

2012

An alternative to intellectual property theories of Locke and utilitarian economics

Michael Morrissey

Louisiana State University and Agricultural and Mechanical College, gdoghomes@gmail.com

Follow this and additional works at: https://digitalcommons.lsu.edu/gradschool_theses



Part of the [Arts and Humanities Commons](#)

Recommended Citation

Morrissey, Michael, "An alternative to intellectual property theories of Locke and utilitarian economics" (2012). *LSU Master's Theses*. 3332.

https://digitalcommons.lsu.edu/gradschool_theses/3332

This Thesis is brought to you for free and open access by the Graduate School at LSU Digital Commons. It has been accepted for inclusion in LSU Master's Theses by an authorized graduate school editor of LSU Digital Commons. For more information, please contact gradetd@lsu.edu.

AN ALTERNATIVE
TO
INTELLECTUAL PROPERTY
THEORIES OF
LOCKE AND
UTILITARIAN ECONOMICS

A Thesis

Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Masters of Arts

in

The Department of Philosophy

by
Michael Morrissey
B.A., Berea College, 2005
August 2012

ACKNOWLEDGMENTS

First, I'd like to thank God for the opportunity to live a human life.

Second, I want to thank my wife, Judianne. We are philosophers on a lifelong journey together. This thesis would not be possible without her.

Third, I must thank the rest of my family for their patience and encouragement. I would not be here without their continued support. It means a lot to me that they are interested in what I do.

Fourth, I'd like to thank my committee for their hard work and insight. I greatly appreciate their patience.

Lastly, I'd like to thank my philosophically inclined friends, particularly Graham Bounds, who have inspired and influenced this thesis through conversations, questions, and support.

TABLE OF CONTENTS

| | |
|---|----|
| ACKNOWLEDGMENTS..... | ii |
| ABSTRACT..... | iv |
| CHAPTER 1. – LOCKEAN INTELLECTUAL PROPERTY THEORY..... | 1 |
| 1.1 – Introduction..... | 1 |
| 1.2 – Locke’s General Theory of Property..... | 3 |
| 1.3 – The Intellectual Property Extension of Locke’s General Theory..... | 6 |
| 1.4 – The Strong Enclosing Thesis..... | 8 |
| 1.5 – The Weak Enclosing Thesis..... | 10 |
| 1.6 – Critique of the Weak Enclosing Thesis..... | 13 |
| 1.7 – Conclusion..... | 16 |
| CHAPTER 2. – UTILITARIAN ECONOMIC THEORY OF INTELLECTUAL PROPERTY.. | 17 |
| 2.1 – Introduction and Scope..... | 17 |
| 2.2 – Focusing on Incentives..... | 18 |
| 2.3 – Globalization and Utilitarian Distributions..... | 22 |
| 2.4 – The Prisoner’s Dilemma..... | 28 |
| 2.5 – Unenforceability..... | 30 |
| 2.6 – Market Inefficiencies and Barriers to Innovations from Intellectual Property Wars..... | 32 |
| 2.7 – Conclusion..... | 35 |
| CHAPTER 3. – AN ALTERNATIVE INTELLECTUAL PROPERTY THEORY BASED ON HUMAN FLOURISHING..... | 36 |
| 3.1 – Introduction..... | 36 |
| 3.2 – Human Function and Flourishing..... | 36 |
| 3.3 – Our Obligations to Flourish..... | 41 |
| 3.4 – Ideas of Intellectual Flourishing as the Means to Flourishing..... | 45 |
| 3.5 – The Right to Flourish..... | 47 |
| 3.6 – Conclusion..... | 49 |
| REFERENCES..... | 50 |
| VITA..... | 52 |

ABSTRACT

In this paper, I examine two standard theories of intellectual property, voice criticisms of each theory from within their own perspectives, and offer an alternative approach to intellectual property. In the first chapter, I explicate Locke's original property theory and provide a modern account of Lockean intellectual property as an extension of the original theory. I argue this extension is not compatible with Locke's original thought on property rights. In the second chapter, I dissect the mainstream economic approach to intellectual property, an approach which employs utilitarianism to justify the intellectual property regime of first world, western nations. I argue that this mainstream utilitarian economic approach fails to satisfy the principle of utility. Lastly, I offer a sketch of an alternative theory or perspective on intellectual property based on the notion of human flourishing. I argue that our obligations to develop and use our minds are so extensive that exclusive claim-type intellectual property rights are not possible.

CHAPTER 1. - LOCKEAN INTELLECTUAL PROPERTY THEORY

1.1 - Introduction

In this chapter, I will outline Locke's property theory, explain and distinguish various components of Lockean intellectual property theory, and voice criticisms of Lockean intellectual property theory from a Lockean perspective. I hope to show that extensions of Locke's account to make sense of intellectual property can't actually be very Lockean, and show where and why these extensions lack justification and compatibility with Locke's original approach to property rights.

Locke's property theory was originally and primarily concerned with ownership of land, water, and natural resources, but over time his interpreters have extended it to include all physical and tangible objects. Intellectual property theories, a topic about which Locke never directly writes, are very commonly made on quasi-Lockean grounds. Lockean intellectual property theorists wish contend to extend Locke's property theory from the material realm to the immaterial realm, as they find these realms somewhat parallel.¹ As Tom Palmer explains it, "intellectual property rights can be justified as 'piggy-back' rights, logical extensions of the right to own and control tangible objects."²

What is intellectual property? There is the legal aspect and a more purely philosophical aspect. In law, intellectual property is a set of loosely connected legal policies or doctrines governing the ownership, use, and distribution of abstract and intangible objects and their

¹ Moore, Adam. "A Lockean Theory of Intellectual Property" (PhD diss., Ohio State University, 1997), 82., in OhioLINK, http://rave.ohiolink.edu/etdc/view?acc_num=osu1214419634 (accessed June 13, 2012).

² Palmer, Tom G. "Are patents and copyrights morally justified? The philosophy of property rights and ideal objects." *Harvard Journal Of Law & Public Policy* 13, no. 3 (Summer90 1990): 817. Academic Search Complete, EBSCOhost (accessed November 24, 2011).

corresponding physical manifestations.³ There are separate laws concerning copyrights, patents, trademarks, and trade secrets. These separate laws are grouped together and referred to as intellectual property law because they share in common the regulation of immaterial objects and their physical manifestations. In philosophy, we justify or criticize these laws by providing the unifying, universal ethical rules for intellectual property, at least a thin view of the metaphysics underlying these intangible objects, and the mechanics for the acquisition and transfer of these properties. It is on the philosophical side of intellectual property that Locke's property theory, which was originally concerned with only the material world, has been extended to the immaterial.

The initial objects of intellectual property, namely ideas, designs, concepts, and models, have special characteristics because they are intangible. Unlike physical objects, which are subject to physical laws like entropy and conservation of energy, intellectual objects cannot be depleted or degraded. This brings about some interesting characteristics. For example, intellectual objects are *non-rivalrous*, meaning one person can consume an intellectual object without diminishing any other person's ability to consume that object.⁴ Further, because intellectual objects are non-rivalrous, the economic notion of scarcity does not apply to them.

There are, perhaps, other special characteristics of intellectual objects which are less clearly understood or not agreed upon, but are still vital for creating, interpreting, or critiquing an intellectual property theory. For instance, we must consider whether or not intellectual objects predate our work in coming to realize them. If they exist (however it is they might exist) before we can recognize their existence, then the sort of work which enables us to realize intellectual

³ Fisher, William. "Theories of Intellectual Property." Harvard Law School. <http://www.law.harvard.edu/faculty/ffisher/iptheory.html> (accessed February 28, 2012).

⁴ Spinello, Richard A., and Herman T. Tavani. "Intellectual Property Rights: From Theory to Practical Implementation." *Intellectual Property Rights in a Networked World: Theory and Practice*. Hershey, Pa: Information Science, 2004: 1-65. 5.

objects results in *discovery*. If intellectual objects do not, however, predate our work in coming to realize them, then perhaps we might say they come into existence because we *created* them. This kind of metaphysical issue does not seem to be as problematic for physical objects, where we may have stronger and more stable intuitions about the discovery and creation of physical objects. The difference between discovering and creating intellectual objects may have major implications for a Lockean intellectual property theory.⁵

Lastly, we must question whether or not one can modify or alter intellectual objects. It is obvious to us how physical objects are modifiable, but it is far less clear if and how intellectual objects can be altered. This difference may stifle or hinder our ability to parallel physical objects to intellectual objects, possibly preventing a viable extension of Lockean property theory to the immaterial. If modifiability (such as adding value) is a necessary condition to acquiring an object as property, then this special characteristic of intellectual objects will be a threat to the acquisition of intellectual property.

We should keep these special characteristics in mind, as they are part of the crux of the debate between paralleling material objects and immaterial objects, the necessary link for extending Lockean property theory to include intellectual property rights.

1.2 - Locke's General Theory of Property

The primary component of Locke's original property theory is the claim that people own themselves. From this claim, Locke arrives at the conclusion that people are responsible for their labor, they own their labor, and they "have a natural right of entitlement to the fruits of their

⁵ Unfortunately, defending either the discovery or creation views is a very complex metaphysical and epistemological concern well beyond the scope of this paper. I cannot settle it here.

labor.”⁶ This is one of the less controversial components in Locke’s original theory, and arguably the grounds upon which other components of this original theory rest. Assuming we satisfy whatever preconditions are set out, Locke believes the acquisition of previously unowned property derives from the ownership of the fruits of our labor; the ownership of the fruits of our labor is derived from the ownership of our labor; and, the ownership of our labor is derived from our self-ownership. Locke’s chain of derivative ownership satisfies certain instincts we have about the nature of property and the results of our self-ownership.

Another component of Locke’s theory is the notion that a person acquires property rights to an unowned object by mixing his or her labor with it. Locke claims, “As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common.”⁷ The labor-mixing component is more controversial than the self-ownership component. Labor-mixing is a complex problem, and Locke did not develop a full account of it for us. The precise nature of labor-mixing (and its various problems) is beyond the scope of this paper, but it is an issue which must be considered in evaluating any intellectual property extensions developed with the labor-mixing component in mind.

Another component seems to arise out of the labor-mixing theory, namely the value-adding condition. From the quote above, words and phrases such “improve” and “cultivate” and “use the product of” hint at additional conditions for property acquisition. The value-adding component of the theory is contentious and fraught with problems. What does it even mean to add value to an object? Locke does not leave us with many clues to clarify the nature of value-adding nor does he provide us a clear explanation of the priority or necessity of the component to

⁶ Ibid., 7.

⁷ Locke, John. *Second Treatise of Government*. Ed. C. B. Macpherson. Indianapolis, Ind: Hackett Pub. Co, 1980. 21.

his property theory. If an intellectual property extension is founded upon a Lockean interpretation including this component, that extension must provide an account for how intellectual labor adds value to its corresponding objects.

There remains one other crucial piece to Locke's property theory, what Robert Nozick has dubbed "the Lockean proviso," which is the last condition for acquisition. Locke explains:

Nor was this *appropriation* of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body 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: and the case of land and water, where there is enough of both, is perfectly the same.⁸

This is a powerful, limiting condition for property acquisition. The public good is the core priority of the proviso. Potential acquisitions which would violate the public good (what exactly counts as the public good isn't clear) are disqualified from acquisition by the proviso. The "still enough" clause is potent, as it precludes monopolies and mass-ownership of resources which may lead to undue injury. To own the entire river, and assuming this river was the only resource of fresh water, would prevent others from being able to quench their thirsts (as they lack the rights to the river). This kind of monopoly, or even an oligarchy by which a limited number of people together monopolize a resource, would injure others because they no longer have access to that which is necessary for life.

We might be tempted to think of Lockean property rights as operating in a kind of vacuum where we need not really consider how property acquisitions affect the people around us. As we can see, Lockean property theory is not separable from substantive considerations

⁸ Ibid.

about the public good and human welfare, as well as the context in which a potential acquisition is to be made.

The Lockean proviso can be very radical, and it serves as a serious wild-card factor for this property theory. The proviso is clearly against ‘company towns’ in which the few actually own everything, and workers are merely ‘loaned’ residence, land, etc. People have a right to *own* enough to subsist (maybe even more). If Lockean property theory were correctly applied today, ownership rights would shift dramatically. Clearly, very few people actually own the things which are required to live life independently. By the proviso, we would need to significantly redistribute properties so that each person owned what was required to live life independently. Parallels between material objects and immaterial objects are subject to the proviso. In order to successfully extend general Lockean property theory (which deals in physical objects) to an intellectual property theory, that extension must satisfy the proviso.

Each of the components has their own set of associated problems and interpretations. Not every Lockean property theorist will buy into all the components I’ve listed, nor is there agreement upon how exactly each component is defined and structured. Consequently, Locke’s theory has ambiguities and can be developed in numerous ways.

We build extensions upon the foundation of these various components of the original Lockean property theory, namely self-ownership, labor-mixing theory, value-adding theory, and the proviso.

1.3 - The Intellectual Property Extension of Locke’s General Theory

One of the underpinning claims of Lockean intellectual property theory, a claim which appears to enable an extension of modern interpretations of Lockean physical property theory, is

the notion that the fruits of thought, design, engineering, and other intellectual labors belong to the laborer. Lockean intellectual property theorists believe this notion of physical labor and physical property acquisition extends nicely into the realm of intellectual labor and intellectual property acquisition.⁹ In the general Lockean property theory, these justifications substantiate why one acquires an unowned physical object through mixing physical labor with the object. In the intellectual property extension of this general Lockean theory, the Lockean intellectual property theorists believe these justifications also substantiate why one acquires intellectual property rights through intellectual labor.¹⁰

What exactly are the fruits of intellectual labors? At first glance, it would seem as though intellectual objects are the fruits of intellectual labor. These abstract ideas and intellectual objects are intangible, immaterial things which may actually be the fruits of intellectual labor, but the intellectual property theorist must demonstrate why this type of fruit is the sort which can be owned. It is not immediately obvious that one can own such objects.

A general claim that “one’s intellectual labor should entitle one to have a natural property right in the finished product of that work, such as a novel, a computer program, or a musical composition” is compelling to many people.¹¹ The claim, however, is ambiguous. It is not clear that the intellectual commons is parallel to the commons of the physical aspects of reality. Are we enclosing intellectual objects or the tangible *expressions* (the physical manifestations or representations) of those objects ‘from the commons’?¹² It looks as if the extension of Locke’s

⁹ Easterbrook, Frank H. "Intellectual property is still property." *Harvard Journal Of Law & Public Policy* 13, (January 15, 1990): 108-118. 110.

¹⁰ Wolff, Jonathan. "Libertarianism, Utility, and Economic Competition." *Virginia Law Review* 92, no. 7 (November 2006): 1605-1623. 1618.

¹¹ Spinello, Richard A., and Herman T. Tavani. "Intellectual Property Rights: From Theory to Practical Implementation." 8.

¹² There are three major types of expressions of intellectual objects, each being protected by a different type of intellectual property law. Expressions of intellectual objects include the actual tangible mediums of books, paper, and canvas in cases of literature, music, art – we refer to the protection of these expressions as *copyrights*.

account of property could be developed in two different ways. The *strong enclosing thesis* is claim that we enclose the intellectual objects themselves from the commons (this is the primitive view). The *weak enclosing thesis* is claim that we enclose particular physical expressions of intellectual objects from the commons, and yet somehow we gain control over access to the corresponding intellectual objects, as well.

1.4 - The Strong Enclosing Thesis

If we hold the strong enclosing thesis and the discovery claim, then intellectual objects are directly owned by their discoverer, e.g. algorithms, mathematical truths, and scientific notions would belong to their discoverers. If we aren't creating intellectual objects, but only discovering them, it does not appear as if Locke's theory would support our owning them, as we did not really mix our labor in them or add value to them. Remember, Lockean labor-mixing requires that we have added value to the object. Intellectual objects are unmodifiable and invariable – they cannot be altered. One cannot add value to these intellectual objects as one can add value to physical objects. Since intellectual labor cannot add value to intellectual objects, intellectual labor does not qualify as Lockean labor-mixing, the only sort of labor-mixing which results in legitimate Lockean property acquisition.

Because of this, it seems as if the strong enclosing may stand on firmer ground if we understand the intellectual objects to have been created by their owners. If we think about intellectual property in terms of adding value, a reasonable component to consider in this case, at first glance it appears that such creation can add value to the universe on this view.

Expressions also include tangible machines and processes in the cases of inventions and functional ideas – the protection of these expressions are called *patents*. Expressions, such as images or words, which uniquely identify entities, services, or products, are protected by *Trademarks*.

Unfortunately, the adding value condition in Lockean thought really seems to be found in a certain type of labor-mixing which is concerned with transformation of present objects into a new object. This type of intellectual object creation does not really parallel any kind of labor-mixing in the physical world. When dealing in physical properties, there is a story we can tell about how physical objects were transformed (with value added) into new physical objects. What is unclear is how a similar story could be told for intellectual objects. The mechanics in the general Lockean property theory, which are concerned with physical objects, do not seem parallelable to the realm of intellectual objects. This is a serious problem for the combination of a creation view and the strong enclosing thesis.

Furthermore, the Lockean proviso likely pushes us even further away from the strong enclosing thesis. For example, the public good would be deeply harmed if we were to recognize the ownership of mathematical truths. It would be difficult (perhaps even impossible) to function in life without implicitly or explicitly using math. How can we live if the rightful owner of a fundamental and vital mathematical formula (e.g. $1+1=2$) does not provide consent for the rest of us to use it? A Lockean property right, when granted, is profoundly strong, and it is for this reason that the proviso is there to make sure we can live with the rights that are actually granted. The problem identified within this math example would apply to many other intellectual objects as well. Perhaps not all intellectual objects activate the proviso's protection of the public good, but it seems as though a significant portion of intellectual objects, particularly those most important to living a human life, are protected from hypothetical acquisition by the proviso.

The strong enclosing thesis has also been criticized by Kai Kimppa who explains:

The reason ownership is needed is that material resources are scarce, and thus everyone cannot necessarily own everything they would want to. This does not hold true for the immaterial. The immaterial is unlimited, and everyone can own as much as they want to at the same time. No one is deprived of ownership in

what he or she has if someone else owns the same immaterial as well...Locke needed the material to be divided amongst people because it can not be owned by many at once...the immaterial need not be owned as it can be used by as many as have a need for it.¹³

This criticism points out why we cannot parallel the material and immaterial realms. The non-rivalrous feature of intellectual objects is precisely why we don't need a property theory for them. Locke's theory does not favor the ownership of intellectual objects. Because intellectual objects are non-rivalrous, they do not meet the conditions for the sort of objects for which we require a property theory. While Locke would agree that you can own a CD, the physical instance or manifestation of an intellectual object(s), he would not agree that you could own the intangible, intellectual objects represented or manifested on the CD. Locke would not have favored the strong enclosing thesis, but he could, perhaps, agree to the weak enclosing thesis.

1.5 - The Weak Enclosing Thesis

Although the strong enclosing thesis may be the initial and primitive view, a temptation for Lockean intellectual property advocates, enough problems emerge from the various Lockean interpretations that the weak enclosing seems to be the more common view to hold. Instead of directly owning abstract intellectual objects, one might argue that ethical rights (and, subsequently, legal rights) regulate material expressions. The weak enclosing thesis takes this path. By regulating material expressions, granting creators or discoverers a set of rights to

¹³ Kimppa, Kai. "Intellectual Property Rights in Software-Justifiable from a Liberalist Position? Free Software Foundation's Position in Comparison to John Locke's Concept of Property." In *Intellectual Property Rights in a Networked World: Theory and Practice*. Richard A. Spinello and Herman T. Tavani.. Hershey, Pa: Information Science, 2004: 67-82. 68.

material expression, we somehow effectively bring about a kind of ownership to the intellectual objects which correspond to these material expressions.¹⁴

A Lockean intellectual property theorist holding the weak enclosing thesis will agree that there is no direct intellectual property ownership, but instead will claim there is an indirect ownership of intellectual property. The *pseudo-ownership claim* performs the conceptual heavy-lifting in the weak enclosing thesis. This is the claim that we can get at the indirect pseudo-ownership of intangible, intellectual objects by directly controlling all of the various possible future physical manifestations or expressions of an intellectual object which happen to be similar enough and related to the original creation or invention.¹⁵ There is no direct ownership of an intellectual object on this view, but indirectly the regulation and direct physical property right to any possible physical manifestation of an intellectual object entails a sort of indirect pseudo-ownership over that intellectual object. While the initial objects of intellectual property are the intangible, intellectual objects, by the pseudo-ownership claim, it is actually the corresponding expressions which are at the heart of Lockean intellectual property theory. The thinking is that by extending the physical Lockean property theory far enough, indirectly regulating intellectual objects, we can produce a kind of Lockean intellectual property theory. Technically speaking, since the intellectual object is not owned on this view, if there was a way to get at intellectual objects without producing, using, or distributing corresponding physical expressions, we would

¹⁴ Moore, Adam. "A Lockean Theory of Intellectual Property" (PhD diss., Ohio State University, 1997), 183-184., in OhioLINK, http://rave.ohiolink.edu/etdc/view?acc_num=osu1214419634 (accessed June 13, 2012).

¹⁵ *Similarity* is the vital relationship between the original work and derivative work regarding intellectual property rights. On this theory (and the legal practice of it) derivative works are not merely about the causal origins of a work. A new work may be transformed so far from an original work that the new bears absolutely no resemblance to the original – these works are not infringing on the original owner's intellectual property rights. A new work which would be potentially infringing on the original without the consent of the original's owner, a judgment based exclusively on similarity, is a derivative work. A derivative work usually has a causal chain connecting it to the original work, but vitally, a derivative work is similar enough to the original that judicial and legislative bodies require the derivative work's producer to acquire consent of the original work's owner.

not be violating any weak enclosing thesis property rights. In practice, however, it appears as though indirect ownership results in the same consequences as direct ownership of an intellectual object.

When the electronic music duo Daft Punk produces an instrumental song, they are essentially discovering or creating some abstract intellectual object. The physical expression or manifestation of this original intellectual object might be a series of 0's and 1's on a CD or hard drive, or it may be recorded on analog cassette tapes, or it may be written down on paper in traditional music notation. Daft Punk directly owns this physical object. But, by the pseudo-ownership claim, they acquire an indirect intellectual property right to this original intellectual object. They don't directly own the intellectual object per se, but they have the exclusive rights to produce, use, or distribute expressions of that intellectual object. This right is not over the intellectual object, but rather a right over all current and future possible expressions of that object.

Vitaly, Daft Punk's intellectual property rights indirectly protect not just one very specific intellectual object (the original), but in fact a set of them, a set of ideas which are close enough in identity for us to call them *roughly the same*. In essence, we are claiming that by directly discovering or creating the original intellectual object, Daft Punk also indirectly discovers or creates a set of similar intellectual objects. Exactly how similar the members of the set must be in order to maintain membership is not an exact science worked out by intellectual property theorists, legislators, or judges (they really should provide an account or heuristic device in this day and age). Daft punk does not directly own this set of ideas per se, but they have the exclusive rights to produce, use, or distribute expressions of any member of this set of intellectual objects.

Excepting expressions of the original intellectual object, the manifestation or expressions of any member of this set of intellectual objects are derivative works. By producing the original physical manifestation, Daft Punk generates the indirect intellectual property right to a corresponding set of intellectual objects. Importantly, Daft Punk directly controls and owns the current and future expressions, essentially derivatives and duplicates of the original expression, of any member of this set of intellectual objects. If I were to produce, use, and/or distribute my own rendition of this Daft Punk song, which would certainly be an expression of one of the abstract objects in this arbitrarily large set which Daft Punk discovered or created, I would be violating their right of direct ownership of all possible expressions or manifestations of the set of these intellectual objects.

1.6 - Critique of the Weak Enclosing Thesis

First, it is unclear how one comes to directly own future expressions – physical objects which do not yet exist. This does not parallel the general Lockean property theory at all. Why should we make the leap made in the pseudo-ownership claim of the weak enclosing thesis? A Lockean intellectual property theory which claims agents can own future objects isn't in line with the original thinking we see in the general Lockean property theory.

Unfortunately, the weak enclosing thesis isn't really an intellectual property theory at all. On the weak enclosing thesis, ownership is concerned with material objects, and despite this set of objects being related to intellectual objects, no headway has been made into establishing a proper intellectual property theory. Extending the general Lockean property theory with the weak enclosing thesis does not actually extend the type of objects which can be owned - only tangible items, including the particular expressions of intellectual objects, can be owned.

Nothing abstract or intangible is ever owned or protected. This doesn't even sound like an intellectual property theory – it really functions as an unnecessary and incompatible extension of the extended physical property theory. The extended Lockean property theory can already make sense of the physical property rights, including rights to manifestations or expressions of intellectual objects.

If it is true that one cannot own intellectual objects, but rather only the expression of those intellectual objects, then it seems possible to create new (even if identical to other) expressions of intellectual objects without violating the so-called intellectual property rights of other expression-holders. That is, there may be multiple expressions of one intellectual object, and my rights to expression-A do not negate your rights to expression-B. Moreover, we all have “enough of” and “as good as” left over for further expressions. If this instinct is correct, then Lockean intellectual property theories and laws which employ the weak enclosing thesis are untenable.

To put it another way, you may take a tree, chop it down, shape it into lumber, build a chair, and you come to own this chair by mixing your labor with its ingredients. It would be easy to show that you've violated the exclusivity rights derived from the pseudo-ownership claim. Surely, someone had to think of and build the chair - there is a form and an idea of a chair – it is an invention. Yet, even Lockean intellectual property theorists are not willing to attribute ownership of all possible expressions of the idea of a chair to the inventor. They don't wish to apply the pseudo-ownership claim in this case, and instead we apply regular Lockean property theory. The next day, your neighbor is fully within her rights to chop down a tree, and so on, and build her own chair. She has not violated your rights to your chair, nor have either of you violated the first chair-creator's rights to his chair.

Why should any other invention or creation which corresponds to an intellectual object be different? For example, you may write a piece a music in clay tablets, and by even traditional Lockean property rights, you already own that tablet, as you have mixed you labor with ingredients (some you already owned and some you perhaps didn't before mixing). You've added value to the clay by forming it into a tablet and further by writing music notation upon it. Why can I not do the exact same? The rewards of my labor in building either a chair or a musical clay tablet are the expressions themselves. The reward of creation, at least on the Lockean view, is not one's ability to monopolize and preclude others from building identical or similar expressions for themselves. My production of a thing, my mixing of my labor with ingredients, does not preclude others from doing the same, even identical action.

Furthermore, the weak enclosing thesis may be contrary to the Lockean proviso. Even if we were to accept the validity of indirect ownership and monopolies over intellectual object, the proviso would be activated, preventing the acquisitions which would lead to the indirect ownership of the most important intellectual objects. It is difficult to know which intellectual objects are protected by the proviso. At the minimum, appropriate interpretations will try to isolate which intellectual objects are necessary for subsistence, well-being, and 'good and plenty' conditions for the public in implementing the proviso. The chair example is a useful marker for considering this minimum protected by the proviso. The chair is not obviously necessary for subsistence, and yet it is still, by and large, protected – probably by the proviso. The Lockean proviso likely provides protection from indirect ownership to an expansive set of intellectual objects.

1.7 - Conclusion

In this chapter, we've delved into so-called Lockean intellectual property theory. The notion that the material realm is parallel to the immaterial realm appears false. It does not seem as if a direct ownership of intellectual objects (as in the strong enclosing thesis) is possible. Indirect ownership of intellectual objects (as in the weak enclosing thesis) does not appear to be an acceptable or consistent extension of Lockean property theory, either. There are gaps in the so-called Lockean intellectual property theory which have not been justified.

It appears as though Locke's argument does not motivate intellectual property at all. It is fine that a so-called Lockean intellectual property theory is not purely Lockean, but advocates must still explain and justify their theory. Since they have not justified their stance on purely Lockean grounds, they must provide some other basis or foundation before one can accept their theory.

In the next chapter, we will tackle the primary argument which has become hybridized with Lockean mechanics: utilitarian economic intellectual property theory.

CHAPTER 2. – UTILITARIAN ECONOMIC THEORY OF INTELLECTUAL PROPERTY

2.1 - Introduction and Scope

This chapter provides an examination of the mainstream utilitarian economic theory of intellectual property rights employed by most first world, western nations. This theory claims that governments should assign strong, artificial intellectual property rights to creators, inventors, and discoverers and intensely enforce these rights against violators. This practice of assigning and enforcing strong intellectual property rights is believed to maximize the incentive to create, innovate, and discover. It is assumed that by maximizing these incentives, we will maximize the quality and quantity of social goods generated. In turn, maximizing the quality and quantity of social goods is believed to be a necessary condition for satisfying the principle of utility.

This chapter will limit its scope to the economic views (of which there are many, but notably Chicago-style, free market economics) which use utilitarian arguments to justify either the status quo or even the expansion of current intellectual property rights of inventors, creators, and discoverers in predominantly American and European intellectual property policies. Essentially, I'm examining a monolithized version of the views and perspectives of various groups and individuals in power, and I think this constructed theory represents the dominant intellectual property theory we face today.

The mainstream theory should not be confused with utilitarian economic theories advocating diminished, but not eliminated, intellectual property rights. Diminishing intellectual property rights theories are neither mainstream nor applied in the economic and legal policies of first world, western nations. This chapter is a response to the intellectual property theory that is

actually being applied in our society. Excepting a few diminishing IP rights theorists and the Pirate Party (a tiny, nearly powerless political minority), the general battle cry of American and European legislative, judicial, and corporate bodies has been one of preserving the status quo of intellectual property rights, if not escalating these rights (which we've seen in recent years). The theory and thought of those who are in power, both maintaining or seeking to expand the status quo, are what is being questioned in this paper.

Assuming certain side-constraints can be satisfied (such as not violating primary human rights, etc.), it seems acceptable that governments should regulate property acquisitions and transfers so as to maximally satisfy the principle of utility. I hope to demonstrate how the currently employed utilitarian economic theory of intellectual property actually fails to satisfy the principle of utility.

2.2 - Focusing on Incentives

Does the mainstream utilitarian economic theory of intellectual property rights “live up” to the general utilitarian standard? First, we must consider the basic structure of the argument for the more common utilitarian economic theories of intellectual property:

1. Assuming side-constraints that human rights are satisfied, society should adopt legal regimes or institutions if they are expected to yield the optimization of aggregate social welfare.
2. Legal Regime X, which does not violate fundamental human rights, is expected to generate the most incentive for the production and creation of intellectual works.
3. Maximally incentivizing the production and creation of intellectual works contributes to the optimization of aggregate social welfare.
4. Therefore, Legal Regime X should be adopted.¹⁶

¹⁶ Spinello, Richard A., and Herman T. Tavani. “Intellectual Property Rights: From Theory to Practical Implementation”. 14.

The mainstream view believes a legal regime that provides authors, creators, and inventors with extensive intellectual property rights and control over their productions will fill in for “Legal Regime X” in the above argument. Essentially, Legal Regime X, on this view, is either the status quo or an expansion of current intellectual property right. Currently, the duration of federally regulated intellectual properties in the United States is as follows: a patent lasts from 14-22 years (depending on certain factors), and a copyright for the life of the creator plus 50-75 years (with a few rare exceptions, such as copyrighted government documents).¹⁷ Qualitatively, patents are the strongest type of intellectual property right, enabling very strict exclusivity rights defined both by litigation and a patent granting institution. Copyright also has extensive exclusivity rights, but within a limited scope defined by the results of litigation. The set of objects which can be copyrighted is narrower than patents and there are fair use exceptions.¹⁸ These are example qualities and durations of intellectual property rights found in the status quo. We must consider whether or not this regime really satisfies the conditions in the basic argument above.

Notice that one may provide an argument in favor of intellectual property rights similar to the mainstream view without requiring rights which last the same duration or which carry the same quality of rights. For example, diminishing intellectual property rights theories claim Legal Regime X is a legal regime that provides authors, creators, and inventors with more limited intellectual property rights and control over their productions. If they are correct, and utility is maximized via less extensive (yet still extant) intellectual property rights, then the mainstream view does not live up to its general utilitarian standard.

¹⁷ Besen, Stanley M. and Leo J. Raskind “An Introduction to the Law and Economics of Intellectual Property.” *The Journal of Economic Perspectives*, Vol. 5, No. 1 (Winter, 1991):3-27. 7-11.

¹⁸ Besen, Stanley M. and Leo J. Raskind “An Introduction to the Law and Economics of Intellectual Property”. 12.

One fallacious argument for extensive intellectual property rights commonly offered by primitive utilitarian economists is that without intellectual property rights content creation and innovation will virtually disappear.¹⁹ This is derived from a common assumption in primitive utilitarian economics that altruism does not exist – they assume human nature rules out virtually all altruistic actions, including creating and innovating for reasons that are not directly in your self-interest. But this is clearly an implausible view. Whatever effects would accompany changes to the current intellectual property regime, innovation and content creation won't simply disappear. If that were true, then there would have been no intellectual production prior to the adoption of the current regime.

More sophisticated utilitarian economists accept that there are other motivations for content creation and innovation beyond the monopolization of profits. Consider the Free Software movement. Within this movement, numerous authors, creators, and inventors of scripts, programs and devices demonstrate that significant innovation and content are created without economic motivation. Many choose to copyright and/or patent via GNU, Creative Commons, or the Apache licensing systems; others totally forgo involvement in the copyright/patenting process. There are people who genuinely give content away for no other reason than because it is a good thing to do. People innovate and create, essentially promoting the greater social welfare, without seeking or needing financial gain or monopolized control over intellectual objects. Artificial incentivization is not necessarily required.

The real question is this: Would there be less content creation and innovation, or even more specifically, the incentive to do these things, without the mainstream utilitarian economic intellectual property rights? It depends. If we did not replace it with anything, then it looks as

¹⁹ Abrams, Howard B. "Originality and creativity in copyright law." *Law & Contemporary Problems* 55, (April 15, 1992). 3-44.

though there could be less content creation and innovation. But if we replaced the intellectual property rights system with an alternative reward system, we still have artificially generated incentive to create content and innovate. Some economists, for example, argue that we can just as effectively generate these incentives “through private patronage by tax-exempt foundations, universities, and the like, or even by government support.”²⁰

Further, a number of economists have explained the efficacy of alternative systems. For example, one study suggests intellectual property rights are strictly inferior to at least hybridized incentive systems (made from elements of both intellectual property and reward systems) and possibly inferior to well-made reward systems in producing maximum incentives and social advantages.²¹

Note that we already have some successful forms of the reward system in place in the form of public research (including at many universities), and this reward system could be expanded to be the exclusive option. A rewards system may very well be the appropriate Legal Regime X. Incentivization can be handled without resorting to an intellectual property system. What remains is a choice between two general systems. In an intellectual property system, intellectual objects are monopolized, and the utility generated by these objects is bottlenecked by the consent (which must be bought) of monopoly and oligopoly holders. In a rewards system, access to intellectual objects is completely open, and utility generation is not bottlenecked; everyone who wants to benefit from and use intellectual objects is free to do so. Even if the incentivization of a rewards system was less effective than an intellectual property system (which isn't even the

²⁰ Robert M. Hurt and Robert M. Schuchman. “The Economic Rationale of Copyright.” *The American Economic Review*, Vol. 56, No. 1/2 (Mar. 1, 1966): 421-436. 426.

²¹ Steven Shavell and Tanguy van Ypersele. “Rewards versus Intellectual Property Rights.” *Journal of Law and Economics*, Vol. 44, No. 2 (October 2001). 525-547.

case), the utility generated by the rewards system might be greater than the intellectual property system because of the difference in bottlenecks.

Furthermore, without even trying to find Legal Regime X, we can consider whether or not the general argument is even correctly postulated. Premise 3 (the claim that maximally incentivizing the production and creation of intellectual works contributes to the optimization of aggregate social welfare) is not obviously true. Maximizing incentive to produce and create intellectual properties does not obviously lead to maximizing aggregate social welfare. It may be safe to assume that some form of artificial incentivization is necessary for satisfying the principle of utility, but it isn't clear that the sort of system which maximizes incentives is really going to lead to maximizing utility.

Unfortunately, incentivization issues have dominated the general utilitarian economics deliberations, and distributive concerns have taken a back seat in many utilitarian approaches (with some notable exceptions like Peter Singer). The costs of incentivizing, particularly in using an intellectual property system, may be much greater than is realized, and the end distribution of goods and the sum total utility in the world may be far lower than we've realized. It may be that the focus on incentivization sometimes blinds us to the larger issues at stake.

2.3 - Globalization and Utilitarian Distributions

When we set aside incentivization, at least for the moment, and instead focus more upon the underlying utility rationale, it seems that the policies which have shaped the status quo are not living up to the utilitarian standard of welfare maximization. Today's policies have not distributed social goods evenly enough across the global population.²² Wealth, including

²² I am not claiming egalitarian distributions maximize utility, rather I'm claiming that distributions with vast wealth inequalities do not satisfy the utility principle.

intellectual properties and the industries built on these intellectual properties, is largely held by a tiny minority. This wealth inequality is in no small part a product of our current intellectual property rights.

Given the principle of diminishing marginal utility, the intuition is that utilitarian distributions should be fairly even, or at the very least, these distributions should likely be concerned with those who have the least. There are diminishing utility returns for each subsequent unit of a social good. The first \$10,000 of wealth will yield more utility than the next \$10,000 of wealth. Surely, the resources necessary to survive will produce far more utility for an agent than the same amount of resources added to wealth of someone who already has more than enough to survive. By this principle of diminishing returns, you will likely get the most utility by maximizing the wealth of the poorest. These diminishing returns are the heart of calculating the sum utility of any distribution of goods, and it is one reason why utilitarian economic thought cannot justify the status quo.

Having a small minority living in abundance while most live far below that standard, many in abject poverty, is difficult to defend from a utilitarian point of view.²³ Economic regimes which claim to be utilitarian have the work of explaining and promoting wealth inequality cut out for them. The distribution generated from the current intellectual property system is not utility maximizing. Wealth inequality, in no small part based on intellectual property distribution, is simply too great.

Economists may argue that wealth inequalities aren't necessarily bad because wealth at the top eventually 'trickles down' to the global poor – i.e. the poor have the best distribution of

²³ I grant that criticisms of general utility, such as the utility monster, actually can lead to very unequal distributions and may result in the impoverishment of the vast majority of the populace. I am not defending utilitarianism in this paper, and I am going to assume more moderate views of utilitarianism (which set aside or are assumed to avoid objections like the utility monster) for the sake of this paper. I'm trying to temporarily grant, for the sake of argument, the viability of the general utilitarian approach.

all economic policies when we implement the (Chicago-style) free market and extensive intellectual property rights.²⁴ This claim, however, is extremely contentious. There are many schools of economic thought which outright reject this laissez-faire, libertarian approach. The idea that vast wealth inequality is not utility maximizing is not a new one. The global poor are not receiving as much as they could under our current economic system. I contend there are better distributions of goods, including a distribution of intellectual property goods which yield more utility, available to us. Our mainstream, extensive intellectual property regime which is currently in place is a barrier to maximizing global utility.

Unfortunately, the globality of utility is often forgotten by economists who are seeking to improve their own nation's utility, even at the cost of the sum total global utility. Somehow, many economists seek to perform utility calculations at a national level. Utility is global, not nationalistic.²⁵ This changes the practical details of economics and the legal issues at stake in a big way. The sorts of laws, such as intellectual property laws, which maximize a nation's utility are different from the sorts of laws necessary to maximize global utility. Rich nations and wealthy people are going to need to sacrifice, giving to the poor and building infrastructure for the deprived. We need laws, including those which govern intellectual objects, which force us to give to the poor, if we truly wish to see utility maximized.

Given the nationalistic approach to utility, it is easy to see how intellectual property rights are somehow acceptable and not obviously causing so much harm within first world nations. Most of the damage is dealt to third world nations. From a global perspective, it

²⁴ Aghion, Philippe, and Patrick Bolton. "A Theory of Trickle-Down Growth and Development." *Review Of Economic Studies* 64, no. 2 (April 1997). 151-172.

²⁵ Even if we considered utility at a national level, the principle of utility is not satisfied in first world western nations. Unfortunately, nationalistic approaches fail to take into account how first world nations have both directly and indirectly caused harm to the poor in third world nations. Our intellectual property system is one of the many causes of the high degree of impoverishment worldwide. The fact is that the average poor person in a third world nation is simply much, much poorer than a poor person in a first world nation, and in part, this is due to first world intellectual property system.

becomes far more obvious why mainstream utilitarian economic intellectual property rights, rights conjured by first world nations, are harmful and not maximizing (global) utility.

Pharmaceuticals are the classic example of this harm. In a first world nation, a significant portion of the population (particularly in first world nations other than the United States) can afford the prices of medicines set by those who control the intellectual property rights. This is not true in third world nations. If you are making \$2 a day, you can't buy medicine with prices artificially raised to \$50 for a month's dosage, a price set by the monopoly over the intellectual property rights to a medicine. An economist will argue the efficient market hypothesis is supposed to make sense of this, explaining that price models will take into account what third world nations can pay. Unfortunately, even with drastic price reductions, many medicines won't provide profit margins in the poorest nations.

Economists might argue that if it is so important that we help these people, then we shouldn't punish intellectual property owners; rather, in order to maintain their incentives, we must instead use first world national public funds to buy products from these monopoly controllers and outright give the products to third world nations. We'd have to trust that monopolies would not price gouge, which would create a gigantic inefficiency in the market (that's a serious flaw in granting intellectual property rights). Even if intellectual property holders didn't price gouge, this middleman process likely forms another (although slighter) market inefficiency. Essentially, public funding of this sort is just an inefficient kind of the reward system. You would see higher market efficiency in a straight-forward reward system, which would then subsequently generate higher social utility; but to do this, would necessitate relinquishing the current intellectual property system.

Setting incentives aside, the fundamental problem with intellectual property rights is the formation of monopolies. Monopolies are innately inefficient for the market. Poor distributions result from monopolies. A rewards system does not form monopolies, it does not have the same degree of inefficiencies we see in the current intellectual property system, and we'd see better distributions through a rewards system.

If prices are kept artificially high, then demand (people willing to pay that price) will be low; subsequently, the utility produced will be low. If you choose not to allow monopolies of intellectual property objects, prices will fall exponentially, demand and the fulfillment of that demand will rise dramatically, and utility will be increased. As for the overall economy, my money is going to be spent. It doesn't have to be spent inefficiently on goods that are artificially priced.

In our current economic scheme, I legally have to pay for objects protected by intellectual property laws. I have finite and very limited resources, which in turn means I can only buy a very limited number of these objects. Obviously, I receive some amount of utility from each object, and because I can only buy a limited number, my potential utility is also limited. An efficient, rational shopping strategy is currently the only legal way to maximize the utility benefit of my limited resources. Yet I am not generating nearly as much utility as I could if I had unlimited access to these objects.

Duplication and distribution costs are virtually zero for a significant portion of objects currently protected by intellectual property laws. Prices to these goods are artificially higher than they would be in a natural market – that's what the intellectual property law does: it creates monopolies which enable rights-holders to raise prices astronomically beyond marginal costs. The monopolization of intellectual property objects prevents society from realizing the benefits

of a new digital, networked infrastructure in which duplication and distribution costs of these objects have plummeted. Old business models do not belong to this new infrastructure, nor do the laws which protect those monopolistic models. Society is being price-gouged, and utility is not being maximized.

The financial cost of artificially incentivizing innovation and creation will always be there. Do we wish to pay this cost in terms of highly abusable monopolies via an outmoded intellectual property system belonging to a time and place where duplication and distribution costs were generally a higher portion of total production costs? Or, alternatively, should we use other modes of artificially generating incentive, such as reward systems, which can produce the same degree of incentive for the same financial cost without the baggage of monopolization? It seems like the latter option generates more utility.

Consider the difference between the utility of 50 million people having a logic book on their shelf or computer to the utility of 5 billion people having a logic book on their shelf or computer – the difference in utility would be enormous.²⁶ The major economic reason only 50 million people (or whatever the exact number might be) have a logic book on their shelf or computer is that demand is restricted by having a price, an artificially high price set by those who have a monopoly over its production, a monopoly granted by intellectual property rights. Without those intellectual property rights, prices would drop – the digital version would be virtually free and available to everyone with an internet connection, demand would certainly surge, and ownership rates would also rise. Imagine the utility to be gained for if all intellectual properties were released into the public domain. It wouldn't be just copyrighted works, but

²⁶ Of course, not everyone would read the logic book on their shelf or computer. But, I believe it is safe to assume that 5 billion people having a logic book will result in more people having read a logic book than merely 50 million having a logic book. I am also assuming that reading a logic book will result in significant utility gains. If you don't like the example, then replace the logic book with something you believe most anyone would benefit by viewing/hearing/reading/etc.

patented as well, a key to technological innovation and economic mobility. The first world can give the proverbial “keys to the kingdom” to the rest of the world.²⁷ This is the opportunity cost we forego, an alternative with substantially higher utility, in accepting and implementing the mainstream utilitarian economic theory intellectual property.

2.4 - The Prisoner’s Dilemma

An additional, complicated aspect of distributions from a utilitarian economics perspective is the matter of how we employ predictive thinking in our models. Economists may see the distribution of goods as a gigantic prisoner’s dilemma. In this prisoner’s dilemma, multiple parties have the choice of whether or not to cooperate. As long as they all cooperate, even if it requires personal sacrifice, the highest sum total utility is attained. The problem, according to rational choice theory and an assumption of egoism, is that parties are predicted to not cooperate, and thus a lower total utility is achieved.

The mainstream view might admit that, theoretically, a distribution of goods which generates more utility than our current intellectual property system is available in this prisoner’s dilemma, but practically, it is not really available to us because of our so-called rational selfishness and egoism. Utopia (the derogatory term for this option in the prisoner’s dilemma) is theoretically there for us, but practically it is not – too many people do evil things and that cycle is predicted to continue. The claim is that because humans are selfish egoists, any property system like socialism is morally unacceptable to pursue, as it does not, by our predictions, result in maximum utility. On this view, our current property rights system, including intellectual property rights, are the way to go.

²⁷ I’m not claiming that releasing all intellectual property into the public domain would result in some celestial utopia, but I do believe it would be enormously beneficial to the world. Yes, it would cost the wealthy something, but the gains in utility would be well worth it.

But, notice, this system is chosen in virtue of the assumption of egoism. Economists assume altruism is not the rational choice. Selecting the selfish and egoist option in the prisoner's dilemma seems to be the practical thing to do, perhaps even the moral thing to do, and thus we should design and use an intellectual property system which harnesses these predictions. The mainstream intellectual property system is thought to harness our predicted selfishness. Sadly, this is no longer about what we ought to do, but more about what we predict others will do. It does not give humanity the chance to do what is right. It is a game, a game in which I predict you will do what is wrong, and I do not respect your autonomy or ability to do otherwise, and I preemptively wrong you and others.

I remain unconvinced from a purely theoretical perspective that the intellectual property system is the result of properly employing the utilitarian model. It still may be the case that we are morally obligated to do something, to choose an action which hinges upon the synergy of others doing what is right, even if we can practically predict that other people will not do what they are morally obligated to do. If this is true, then clearly our obligations and rights are not about *predicting how others will act* (as in the case of the prisoner's dilemma), but rather *expecting how others should act*. Consequently, it may be correct upon this very theoretical utilitarian view to not employ an intellectual property system, and if one is in place, perhaps we not obligated to obey intellectual property laws; rather, we may be obligated to pursue a type of weak socialism (a topic to which many people have become allergic without necessarily having done prior, reasonable reflection).

On this theoretical view, utility clearly selects a system which is far more utopic. Even if Utopia, or whatever is nearest to it, doesn't come about, perhaps we are still bound to aim for it from the utilitarian perspective. If this is not true, and if we should use predictions (to what

extent I do not know) to inform our normative policies, there are other serious problems for the mainstream theory. If you are unconvinced by the prisoner's dilemma issue, the practical matter of enforcement may be yet another critique.

2.5 - Unenforceability

Intellectual property rights, at least as they are granted in the current implementation of utilitarian economic theory, are not fully, and practically enforceable. We can have intellectual property laws on the books, and we can stop some infringement, but in a digital and globalized world, intellectual property rights are increasingly unenforceable. As we shall see, the issue of enforceability of intellectual property claims introduces great complexities for a utilitarian justification of intellectual property rights.

Protecting physical property is far easier than protecting intellectual property. Fences, cages, buildings, safes, locks, physical access, transportation, and physical forensics are stable and effective means to protecting and enforcing physical property rights. Further, involving authorities in physical property theft is easy to explain and prove – it is kind of theft which we can somewhat easily make sense of in lawmaking, law enforcement, and judging law. Physical property rights are enforced fairly well. That doesn't mean there isn't any theft of physical goods, but seems as if we have a decent track record of maintaining the lion's share of physical property rights at acceptable costs of enforcement.

Intellectual property, in contrast to physical property, is far more difficult to protect. Enforcing intellectual property rights is too often not possible. For example, imagine a person invented a power loom in England. No other country has one which is nearly as successful. The inventor can stop people from stealing the physical power looms themselves, but can they protect

the intellectual property of this invention? Along comes Francis Cabot Lowell who travels to England, memorizes the schematics of this power loom, travels back to the United States and rebuilds from memory (with the help of a master mechanic) an identical power loom. He and everyone else like him are infringing on the inventor's intellectual property rights to the power loom. No one could stop him.

One side note: would we even want to stop Lowell? He is one of the fathers of the American industrial revolution. Other nations have their own fathers, many disregarding intellectual property rights. Isn't infringement often necessary for improving the world? This scenario has been played out over and over (and over) in the history of intellectual property. It will continue. It is unstoppable.

Consider another example: perhaps a person has a book published and printed. Printshops and bookstores have feasible, practical, and consistent means to protect the physical property rights to these physical copies of his book. Contrast these paper copies to the digital copies he also sells on Amazon.com. He's taken the proper precautions, using Digital Rights Management (DRM) tools to attempt to stop piracy. The fact remains that in minutes, anyone can strip that DRM off a digital copy and anonymously distribute DRM-free copies of his book – infringing on his copyright. Digital media is pirated behind nearly impenetrable proxies with encryption to thwart packet shaping. There are too many clever people who are well-protected, using decentralized networks to distribute these infringed goods – infringement, even from those who have taken precautions, can't be stopped. Even if he went so far as to not release/sell a digital copy for concerns of piracy, it wouldn't help. A pirate can borrow a physical copy and spend an hour generating high-resolution scans of the book with an AI that translates text images into searchable ASCII (essentially reproducing the PDF the author has sitting on his hard drive).

Enforcing these intellectual property rights, unlike physical property rights, is often impossible. Even where it is possible, it often isn't feasible. The cost to intellectual property rights enforcement may be too high.

Even if one attempted to lock down society (let's assume one somehow found a way to do it without violating human rights), it is very possible that intellectual property infringement is to some degree economically the better thing to do. There are studies and models which show that the costs of complete intellectual property infringement deterrence are not economically preferred.²⁸ Infringement without guaranteed repercussion should be preferred from the enforcement perspective. Unfortunately, the mainstream view sees punishment for infringement as always being worth pursuing. Copious amounts of economic and legal resources are directed toward enforcing the utilitarian economic intellectual property rights in vain. Intellectual property rights enforcement is generally a waste of resources. Those resources should be put to better use; higher utility would be gained from not attempting to enforce what is essentially unenforceable. The solution is lowering the expected quality and duration of intellectual property rights, spending time and money enforcing only what is practical to enforce.

2.6 - Market Inefficiencies and Barriers to Innovations from Intellectual Property Wars

When it comes to the technology sector, a sub-economy historically dominated by intellectual property, we see a world in which intellectual properties (such as patents) are not doing the incentivization work we expect; rather they have been turned into bargaining chips in litigation. These bargaining chips are used to maintain an oligarchy of technology giants which

²⁸ Konstantinos Giannakas. "Infringement of Intellectual Property Rights: Causes and Consequences." *American Journal of Agricultural Economics*, Vol. 84, No. 2 (May, 2002). 482-494.

monopolize the various regions of technological innovation space, largely preventing independent innovators from entering the market.

Generally, technology giants are constantly violating each other's intellectual property rights, but because each giant has a war chest of intellectual properties to levy against other giants, they stand in a litigation deadlock. Time and money are spent litigating rather than researching and developing. Patent wars slow down the innovation and creation of tech giants. The digital world is moving and changing very quickly, and our legal system is a barrier rather than a boon to innovation, even for giants.

Further, these intellectual property war chests are used to litigate (often unjustly) potential independent and smaller innovators out of the market. This oligarchy prevents the rapid change that we should be seeing from experts and inventors not employed by giants.

Google's buyout of Motorola is a prime example of tactical patent hoarding used as defensive resources against other tech giants and as offensive tools against smaller companies. Would-be innovators are litigated out of the market. What is left is a market inefficiency of bargaining patents and litigation.²⁹ Both the useless fighting amongst giants and the oligarchic, anti-trust practices against smaller competitors form major market inefficiencies, and limit the actual innovation and creation which takes place.

Essentially, the intellectual property system we have engenders intellectual property wars, forming an obstruction to the innovation and creation we were expecting in sectors like technology. In turn, the utility principle is not being satisfied.

The innovations we do see today often exist in virtue of people ignoring (outright infringing, at times) intellectual property rights. The road of successful technology giants is

²⁹ Joseph Farrell. "Intellectual Property as a Bargaining Environment." *Innovation Policy and the Economy* , Vol. 9, No. 1 (2009). 39-53.

paved with intellectual property infringement. Microsoft and Apple have a long history of it, from operating systems (Bill Gates clearly infringed upon Apple's design), to hardware and interfaces (both companies and many others having infringed upon the innovations from Bell Labs), to devices like the touchpad (Bill Gates introduced one year before the iPad). This tradition continues between mobile device manufacturers and software producers. We see the same software, OS, and hardware mechanics at work in iPhones as we do in Android – they both have borrowed from each other. It is only by ignoring intellectual property rights that these devices have evolved so quickly.³⁰ They could evolve even quicker if intellectual property did not exist. People will buy the device that implements an intellectual property (such as a patent) the best, regardless of who invented it.

Patent wars are nothing new. The term dates back to at least to the 1920's.³¹ Patent wars are becoming more and more prevalent, and more costly than before. This is not what was intended from intellectual property regimes, but it is the result. Intellectual property laws are highly susceptible to abuse. The rights we've artificially created are not doing the work we expect to them to do. Rather than incentivizing creation, they've pushed many who don't have a billion dollar bankroll out of patent war-heavy markets because they can't afford to litigate, even when justice would be on their side. As for the giants who can afford to litigate, it holds their creation and innovation back for years unless they simply continue to disregard intellectual property law.

³⁰ Timothy Lee, "If Android is a 'stolen product,' then so was the iPhone," *Ars Technica*, February 23, 2012. <http://arstechnica.com/tech-policy/news/2012/02/if-android-is-a-stolen-product-then-so-was-the-iphone.ars>(accessed February 27, 2012).

³¹ *Time Magazine*. Business: Patent War. June 10, 1929. <http://www.time.com/time/magazine/article/0,9171,751967,00.html> (accessed February 27, 2012).

2.7 - Conclusion

I hoped to have provided doubts as to whether or not the mainstream utilitarian economic theory of intellectual property actually maximizes utility. The claim that the current intellectual property regime (or a regime which had even more extensive intellectual property rights) maximally encourages innovation or inevitably maximizes utility via innovation is extremely contentious. There are possibly alternative regimes which don't include our current intellectual property rights which maximize incentive and utility. Further, this mainstream utilitarian economic theory appears to contribute the poverty and misery of the global poor. It is quite possible that abolishing intellectual property rights would immensely help the impoverished, and subsequently be a part of whatever economic regime actually maximizes utility. Lastly, the nature of intellectual property, in contrast to physical property, makes enforcement extremely difficult and results in inefficient use of resources. This is especially seen in the patent wars.

CHAPTER 3. – AN ALTERNATIVE INTELLECTUAL PROPERTY THEORY BASED ON HUMAN FLOURISHING

3.1 - Introduction

This chapter is a sketch of an alternative theory or view of intellectual property based on neo-Aristotelian teleological and virtue concepts. The conclusions about intellectual property in this chapter will remain compatible with the conclusions I've drawn in the previous chapters, but will arrive at a similar perspective on intellectual property rights in a different way. This chapter is a *sketch* of a much larger project. I cannot explain or defend everything, but I hope to provide a loose framework and direction for this larger project, while pointing out major obstacles and important claims which require more explanation and justification.

I will offer a fairly traditional moral framework – not explicitly a virtue theory, but one with similar grounds. Within this framework I will argue for an obligation to intellectually flourish, which will be the source of particular intellectual property rights or lack thereof.

3.2 – Human Function and Flourishing

The assumed framework for this chapter is a perfectionist, objective, and substantive account of the human good, our well-being, and excellence.³² I am not in a position to justify or even substantiate a complete account of the human good in this chapter. I rely upon teleological, aretaic, and eudaimonic concepts which I cannot wholly defend. Exactly all of what counts as human flourishing (*eudaimonia*) is not something I can flesh out in this mere chapter, but there are obvious examples of flourishing: nourishing ourselves, appropriately resting and sleeping, living as social creatures and citizens, and being sheltered. Various aspects of flourishing are less

³² See Hurka, Thomas. *Perfectionism*. New York: Oxford University Press, 1993; and Foot, Philippa. *Natural Goodness*. Oxford: Clarendon, 2003.

intuitive to some people. For the purpose of this chapter, which is concerned with reaching conclusions about intellectual property, I will assume and mostly focus upon the claim that being an excellent human specimen is largely predicated upon fulfilling our function as humans, a function deeply related to intellectual property.

One of the root assumptions of this chapter is that humans have a specific, shared, and species-wide function. In large part, I believe the fundamental, unchanging function of humans is the activity of thinking. Aristotle was basically right about this.³³ We are thinking things—which is essential to who and what we are as humans. Humans exist to learn, to cultivate our minds, to ponder, to understand reality, to experience, to appreciate aesthetic beauty, to participate in political life and society, to read and watch and hear the ideas of others, to find truth, and to intellectually pursue whatever counts as being relevant and valuable. Our function is thinking, and that is the essence of being human. Fulfilling our function is a vital part of human flourishing or living well. Or one might say, following the influential work of Amartya Sen and Martha Nussbaum, that thinking is a fundamental human capability whose exercise is necessary for minimally decent human life.³⁴

I will refer to intellectual flourishing as fulfilling our function and living in accordance with reason. We might find such a perfectionist theory worrisome, in some ways. For instance, one might think we've boxed the human function in such a way that we lack variety or plurality of lives that can be said to be flourishing. Not everyone must fit a very specific cookie-cutter mold. There are topics about which all humans need to be literate and constantly engaging our minds (literature, math, politics, etc.). These are necessary intellectual realms. Not everyone,

³³ Nicomachean Ethics I. 7, 1097b25-1098a15.

³⁴ See Nussbaum, Martha. *Capabilities and Human Rights*, 66 Forham L. Rev 273 (1997), <http://ir.lawnet.forham.edu/flr/vol66/iss2/2/>; and Sen, Amartya. "Human Rights and Capabilities." *Journal of Human Development* 6, no. 2 (July 2005): 151-166.

however, needs to learn to play a musical instrument or become a grandmaster chess player. Even music and chess, however, might sometimes be the only means to intellectual flourishing for someone. We must keep all avenues of intellectual flourishing open. Some people are suited to flourish intellectually in ways that others are not.

Intellectual flourishing is one of the primary and necessary conditions for living well, but it is not the only condition. Human flourishing consists of some sort of balance between leading ethical lives, intellectual flourishing, and biologically thriving. The exact priority of each of these conditions to flourishing isn't clear. It seems, however, that biologically thriving generally serves as a means to the other two, even if it is an end as well. Thinking and leading ethical lives (which may just be a subset of thinking and mental action) are primary. This line of thought is more or less aligned with Nussbaum's approach and list of capabilities.³⁵

For one to attain eudaimonia, to maximally partake of the human good, to flourish as a human, and to live well, one must flourish intellectually. The good human life requires that we think and employ reason in the right ways, at the right times, about the right things, and to the right extent. Similar things can be said for the other conditions necessary for attaining eudaimonia. For instance, the good human life requires one to eat the right foods, in the right quantities, at the right times, and so on.

These activities necessary for human flourishing are largely compatible with each other, often intertwined and deeply connected, and rarely at odds. There are, however, exceptions. For example, sometimes the ethical thing to do will require us to sacrifice our biological well-being. Such a sacrifice is morally right, but it does not lead to our own maximal human flourishing individually. Somehow we do not partake of the human good as much as we would have if we

³⁵ Nussbaum, Martha. *Capabilities and Human Rights*, 66 *Forham L. Rev* 273 (1997), <http://ir.lawnet.forham.edu/flr/vol66/iss2/2>: 287.

weren't put in a position where we had to sacrifice our biological well-being. Human flourishing is not always accessible or practically available to us – sometimes it isn't our fault that we aren't flourishing. Our well-being and the degree to which we partake of the human good is usually a mix between circumstances outside our control and some choices over which we do have control. Consider the following example.

Proper nourishment is a necessary condition for biologically thriving, and as such, it is a necessary condition for human flourishing. With respect to nourishment, a starving person in a third world nation is not living a good human life as effectively as a healthy, well-fed person who takes her vitamins in a first world nation.³⁶ The starving person is eudaimonically impoverished; to some extent he isn't flourishing as a human being because he isn't biologically thriving. The well-fed person is a better human specimen in this respect. She isn't a better human of her own volition (in large part) – rather, her flourishing and partaking of the human good is largely circumstantial. We must realize her choices about what are right and wrong are distinct from the degree to which she partakes of the human good. Circumstances, often outside our control, have a profound impact upon human flourishing.

Being an excellent human and living the good human life likewise requires that we flourish intellectually. To not flourish intellectually is a supreme type of impoverishment. All else being equal, the man who knows algebra is a better human specimen than the man who doesn't. Likewise, the woman who engages in systematic and disciplined thinking is living a better human life than the woman who does not engage in this activity. Humans who aren't functioning as humans aren't flourishing. This, of course, brings up worries. After all, do we really want classify one human being as intrinsically better than another, particularly when they had no choice in the matter?

³⁶ Sen, Amartya. "Human Rights and Capabilities." *Journal of Human Development* 6, no. 2 (July 2005): 154.

Let us consider the case of a human with Down syndrome as a worrisome example for the eudaimonic model. A cognitively impaired human is not living the good life to the fullest extent. He lacks well-being to some degree. He cannot and does not completely partake of the human good. Since he has Down syndrome, he is not flourishing intellectually, and, therefore, he cannot fully achieve eudaimonia. I think we intuitively know this already – this is why sympathy and pity are appropriate responses toward a human with Down syndrome. Something vital is missing in the lives of the cognitively impaired.

The implications of the claim that such a person is not flourishing may cause us to cringe. All else being equal, this cognitively impaired human being is not living as well as a human who is cognitively functional. Again, assuming everything else is equal, somehow the cognitively functional man without Down syndrome is a better human specimen, leading a better human life, than the man with Down syndrome. Our impulse might be to deny such claims. Positing human inequalities, eudaimonic or otherwise, may lead us to draw false conclusions – talk of human supremacy has a very troubled past. The worry is that placing eudaimonic values on human lives, comparing each individual against an objective standard of the human good, while demonstrating that some humans are superior or more excellent than others, may somehow lead us to treat poor human specimens inhumanely and unethically. Such treatment, however, is not deducible from recognizing when, where, who, how and why various humans are better or worse human specimens, partaking of the human good in different degrees, than other humans. Eudaimonic inequality does not remove one's fundamental human rights (or our duties to such people); as we shall see later in this chapter, eudaimonic inequality can actually bring with it many claim rights of the impoverished (to which others are obligated).

In examining the human good, we must define when, where, and to what extent a human is responsible for his or her lack of flourishing. To the extent that one is not flourishing because of Down syndrome, one is not at fault. Genetic circumstance, rather than choice, has forced this human into eudaimonic impoverishment. He is not accountable for his lack of human flourishing in this respect. Consider, however, how cognitive impairment isn't always just a matter of circumstance – some people choose to permanently impair their minds. The person who regularly gives in to laziness (choosing not to learn and think) or habitually abuses a dangerous substance which impairs cognitive development is intellectually impoverished. These cases are different from the human with Down syndrome. The constantly lazy, or habitual users of dangerous substances, have elected to impoverish themselves intellectually, and as such, they are culpable to that extent. The issue of responsibility leads us to the next important assumption of this project.

3.3 - Our Obligations to Flourish

The distinction between the human good and what is morally right/wrong is essential to this theory. The standard by which we judge moral action is parasitic upon the human good. Our obligations and rights are grounded and interpreted in virtue of the human good. To partake in the human good is not always up to us, and yet sometimes it is. The degree to which others partake in the human good is not always up to us either, and yet sometimes it is. In those cases in which it is our choice to influence or determine when humans can partake of the human good (flourishing), rights and obligations are formed.

I take for granted that we as humans have extensive obligations to ourselves to flourish and to enable others to flourish. We are morally required to ensure that we as individuals are

existing and growing as humans ought. Further, we should help others flourish as human beings, as well. Insofar as it is up to us, we are morally responsible to flourish as a species.

This is not out of line with the neo-Aristotelian tradition. Our human *telos*, namely flourishing and living well, is not merely descriptive. It is the normative standard by which we judge the well-being of humans. These aretaic and eudaimonic concepts come pre-built with prescriptive powers. We are obligated to flourish, and as such we are obligated to take the means necessary to that end. Those conditions necessary for human flourishing form more particular obligations. We ought to lead ethical lives, we ought to thrive biologically, and we ought to flourish intellectually. A cascade of obligations flow out of these conditions for human flourishing.

It is perhaps more intuitive to see why we have obligations to ourselves to flourish as individuals. Surely we should take care of ourselves and improve ourselves. We should not waste our lives. We are responsible for ourselves. Our obligation to flourish is almost common sense. Our obligations to others, specifically to enable others to flourish, are perhaps less clear and obvious.

It seems easy to run into cases where interests conflict. For example, your personal flourishing is limited when you sacrifice resources to enable someone else's flourishing. Exactly where and how we draw these lines of obligation are beyond the scope of this paper, but is an important obstacle to be dealt with when approaching my larger project. This worry of moral precision is complex. For this paper, I assume, even if I cannot justify or fully explain, that we have extensive obligations to others in virtue of their humanity.

Let us bring back our nourishment example. The starving person in a third world nation is not morally responsible for failing to flourish – there is no food available. To that extent, we

cannot hold that individual accountable for not attaining or maintaining eudaimonia. The well-fed person in a first world nation, likewise, is largely not responsible for living in her circumstances, in this case, circumstances in which food is plentiful. We cannot praise the well-fed person for flourishing with respect to circumstances which are outside her control. The well-fed person, however, is responsible to eat healthily when possible and not in conflict with other duties. To that extent, the person is responsible for her personal nourishment and flourishing – she is morally praiseworthy insofar as she is responsible for her own successful flourishing and excellence.

Each individual has responsibilities to nourish themselves, to thrive biologically, and to flourish intellectually insofar as they are capable. Being a good human, however, is not always up to us – sometimes being a good human requires others to help us, as in the case of the starving person, who requires our aid (which presumably we could provide). We who live in abundance have obligations to starving people. We must enable them to flourish. We must provide for them the means to attain the basic, vital, and essential conditions to human flourishing. We have more than just eudaimonic obligations to ourselves; we also have extensive obligations to others. Equivalently, starving people have extensive rights to receive aid and to be enabled to nourish themselves.

Intellectual flourishing is similar. The person with Down syndrome is not morally responsible for not flourishing intellectually because of a genetic defect outside of his control. That person, however, is responsible for cultivating himself insofar as it is up to him. Furthermore, we have obligations to provide for him, to practically enable him to reach his potential. Conversely, people who are habitually too lazy to cultivate their minds or who

capriciously and violently damage their minds are doing something immoral. They are responsible for these actions, and they are responsible for failing to flourish.

Similar to the nourishment example, intellectual flourishing of our species is not just a personal obligation to ourselves, it includes an expansive set of obligations to others. Providing education (in a very broad sense of this term) and the resources necessary to flourish intellectually is our crucial and collective obligation to every human. Fulfilling our function as much as possible requires planning and infrastructure; it also requires that we invest in others. We are morally required to maximally enable our species to cultivate our minds and to fulfill our human function.

Flourishing intellectually is just as important as thriving biologically, perhaps even more important. It would be better to live as a crippled scholar than as an uneducated and willfully ignorant gymnast who has his health and is thriving biologically. Not only are we required to feed and nourish others' bodies, we must feed and nourish their minds. We are doing something immoral by not enabling others to flourish intellectually, just as it is immoral to refuse to provide food, and/or ways to acquire food, to those who need it.

This obligation to others has far reaching consequences. For the purpose of this paper, I wish to concentrate on the problem of obstructing others from flourishing intellectually. With some exceptions, it is generally immoral to prevent others from fulfilling their human function. It would be immoral, for example, to prevent poor children or a particular ethnicity from attending school, or reading books, or using the internet. These people are human, and like all other people, they have a right to have an education. Similarly, intellectual property rights, as we employ them today, are an obstruction to human flourishing, an obstruction for which we are morally responsible.

3.4 – Ideas of Intellectual Flourishing as the Means to Flourishing

The ideas protected by intellectual property claims, whatever they may be, are the ingredients and mediums of the human function. Ideas, concepts, designs, theories, books, music, movies, and whatever else is involved in intellectual property (and perhaps even more) are the very things which are necessary for intellectual flourishing. We must use and implement these ideas, many of which are artificially protected by intellectual property rights, to fulfill our function.

These ideas are the building blocks of thinking. They are the necessary and fundamental components of fulfilling our human function. Without having the access necessary to use and implement them, we are impoverished, not just intellectually, but also biologically.

It is fairly obvious how the use and implementation of these ideas are necessary for our cognitive development. These are the primary objects of cognition. Ideas are directly used or handled in our minds. Material objects must be used or implemented to enable further cognitive development. Printed media has accelerated how we pass information and knowledge on to others. Music notation and sound recording devices have enabled us to pass on phonic art and original lectures and speeches. Video synergizes our senses, efficiently passing on cultural, aesthetic, and educational information to others. Reflect on what the abacus or computer has enabled in terms of intellectual flourishing. We would not be able to develop our minds and fulfill our intellectual *telos* without using and implementing objects of intellectual flourishing.

Implementation provides other indirect benefits to fulfilling our intellectual *telos* as well. Take the case of Norman Borlaug, a man famous for changing agriculture around the world, many of us owe our lives to this man. Borlaug discovered or created the processes which doubled crop yields around the world. His work is not solely for academics or for the sake of

Borlaug's personal intellectual flourishing. The use and implementation of these ideas are necessary for human flourishing in other respects – directly impacting how we nourish ourselves as a species, and indirectly freeing up time and energy, while allowing us to pursue even greater intellectual flourishing. They open the gates to be better humans, individually and as a species.

Ideas of all sorts are necessary to intellectual flourishing; they are instrumental means to our function, and also therefore to our end as human beings. To be obligated to achieve an end is to be obligated to the necessary conditions and means for that end. We are obligated to use and implement the objects of intellectual property because they are part of the necessary means to achieving intellectual flourishing.

Granted, it isn't clear how we know which intellectual objects are necessary as means to our flourishing, intellectually and otherwise. Some intellectual objects are clearly more relevant to our flourishing than others, and I'm unsure exactly which objects have absolutely no possible instrumental value to human flourishing. In the future, when developing my larger project related to intellectual property rights, I must address and substantiate/support the following claim: the number of objects which have no possible instrumental value to human flourishing, is exceedingly small. Some people already have this intuition, but for others, I may need to provide a wide-ranging set of cases and empirical evidence to support the claim.

Essentially, virtually all the objects of intellectual property must be made available to humanity. Some objects are necessary for everyone (literature, math, politics, etc.), and some objects are necessary for a few (musical instruments and chess). These objects must be freely available if we are to flourish as a species. Further, we are obligated to use and implement these objects to fulfill our function. Moreover, we should enable others to use and implement these

objects, and we should not impede others from accessing, using, and implementing these objects because these are the means to flourishing.

3.5 - The Right to Flourish

Sen and Nussbaum's capabilities approach is an empirical method of institutional reform that is derived from the normative claims that the freedom to achieve well-being as a human being is of vital moral importance and that this freedom can only be understood relative to the capabilities of individuals to realize it: that is, individuals must have real opportunities to live well and to flourish as human beings.

Their approach and my sketch are rooted in the same general kind of eudaimonism and picture of the human good. An account of human flourishing or human good defined by the essential functions and characteristics of humans is needed for the capability approach to produce tangible and substantial claims on which to apply its methodology.

Martha Nussbaum describes her "thick vague theory of the good" as "an account of the most important functions of the human being, in terms of which human life is defined. The idea is that once we identify a group of especially important functions in human life, we are then in a position to ask what social and political institutions are doing about them."³⁷ The capability approach is a method, arguably a heuristic device for justice, built upon this teleological view of humankind. This is the approach:

[1] We assume human life has a function(s) and a set of essential features; [2] we identify those properties in terms of functions/achievements and capabilities/opportunities, and set them as a metric or standard of human flourishing; [3] we go out into the world to test and observe

³⁷ Nussbaum, Martha C. "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism." *Political Theory* Vol. 20, No. 2 (May, 1992): 214

whether or not, and to what degree, social and political institutions (like the basic structure in Rawls) are promoting and enabling humans in their domains to flourish according to our metrics; [4] if these standards aren't reached, if humans aren't flourishing as they should, if our social order performs poorly to any degree on our metrics, then we look to see how to reform or revolutionize public policies of these institutions in order for them to better enable and promote human flourishing; [5] go back to step 3, rinse and repeat.

The capability approach is not just interested in being able to describe what counts as flourishing – it wants to prescribe how we can bring about flourishing on a global scale. The sketch I'm offering in this chapter is more or less aligned with the capability approach in this goal.

Intellectual flourishing can be found in the central human capabilities that Nussbaum outlines. She outlines the ability to use and engage our senses, imagination, thought, experience, emotions, practical reason, among others, as central human capabilities – as essential teleological features of humans.³⁸ Intellectual property rights are certainly a matter of great interest to the capability approach.

The capability approach is interested in measuring how public policy, including the quality and quantity intellectual property rights, generates or fails to generate circumstances in which humans maximally flourish. Current intellectual property rights do not merely interfere with our efforts to exercise our intellectual capabilities, but they generate a material circumstance for a majority of the world in which we can't maximally exercise our intellectual capacities, and thus we fail as a species to maximally flourish.

³⁸ Nussbaum, Martha. *Capabilities and Human Rights*, 66 *Forham L. Rev* 273 (1997), <http://ir.lawnet.forham.edu/flr/vol66/iss2/2>: 285-288.

One of the more contentious claims of this sketch theory is that, on average, more people will flourish, and flourish to a greater degree, if we did not continue to protect intellectual property rights in such high quantities and qualities. The current intellectual property regime impinges on our ability to exercise our intellectual capacities, and essentially we are restricted from maximally flourishing because of unnecessary intellectual property protections. That is clearly an empirical question which must be answered with a tool like the capability approach. If that claim is correct, then on a eudaimonistic approach to intellectual property, we may prescribe diminished intellectual property rights.

3.6 - Conclusion

Lockean and utilitarian economic theories of intellectual property try to construct a framework for extensive claim rights to intellectual objects. What I take from critiquing these theories is that their foundations – Locke’s general property theory and utilitarianism – actually lead to denying extensive and exclusive claim rights to intellectual objects. My alternative sketch of intellectual property reaches a similar and compatible conclusion.

REFERENCES

- Abrams, Howard B. "Originality and creativity in copyright law." *Law & Contemporary Problems* 55, (April 15, 1992). 3-44.
- Aghion, Philippe, and Patrick Bolton. "A Theory of Trickle-Down Growth and Development." *Review Of Economic Studies* 64, no. 2 (April 1997). 151-172.
- Besen, Stanley M. and Leo J. Raskind "An Introduction to the Law and Economics of Intellectual Property." *The Journal of Economic Perspectives* , Vol. 5, No. 1 (Winter, 1991):3-27.
- Easterbrook, Frank H. "Intellectual property is still property." *Harvard Journal Of Law & Public Policy* 13, (January 15, 1990): 108-118.
- Farrell, Joseph. "Intellectual Property as a Bargaining Environment." *Innovation Policy and the Economy* , Vol. 9, No. 1 (2009). 39-53.
- Fisher, William. "Theories of Intellectual Property." Harvard Law School. <http://www.law.harvard.edu/faculty/ffisher/iptheory.html> (accessed February 28, 2012).
- Foot, Philippa. *Natural Goodness*. Oxford: Clarendon, 2003.
- Giannakas, Konstantinos. "Infringement of Intellectual Property Rights: Causes and Consequences." *American Journal of Agricultural Economics* , Vol. 84, No. 2 (May, 2002). 482-494.
- Hurt, Robert M. and Robert M. Schuchman. "The Economic Rationale of Copyright." *The American Economic Review* , Vol. 56, No. 1/2 (Mar. 1, 1966): 421-436. 426.
- Hurka, Thomas. *Perfectionism*. New York: Oxford University Press, 1993.
- Kimppa, Kai. "Intellectual Property Rights in Software-Justifiable from a Liberalist Position? Free Software Foundation's Position in Comparison to John Locke's Concept of Property." In *Intellectual Property Rights in a Networked World: Theory and Practice*. Richard A. Spinello and Herman T. Tavani.. Hershey, Pa: Information Science, 2004: 67-82.
- Lee, Timothy. "If Android is a 'stolen product,' then so was the iPhone," *Ars Technica*, February 23, 2012. <http://arstechnica.com/tech-policy/news/2012/02/if-android-is-a-stolen-product-then-so-was-the-iphone.ars>(accessed February 27, 2012).
- Locke, John. *Second Treatise of Government*. Ed. C. B. Macpherson. Indianapolis, Ind: Hackett Pub. Co, 1980.
- Moore, Adam D. "A Lockean Theory of Intellectual Property." PhD diss., Ohio State University, 1997. In OhioLINK, http://rave.ohiolink.edu/etdc/view?acc_num=osu1214419634 (accessed June 13, 2012).
- Nussbaum, Martha. *Capabilities and Human Rights*, 66 *Forham L. Rev* 273 (1997), <http://ir.lawnet.forham.edu/flr/vol66/iss2/2>.

Nussbaum, Martha C. "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism." *Political Theory* Vol. 20, No. 2 (May, 1992):

Palmer, Tom G. "Are patents and copyrights morally justified? The philosophy of property rights and ideal objects." *Harvard Journal Of Law & Public Policy* 13, no. 3 (Summer90 1990): 817. Academic Search Complete, EBSCOhost (accessed November 24, 2011).

Sen, Amartya. "Human Rights and Capabilities." *Journal of Human Development* 6, no. 2 (July 2005): 154.

Spinello, Richard A., and Herman T. Tavani. "Intellectual Property Rights: From Theory to Practical Implementation". *Intellectual Property Rights in a Networked World: Theory and Practice*. Hershey, Pa: Information Science, 2004: 1-65.

Shavell, Steven and Tanguy van Ypersele. "Rewards versus Intellectual Property Rights." *Journal of Law and Economics* , Vol. 44, No. 2 (October 2001). 525-547.

Time Magazine. Business: Patent War. June 10, 1929.
<http://www.time.com/time/magazine/article/0,9171,751967,00.html> (accessed February 27, 2012).

"While Drafting SOPA, the U.S. House Harbors BitTorrent Pirates." TorrentFreak. Entry posted December 26q, 2011. <https://torrentfreak.com/while-drafting-sopa-us-house-harbors-bittorrent-pirates-111226/> (accessed December 26, 2011).

Wolff, Jonathan. "Libertarianism, Utility, and Economic Competition." *Virginia Law Review* 92, no. 7 (November 2006): 1605-1623.

VITA

Michael Morrissey was born in Chicago, IL in 1985. He was raised with his two brothers in various towns and cities in Kentucky – his parents were Methodist ministers (currently, missionaries in Thailand). Michael graduated from high school early and attended Elizabethtown Community College for two years. Afterwards, he attended Berea College to earn his B.A. in Philosophy. He met his wife, Jude (short for Judianne), in a religion class. They (formally) argued with each other a lot. They took more religion and philosophy classes together. They argued with each other a lot. They got married in their last semester at Berea (eloped Feb. 22, had ceremony for family and feeling “all pretty and stuff” on May 23). They still argue with each other a lot. Michael loves Jude a lot.

Michael and Jude had their first child, Madeline, on December 31, 2005. At this time, Michael was a high school teacher. Meh. He moved on to be an analyst at a Fortune 500 company. Jude and Michael then had their second child, Isaiah, on January 1, 2008. Michael and Jude will be forever broke during the months of December and January (Christmas, New Years, and 2x Birthdays). After Isaiah was born, Michael’s family moved to Thailand to serve and to see his parents’ vocation in action. Michael and Jude eventually moved to Baton Rouge, LA in pursuit of Masters Degrees at LSU. That’s where Michael, Jude, Madeline, and Isaiah now live.

Michael has an addictive personality. Besides family life and school work, Michael has many interests. He loves the interwebs, reading, computer science, computer games, Magic the Gathering, “doing philosophy,” the interwebs, programming, mixed martial arts (watching, reading, and thinking about it – he is too fat and asthmatic to actually engage in it), playing piano once in a while, and, of course, the interwebs. Michael has a good life.