, it will briefly outline the relationship between a public interest in the participation right and the justification of IPRs; secondly, it will show how this public

<sup>1</sup> E.g. Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 art.7; WIPO Copyright Treaty 1996 preamble.

<sup>2</sup> For accounts and critique of this in relation to TRIPS, see, for example, Peter Drahos and John Braithwaite, *Information Feudalism* (New York: New Press, 2002); Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Washington: Brookings Institution Press, 1998); Peter K. Yu, “The International Enclosure Movement” (2007) 82 *Ind. L.J.* 828.

<sup>3</sup> For how rights and privileges are correlative juridical concepts, see Wesley N. Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1923) 23 *Yale L.J.* 16.

<sup>4</sup> E.g. Michael Lehmann, “The Theory of Property Rights and the Protection of Intellectual and Industrial Property” (1985) 16 *Int’l Rev. Indus. Prop. & Copyright L.* 525. Congress has explicit constitutional powers to enact copyright and patent laws “to promote the Progress of Science and useful Arts”. US Constitution art.1 s.8 cl.8.



interest possesses the character of a fundamental right; and thirdly, it will identify the ways in which the participation right finds expression in our IP laws, especially in the international framework for such laws. It is hoped that this identification of the role of the participation right in legitimising claims to IPRs and the loci in our laws where it is given effect will give all a reason to preserve these rights and point the way towards a more just development of IPRs. We must first consider, though, how and why there is such a participation right.

### The “participation right” and the equal right to liberty and well-being

Article 27 of the UDHR twins “the protection of the moral and material interests” of authors of “any scientific, literary or artistic production” (art.27(2)) with a prior right of everyone to “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” (art.27(1)). For short, let us call the latter the participation right. It should be noted that this right is prior, perhaps indicating that it is the ground for the protection of the moral and material interests of authors. Further, the following right of authors to protection does not directly require that they enjoy property rights, merely that such interests should have protection in some way.

IPRs, however, are an increasingly common and worldwide means of implementing such protection because of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and other international IP treaties. These include: copyright given to authors and their assigns to exclusive rights of reproduction, publication, performance in public and others over their literary, artistic and other works; patent rights of exclusive making, using or importing of inventions given to inventors and their assigns; and a variety of forms of exclusive control over aspects of commercially valuable ideas in relation to designs, trademarks and geographical indications.

The use of IPRs to protect authors raises several questions about the nature of the *participation* right as it belongs to the non-IP owning public. These include the following questions: (1) In what sense is such an interest a *right*? (2) Would this right be legal or natural—and if the latter, what does that mean? (3) If the right belongs to everyone, how is such a collective interest to be enjoyed and exercised? (4) What are we to do, or refrain from doing, to respect such a right?

The answers to these questions would require a longer work to develop, but I would like to outline in this more modest article how the idea of an underpinning universal moral principle may suggest an approach that will provide a basis for addressing these questions. This principle is *the equal right to freedom and well-being* which is the most basic moral criterion for resolving other moral questions and for all social, including legal, cooperation. I have made elsewhere the derivation of such a basic right,<sup>5</sup> but I want to acknowledge here an essential use of Alan Gewirth’s “Principle of Generic Consistency” (PGC).<sup>6</sup> This principle identifies freedom and well-being as a fundamental rational good and argues that the right to such freedom and well-being is one that no prospective purposive agent can rationally deny. This is because the ability to act (which requires freedom and well-being) is one that no one can rationally deny as a necessary good if the individual has any purpose he or she wants to realise at all. It is also rational to want the participation interests be protected as a basic right. If every rational individual ought to want to claim the protection as a right—and if “rights” as moral claims on one another must be framed in universal terms without personal distinctions<sup>7</sup> (and, one might add, without other particular non-rational, non-arbitrary distinctions)—then there is a rationally compelling reason for everyone to acknowledge a right of every

<sup>5</sup> Steven Ang, *The Moral Dimensions of Intellectual Property Rights* (Cheltenham: Edward Elgar Publishing, 2013), pp.21–61.

<sup>6</sup> Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978); Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), pp.50–53.

<sup>7</sup> Richard M. Hare, *The Language of Morals* (Oxford: The Clarendon Press, 1952); Richard M. Hare, *Freedom and Reason* (Oxford: The Clarendon Press, 1963); Richard M. Hare, *Sorting Out Ethics* (Oxford: The Clarendon Press, 1997).

human as an equal to freedom and well-being and to use it as the fundamental basis of their claims upon one another.

Rather than further explicating this philosophical groundwork for this proposition, it may suffice here to just note that some such principle seems necessary for resolving the tensions between the various rights in the UDHR and, more pertinently, the twinning of both the participation right and the protection right in art.27 thereof.<sup>8</sup> One may understand legal theory as the search for the principle(s) or policy(ies) which explain and justify our legal practices.<sup>9</sup> The equal right to liberty and well-being is a principle that does this for the UDHR (and the implementing international human rights conventions) because it provides a foundational justification for both negative liberties (which embrace the right not to be interfered with or restricted by others) and positive liberties (which favour claims to support from the community for self-realisation).<sup>10</sup> The former, largely coterminous with “first generation” human rights such as civil and political rights, include the art.18 right to freedom of thought, conscience and religion and the art.19 right to freedom of opinion and expression. Examples of the latter—or “second generation” social, cultural and economic rights—include the art.22 right to social security and the art.26 right to education.<sup>11</sup> There is a tension between positive and negative liberties because realisation of the latter requires restraint on states or communities to respect individual freedom, whilst the provision of the former requires claims by the state or community on behalf of all individuals to positively cooperate to confer a benefit on each other.

Any system of norms that embraces both positive and negative liberties logically implies a more basic criterion that justifies and explains the necessary trade-offs if they are to work coherently together as part of a single system. The equal right to freedom and well-being (and Gewirth’s PGC), which places a premium on advancing each individual human’s ability or capacity for action, explains why we would not want basic rights to be interfered with and yet would also want to have rights to claim the cooperation of others in securing certain types of capacities.

It is not purely negative liberties which are in our interest (they are useless to our ability to act if we are uneducated or without basic means of survival), but our substantive freedoms (that is, liberties together with the conditions of well-being that are required for action). Of course, the various rights and freedoms in the UDHR do not always neatly fall into such divisions. For example, the art.17 right to own property is about entitlement to non-interference in one’s private property, but any system of property requires cooperation to create and maintain the institution of property rights. The art.27 right to protection of authors’ moral and material interests and the twinned participation right similarly embraces both aspects. But it is the interest that everyone has in participation in the cultural life of the community, as a resource for their capacity to act, that provides the rational basis for also recognising that the authors of scientific, literary and artistic productions ought to have their moral and material interests protected. As noted above, these interests are increasingly protected by IPRs. If such protection can be understood as being justified by the equal right to freedom and well-being (or some similar principle), the very same criterion also supports the right of everyone “to freely participate in the cultural life of the community, to enjoy the arts and share in scientific advancement and its benefits”. The participation right therefore provides a ground for natural limits and exceptions in the former to the extent that it is necessary to fairly ensure the latter.

It is perhaps then not surprising that the justification, and often IP laws, is replete with the rhetoric of “balance”.<sup>12</sup> For example, art.7 of the TRIPS Agreement provides that the protection and enforcement of

<sup>8</sup> Ang, *The Moral Dimensions of Intellectual Property Rights* (Cheltenham: Edward Elgar Publishing, 2013), pp.56–58.

<sup>9</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986).

<sup>10</sup> On negative and positive liberties, see Isaiah Berlin, “Introduction” and “Two Concepts of Liberty” in Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty*, edited by Henry Hardy, 2nd edn (Oxford: Oxford University Press, 2002).

<sup>11</sup> On the typology of “generations” of human rights, including a third generation of these rights concerning collective goods such as development and peace, see Cees Flinterman, “Three Generations of Human Rights” in Jan Berting (ed.), *Human Rights in a Pluralist World: Individuals and Collectives* (Westport: Meckler, 1990). On this distinction, which was incipient during the drafting of the UDHR, and the fundamental unity of the various rights, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp.222–238.

<sup>12</sup> Ang, *The Moral Dimensions of Intellectual Property Rights* (2013), pp.104–106.

IPRs should contribute to promotion of technological innovation and transfer and dissemination of technology

“to the *mutual advantage* of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a *balance* of rights and obligations”.<sup>13</sup>

The rhetoric of mutual advantage and balance in IPR justification requires an explanation of the nature and terms of this “balance”. It is argued here that the concern for each individual’s capacity for action, as embraced in the equal right to freedom and well-being, would favour there being some IPRs because they (or some of them), if suitably limited, enable creators (and owners) to exercise control of ideas they have created or introduced. These rights therefore empower a form of action that would be impossible without legal institutions (ideas being, by their nature, free once public) and because the availability of such ideas to others empowers those others by opening new possibilities for action. The concern for the possibilities of action on the part of others requires that there be limits to the creators’ (and owners’) ability to control the new ideas, for such control is secured by the legal restriction of users, which limit their ability to act.

The balance and mutual advantage spoken of would then be of the relative weight given to the owners’ and users’ ability to act. Here, Gewirth’s identification of the capacity for action as the most basic good to which human beings have fundamental rights provides an important test for making this trade-off—the criterion of needfulness for action. This provides that, in a contest of claims to such rights, the one that as a general principle is more needful for action should prevail.<sup>14</sup> That is why the right to participation is a fundamental right in art.27 of the UDHR while IPRs are only instrumental means of realising the twinned right to protection of the authors’ material and moral interests which, when not protected by IPRs, may be realised by other means.

The idea of a “participation right” begs the question as to participation in what? Article 27(1) of the UDHR identifies “the cultural life of the community”, “the arts” and “scientific advancement and its benefits” as the matters over which this right operates. Broadly conceived, this language embraces the whole universe of human knowledge and ideas that is the product of, as well as a resource for, human action. We need cultural resources like language in order to relate to one another and technology as ancient and fundamental as cooking with fire to be even remotely recognisable as humans. Article 27(1) treats this entire sphere as a knowledge commons in which each of us has a fundamental right of participation. Thus, this commons is prior, both logically and in order of statement, to the art.27(2) right of authors (and perhaps inventors and other innovators<sup>15</sup>) to protection of the moral and material interests in their creations. Authors use prior existing knowledge and ideas to develop and integrate new ones. The concept of the “public domain”<sup>16</sup> is a result of limited and expiring IPRs. It is that creation or part thereof that is not privately appropriated under an IPR or that, having once been so exclusively controlled, has become publicly free upon expiry of the IPR’s term of protection.

IPRs properly limited treats this knowledge sphere as a commons by granting a limited and only temporary exclusivity to aspects of the created ideas and knowledge. The idea of the knowledge commons is larger than and prior to the public domain in that the former includes elements of works and matters currently under IPR protection that remain nevertheless accessible in various degrees to the public during an IPR’s term—such as the unprotectable ideas in a copyright work, short quotes or fair use or dealing

<sup>13</sup> Emphasis added.

<sup>14</sup> Gewirth, *The Community of Rights* (1996), p.45 (“When two rights are in conflict with one another, that right takes precedence whose object is more needed for action.”).

<sup>15</sup> There is a disparity of views as to whether “author” in art.27(2) of the UDHR may properly embrace all forms of creators, including inventors, or if the term is limited to only producers of copyright works. The drafting history of the UDHR suggests the latter: see Morsink, *The Universal Declaration of Human Rights* (1999), pp.217–222. Without precluding this more limited understanding, the argument made here is that the participation right, even on the wider reading, may be asserted over other instruments for implementing art.27, such as patents for encouraging inventions, because these instruments are some of the “benefits” of “scientific advancement” to which everyone is entitled to share under the art.27(1) participation right.

<sup>16</sup> For recent general discussion and exploration of this idea, see James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008); Robert Spoo, *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford: Oxford University Press, 2013).

that such laws allow. The public domain seems to feature essentially as a shadow creature of IPRs: ideas and features left to the public after IP exclusivity has staked out private areas.<sup>17</sup>

Situating the public domain within the knowledge commons restores the historical relationship since it is only in recent centuries (and, for many countries, only late in the 20th century with the TRIPS Agreement) that IPRs have made that exclusivity possible. Sharing of public ideas and knowledge is the natural default position. In that default position, it would not have been necessary to speak of a participation right because participatory access to ideas would have been natural. It is against the background of the introduction and expansion of IPRs, and the continuous encroachment of that naturally shared space, that it has become necessary to consider the protection of that participatory interest which everyone shares as part of the public as well as the extent to which that protection should exist and can be recognised as a right.<sup>18</sup>

### The participation interest as a right

In what sense, then, is everyone's interest in protection of participation a *right*? This is where understanding the participation right in the first place as a *moral* claim grounded in the equal right to freedom and well-being, which supports and informs IPR systems, opens up productive perspectives and avenues for development. A right is a claim on others in some way that the others are obliged to acknowledge and respect. It is suggested here that, in the moral scheme for cooperating in and justifying social institutions (e.g. laws or IP laws in particular), the case for using an equal right to freedom and well-being (or Gewirth's PGC) to provide the rational foundation for all moral claims makes the claim for the participation right one that proponents and supporters of IPRs have to recognise. That claim has to be recognised because both IPRs and the participation right rests on the idea that liberty and well-being for all lie at the root of their claims to each other for any social cooperation.

It may also be observed that this helps explain what we mean by a fundamental human right.<sup>19</sup> The right identified here is *fundamental* in the sense that it is the foundational moral criterion upon which all the other rights rest. It is a *human* right in the sense that it is our irrefragable interest in human capacity for action as a basic good that provides the rationale for such a right. And the claim here is a *right*, albeit in the primary sense a moral rather than legal one, because it is a principle that requires one to recognise the obligation that every human individual owes to everyone else when cooperating to realise when to establish laws and other institutions and, indeed, when framing other moral norms for evaluating such institutions.

Both the participation right and IPRs are social elements that require such human cooperative effort to bring to reality. Like other aspects of the common good that can be enjoyed by each individual of the public only if they are available to all (e.g. so-called "third generation" rights, such as the right to development and peace), the right to participate in the cultural life of the community, enjoyment of the arts and share in scientific advancement and its benefits, as embraced by art.27(1) of the UDHR, requires collective effort and an obligation on all to cooperate to that end. That cooperation is partly assisted by instituting IPRs, which impose power of private restrictions on what is available, for the very purpose of inducing a net increase of what becomes available to the public for the purpose of increasing each person's capacity for action. That net increase is facilitated by a variety of means by which the generated new knowledge and ideas are shared—some by market means in which products using or embodying these

<sup>17</sup> Ang, *The Moral Dimensions of Intellectual Property Rights* (2013), pp.88–90, 209–213. It has been suggested that IP law is concerned with the entire realm of "human knowledge": see William van Caenegem, "The Public Domain: Scientia Nullius?" (2002) 24 Eur. Intell. Prop. Rev. 324–330.

<sup>18</sup> Concern with access and participation in this space of knowledge and culture is also reflected in writings on the theme of access to knowledge: see Dana Beldiman (ed.), *Access to Knowledge and Information: 21st Century Challenges in Intellectual Property and Knowledge Governance* (Cheltenham: Edward Elgar Publishing, 2013); Zohar Efroni, *Access-Right: The Future of Digital Copyright* (Oxford: Oxford University Press, 2011); Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge: in the Age of Intellectual Property* (New York: Zone Books, 2010).

<sup>19</sup> Alan Gewirth, "The Basis and Content of Human Rights" in Alan Gewirth, *Human Rights: Essays on Justification and Application* (Chicago: University of Chicago Press, 1982), pp.41–78.

ideas (e.g. patented medicines or copyrighted files of music) are made available to the public at market rates for limited times, while others through compulsory licensing or, in certain limited cases, exemptions from protection. In some cases, the moral requirement that there be such access amounts to a fundamental human right.

The implications of a participation right are wide-ranging, and it is not possible here to do more than outline in a few examples what this may mean for the development of IPRs—in particular, what they may mean for the development of internationally implemented exemptions and limitations to IPRs, since it is against the assertion of owners’ rights of exclusivity over certain types of knowledge and ideas that preservation of the public availability of aspects of such knowledge and ideas become meaningful as rights. The focus will be on identifying how their justificatory basis in the furtherance of each human being’s capacity for action, which requires an equal right to freedom and well-being, provides a criterion for trading off protection of the authors’ moral and material interests by means of IPRs against the access conditions required by the participation right. Identifying that participation right as a moral principle informing and underpinning the legal institutions, as distinct from being a legal rule, enables one to consider the various ways in which that principle operates upon the laws and speak of various degrees by which that principle may be recognised and become entrenched in law.

First, the moral participation right, even when it does not exist as an explicit rule in the law, operates as an interpretive guideline and resource in various legal concepts that appear deliberately framed in moral or evaluative terms that seem to call for a background justificatory theory of balance between the interest of owners and users. Examples are the various versions of the “three-step test”<sup>20</sup> for permissible exemptions and limitations in the TRIPS Agreement and other international conventions. The concept of a “special case” regarding allowable exemptions or limitations of copyright protection calls for a theory justifying the general protection that also explains why there should be exceptions. The references to “legitimate interests” of owners suggest that some interests may be illegitimate, thus requiring an ethical basis for making such distinctions. And the test, by requiring that exemptions and limitations not to “unreasonably restrict” legitimate interests, implies that there are grounds upon which even the legitimate interests of owners may be reasonably restricted. Hence, the concept of reasonableness calls for a general theory of justice implied by the scheme for IPR protection that allocates and balances rights and claims between various participants in the community. It is submitted that the participation right (and the criterion of needfulness for action for adjudicating between that right and the authors’ right to protection) provides a means for clarifying these interpretive questions. (How this may be done in respect of the “three-step test” is explained in the next section.)

Secondly, the participation right may also operate in the political sphere in legislative processes and international conventions where at least part of the deliberative process involves rational moral suasion. In this sphere, people ask: what laws ought we make and why? Even in the heat of the political process and the realpolitik arm-twisting of international trade negotiations, appeal is sometimes made for public support, and a rational, partly moral argument has to be made. Here the appeal to a balance of rights implies a participation element and a respect for what such a right may imply as necessary.

Thirdly, the participation right may be recognised and required by law itself. Here, it ought to be noted that there are several systems of laws working in relation to one another, and what is recognised in one may form the background of, and operate upon, another via the foregoing interpretive and political modes. Thus, national laws are made by legislatures of countries bound by international IP conventions to which they are parties. Within each national system, the legislatures are often bound and restricted by constitutional and other laws that make human rights and other liberties fundamental law.

<sup>20</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 art.13 (copyright), art.26(2) (industrial designs), art.30 (patents); WIPO Copyright Treaty 1996 art.10; WIPO Performances and Phonograms Treaty 1996 art.16.

For example, copyright in the United States must be subject to the First Amendment right of free speech and expression.<sup>21</sup> A similar right is provided for in art.10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). The ECHR rights are incorporated into the UK Human Rights Act 1998, which requires courts to interpret legislation (including copyright legislation) in a manner consistent with that right. Since courts make such interpretation bearing in mind their duty to apply parliamentary enactments,<sup>22</sup> the act calls for interpretive processes to be employed where necessary and possible to realise the fundamental right in IP law.

The international IP conventions are themselves made within an international law-making process that gives primacy to certain principles, including human rights and international conventions for the protection of human rights. Within the regime of human rights norms, some of these norms are part of international *law*—for example, the rules of the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1996 (ICESCR). In relation to IPRs, art.15 of the ICESCR obliges State Parties to recognise the right of everyone to “take part in cultural life” (art.15(1)(a)), “enjoy the benefit of scientific progress and its applications” (art.15(1)(b)) and “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic protection of which he is the author” (art.15(1)(c)).<sup>23</sup>

The rights declared in the UDHR, however, appear to be framed, and are best understood, as statements of commitments or aspirations to specific *principles*. These principles require other mechanisms, recognition under either customary international law or international conventions, to have the force of law upon states. But it is submitted that even a set of principles like the UDHR can have some force on the making of international IP laws. This may occur by way of UN obligations to respect human rights.<sup>24</sup> Or the obligations may form part of the background for interpreting international conventions, where the language of their rules permits some flexibility, such as in the “three-step test” mentioned above. Within each international IP convention or treaty, there may be clear rules that form part of the matrix for interpreting more specific rules, which recognise such a participation right. As such a right is implied by the balance of rights called for by the stated “objectives” in art.7 of the TRIPS Agreement, this right must inform the interpretation of its various versions of the “three-step test” and other requirements.<sup>25</sup>

Hence, one may identify various ways in which the participation right may be recognised and the degrees to which its protection may be entrenched by the various interlocking legal regimes. The exercise of such a right may be permitted by national laws—as is the case for many exemptions and limitations that are allowed, though not required, by the TRIPS Agreement and other international IP conventions and treaties. In some cases, the language of the Agreement does suggest a mandatory limit—as in the case for the non-protection of ideas by copyright in TRIPS,<sup>26</sup> which is nonetheless subject to encroachment by a variety of means, including private appropriation under alternative IP regimes and through contractual waiver or technological denial. Thus, if the idea of a balance between IPRs and the participation interest embodied in art.27(1) of the UDHR is to be taken seriously, it is important to identify the various ways in which we may work towards a greater realisation of the participation right as a human right.

<sup>21</sup> *Harper & Row Publishers, Inc v Nation Enterprises* 471 U.S. 539 (1985); L. Ray Paterson, “Free Speech, Copyright and Fair Use” (1987) 40 *Vand. L. Rev.* 1; L. Ray Paterson and Stanley F. Birch Jr, “Copyright and Free Speech Rights” (1996) 4 *J. Intell. Prop. L.* 1.

<sup>22</sup> Human Rights Act 1998 ss.3, 6; *Ashdown v Telegraph Group Plc* [2001] EWCA Civ 1142.

<sup>23</sup> For a Human Rights Council report related to this, see Special Rapporteur in the Field of Cultural Rights, “Copyright Policy and the Right to Science and Culture: Rep. of the Special Rapporteur in the Field of Cultural Rights” (2014) U.N. Doc. A/HRC/28/57 (by Farida Shaheed). (The author was a participant in the experts’ meetings and consultation leading to this document.)

<sup>24</sup> U.N. Charter 1945 arts 1(3), 55, 56.

<sup>25</sup> On art.7 (Objectives) and art.8 (Principles) of TRIPS providing the interpretative framework for this agreement, see Peter K. Yu, “The Objectives and Principles of the TRIPS Agreement” (2009) 46 *Hous. L. Rev.* 979.

<sup>26</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 art.9(2).

## Towards a participation right

What would this mean for limits on the international development of IPR regimes then? First, the equal right to freedom and well-being (and Gewirth's PGC) are arguments for limitations and exemptions in IPRs because this is part of the sharing between public and owners mandated by the participation right. In a test favouring the right, or balance of rights, that privileges the claim that is more needful for action in general, this right provides a criterion for explicating legal terms and concepts implying a reference to this justificatory sharing such as the criteria used in the three-step test mentioned above.

On such an understanding,<sup>27</sup> the distinction between the general case of IPR protection and the "special case" of an exception therefrom may be identified when an appropriately restricted exception to protection may prove more needful for individual's action than protection of the authors' or owners' right to private control of the idea. This would not conflict with the "normal exploitation" of owners because the normative acceptability of that exploitation ends where the needfulness of others for action outweighs that of authors. The interference with the "legitimate expectations" of right holders, on this understanding, would not be unreasonable if the exemption or limitation is appropriately restricted so as to apply only where, and to the extent that, the criterion of individuals' needfulness for action does require a freedom for access (as opposed to the authors' right of control). Some freedom of access, in fact, would also be a legitimate expectation under the idea of having an equal right to freedom and well-being as the fundamental basis for social cooperation. It would thus provide grounds for denying the treatment of all the IP owners' expectations as entitlements.

In the field of copyright, the application of this idea to the case for a general exemption along the lines of a *general* fair use or fair dealing exception to copyright protection is illustrative. If the primary criterion is the individual human's capacity to act under an equal right to freedom and well-being, it may be observed that such a consideration rarely requires anyone other than the author to have a right to make a literal reproduction of any copyright work in its entirety. The author would have such an interest because it would be his or her expression, but the individuality of others may be expressed by other means and their right to life and participation in society, and its culture may be enabled by other means. When we confine the access and use by others to more restricted and less literal taking, the balance of protection and access suggested by this metric does shift until it, at some point and for some purposes, favours a limited free access by others.

The transformative use doctrine for fair use in the American copyright system<sup>28</sup> appears to facilitate this particularly appropriately. It allows the courts to adaptively recognise new situations where such exceptions may be fashioned, and it allows the public to experiment with new uses that test the borderline between copyright protection and legitimate public access without the requirement of prior legislated specifically circumscribed exceptions. It may be argued that some such general provision for courts to fashion exceptions ought to be required in all copyright laws, at least in common law systems, in order for them to be consistent with a recognition of the participation right as a human right.<sup>29</sup>

Another area in which the participation right may call for reform in the current virtually worldwide protection mandated by the TRIPS Agreement may be its compulsory licensing provisions for patents in art.31. Compulsory licensing is a way of expressing the participation right—or limiting the exclusive right—without conceding to the public completely free access. That is, the public (or part thereof) may under certain restrictions use the protected idea without having obtained the owner's consent, but on the condition of paying a reasonable (rather than market determined) sum for the privilege. This in itself is a

<sup>27</sup> This is in contrast to, and is put forward as an alternative interpretation of, the panel decision adopted by the WTO Dispute Settlement Body in *United States—Section 110(5) of the US Copyright Act*, which the author critiqued in Ang, *The Moral Dimensions of Intellectual Property Rights* (2013), pp.223–229.

<sup>28</sup> US Copyright Act 1976 s.107; *Campbell v Acuff-Rose Music, Inc* 510 U.S. 569.

<sup>29</sup> Singapore Copyright Act 1987 ss.35–37 and Israel Copyright Law 2007 s.19 have adopted similarly open fair dealing exemptions modelled on the US provision.

form of access, but it also indirectly furthers the participatory interest. Given that one of the preconditions to a compulsory licence is the absence of ready market availability of the protected item to a sector of the public at a reasonable price, the very possibility that such access may be exercised is an inducement to the owners to take steps to ensure reasonable availability of the patented or other IP protected matter (even if such availability has to be made on below market terms). Such a compromise solution to the tension between IP protection and the participation right may be particularly fitting as regards patents and protection for inventive efforts.

Take the issue of patents and access to medicines, which was for a time a prime example of this tension.<sup>30</sup> Making an exception for medicines from patent protection is not necessarily the best way to ensure respect for the participation right of the public in scientific advancement and its benefits. To the extent that patents do work to induce innovation, such an exemption would merely divert inventive efforts and expenditure to other areas of research and development that are covered by patents. The unintended but somewhat predictable result would be the deprivation of patients of access to future medicines. Patent protection largely fosters a compromise by granting strong monopoly protection in return for release of the information to the public and a freeing of the use of the invention by terminating protection within a period far shorter than applies to copyright works.

However, this leaves the problem that the very right itself operates to enable strong exclusion of access during the term of protection unless someone (the patient or a state subsidised healthcare system) is willing to pay a profit-maximising price to the owner of the patent. Where vital medicines—and, perhaps, some other life critical inventions—are concerned, this inducement for the eventual increase in everyone's capacity to act is bought at the price of denying life-saving and critical health preserving means, which are presently available to only those able to meet the market price or have others meet it for them. If one applied the test of needfulness for action, it might be argued that the right of patients needing future medicines may, for the same reason, be balanced by the right of present patients needing presently available medicines.

Nevertheless, the options are not purely binary. If one may have patented medicines produced under a compulsory licensing system that substantially restricts their delivery to the target groups that are unable to pay the market rate, the effect would be to preserve the efficacy of the patent system as an inducement to medical innovation because the patent owners' normal markets would not be affected while meeting the right of current patients to participation in the benefits of scientific advancement. Where such a third option scheme is a practical possibility, the criterion of needfulness for action would suggest that the balance of participation and protection rights tilts, at least thus far, in the direction of enabling such a scheme.

The obligation of realising the participation right through devising such a scheme falls on the collective (everyone) and not on patent owners alone. But the ownership of IPRs give patent owners a special role and imposes a special obligation in this, both because the IPR is potentially an obstacle to such a scheme and because their reliance on the equal right to freedom and well-being in justifying such IPRs also gives them a reason for recognising such a participation right. At the very least, the IP owners have a moral obligation in such circumstances not to oppose such a scheme. The more intriguing point is that, where such a scheme under compulsory licensing is permissible to governments and other entrepreneurs, the very existence of such a possibility works as an inducement to patent owners to come forward and participate in such a scheme, rather than to leave that niche open to alternative entrepreneurs.

<sup>30</sup> For example, the public furore surrounding the litigation by a group of pharmaceutical corporations against the South African Medicines and Related Substances Control Amendment Act 1997, which made it possible to grant compulsory licences and allow parallel importing of generic versions of patented medicines used in the treatment of certain diseases, including HIV/AIDS which has become a national emergency. Peter Drahos and John Braithwaite, *Information Feudalism* (New York: New Press, 2002), pp.5–10; Ruth Mayne, "The Global Campaign on Patents and Access to Medicines" in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights* (Basingstoke: Palgrave Macmillan, 2002), pp.244–258.



The present art.31 of the TRIPS Agreement permits compulsory licensing but under so many restrictions that it hardly works in the way suggested earlier. In particular, there is the requirement that there be first an attempt to obtain “authorization from the right holder on reasonable commercial terms”, except that this requirement may be waived in instances of public non-commercial use, cases of national emergency, or other circumstances of extreme urgency. This requires the entire system to be reactive, waiting until there is an international furore over a pandemic or other emergency before the waiver kicks in. A well-designed system should induce IP owners to proactively seek to further the public welfare. In the same way that the dangling of the carrot of the property right works to induce innovation, the potential stick of a compulsory licence should be designed to induce sharing where the public welfare will be increased by the appropriate measures. Thus, wherever the product is not available to a sector of the market at a reasonable rate for that sector, a compulsory licence should be available (on the condition that a reasonable remuneration can be demanded of the licensee), when a scheme can be devised—whether by the state or a private organisation—to meet the aforementioned criteria of not affecting the patent owners’ normal markets while benefiting both patent owners and the public.

This is the type of solution that the WTO attempted to devise in response to the challenges of AIDS and other health pandemics identified by the 2001 Doha Declaration on the TRIPS Agreement and Public Health. This eventually resulted in a decision by the Council of TRIPS to provide for a waiver of the restriction in art.31(f) of the TRIPS Agreement, which requires compulsory licences to be issued primarily for local markets and permits schemes that mark out compulsory licensed medicines and prevents exports to non-qualifying countries.<sup>31</sup>

Several lessons can be learnt from this episode. First, in being reactive, the decision came late, only after a major international furore had been raised. Secondly, the waiver and the TRIPS amendment, which introduced a new art.31*bis* to make this waiver permanent, impose too many cumbersome requirements to be truly effective, not to mention that the amendment is still pending ratification. Thirdly, the solution is hostage to the imagination and will of the international trade forum, as witnessed by the prolonged ratification process for the Amendment that would regularise the scheme within the TRIPS Agreement.<sup>32</sup> What is needed is therefore a more general compulsory licensing exception that allows any national, international, regional or global practical scheme devised by anyone who meets the aforementioned criteria to operate as an exception to the strict property right. This empowers governments and civil society to actively seek solutions without waiting for a WTO mandate and incentivises patent right holders to proactively provide solutions before the situation becomes scandalously problematic.

## Conclusion

The implications of the idea of an equal right to freedom and well-being goes further than these examples of course, but the examples illustrate the potential of the idea to reshape our thinking about the design of IPRs in a way that may move us towards a greater recognition of the participation right. The idea of this right as part of the underlying idea of the balance of the interests of authors and the public—upon which the justification of IPRs rely, at least within the TRIPS regime—provides the moral groundwork for various forms of legal embodiments of this right and suggests lines of development. That is why this article focuses on the *moral* principle (which is of more general application), rather than the legal human right (which is contained in art.15(1)(a) and (b) of the ICESCR).

The reference to the moral principle as a participation right is significant in that it explains how the IPR system has within its own frame of reference and justificatory theory the resources to develop towards a

<sup>31</sup> Council of TRIPS, “Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health” (2003) WT/L/540 (Decision of August 30, 2003).

<sup>32</sup> Since the adoption of the TRIPS Agreement in 2005, the deadline for ratification by WTO members has been repeatedly extended. The current deadline is December 31, 2015.

more just balance between the interest of authors and inventors and other IP producers in benefiting materially from their contributions. Such a balance allows for the development towards the right of the public to participate in the knowledge commons.

# Patent Fairness and International Justice

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☞ Developing countries; Innovation; International law; Jurisprudence; Moral rights; Patents

### Persistent patent controversies

In 2002, Hugh Laddie lamented the “blind adherence to dogma” that had led to an apparent impasse in philosophical and practical discussions of intellectual property (IP):

“On the one side, the developed world side, there exists a lobby of those who believe that all IPRs [intellectual property rights] are good for business, benefit the public at large, and act as catalysts for technical progress. They believe and argue that, if IPRs are good, more IPRs must be better.”<sup>1</sup>

But “on the other side”, he continued:

“there exists a vociferous lobby of those who believe that IPRs are likely to cripple the development of local industry and technology, will harm the local population, and benefit none but the developed world. They believe and argue that, if IPRs are bad, the fewer the better.”

Laddie recommended reforms designed to ensure that IPR development and enforcement would better serve the interests of developing countries. He hoped these reforms would provide an effective response to those who regard IPRs as “food for the rich countries and poison for the poor”.<sup>2</sup>

In 2015 we see the persistence of this disagreement, with critics urging that the international IPR regime, including especially the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), creates an un-level playing field for international commerce, tilting the advantage strongly towards the interests of the developed world and against the interests of developing nations. Similar concerns have been raised with respect to the IP chapter of the Trans-Pacific Partnership Agreement, which includes and reinforces many of the same provisions people have found objectionable in TRIPs. Aaron James has recently argued that the only appropriate remedy is to “eviscerate TRIPs”. He urges that we need to weaken IPRs in order to reduce the level of unfair competition faced by developing nations.<sup>3</sup> At the same time, articulate advocates argue that IPRs are a crucial incentive for research and technological development, which is otherwise woefully undersupplied by the market. In order to enhance this incentive, Alex Rosenberg argues that we should treat “the ownership of intellectual property as a right ... which is untrumpable by any other sort of consideration from human welfare”.<sup>4</sup> According to Rosenberg, the value

\* I would like to thank Daniel Pilchman and Peter Yu for tremendously helpful comments and discussion of this project.

<sup>1</sup> Hugh Laddie, “Foreword” in Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* (London, 2002), p.iii.

<sup>2</sup> Laddie, “Foreword” in Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), p.iv.

<sup>3</sup> Aaron James, *Fairness in Practice* (Oxford: Oxford University Press, 2012), p.285. See also Ali M. Nizamuddin, *The Patenting of Life, Limiting Liberty, and the Corporate Pursuit of Seeds* (New York: Lexington Books, 2015).

<sup>4</sup> Alex Rosenberg, “Designing a Successor to the Patent as Second Best Solution to the Problem of Optimal Provision of Good Ideas” in Annabelle Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (New York: Cambridge University Press, 2014); Alex Rosenberg, “The Priority of Intellectual Property Rights” (2004) 3 Pol., Phil. & Econ. 77.

created by IP incentives should be expected to swamp the incidental disvalues associated with the enforcement of IPRs. Rosenberg might be read as advising that IPRs should be *as strong as possible*.

In this brief article, I cannot address all of the arguments that have been aired, nor put the controversies to rest. What I will do is to examine some of the more prevalent philosophical and legal arguments on both sides and urge a partial solution. I will give most of my attention to patents, but the argument developed here should apply to other forms of IP as well.

## The case for patents: From simple economic logic to robust (natural?) moral rights

### *The simple argument*

The economics of patent law, in the simplest case, are straightforward: In the absence of effective IPRs, market forces provide systematic sub-optimal incentives for creative work, including inadequate incentive to pursue the research necessary for the development of new technologies. There are several reasons for this: new technologies benefit future generations, whose interests are not fully represented in contemporary market incentives. As Alex Rosenberg points out, “discovering and testing good ideas is costly and risky”.<sup>5</sup> It may sometimes take 10–15 years and millions of dollars from the time researchers begin to develop a new drug, or a new agricultural crop, before it is ready to market.<sup>6</sup> On the other hand, for many products, including software and non-hybrid crop varieties, the cost of reproduction after a new item has come on the market, is very low. In the absence of patent protection, much research and development simply would not take place. The likelihood that welfare-enhancing research will take place is less when research costs are high and where the private benefits to the researcher are insecure. The patent system provides patent holders with a temporary right to prevent other people from marketing new innovations. Possession of this right protects and incentivises the process of research and development, leading to the creation of new technologies that would not have existed at all if the patent incentive had not been available. Call this the *simple argument* for patent protection.

So understood, do patents make people worse off—impose a welfare cost—because they prevent people from accessing needed innovation? According to the simple argument, the answer is *no*, because the technologies in question would not have existed but for the incentive created by IPRs. While patents temporarily restrict their access to new technologies, including life-saving medicines, the people whose access is restricted and who need these drugs would not have access to them in the absence of patent protection. No one else would have access either. Without patents, the research would not have been pursued. Without the research, the products would not have been created.

When patents work this way, the implementation of a patent system is a Pareto improvement: it provides advantages for some and disadvantages for no one. This is the understanding of patent law according to which patents add “the fuel of interest to the fire of genius, in the discovery and production of new and useful things”, as Abraham Lincoln enthusiastically argued.<sup>7</sup> So on this model, patents and other IPRs enhance welfare directly. Where IPRs are welfare-enhancing and disadvantageous to no one, there are good moral reasons to put them in place.

This instrumental case for patents, as a needed extra incentive, may gain strength at times and in circumstances where we have an especially pressing need for innovation. There is wide agreement that we need alternative environmentally appropriate sources of energy. Climate change may significantly alter the circumstances of agriculture and may increase incidence of certain diseases. Farmers in Bangladesh,

<sup>5</sup> Rosenberg, “Designing a Successor to the Patent as Second Best Solution to the Problem of Optimal Provision of Good Ideas” in Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2014), p.89.

<sup>6</sup> Edmund J. Sease and Robert A. Hodgson, “Plants are Properly Patentable under Prevailing U.S. Law and This Is Good Public Policy” (2006) 11 *Drake J. Agric. L.* 327.

<sup>7</sup> Abraham Lincoln, “Second Lecture on Discoveries and Inventions” in Jacksonville, Illinois, February 11, 1859.

facing increasing floods and salt-water intrusion in agricultural areas, have a pressing need for flood-tolerant and salt-tolerant crops, some of which are already under development. In other areas, sub-Saharan Africa in particular, there is a similarly urgent and growing need for drought-tolerant food crops. Resource depletion makes it less and less likely that future generations will be able to rely on the same technologies that have been used in the past and that have supported our current standard of living.<sup>8</sup> If we hope to leave later generations with productive opportunities similar to those of the present generation—or, in the words of John Rawls, to leave to future generations “a social world that makes possible a worthwhile life for all its citizens”—then we will need to replace existing technologies with new ones and to find substitutes for the resources we have plundered.<sup>9</sup> For these reasons, our obligations to future generations give us a secondary obligation to promote needed innovations. Patent and other IP protections may be at least one way we could fulfil that obligation.

### *Jefferson on the simple argument*

The “simple argument for patents” was accepted, more or less as stated above, by Thomas Jefferson, who famously argued that there is no *natural* right to IP:

“It has been pretended ... that inventors have a natural and exclusive right to their inventions. ... If nature has made any one thing less susceptible than others of exclusive property, it is the action of the thinking power called an idea. Its peculiar character ... is that no one possesses less because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening me.”<sup>10</sup>

According to Jefferson, following Locke in this respect, property rights in land and real property were natural rights. The *purpose* of government is to secure these rights, so any government that fails to protect and respect them thereby wrongs its citizens. But not so with IP: Jefferson argues that IP is naturally free and available to everyone, since one person’s use of it does not block use by others. So in Jefferson’s view, the reason for protecting IPRs is that it is advantageous. But no one is wronged if IPR protection is not put in place:

“Society may give an exclusive right to the profits arising from [creative inventions] as an encouragement to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.”<sup>11</sup>

### *IPRs as natural moral rights?*

But is Jefferson’s view acceptable? A contrary view would hold that inventors have a special claim over their own creations, one that is different from the claims others may have. This thought may derive in part from the work of John Locke. Locke accepted a doctrine of “Maker’s Right”, according to which “Makers”, those who create something new, have special claims over their creations.<sup>12</sup> While Locke does not clearly extend this doctrine to the case of IP, such an extension seems natural since intellectual creations come *from* us in a more direct way than physical objects on which we may labour. The Maker’s Right argument

<sup>8</sup> I do not mean to imply that all members of the present generation enjoy a reasonable standard of living.

<sup>9</sup> John Rawls argues that we have an obligation to leave future generations with “a social world that makes possible a worthwhile life for all its citizens”. John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p.107. Bryan Barry argues that the present generation has an obligation to leave future generations with undiminished productive opportunities. Bryan Barry, *Democracy, Power, and Justice* (Oxford: Clarendon Press, 1989), p.517.

<sup>10</sup> Letter from Thomas Jefferson to Isaac McPherson, August 13, 1813.

<sup>11</sup> Letter from Jefferson to McPherson, 1813. See also Adam Moore, *Intellectual Property and Information Control* (New Brunswick: Transaction Publishers, 2006), Ch.3; Seana Shiffrin, “Lockean Arguments for Private Intellectual Property” in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001).

<sup>12</sup> Gopal Sreenivasan, *Limits of Lockean Rights in Property* (New York: Oxford University Press, 1995), pp.66–74.

appears to be stronger where it is more plausible to regard the Maker as fully responsible for the existence of the creative product. In Locke's view, this doctrine is arguably more fundamental than the standard argument from "labour mixing". Making is a form of labour. According to Locke, labour—more properly, labour-mixing—is the operation by which people legitimately appropriate land or other goods from the common, at least where they leave "enough and as good" for others and avoid appropriating more than we can use before it spoils. The reason, Locke urges, is that it "hath by this labor something annexed to it that excludes the common right of other men".<sup>13</sup> It is a small stretch to think that intellectual creations are similarly associated with those responsible for their creation—and that they have "something annexed" to them that distinguishes the claim of creators from the competing claims of non-creator users.<sup>14</sup>

Does this unique relationship between intellectual creations and their maker-creators justify a claim that "excludes the common right of other men?" The plant breeder Luther Burbank seems initially to have agreed with Jefferson that it does not. Early in his career, he expressed satisfaction about the fact that patent and other IP protections were not available for work in plant science:

"No patents can be obtained on any improvements of plants, and I for one am glad that is so. The reward is in the joy of having done good work, and the impotent envy and jealousy of those who know nothing of the labor and sacrifices necessary, and who are by nature and cultivation kickers rather than lifters."<sup>15</sup>

Many years later, after spending his life developing new plant varieties in an economic environment where he was often unable to make a profit to cover the costs of research and development, Burbank seems to have found less solace in the impotent envy of the kickers. In a letter to his friend Paul Stark, Burbank is reported to have written:

"I despair of anything being done at present to secure to the plant breeder any adequate returns for his enormous outlays of energy and money. A man can patent a mousetrap or copyright a nasty song, but if he gives the world a new fruit that will add millions to the value of the earth's annual harvests he will be fortunate if he is rewarded so much as having his name connected with the result. Though the surface of plant experimentation has thus far been only scratched and there is so much immeasurably important work to be done in this line, I would hesitate to advise a young man, no matter how gifted or devoted, to adopt plant breeding as a life work until America takes some action to protect his unquestioned right to some benefit from his achievements."<sup>16</sup>

The argument in this letter was apparently given great weight when it was introduced by Representative Purcell as a consideration in favour of the Plant Protection Act of 1930. Whether or not the words are truly those of Luther Burbank,<sup>17</sup> the argument has independent appeal: should people like Burbank not be

<sup>13</sup> John Locke, *Second Treatise of Government* (1689) in Peter Laslett (ed.), *Locke's Two Treatises of Government* (New York: Cambridge University Press, 1960), p.329.

<sup>14</sup> Seana Shiffrin offers quite a different, and much more detailed, analysis of Lockean rights to intellectual property in her excellent paper, "Lockean Arguments for Private Intellectual Property" in Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (2001).

<sup>15</sup> Luther Burbank, "How to Judge Horticultural Novelities", *Pacific Rural Press*, September 30, 1911, p.264. See also Clark Wolf, "Plants, Patents, Property, and Pirates: Luther Burbank v. Thomas Jefferson" (2007) 9(1) *Bioethics in Brief*, available at [http://www.biotech.iastate.edu/publications/bioethics\\_outreach/Bioethics\\_in\\_Brief/mar07.html](http://www.biotech.iastate.edu/publications/bioethics_outreach/Bioethics_in_Brief/mar07.html) [Accessed November 4, 2015].

<sup>16</sup> Letter from Luther Burbank to Paul Stark, quoted by Rep. Purcell reading a telegram received from the widow of Luther Burbank, H.R. Rep. No.1129, 71st Cong., 2d Sess. (1930). This letter is widely quoted, for example, in David Ronald Murray, *Seeds of Concern: The Genetic Modification of Plants* (Wallingford: CABI Publishing, 2003), p.101; Mark Sagoff, "Animals as Inventions: Biotechnology and Intellectual Property Rights" in Lakshman D. Guruswamy and Jeffrey A. McNeely (eds), *The Protection of Global Biodiversity: Converging Strategies* (Durham: Duke University Press, 1998); Jack Wilson, "Patenting Organisms: Intellectual Property Law Meets Biology" in David Magnus, Arthur L. Caplan and Glenn McGee (eds), *Who Owns Life?* (New York: Prometheus Books, 2002).

<sup>17</sup> It is interesting to note, however, that Burbank's letter turned up at an opportune moment: Burbank's earlier words were introduced in discussion as a reason against the Plant Protection Act of 1930. This letter may have been the key that turned the rhetorical tide in the congressional debate and made the act's passage possible. Representative Purcell apparently aired this quote during the House debate, but did not produce the letter itself. For understandable reasons, Luther Burbank's widow, Purcell's source for the letter, might be expected to have favoured increased protection for plant varieties. Since the only sources for this letter are *partial* sources, since the letter appeared at a moment when it perfectly served the political needs of

able to gain profit from the beneficial products they develop? Even now many people regularly use and enjoy various varieties developed by Burbank over the course of his life. Burbank sold the rights to the Burbank Potato for \$150. They are now the most widely produced potatoes in the United States.

Burbank's letter includes an argument by analogy: If you can get IP protection for *other* kinds of creative work, why exclude plants? The reason that had been given for the exclusion was that plants are self-reproducing. They reproduce and distribute *themselves*. But legislation protecting plant breeders sought to accommodate that feature, rather than use it as ground to deny protection altogether. There is still vigorous disagreement about whether this effort was successful.

When Burbank's letter refers to a plant breeder's "unquestioned right to some benefit from his achievements", the right referenced cannot be a *legal* right. If the sentence makes sense, it must refer to a *moral* or *natural* right. And if we find appealing the idea that plant breeders like Burbank, who devote their lives and fortunes to the development of new varieties, should have a right to benefit from this achievement, we might say that the strength of this appeal is a measure of the attractiveness of the idea that creators do, *pace* Jefferson, have a natural moral claim to the things they create. This idea is embedded in several areas of IP jurisprudence. It may have its greatest appeal for intellectual products in which the creator has invested personal or artistic commitment, where it is sometimes identified as a *personality interest* in intellectual products. If *you*, the reader, find this notion appealing, as many do, then *you* are committed (to at least some degree) to the idea that creators have a natural moral right to control their creations.<sup>18</sup>

Should we be uncomfortable with the language of natural rights? Such rights need not be interpreted theologically (as Locke's rights that are "granted by God") or as having deep metaphysical underpinnings (as Kant's metaphysical doctrine of Right). We might simply understand them in terms of reasons: If we find, after critical self-reflection, that we accept principles that imply a moral claim on the part of creators to the objects they create—a claim that is different from the claims non-creators might make—then this supports at least a *prima facie* case in favour of such a moral claim. A "moral right of creators over their creations" might simply refer to a valid claim that creators have over their creative products, a claim that can be distinguished from the competing claims of non-creators.<sup>19</sup> The existence of such a valid claim will not settle questions about its moral weight and significance, or how it will fare when it comes up against the competing claims of others. In sum, the view that claims to intellectual creations are moral or natural, in a sense, does not imply that the associated rights are absolute. Nor does it immediately imply that these claims should be secured by law. Nonetheless, the idea that "creators have special claims to the objects they create" undoubtedly accounts for part of the practical moral appeal of IP protection.

These are not, of course, the only moral arguments for patent and other IPRs, but I believe that they are the principal ones. The weight and significance—I would say, the *moral* weight and significance—of IPRs will depend on the strength of the arguments that constitute the strongest reasons for putting these rights in place, but also on the weight and significance of other rights and interests with which IPRs sometimes conflict. Moreover, IPRs may have different moral significance in international contexts than they do in domestic law. This different significance will be salient if efforts to strengthen IPRs and to harmonise international IP regulations have disparate effects on nations that are at different stages of development.

those who introduced it and since there is (to my knowledge) no record of the original, it seems reasonable to question whether these are truly the words of Luther Burbank. The *argument* contained in them, however, should in any case be evaluated independently.

<sup>18</sup> It may be appropriate to identify *moral rights* that are typically regarded to be included as part of IPRs as having an association with the idea of "makers' right". For an engaging discussion of the moral aspect of IPRs, see Peter K. Yu, "Moral Rights 2.0" (2014) 1 Tex. A&M L. Rev. 873. See also Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Geo. L.J. 287.

<sup>19</sup> The view that valid claims are rights has been articulately defended by Joel Feinberg, "In Defense of Moral Rights: Their Bare Existence (1990)" in *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992).

## Patent critics

### *A spurious critique?*

Those who are in the grip of the *simple economic argument for patents* may wonder at objections raised by critics. If patents call into existence valuable and necessary new technologies that would not have existed otherwise, how can we grudge patent holders their temporary monopoly? Some critics simply seem to have missed the point. Vandana Shiva writes:

“Central to the ideology of IPRs is this fallacy ... that people are creative only if they can make profits and such profits are guaranteed through IPR protection. This negates the scientific creativity of those not spurred by the search for profits, i.e., the majority of scientists in universities and public research systems. It negates the creativity of traditional societies and the modern scientific community in which free exchange of ideas is the very condition for creativity, not the anti-thesis.”<sup>20</sup>

This fallacy, argues Shiva, is the source of the “myth” that patents stimulate creativity. But no such fallacious claim is involved in the simple argument for patents. Patent advocates need not and do not deny that people can be and are creative in the absence of a patent incentive. But they also hold, reasonably, that *some* forms of valuable research will not take place unless people have an additional incentive. When research involves serious time and expense, those who pursue it must have a reasonable expectation that they will be able to earn back the costs of research and development. In addition, patent advocates also hope that *more* research will take place when people have a profit incentive in addition to the other motives that regularly lead people to pursue creative work.

Even without patent protection, Luther Burbank worked a lifetime to develop new valuable plant varieties. But where technological development is very expensive in time and money, it is less likely that it will be pursued if developers cannot expect proprietary rights in their product. In the case of valuable drugs or crops, for example, where production time may be more than a decade and may cost millions of dollars, it is less likely that work will be undertaken in the absence of patent protection.

### *Orphaned drugs and crops*

*Pace* Shiva, there is further evidence that IP protections spur innovation: Why have more research dollars been poured into remedies for erectile dysfunction and baldness, while fewer have gone to “orphaned” diseases like cholera and malaria? The reason is that people who have cholera and malaria are *poor*, so the profit incentive does not work. You cannot make much money serving the interests of people who cannot afford to pay. For those diseases, there are crucial reasons of compassion, justice and pure scientific curiosity, all of which motivate dedicated researchers to look for ways to improve the lives of those who suffer from them. But the research dollars are not there because there are few profit-making opportunities associated with these orphaned diseases. The case is similar for orphaned crops (like manioc) and other crop varieties that would serve the poor (like drought and flood-tolerant rice varieties). Important and potentially life-saving work has been done on orphaned products that serve the poor. But the reason *less* has been done is that investment firms reason that they will do better for their shareholders if they invest in projects that will serve a paying customer base. As so often is the case, poor people are simply left out, and their urgent needs go unmet while market funded research follows relatively trivial wants of wealthier consumers. The relevant conclusion is not that patents do not spur welfare-enhancing innovation, but that they do not effectively motivate innovations that would specifically benefit those who are most needy.

<sup>20</sup> Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights* (New York: Zed Books, 2001), p.25.



### *Further reservations about patents: Trolls, pirates and thickets*

Orphaned drugs and crops are not the only, or the most important, problem with patents, and the incentive system they create. Critics have identified even more serious reasons why patents raise problems, in both domestic and international contexts. In short, patents do not always work in the way the *simple argument* suggests. While the *simple argument* implies that patents increase the rate of innovation, well-known cases show patent holders can *shut down* further innovation once they possess an exclusive right.<sup>21</sup> Monopoly holders have a motive to block competitors even when they have no intention to develop the innovation independently.<sup>22</sup> These are not mere hypotheticals: In one widely discussed case, Summit Technology and VISX, both of which held key patents involved in laser eye surgery, formed a partnership to manage their joint property in a way that gave them a de facto “veto over any attempt by the other to license technology to third parties, effectively eliminating competition between them to offer such licenses”.<sup>23</sup> In other cases, patents have been used to assert exclusive private rights over intellectual resources that should properly have been recognised as common property, available for everyone to use. In another notorious case, Larry Proctor filed a patent for what he called the “Enola bean”, identified by colour and species. This patent gave Proctor exclusive marketing rights for yellow beans of the species *phaseolus vulgaris*, which had been in use in Mexico for hundreds of years. Proctor *asserted* these rights by sending cease-and-desist orders to importers who had been bringing yellow Mayacoba beans to the United States from Mexico since long before Proctor’s patent was issued. Proctor’s patent was widely discussed and decried and has since been revoked. But the problem remains: the existence of the patent system gives people an incentive to claim private rights over resources that should properly remain in the commons.<sup>24</sup>

The problems patents sometimes create are exacerbated if companies are able to *extend* their patents beyond the normal period during which they can legitimately be enforced. There are several means for “evergreening” patents—for example, by filing a new patent that covers subject matter that is, conceptually, *right next to* the subject matter over which an older patent is about to expire. When patent holders manage to extend their claims beyond the normal life of a patent, they are, in effect, asserting a private right in subject matter that should properly move into the commons. Finally, as Tony Smith points out, patents must be *defended*, and the expenditure necessary for such protection undermines the net value of the IP. This has unfortunate economic effects, since larger companies are in a better position to manage the legal costs associated with litigation. “[A]s a result”, writes Smith, large companies “are increasingly able to subordinate small innovating companies in emerging sectors, choking economic dynamism.”<sup>25</sup>

There is wide agreement that patents can be misused to slow innovation, privatise common property, choke competition and squeeze money and profitability out of otherwise dynamic companies. There is also wide, though not universal, agreement that patents generate a profit motive that spurs innovation and that much of the research that takes place would not have been pursued but for the promise of IP protection at the end of the process. These two competing truths constitute the background for the debate described by Hugh Laddie, referenced at the beginning of this article.

Perhaps the debate between critics and defenders of patent can be associated with an underlying disagreement about the *extent* to which patents create technology, versus the extent to which they generate perverse incentives and undermine innovation. Defenders tend to dismiss the problems as incidental and

<sup>21</sup> Adam Jaffe and Josh Lerner cite numerous cases in *Innovation and Its Discontents* (Princeton: Princeton University Press, 2004). Notably, they discuss the case of the Wright brothers, who used their patents to obstruct further development of airplane technology.

<sup>22</sup> Tony Smith makes this point in “The End of One American Century ... and the Beginning of Another?” in Richard Westra, Dennis Badeen and Robert Albritton (eds), *The Future of Capitalism after the Financial Crisis: The Varieties of Capitalism Debate in the Age of Austerity* (New York: Routledge, 2015), pp.89–90.

<sup>23</sup> Adam Jaffe and Josh Lerner, *Innovation and Its Discontents* (2004), p.61.

<sup>24</sup> Boyle sees many contemporary changes in IP law as efforts to privatise or “enclose” what has been (and should be?) common property. James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (Winter/Spring 2003) 66 L. & Contemp. Probs. 33.

<sup>25</sup> Smith, “The End of One American Century ... and the Beginning of Another?” in Westra, Badeen and Albritton (eds), *The Future of Capitalism after the Financial Crisis* (2015), pp.89–90.

infrequent side effects of a system that is effective overall. Critics tend to see the problems as pervasive and structural, as aspects of an overall system that advantages some at cost to others. Could we reduce this disagreement to an empirical question if we had some way to measure and compare costs and benefits of alternative IP protection regimes? This brief article cannot accomplish such a comparison. Instead, I will examine a specific argument by critics who urge that the globalisation of patent and other IP protection is unfair because of disparate effects on developed versus developing nations.

## Fairness and international justice

There is a widespread perception that IP rules in general, and globalised IP rules in particular, are disadvantageous to less developed countries. One face of this disadvantage is seen in the view that IP incentives are not an effective way to provide welfare-enhancing and health-enhancing technologies that will serve poor people. Some policy proposals seek to address this gap either by providing an additional market incentive for research that is likely to have widespread humanitarian benefits.<sup>26</sup> Such proposals would not constitute a *replacement* for patent and other traditional IP institutions; they are rather a *supplement*, designed to spur innovation in needed areas or to make innovation public as a means to facilitate access.

### *IPRs and international fairness*

Another face of the argument that patents are disadvantageous to countries in the global South is the perception that patent and other IP rules are internationally *unfair*. The charge is that stronger IP protection creates an advantage for developed nations, but imposes costs on developing nations. Aaron James makes this case in a recent book on globalisation and international fairness:

“IP rules tend to slow economic development. They transfer resources from developing countries to rich-country authors, away from where they do the most good. They slow the transfer of technologies to developing countries—one of the chief benefits of trade—by making it more expensive. They limit the imitative innovation that was crucial for advanced countries when they industrialized, as well as the policy flexibility that has been a hallmark of almost every development success story.”<sup>27</sup>

James is especially concerned that efforts to *strengthen* or *harmonise* international IP rules will have these disproportionate deleterious effects on developing nations. According to James, the most important argument in favour of strong and internationally harmonised IP protections is that such protections create circumstances of *fair competition*, since otherwise innovative firms would face unfair competition from competitors who could take advantage of their technology without ever incurring the cost of innovation—perhaps by reverse engineering or cheaply reproducing their products. But, as he urges, this argument from *fair competition* fails because international markets are already tilted in ways that systematically advantage people in developed nations. IP harmonisation, then, is not a path to fairness, but just another way to provide additional benefits for those who already have unfair advantages.<sup>28</sup>

<sup>26</sup> E.g. Thomas Pogge, “Human Rights and Global Health: A Research Program” (2005) 36 *Metaphilosophy* 182; Thomas Pogge, “Intellectual Property Rights and Access to Essential Medicines”, available at <http://siteresources.worldbank.org/INTDECINEQ/Resources/IntellectualPropRts.pdf> [Accessed November 4, 2015]. In association with his proposal, Pogge has initiated the Health Impact Fund (<http://healthimpactfund.org/>), which seeks to implement evidenced-based rewards for innovations that are expected to bring global health gains. In a similar vein, Michael Kremer also suggested prizes and buyouts for valuable innovations. Michael Kremer, “Patent Buyouts: A Mechanism for Encouraging Innovation” (1998) 113 Q.J. Econ. 1137. See also James Love and Tim Hubbard, “The Big Idea: Prizes to Stimulate R&D for New Medicines” (2007) 82 Chi.-Kent L. Rev. 1519; J.E. Stiglitz, “Scrooge and Intellectual Property Rights” (2006) 333 British Med. J. 1279. Pogge’s argument is sometimes wrongly taken as an argument for the view that patents on essential medicines are inappropriate or morally impermissible. For an argument against this strong view, see Jorn Sonderholm, “A Critique of the Argument against Patent Rights for Essential Medicines” (2014) 7 *Ethics & Global Pol.* 119.

<sup>27</sup> James, *Fairness in Practice* (2012), pp.287–288.

<sup>28</sup> It is worth noting that it is companies and patent holders that are in direct competition in IP markets, not nations. James recognises this in *Fairness in Practice* (2012), p.299.

Even more importantly, harmonised rules make it more difficult for nations to adjust policy so that it can more effectively promote nationally relevant goals. Consider the predicament of Greece during the 2015 financial crisis: many commentators have urged that Greece would have been better if it had never joined the EU currency union, but had instead kept its own domestic currency, the drachma. If Greece had kept the drachma, it could have promoted local economic activity by reducing the value of its domestic currency, which would be predicted to increase international investment and international purchase of Greek products. In a similar vein, it will be sometimes advantageous for nations to develop IP rules that serve national goals, rather than subsuming those goals under the umbrella of international harmonisation or consistency.<sup>29</sup> In sum, it is not at all obvious that the growing trend towards international harmonisation of IP rules will advantage developing nations.

In this regard, it is noteworthy that there is another intertemporal issue of fairness at play: Like other industrialised nations, the United States grew its own industrial power by flouting IP rules and using domestic patent protection to promote the importation of technologies needed for the economic development of a new nation. The policies undertaken by the United States in the early decades of its existence would now be regarded by many as a form of piracy. Can it be fair for the United States and other developed nations to deny presently developing nations from employing a strategy that the United States enthusiastically used when it was undergoing the process of economic development?<sup>30</sup>

In the absence of strong internationally harmonised IP protections, new technologies and medicines could be available for free, or at least without licensure costs, to people who need them most. This *spillover* value has sometimes been celebrated as a key advantage of domestic IP protections.<sup>31</sup> Because developed nations typically have better research infrastructure in place, most patents are held by firms and individuals in developed nations. But for key advances in medicine, crop development and other technologies, the people who would benefit most from access are poor people in developed nations. William Haddad, writing in the *Bulletin of the World Health Organization*, expresses concern that international patent harmonisation “could have a devastating impact” on the ability of developing countries to access “essential medicines, diagnostics, and vaccines”.<sup>32</sup> In developing nations, the same case might be made for the need for sustainable and appropriate crop varieties that can thrive in changing environmental conditions: in the worst case, IP protections may prevent needed technologies from getting to those who need them most urgently.

Does the *simple argument* for patents provide a response to this objection?<sup>33</sup> According to the *simple argument*, the drugs, crops and new technologies in question would not have existed at all, but for the IP protections that restrict access to them. This may not be the case, however, in contexts where multiple investigators were independently working on the same project, and the protection is gained by the group that succeeded first. More importantly, there is no reason to believe that IP protections that deny access to *poor* people are optimally welfare-enhancing. As noted earlier, people without access to capital are not the intended target for new profit-driven innovation efforts because they are not a lucrative market. The other side of this argument is that not much *loss* is incurred when poor people are provided with new technologies without licensure payments. Since poor people were not the intended market, it may be possible to weaken IP protections in ways that serve them without undermining the incentive effect of patent protection. This thought will be carried further in the final section of this article.

<sup>29</sup> In this spirit, John Duffy argues in favour of *diversity* of patent rules. John F. Duffy, “Harmony and Diversity in Global Patent Law” (2002) 17 Berkeley Tech. L.J. 685.

<sup>30</sup> This point is eloquently made in Doron S. Ben-Atar, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* (New Haven: Yale University Press, 2004).

<sup>31</sup> Sergio Lence and Dermot Hayes examine the welfare benefits of IP spillover effects in Sergio H. Lence and Dermot J. Hayes, “Welfare Impacts of Cross-Country Spillovers in Agricultural Research” (2007) Iowa State University, Working Paper No.07-WP-446.

<sup>32</sup> William Haddad, “Rich and Poor Countries Divided on Patent Treaty” (2006) 84 Bull. World Health Org. 337.

<sup>33</sup> As I read Aaron James’s otherwise excellent discussion of intellectual property, he does not properly present the *simple argument*, as I have called it here, among the arguments he considers in support of international patent harmonisation. He does consider the argument from utility (or welfare), but his discussion is too quick and dismissive.

### *IPRs as trumps?*

In considering proposals to *weaken* IP protection, we must consider the argument of Alex Rosenberg, who has urged that international harmonisation of IP rules is essential for effective patent protection:

“The absence of an internationally enforceable patent right is close to the same as no patent right at all. This consequence follows from the difficulty of effective excludability in consumption of good ideas. When the cost of copying a piece of software became only slightly more than the price of a floppy disk, excluding non-purchasers from access to the good rests on the willingness of purchasers or their agents to refrain from reselling or giving away a non-rivalrous good. It is well known that no such willingness can be relied on and that consequently protection afforded by nationally enforceable patents is quite inadequate. When the ease and undetectability of copying good ideas dropped further, owing to the availability of high bandwidth to transmit digital copies of information, these protections become non-existent.”<sup>34</sup>

According to Rosenberg, innovation is the most important long-term factor contributing to human welfare. IPRs, therefore, should not be “trumpable” (or overridable) by any non-IPR welfare considerations. Enforcement of IPRs enacts our obligation to protect the welfare of future generations, since the long- and medium-run welfare interests in innovation, Rosenberg argues, will swamp the short-term benefits we might gain by temporarily overriding IPRs.

Without discussing all of the details of his argument, it is worth recognising that Rosenberg assumes, in the ideal case, that the relationship between strong IPRs and increased innovation is a strictly increasing function. As noted above, there are reasons to doubt this: inappropriately structured IPRs may actually *stifle* innovation as they are made stronger—for example, when they can be used to quash unwanted competition by firms that would otherwise be more efficient producers of products and ideas. It is important, in this context, that such anticompetitive practices can quash innovation as well as preventing market competitors from undercutting the market price of the patented item. Strengthening IPRs will not always increase the rate of innovation, and weakening IPRs will not always reduce the rate of innovation: weakening the research exemption for IPRs would make IPRs stronger, but there are good reasons to expect that a research exemption should promote, not undermine, build-on innovation. Rosenberg’s argument also tendentially assumes that increasing the innovation incentive will not have diminishing marginal value as we increase the strength of IPRs. If it does have diminishing marginal value, then there will be a point when alternative welfare-enhancing opportunities will be more efficient. The appropriate conclusion to draw, then, is, if other parts of Rosenberg’s argument are accepted, we should maximally protect and incentivise innovation whenever alternative welfare-enhancing opportunities are less efficient. IPRs should then be structured to do this most effectively.

Should we accept other aspects of Rosenberg’s argument? I must confess to doubts that the value of IPRs will always trump other welfare-enhancing ways we might spend development dollars, and even more serious doubts that such a thing could be known or shown *a priori*.<sup>35</sup> Rosenberg makes a very strong case for the crucial importance of innovation, and the necessity of innovation if we wish to promote long- and middle-term human welfare. Even if one were to accept a somewhat weaker version of Rosenberg’s view, there appears to be excellent reasons to give IPRs high priority—higher than they usually receive—when comparing their significance with other welfare-enhancing policy opportunities.

<sup>34</sup> Rosenberg, “Designing a Successor to the Patent as Second Best Solution to the Problem of Optimal Provision of Good Ideas” in Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2014), pp.90–91, fn.2. See also Rosenberg, “The Priority of Intellectual Property Rights” (2004) 3 *Pol., Phil. & Econ.* 77.

<sup>35</sup> I am uncertain that this is properly an implication of Rosenberg’s argument, but a 2005 discussion of Rosenberg’s work on this topic with Julian LaMont led me to believe so.

## Conclusion and policy implications

Stronger IPRs will not always increase the incentive for technological development. The clearest example of this, perhaps, is the research exemption: to allow researchers to use patented subject matter for purposes of research makes IPRs weaker than they would be if such use were prohibited. But it is unlikely that prohibiting possession of such subject matter *for purposes of research* will significantly undermine the overall incentive to pursue the development of new technologies.<sup>36</sup> The goal should not be to maximise the strength of IPRs, but to maximise the incentive effect of IPRs while undermining the ability of IPR holders to use their rights to curtail others' research or to engage in anticompetitive practices. In a similar vein, there may be ways to adjust IPRs to promote development goals without significantly undermining the incentive effect.

I conclude with a modest proposal, which is in the spirit of the discussion above, but which will require more extensive discussion and defence elsewhere.<sup>37</sup> Suppose developing nations were to adopt patent rules that forbid enforcement of IPRs where the needed technology serves the poor. Such a rule might stipulate that patented subject matter will be available without licensure for users whose income is less than \$10,000 per year and that domestic patent infringement suits will not be recognised where the annual income of the beneficiary—the person who benefited from the use of the protected subject matter—is less than \$10,000 per year. Such a provision should not be expected to have a serious negative impact on the profitability of patents or to significantly diminish the incentive associated with patent protection. The people served by such a provision are too poor to make patent holders rich. They are not the intended target of market-driven IPR-protected innovation in any case.

Would nations that impose such a rule be subject to lawsuits by patent holders, who are concerned to maintain the strength of their IPRs?<sup>38</sup> Such suits could be pursued through the WTO, or perhaps within other emerging enforcement bodies. However, there is reason to think that patent holders will not find it advantageous to pursue such lawsuits: any company that pursued a lawsuit that expressly targeted policies designed to serve the poor would incur significant public relations disadvantages. And perhaps developing nations could successfully defend themselves if a suit were filed: both TRIPs and the Trans-Pacific Partnership include provisions that allow member states to exclude from patentability subject matter that would be contrary to “*ordre public* or morality”. There is a lively debate about what these provisions mean and how they should be interpreted in court. Existing disagreement creates at least some hope that they might be interpreted to allow developing nations to adjust domestic IP policy so that IP legislation can more effectively serve those who most need the technologies IPRs protect.

<sup>36</sup> I do not mean to imply that such a weakening of IPRs would not have *some* impact on the research incentive. There are, however, reasons to believe that the benefit to research afforded by this exemption would outweigh the cost. The argument for that claim may not be obvious, but cannot be made here.

<sup>37</sup> A slightly more complete defence can be found in Clark Wolf, “Getting New Agricultural Varieties to Those Who Need Them Most” (2015) 17(1) *Bioethics in Brief*, available at <http://www.biotech.iastate.edu/march-2014-bioethics-in-brief-copy-2/> [Accessed November 4, 2015].

<sup>38</sup> I thank Daniel Pilchman for pressing this question.

# Indigenous Peoples' Rights and Remedies in Complex Situations

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☞ Corrective justice; Fairness; Historical jurisprudence; Indigenous peoples; Intellectual property

Most indigenous peoples have various forms of “traditional knowledge” (TK).<sup>1</sup> Much though not all TK is informational; it consists of knowledge of plants and animals and ways to use this knowledge within a particular environment and culture. The narrow inquiry to which this article belongs is figuring out what should be done when colonial powers borrow, consume or destroy this knowledge, harm the indigenous culture that gave rise to it, and render the re-creation of this TK difficult or impracticable. There is a larger inquiry about the responsibility of colonial powers for the murder and enslavement of indigenous peoples and the taking of their land and mineral resources. In regard to that larger inquiry, arguments in this article can support a wide range of remedies for indigenous peoples, such as reparations, monetary compensation, resettlement, educational opportunities and health care. Here I concentrate on the narrow inquiry and intellectual property (IP) rights in TK as a remedy for indigenous peoples because such rights are central to the intellectual enterprise of this journal.

A specific problem addressed here is figuring out what should be done in complex situations. There are many kinds of complexity. This article addresses only one, which is marked by the following distinction. A situation is simple if a single actor, or a closely related set of actors, harms an indigenous people over time. For example, a colonial power that harms an indigenous people, along with its corporations, banks and industrialists, presents a simple situation. A situation is complex if multiple actors that are not closely related to each other harm an indigenous people over time. To illustrate, one has a complex situation if one adds to the colonial power subsequent actors, such as a nationalist government that relocates an indigenous people, Third World government agencies that later marginalise that indigenous people, and still later outside intervention by a major world power which is interested in a country's natural resources and whose actions also harm that indigenous people. Complex situations are sequential across many actors which are not closely related and which involve harm to indigenous peoples. The existence of complex situations is important because they make discerning appropriate remedies more difficult.

This article is chiefly philosophical. I start with a view of corrective justice as it relates to IP and propose that some special rights involve corrective justice. I then show how fairness can be projected onto corrective justice and tie corrective justice to remedies recognised by the UN Declaration on the Rights of Indigenous Peoples. At the end I suggest how one might think about legal remedies for harm to indigenous peoples' TK in complex situations. This article is sometimes schematic in stitching together my own thoughts and contributions made by others. It presupposes familiarity with some of the literature on TK, indigenous peoples, corrective justice, rights, free riding and fairness. It incorporates by reference the arguments and

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<sup>1</sup> I use TK as an equivalent for the more cumbersome label “genetic resources, traditional knowledge, and traditional cultural expressions/folklore”, or GR/TK/TCE/F.

conclusions of two earlier articles<sup>2</sup> and tries to improve on them. I take it as understood that some arguments (such as a corrective justice argument), which do not belong to standard philosophical theories of property, may support rights in TK that work like IP rights.<sup>3</sup> I cannot discuss here the difficult issue of which groups count as indigenous peoples.<sup>4</sup>

## Corrective justice and intellectual property

I once offered a philosophical and legal corrective justice argument for the proposition that indigenous peoples should have some IP rights in their TK.<sup>5</sup> I said that this proposition is justifiable “in principle”, even if the rights they ought to have “at a particularized level [require] judgment and detailed knowledge”.<sup>6</sup> I claimed that my argument did not invoke human rights, distributive justice or theories of property. It depended entirely on corrective justice.

That argument consisted of six basic steps: (1) Some wrongs have been committed against indigenous groups, some or all of their members, or both. (2) The wrongdoers and their closely related successors are sometimes identifiable as a group, individual members of a group, some other legal entity such as a corporation or a state, or some combination of these. (3) The wrongs unjustifiably harmed indigenous peoples, some of their members, or both. (4) Those harmed are identifiable as indigenous groups, individual members of indigenous groups, or both. (5) No excuse is available such that the wrongdoers or their successors lack a moral duty to rectify their wrongs and undo the harm caused. (6) Finally, recognising IP rights in TK can in principle be part of an effective and reasonably efficient means of restoring justice to the indigenous peoples or their members who have been harmed, even if in some cases it is necessary to resort to other remedies such as monetary compensation.<sup>7</sup>

I recognise that the foregoing argument is skeletal and requires judgment in its application to complicated historical situations. The argument, if sound, offsets some familiar objections to recognising IP rights in TK. Common objections are that in the past social groups have frequently borrowed from one another without compensation; that often TK is not fixed in a tangible medium of expression; and that TK is inferior to patentable inventions, because TK is collective and incremental.

I recognise, too, that harm involving TK must distinguish between at least two different ways of valuing that harm. The first is the subjective value of TK to a particular indigenous people. The second is the value of that TK on the market. Often, the first sort of value is higher than the second. For example, many TK medicines prized by indigenous peoples have a low value on the market because they either are inefficacious once placebo effects are taken into account or have unwanted side effects, such as hepatic toxicity at therapeutic levels.<sup>8</sup> As another example, most TK in the form of folk tales, which indigenous peoples value highly as part of their culture, has little monetary value on the world literature market, because non-indigenous readers usually lack the cultural background to appreciate the stories. TK music is different. Indigenous music from West Africa, for instance, sometimes does well in France.

<sup>2</sup> Stephen R. Munzer, “Corrective Justice and Intellectual Property Rights in Traditional Knowledge” in Annabelle Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (Cambridge: Cambridge University Press, 2012); Stephen R. Munzer and Kal Raustiala, “The Uneasy Case for Intellectual Property Rights in Traditional Knowledge” (2009) 27 *Cardozo Arts & Ent. L.J.* 37.

<sup>3</sup> Munzer and Raustiala, “The Uneasy Case for Intellectual Property Rights in Traditional Knowledge” (2009) 27 *Cardozo Arts & Ent. L.J.* 37, 42–43.  
<sup>4</sup> E.g. Christoph B. Graber, “Stimulating Trade and Development of Indigenous Cultural Heritage by Means of International Law: Issues of Legitimacy and Method” in Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham: Edward Elgar Publishing, 2012), pp.13–17.

<sup>5</sup> Munzer, “Corrective Justice and Intellectual Property Rights in Traditional Knowledge” in Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2012).

<sup>6</sup> Munzer, “Corrective Justice and Intellectual Property Rights in Traditional Knowledge” in Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2012), p.60.

<sup>7</sup> Munzer, “Corrective Justice and Intellectual Property Rights in Traditional Knowledge” in Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2012), pp.61–62.

<sup>8</sup> An illustration is the low market value of the *Hoodia* plant and its derivatives used by some indigenous peoples in southern Africa. Stephen R. Munzer and Phyllis Chen Simon, “Territory, Plants, and Land-Use Rights among the San of Southern Africa: A Case Study in Regional Biodiversity, Traditional Knowledge, and Intellectual Property” (2009) 17 *Wm. & Mary Bill Rights J.* 831.

In the case of TK, it makes no sense to concentrate entirely on market value over subjective value to an indigenous people. Appealing to subjective value is a way of conceptualising what is lost when cultures are decimated. Decimation suggests that placing that loss in a legally recognised category, such as IP, is a start on rectifying the harm done. One feature of relying on corrective justice arguments to address cultural harm is evident: A culture can have subjective value over and above its specific manifestations such as texts, rituals and medicinal knowledge. It is worth investigating whether culture, if writ large in TK-like terms, enables us to see cultures themselves as forms of IP. Should the investigation pan out, that might help us to categorise, in both moral and legal ways, the harms that result when cultures are wrecked by colonialism and other human forces.<sup>9</sup> The value of a culture can be greater than the value of that culture's TK.

In any event, I think my earlier argument can be improved by mapping a particular understanding of fairness onto corrective justice. To this end, I ward off a possible unsound criticism. Next, I discuss a conception of fairness that rests on moral free riding. Only then do I use Garrett Cullity's understanding of fairness to improve my earlier argument.

## General rights and special rights

My previous claim that “corrective justice can in principle ground a baseline entitlement such as IP rights in TK”,<sup>10</sup> without explaining what “baseline entitlement” means, was not the best way of putting the matter. In particular, this claim might seem open to the criticism that, because all baseline entitlements are general rights, the argument in question is flawed from the start, for rights that issue from corrective justice have to be special rights. After all, arguments of corrective justice are remedial in nature, for they rest on a schema like this: because A wronged B, to remedy this wrong, A must restore to B that which B was deprived of by A's wrong in order to make B whole. If IP rights are general rights, and if arguments of corrective justice support only special rights, then corrective justice arguments, the criticism concludes, cannot justify any IP rights at all—in TK or in patents, copyrights or trademarks.

To understand this criticism, recall how H.L.A. Hart distinguishes between general and special rights.<sup>11</sup> General rights, he says, “are thought of as rights against . . . everyone”.<sup>12</sup> The right of all persons “capable of choice” to be free “in the absence of those special conditions which constitute a special right to limit another's freedom” is a prime example of a general right.<sup>13</sup> General rights are good against everyone. Special rights “arise out of special transactions . . . or out of some special relationship”.<sup>14</sup> Special rights are good against particular persons or classes of persons. Because most property rights, including most IP rights, are good against everyone, some might conclude that IP rights are usually general rights of authors and inventors. Some might conclude further that the burden is against recognising any general non-standard IP rights in favour of indigenous peoples.

<sup>9</sup> I owe this suggestion to Michael Cholbi. See also James W. Nickel, “Ethnocide and Indigenous Peoples” (1994) 25 J. Soc. Phil. 84 (Supplement, 25th Anniversary Special Issue).

<sup>10</sup> Munzer, “Corrective Justice and Intellectual Property Rights in Traditional Knowledge” in Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2012), p.63.

<sup>11</sup> H.L.A. Hart, “Are There Any Natural Rights?” (1955) 64 Phil. Rev. 175. Hart declined to reprint this article in a 1983 collection because “its main argument seems to [him] to be mistaken”—that is, the argument that, if there are any moral rights at all, there must be at least one natural right, namely, the equal right of all persons to be free. H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), p.17. In a 1988 interview, Hart reiterated this judgment. “Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman” (2005) 32 J.L. & Soc'y 267, 278. However, Hart continued to regard his distinction between general and special rights as useful exposition. For information on Hart's partial retraction, I thank Margaret Gilbert and Amanda Trefethen.

<sup>12</sup> Hart, “Are There Any Natural Rights?” (1955) 64 Phil. Rev. 175, 183.

<sup>13</sup> Hart, “Are There Any Natural Rights?” (1955) 64 Phil. Rev. 175, 188.

<sup>14</sup> Hart, “Are There Any Natural Rights?” (1955) 64 Phil. Rev. 175, 183.



Hart's distinction is sound,<sup>15</sup> but warrant exists for expanding the class of special rights to rights to corrective justice remedies for harm done by colonial actors to indigenous peoples. Special rights "arise out of special transactions between individuals or out of some special relationship in which they stand to each other".<sup>16</sup> Hart nowhere claims that his examples of the relevant transactions and relationships—promises, consent and authorisations, mutual restrictions and the relationship between parent and child—are exhaustive. I suggest an additional category of special rights: one in which A voluntarily inflicts harm on B that A knows, or should know, causes significant harm to B even if A derives a benefit which outweighs the harm to B. The substitution-instances for both A and B include individual persons, sets of persons at a particular time and trans-temporal groups of persons. For trans-temporal groups, there must be some ties of interest, lineage, race, class, status or culture for those in the A-group and different such ties for those in the B-group. A good contrasting example of trans-temporal groups involves white colonisers as members of the A-group and non-white indigenous peoples as members of the B-group.

Both general rights and special rights are involved in various IP rights in TK. As to general rights, indigenous peoples have or once had some measure of sovereignty. TK is an important feature of their sovereignty, for it is a product of their culture. Just as patentable inventions and copyrightable works are expressions of Western and westernised cultures, TK is an expression of indigenous cultures. Indigenous peoples' control over the meaning of their culture is a basis for their having normative input as national legal systems and international organisations decide which IP rights to recognise. Such IP rights in TK, as they ought to have been recognised in these decisions, would be good against everyone.

As to special rights, two connected arguments suggest themselves. First, if indigenous peoples had a normative seat at the table, then the IP regime that should have been created would have made room for some IP rights in TK. In fact, few if any such rights were created until recently. Thus, the non-recognition of such rights counts as counterfactual violations, which bring in special rights for indigenous peoples as a way to rectify the wrongs done. Secondly, rights to corrective justice remedies arise from a special relationship between colonial wrongdoers and indigenous peoples in which the former harmed the latter. An indigenous people's right to a remedy is a special right good against a particular colonial wrongdoer. But if the appropriate remedy is IP rights in TK, those IP rights are good against everyone. Analogously, if you infringe my patent and my suit against you prevails, my patent rights are good against everyone, not just you.

To see how special rights of this sort can make use of the six-step skeletal argument in the previous section, let us apply that argument to the Urvolk, a hypothetical indigenous people who were colonised by Sylvania, a hypothetical European country, in the late 19th century.<sup>17</sup> The Urvolk are an undeveloped forest people who live in small groups of 50–80 persons in central Africa. Their TK originally consisted of knowledge of forest animals and plants, a stringed musical instrument similar to a zither, and songs and stories about hunting animals in the forest. The Sylvanians were technologically much more advanced than the Urvolk.

The argument goes: (1) The Urvolk and their members suffered manifold harms from Sylvanian colonialism. Violence, starvation, loss of timber, temporary forced relocation and interference with their TK are among these harms. (2) Next, it is often possible to identify the wrongdoers, such as King Waldnacht of Sylvania, some Sylvanian corporations and industrialists, and some ordinary Sylvanians who knowingly profited from the exploitation of the Urvolk and did nothing to protest this exploitation or reduce its

<sup>15</sup> I do not, however, accept Hart's claim that general rights are possessed only by persons "capable of choice". Hart, "Are There Any Natural Rights?" (1955) 64 Phil. Rev. 175, 188. The right not to be tortured, for example, is a general right possessed by all persons, including even those who lack the capacity to choose, such as infants and advanced Alzheimer's patients.

<sup>16</sup> Hart, "Are There Any Natural Rights?" (1955) 64 Phil. Rev. 175, 183.

<sup>17</sup> I apologise for the hypothetical illustration, but space constraints prevent an actual, historically nuanced example. Development of the Urvolk example in later sections generates a trans-temporal hypothetical example. Here, "Urvolk" is the proper name of a hypothetical indigenous people. It is not the German common noun often translated as "aborigine".

gravity. (3) The infliction of these harms was unjustifiable. (4) Furthermore, those harmed are to some extent identifiable, for Sylvanian colonialism is, in historical terms, fairly recent. Even if we cannot *name* individual Urvolk harmed in the late 19th century, we can nevertheless pick out the Urvolk from other central African ethnic groups. The Urvolk are a collective group across time. Although the identity conditions for trans-temporal groups are scarcely beyond debate, in the case of indigenous groups it makes sense to concentrate on two features: lineage and cultural continuity.<sup>18</sup> Because these features are present in the Urvolk, we can identify the Urvolk today as an indigenous group that has suffered and continues to suffer multiple harms, and individual members of the Urvolk today can usually be identified by name. (5) No excuse is available such that the wrongdoers and their successors, past and present, lack a moral duty to rectify the moral wrongs inflicted on the Urvolk and their members and, so far as possible, undo the harm caused. (6) Manifold ways of performing that duty are available. They range from recognising Urvolk IP rights in their TK as well as monetary compensation, health care, education and sensible resettlement programmes that return the Urvolk to their place of origin in central Africa. It will require fact-sensitive judgment to decide which of these possible remedies make the most sense. Some IP rights in TK are special rights, but most are general rights.

### **Moral free riding and the projection of fairness onto corrective justice**

The idea of moral free riding serves as a springboard to showing how fairness can be projected onto corrective justice. “Free riding” is, as Cullity suggests, “a term of art” whose meaning, or meanings, must be explained in terms of the economic literature on public goods.<sup>19</sup> He introduces another term of art, “moral free riding”, to capture cases in which the free rider’s “failure to pay for nonrival goods” under certain conditions that make “her conduct unfair”.<sup>20</sup> His paradigmatic illustration is the conduct of a fare-evader in a system of public transport. If a large percentage of people were to avoid paying the fare, then the public good of public transport would be under-produced. Cullity’s choice of the term “moral” free riding might seem curious, for free riding seems to be morally wrong. Though “immoral” free riding might be a less curious choice, here I stick with Cullity’s usage.

TK is not a public good in the sense that public transport is a public good. Even if Western, or westernised, nations and peoples have made use of TK without paying for it, generally TK has been and is now produced by indigenous peoples despite lack of payment and despite little in the way of legal protection for TK. The TK case therefore differs from the fare-evader case on which Cullity’s concept of moral free riding rests.

I am not saying that TK has zero market value, or that it provides hardly any public benefit, or that it is in no sense a public good, or that indigenous peoples would fail to produce more TK if they were paid to do so, or that the past and current behaviour of Westerners is beyond reproach. I say only that TK is not a public good in the same sense as public transit such that rampant non-payment will always result in the under-production of TK.

Now to corrective justice. In a later article, Cullity provides an account of one sort of unfairness, where “X-ing” is a remedial action. For him unfairness is partiality, and fairness is impartiality. Not X-ing is unfair when:

- (i) something ought, all things considered, to be done;
- (ii) doing it as it ought to be done requires a form of impartiality;
- (iii) X-ing is the appropriate form for that impartiality to take; and

<sup>18</sup> Munzer and Raustiala, “The Uneasy Case for Intellectual Property Rights in Traditional Knowledge” (2009) 27 *Cardozo Arts & Ent. L.J.* 37, 64.

<sup>19</sup> Garrett Cullity, “Moral Free Riding” (1995) 24 *Phil. & Pub. Aff.* 3, 3.

<sup>20</sup> Cullity, “Moral Free Riding” (1995) 24 *Phil. & Pub. Aff.* 3, 7.

- (iv) the failure of appropriate impartiality can contribute to a non-instrumental explanation of the failure to do what ought to be done.<sup>21</sup>

One can project the opposite of this sort of unfairness onto corrective justice. A difference exists between non-indigenous and indigenous peoples. Some non-indigenous peoples—especially those from Portugal, Spain, Great Britain, France and Holland—were among the first Western nations to set up colonies from the late 15th century onwards. Later, as the Industrial Revolution occurred in the 18th and 19th centuries, these countries began to develop IP systems to protect the kinds of innovations that interested them. By 1840 Sylvania had become an independent nation and followed suit on IP. These IP systems protected patents, copyrights and trademarks by legal enforcement mechanisms, such as actions for damages and injunctions. These systems were unfair because they were not impartial, and they were not impartial because they failed to take the TK of indigenous peoples into account.

In contrast, indigenous peoples bore the brunt of Western colonialism. Often colonising peoples killed, raped and injured indigenous peoples, and took their land and mineral resources. Even at the earliest colonial stages, indigenous peoples like the Urvolk had TK in the form of art, artefacts, music, stories and knowledge of the uses of plants and animals. With few exceptions, indigenous peoples had little in the way of legal enforcement mechanisms to prevent outsiders from using their TK or repackaging it without acknowledging its source. It was mainly in the second half of the 20th century that indigenous peoples, sometimes with the aid of national governments, developed legal or quasi-legal rules for protecting their TK from non-indigenous peoples.

With this background, it is possible to use Cullity's argument-schema to support indigenous IP rights in TK. Preserving equal moral and legal status between non-indigenous and indigenous peoples ought, all things considered, to be done. Doing it as it ought to be done requires a form of impartiality between these two sets of peoples. This impartiality requires that non-indigenous and indigenous peoples allow each other to construct, among other things, IP laws in accordance with their respective cultures and values. Moreover, impartiality demands that a society made up chiefly of non-indigenous peoples, like the Sylvanians, should not privilege its IP laws over those of indigenous peoples, like the Urvolk, or the IP laws indigenous peoples would rightly have insisted on had they had a normative voice on which IP rights to recognise. This form of impartiality is the appropriate form of impartiality to take. If that is correct, then failing to take this form of impartiality will result in non-indigenous and indigenous peoples being treated as if they lack equal status. Therefore, it is unfair for non-indigenous peoples in Western, or westernised, countries to insist on applying to indigenous peoples their own IP laws—laws that have been developed for industrialised societies—and no others.

The foregoing argument contrasts one sort of unfairness (partiality) with one sort of fairness (impartiality). One can project impartiality onto different kinds of justice, including distributive as well as corrective justice. Distributive justice would yield general rights. Corrective justice would yield special rights good against the wrongdoer initially, and the remedy rights for the violation would eventually include IP rights in TK good against everyone.

It is beyond the scope of this article to show which moral and legal IP rights in TK are justifiable on a practical, particularised basis—especially whether TK rights have a term or ever enter the public domain. But it is a defensible claim that a well-constructed corrective justice argument would justify indigenous rights for the Urvolk like those proposed in the UN Declaration on the Rights of Indigenous Peoples. These include rights to self-determination, autonomy, self-government and a nationality.<sup>22</sup> Indigenous peoples have rights against “forced assimilation or destruction of their culture”.<sup>23</sup> As to TK, they have

<sup>21</sup> Garrett Cullity, “Public Goods and Fairness” (2008) 86 *Austl. J. Phil.* 1, 5.

<sup>22</sup> “United Nations Declaration on the Rights of Indigenous Peoples” (2007) U.N. Doc. A/RES/61/295, arts 3, 4, 6.

<sup>23</sup> “United Nations Declaration on the Rights of Indigenous Peoples” (2007) U.N. Doc. A/RES/61/295, art.8(1).

“the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals, and minerals”.<sup>24</sup> Moreover, the UN Declaration provides:

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”<sup>25</sup>

In regard to legal remedies, the first three sections provide a moral argument as to why the Urvolk should receive compensation in some form from the Sylvania monarchy, Sylvania corporations and industrialists, and ordinary Sylvania who knew of and benefited from the exploitation of the Urvolk and who did nothing to protest or alleviate that exploitation. The treatment of the Urvolk has not been impartial. It has unjustly enriched Sylvania wrongdoers and their descendants. However, if moral grievances and the unjust enrichment of oppressors, as in the case of chattel slavery, are serious enough, then that serves as a basis on which to argue for legal remedies. Civil rights legislation pursuant to the Thirteenth and Fourteenth Amendments to the US Constitution made at least a start on legal remedies for slavery. Legislatures are often better than courts for crafting remedies for harms inflicted on indigenous peoples such as the Urvolk.

Most of the moral wrongs associated with colonial exploitation of indigenous peoples are not as grievous as the moral wrongs associated with slavery, though some of them come close. Sylvania displacement of the Urvolk led to temporary forced relocation, compromised health, loss of knowledge of plant-based medicines, the destabilisation of traditional cultural expressions such as music and stories, and cultural disruption. Sylvania exploitation has created many Urvolk moral grievances. It has also unjustly enriched many Sylvania now and in the past, and for that a legal remedy is in order.<sup>26</sup>

Article 28 of the UN Declaration sketches the remedies available for breaches of the foregoing rights, as well as many other rights:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise taken or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

To this list I would add remedies for the loss of or damage to TK as broadly defined earlier in this article. Procedures for obtaining these remedies are competently outlined in the UN Declaration:

“Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due

<sup>24</sup> “United Nations Declaration on the Rights of Indigenous Peoples” (2007) U.N. Doc. A/RES/61/295, art.24(1).

<sup>25</sup> “United Nations Declaration on the Rights of Indigenous Peoples” (2007) U.N. Doc. A/RES/61/295, art.31(1).

<sup>26</sup> Kit Barker, “Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right” (1998) 57 Cambridge L.J. 301.

consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”<sup>27</sup>

## Complex situations

To extend the foregoing account to complex situations, it will be useful to reiterate the Urvolk’s exposure to Sylvanian colonialism and to introduce the sequence of their later misfortunes. The importance of the extension lies in the fact many indigenous peoples have experienced various harms caused by independent actors over many generations and even centuries:

1. **1880–1900:**

Sylvanian colonisation of the Urvolk in their forest area of central Africa temporarily destabilised, but did not erase, Urvolk TK and culture. The Sylvanians harvested timber for shipment to their home country. After most accessible timber had been taken, the Sylvanians sold it on the European market and allowed the Urvolk to return to a somewhat denuded forest, which recovered by 1900. The Sylvanians copied the zither-like instrument of the Urvolk without paying them anything.

2. **1900–1950:**

The subsequent decolonisation of what is now the hypothetical country of Kassa in central Africa included the forest area inhabited by the Urvolk. In the first half of the 20th century, the Kassa National Government moved the Urvolk from what was left of their closed canopy forest to an open canopy savannah. As a result, much of the Urvolk knowledge of plants and animals became irrelevant because the same sorts of plants and animals did not exist in the savannah.

3. **1950–1995:**

After a military coup, a Marxist Government in Kassa under President Isidore Savabu imposed severe restrictions on the movement of all ethnic minorities, including the Urvolk. Governmental agencies regulated where indigenous peoples could live. The Urvolk were confined to a different savannah that had no trees whatsoever. They tried to eke out a living as cattle herders. Their TK became largely irrelevant. Their songs and stories about netting monkeys elicited scant interest, even among the Urvolk, in an area where cattle were about the only animals they saw.

4. **1995–2015:**

In 1995, ores of uranium, cobalt and coltan were discovered in the area of Kassa in which the Urvolk now live. The Chinese Government took a keen interest in these mineral resources, which could be used to make fissile material and electronic devices. A Chinese corporation secured a 50-year lease on this area of Kassa. The Chinese taught the Urvolk to work as miners and domestic servants. Some Urvolk women fell into prostitution. Older Urvolk men continued to play the zither-like instrument. Some still sang about catching monkeys. Other residents of Kassa were uninterested in Urvolk music, but enterprising visitors from Europe secretly recorded the songs. The melodies, though not the lyrics, proved to be a big hit in France. Urvolk singers and instrumentalists received no compensation for secretly recorded

<sup>27</sup> “United Nations Declaration on the Rights of Indigenous Peoples” (2007) U.N. Doc. A/RES/61/295, art.40.

songs. They were astonished and angry to learn that their music was being played in Paris night clubs.

As my concern here lies mainly with TK, I will spend little time on non-TK harms experienced by the Urvolk. I leave to the reader the exercise of applying the six-step argument summarised in the first section to the TK rights held by the Urvolk in the three situations just listed in the period 1900–2015. This exercise will track in principle the filled-out example given in the second section.

The TK rights violated and harms suffered between 1880 and 2015 include the following. First, the colonial period (1880–1900) infringed the right of the Urvolk to control the dissemination of their zither-like instrument and deprived them of whatever royalties might have been due them from Europe. Their temporary displacement from the Urvolk forest area made it hard for them to make use of their TK, such as their hunting knowledge of animals in the forest. Secondly, the decolonisation period (1900–1950) in Kassa made it even harder for the Urvolk to use their TK. Their former hunting practices were no longer apt. Their old plant-based medicines were unavailable, for the same sorts of plants did not exist in the open canopy savannah. Though the Urvolk culture still existed, it was watered down. Thirdly, the long term of Savabu's presidency (1950–1995) of Kassa made it still harder for the Urvolk to exercise their TK in an entirely grassland savannah. Techniques for hunting monkeys were useless to the cattle herders they had become. Songs and stories about hunting held little interest even for the Urvolk. The actions of the Savabu Government undercut their traditional cultural expressions. Fourthly, the period of outside intervention by a major world power (1995–2015) resulted from the interest of China in Kassa's mineral resources in the area where the Urvolk live. We now see a culture under siege as the Urvolk have to step away from their animal-oriented life to work as miners and domestic servants. Urvolk songs were surreptitiously recorded, and the melodies became popular in France. It violated the TK rights of the Urvolk to purloin these melodies from them without their consent and without compensation.

How ought one to think about the sequence of rights violations and concomitant harms in these four situations? Here are an image and a suggestion from tort remedies.

Imagine that a new canoe is unloosed from its mooring in springtime. Its path through a stream into tributary rivers and finally into the Mississippi River is marked by turbulence. Turbulence is a flow of fluid in which chaos reigns. The theory of turbulence is part of fluid dynamics.<sup>28</sup> Everyday examples of turbulence include the flow of air around a moving baseball, exhaust from a jet engine, and of course the flow of water which takes the canoe downstream. In a stream swollen from recent rains, the canoe will acquire dents and scrapes as it hits rocks and logs. At lower speeds on a wide river, or stuck in eddies near a riverbank, the canoe will pick up sand and grit as it travels to the Mississippi. The various marks and detritus acquired in the canoe's long trip are distantly analogous to the sequential harms suffered by the Urvolk from 1880 to 2015. Predictions in turbulence theory are often statistical rather than deterministic because it is difficult to say exactly how a baseball will behave as it nears the plate or exactly how many dents a canoe will acquire as it heads downstream. Even in retrospect, once the baseball's path and the number of dents are known, it can be hard to explain why exactly that path and that many dents resulted. By the same token, no one in 1880 would have been able to predict the sequential harms experienced by the Urvolk down to 2015. Tracing the latest harms back to the earliest harms can also be hard to explain.

How would the law of tort remedies apportion, at least in principle, the liability for damages of *A*, *B*, *C* and *D* in regard to a victim *V*? *A*, *B*, *C* and *D* are independent agents. Each acts intentionally, recklessly or negligently at some point during a period of one month. In Week 1, *A* intentionally shoves *V* with substantial force, which causes *V* to fall and break his coccyx. In Week 2, *B* is driving recklessly on the streets of Manhattan and hits *V* in a crosswalk, for *V*'s fractured coccyx caused *V* so much pain that *V* was

<sup>28</sup> E.g. Tomas Bohr, Mogens H. Jensen, Giovanni Paladin and Angelo Vulpiani, *Dynamical Systems Approach to Turbulence* (Cambridge: Cambridge University Press, 1998).

unable to get out of the way of *B*'s car. A causal consequence of *B*'s reckless driving is that *V*'s left tibia is broken, whereas if *V* had not suffered the broken coccyx he would have suffered only a fracture of his left fibula. The pain and recovery time are greater for tibial than fibular fractures. In Week 3, *C* is playing racquetball with a partner and negligently leaves open the door to the racquetball court. The ball bounces out of the court and in front of *V*, who is at the gym to use a hand ergometer for exercise. A causal consequence of *C*'s negligence is that *V*, who is on crutches, falls and suffers a fracture of his right radius. As a result of the fracture, *V* can no longer work at the computer at his job. In Week 4, *D*, an orthopaedic surgeon, negligently resets *V*'s radial fracture. A causal consequence of *D*'s negligence is that *V* has to go on disability leave for two months, which results in a loss of income for *V*.

The law of remedies in the United States would seek to apportion liability for damages by determining *V*'s rightful position and then ascertain how much (new) harm is created by each independent actor. This apportionment is a matter of corrective justice. Subsequent tortfeasors are typically liable only for the incremental harm they create. In everyday tort contexts, the apportionment usually concentrates on medical expenses, if only because there is no market for broken bones.<sup>29</sup> Damages for pain and suffering are often available, unless a jurisdiction precludes physicians from being liable for such damages.<sup>30</sup> Thus, one would expect that *A* would have to pay for *V*'s coccyx-related medical expenses and pain and suffering. *B*, *C* and probably *D* would have to answer for later incremental increases in medical expenses and pain and suffering. There are complications. Sometimes earlier tortfeasors in the causal chain might be jointly and severally liable for harms caused by later tortfeasors who are insolvent or unlocatable. Occasionally persons in *V*'s position might get reliance damages. Rarely, restitution or injunctive relief might be available. In the last case, one might debate whether *D* is liable only for the cost of a properly set radial fracture given that pain and suffering would have existed anyway, or a bit less than that if *D*'s inadequate surgery improved *V*'s condition somewhat. In light of *A*'s intentional shoving of *V*, perhaps *V* might be able to obtain a restraining order or an injunction against *A* in addition to damages.

The foregoing example and brief discussion of compensatory damages that could be awarded might have the nostalgic charm of a law school examination, but it is at once apparent how much remains to be done. It is not merely that a solution under US law would require sustained analysis and argument. It is also that other legal systems could provide different remedies for a tort problem like this one.

Furthermore, the stylised tort example is much simpler than the sequential harms suffered by the Urvolk. Determinate applicable rights and remedies are not available to the Urvolk under most domestic, regional and international legal systems. What rights they have and what remedies they are entitled to are still a matter of philosophical and legal dispute. The UN Declaration on the Rights of Indigenous Peoples remains aspirational. In addition, the wrongdoers in the Urvolk example are much harder to identify and sequence than the tortfeasors who brought so much grief to their victim. The Urvolk are a more or less cohesive group over many years and multiple generations, but saying exactly who they are is trickier than pointing to the single tort victim *V*. Describing the harms that the Urvolk have experienced is a harder task than listing *V*'s injuries. Owing to historical turbulence in the period 1880–2015, it is no easy matter to establish the causes of the manifold harms experienced by the Urvolk.

Still, the tort example provides a helpful schema for investigating the case of the Urvolk. The tort example has wrongdoers who are responsible for creating harm, and as a matter of corrective justice, they ought to compensate those whom they have harmed. The same holds true for the complex situation in which the Urvolk find themselves. A salient difference between the two cases is that the normative apparatus which might sort out how corrective justice is to be achieved is much clearer in the tort case. In most legal systems, custom and eventually law worked out detailed accounts of corrective justice in what we call

<sup>29</sup> Dan B. Dobbs, *Dobbs Law of Remedies*, 2nd edn (St. Paul: West, 1993), Vol.2, pp.375–381.

<sup>30</sup> Dobbs, *Dobbs Law of Remedies* (1993), Vol.2, pp.381–400. The vocabulary of damages is complicated. Douglas Laycock, *Modern American Remedies: Cases and Materials*, 4th edn (New York: Aspen, 2010), pp.55–58.

tort lawsuits. Possibly the custom and law that evolved grew out of moral principles for sorting out who should pay what to whom. It seems plausible that rudimentary versions of custom and law held initially for small social groups, and only much later did legal systems arise for governing behaviour and creating remedies for torts in nation states. In regard to indigenous peoples, we are still far from reaching consensus on the underlying principles of corrective justice and applying them to sequential harms created by colonisers and other non-indigenous peoples. We are at least as far away from knowing which law applies. It might be the law of the indigenous people, the colonising country, the country in which they reside, or international law. And for each possibility, the applicable law might be that which exists now or that which existed at the time(s) the harm resulted.

## **Conclusion**

Corrective justice applies in various situations. Among them are simple situations in which trans-temporal groups of closely related white colonisers voluntarily and intentionally cause substantial harm, without justification, to non-white indigenous peoples. There are also complex situations in which different actors, many of them non-white and non-colonial and not closely related to each other, unjustifiably cause substantial harm to indigenous peoples over a long time. Rectifying these sequential harms is partly a matter of projecting a requirement of impartiality on to corrective justice. By investigating a modestly challenging example of sequential harm in a hypothetical tort case, we can gain important insights for rectifying injustice done to the IP rights of indigenous peoples in complex situations.



