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**REVISITING JUSTIFICATION THEORIES FOR
PROTECTION OF INTELLECTUAL PROPERTY:
CONTEMPORARY PERSPECTIVES**

*Swaril Dania**

ABSTRACT

The conflict between recognition of individual effort in creation of any intellectual work, guaranteed by the protection of intellectual property rights, and the considerations of social welfare in the free dissemination of intellectual works has long been a point of academic discussion. To further the claim for a regime for intellectual property rights, several justification theories have been put forward. These range from the Lockean justifications to utilitarian arguments and personhood theories. The Lockean justification is based on viewing intellectual work as an embodiment of one's labour and thus one's private property. On the other hand, utilitarian arguments are centred around the utility of such a regime for promotion of cultural and scientific progress. Apart from these, there are personhood theories, which view the work as an extension of the self of the creator. Since the prescriptive power of these theories is severely limited, to justify all aspects of the existing IPR regimes, more pragmatic and economic justifications have also been put forward utilising models such as of the Nash Equilibrium and Game Theory. Any framework of intellectual property protection must be grounded in sound

* The author has served as an Assistant Professor at Delhi Metropolitan Education and has completed her LL.M from Indian Law Institute, New Delhi (Gold Medalist), and may be contacted at [swarildania\[at\]therate\[dot\]gmail\[dot\]com](mailto:swarildania[at]therate[dot]gmail[dot]com).

juristic principles. This is crucial for the framework to enjoy full moral and political allegiance. Thus, in the wake of the discussion as to the extension of intellectual property protection to new subjects such as traditional knowledge, traditional cultural expression and gene patenting, this article would be indulging in an important task of revisiting and analysing these justification theories as well as the contemporary and pragmatic approaches.

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I. INTRODUCTION

The word ‘property’ as it appears in the term ‘intellectual property’ refers to ‘non-physical’ property. This property is created by one’s intellect. It arises as a result of expending the cognitive process of man. Compared to the prevalent traditional legal sense in which the term ‘property’ is understood, i.e., having a tangible connotation and some intrinsic value and rights associated with it, the word ‘property’ contained herein is intangible and is considered to derive value from the expenditure of one’s intellect and creative process. Thus, unlike the general rights of ownership and possession which exist in relation to the physical property itself, the rights in intellectual property do not vest in the abstract non-physical entity such as the idea. It is the physical manifestation of that idea or the expression of that idea in the form of a ‘work’ which is regarded as an embodiment of the ingenuity and labour, which is supposed to carry value and deserves protection under a legal framework of rights and obligations.

Thus, one expects that the grounds for justification for rights arising out of intellectual property would be somewhat different from that of physical property. “*The non-exclusive character of intellectual property objects and the restriction on the free flow of information*”,¹ which the intellectual property rights [*hereinafter* referred to as “**IPR**”] protection regimes entails, has presented interesting challenges before advocates of the regime for IPR protection. Moreover, while attempting to justify these regimes, issues

¹ Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 34-36 (1989) (*hereinafter* “**Hettinger**”).

have always been raised as to conflicting interests between individual recognition and social welfare promotion. In response to this, several justification theories have been propounded to explain the rationale behind the need for IPR protection regimes, such as property based Lockean arguments, utilitarian theories, personhood theories, etc. Despite numerous attempts at the same, none of these justification theories have proved to be comprehensive, sufficient or adequate to explain all the features of the existing IPR protection regimes. Further, none are capable of a universal application.

Modern times are being described as marked by an intellectual property land grab, as can be seen from the alarming rush to patent even the human DNA.² In such a scenario, when “*intellectual property rights are starting to be viewed as state created entities used by the privileged and economically advantaged to control information access and consumption*”, a re-assessment of the justification theories becomes an indispensable exercise.³ The present paper attempts this assessment.

II. THE LOCKEAN THEORY

The starting point of the discussion as to the justification of IPR regime is often centred around the classical theory of John Locke which

² Adam D. Moore, *Intellectual Property: Theory, Privilege, and Pragmatism*, 16 CAN. J.L. & JURIS. 191 (2003) (hereinafter “**Theory, Privilege, and Pragmatism**”).

³ ADAM D. MOORE, *INTELLECTUAL PROPERTY & INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES* 9 (Transaction Publishers ed. 2001).

has been discussed by him in the ‘Second Treatise of Government’.⁴ This may thus be called the ‘Lockean’ tradition. The better description of this cluster of arguments would be ‘proprietaryism’.⁵ Proprietary arguments are based on the view that “*all enforceable moral rights are moral property rights*” (rights over things). Such arguments are based on the premise that property rights exist in the creations of intellectual works of the authors and these rights are grounded in ‘natural’ or ‘moral law’, rather than looking at these rights as something which deserves protection by positive law.⁶

According to the Lockean theory, if a person exerts his labour upon resources which are either unowned or “*held in common*”, it gives rise to a natural property right which vests in such person. This right over the fruits of one’s efforts deserves protection by the State and enforcement of this natural right is the obligation of the State.⁷ According to Locke, “*every man has a property in his own person*” and that “*the labour of his body, and the work of his hands are properly his*”.⁸ The Lockean justification is thus based on the idea of one’s natural possession of one’s own body and one’s own labour. To quote specifically:

⁴ JOHN LOCKE, LOCKE: TWO TREATISES OF GOVERNMENT (Peter Laslett ed. 1988) (hereinafter “**Locke**”).

⁵ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 287-366 (1988); HETTINGER, *supra* note 1; Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 65-108 (1997).

⁶ William Fisher, *Theories of Intellectual Property* in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168-200 (Stephen Munzer ed., 2001).

⁷ *Id.*

⁸ LOCKE, *supra* note 4.

“Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.”⁹

The appropriative ability as discussed above however is not unlimited. Locke had been wise to formulate the condition subject to which the appropriation can be made. According to Locke’s theory, *“the mixing of one’s labour only creates a property right where there is enough, and as good left in common for others.”* The ambiguity of this proviso has led to much intellectual discourse and there is much contestation as to the correct interpretation of it. It is at times vehemently argued that since ideas are non-rivalrous in nature, are not consumed by their use, and are open to simultaneous appropriation, intellectual property protection is justified since it very well satisfies this proviso. Further, there is another proviso called as the ‘no-waste proviso’ which provides that appropriated resources must be used and not wasted, otherwise they would become common again.

To sum up the Lockean theory, we see two main constituent elements. *First*, the act of appropriation of previously unowned resources through mixing of one’s labour with them. This act gives rise to a right to exclusive ownership to the product of such mixing. *Second*, the condition

⁹ *Id.*

that such appropriation must not leave anyone else worse off. It must leave enough and as good in common for others without wastage. Justification of intellectual property regimes based on Lockean theories can be captured in Justin Hughes' writings wherein he bases the IPR protection in these three propositions.

*“First of all, that the production of ideas requires a person’s labour; secondly, that these ideas are appropriated from a “common” which is not significantly devaluated by the idea removal; and thirdly, that ideas can be appropriated without breaking the ‘enough and as good’ and ‘non-waste’ conditions.”*¹⁰

The theory though regarded by some scholars to be the strongest justification theory is objected by some who question how far and to what extent these above propositions are fulfilled in the case of intellectual property. The following section discusses some of these objections.

A. OBJECTIONS AGAINST LOCKEAN THEORY

i. Why Private Property Must Exist At All? (Difficulties with the Lockean Justifications of Exclusive Property Rights)

Locke developed a theory of private property on certain assumptions about the need for the existence of private property. He

¹⁰ Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 287-366 (1988) as cited in Theo Papaioannou, *Human Gene Patents and the Question of Liberal Morality*, 4 GENOMICS, SOC., & POL'Y 64, 64-83 (2008).

reasoned that man needs to consume to sustain himself. Thus, the basic notion underlying the need for private property to exist is self-preservation. Since in order to survive, man must eat and drink for which he needs to utilise natural resources, it is necessary that he makes them his exclusive property. However, arguments remain as to the soundness of this principle since subsistence provides for a weak ground to establish any general justification of exclusive property rights. It may justify consumption and that too in respect of a limited range of goods.¹¹

Exclusive property rights are further justified on the ground that in order to pursue long-term life plans and welfare means, the same is needed since by means of exclusive property rights over goods, one can derive the ability to utilise those goods in any manner as needed for fulfilment of one's welfare goals. Thus, exclusive rights should exist. This justification is slightly broader than the one based on simple subsistence.¹²

Moreover, exclusive property is sometimes defended on the ground that it avoids "*tragedy of commons*" as has been explained by

¹¹ See Daniel Attas, *Lockean Justifications of Intellectual Property* in INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE 31, 31-32 (A. Gosseries et al. eds., 2008) [hereinafter "**Attas**"]. He argues, "Though it seems reasonable that food and drink must exclude others in the process of their consumption, it is far from clear that this implies a property right in any interesting sense. For a property right includes not merely use, but also control, management and the right to transfer. Yet these incidents do not apply in the case of a chewed, swallowed and digested apple, for example. If what I am permitted to take from nature is what I need to eat and drink, then I may do just that. Of course, in a slightly more advanced economy I may want to specialise in apples, say, and trade them for your eggs. Exclusive property rights are certainly required to allow a division of labour to develop and for the possibility of trade, but it does not follow that these are necessary for subsistence."

¹² See Loren Lomasky, "persons have a natural interest in having things" as cited in ATTAS, *Id.* ¶ 11.

economist Garrett Hardin wherein he argues that common ownership of assets would lead to individuals overusing the asset and under-maintaining it.¹³ However, the theory though appeals to logic, has floundered when tested on the basis of empirical evidence. Economist Elinor Ostrom has in her Nobel Prize winning work busted the myth of exclusive property rights being essential to manage natural resources and has argued for models of collective ownership and management.¹⁴

Thus, the main premise which forms the basis for exclusive rights to property in material goods appears to be flawed. It is interesting to see how a theory which falters at justifying private ownership even of material goods, could serve to be a good justification guide for ownership of intangible, intellectual property.

ii. Ideas as Individual Creation?

It has been argued by some scholars, such as D.G. Richards that ideas are not individual creation, rather ideas arise as a result of social creation.¹⁵ There is a distinction between labour that is expended by a person while creating an intellectual work and the physical labour that he may perform. Unlike physical labour, such form of intellectual labour is to be conceived as a special labour which is based on interaction and learning

¹³ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE, 1243-1248 (1968).

¹⁴ ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 1 (James E. Alt et al. eds., 1990).

¹⁵ D.G. Richards, *The Ideology of Intellectual Property Rights in the International Economy*, 9 REV. OF SOC. ECON. 521, 521-541 (2002) as cited in Theo Papaioannou, *Human Gene Patents and the Question of Liberal Morality*, 4 GENOMICS, SOC., & POL'Y, 64-83 (2008).

within society.¹⁶ Thus, a Lockean justification on the premise of rights over the fruit of one's labour seems to be unsuitable in the case of intellectual property. Moreover, questions have been raised as to how much ownership one has over one's own body. It is argued that even in the creation of one's own body, there is expenditure of significant labour and effort of others, perhaps of the parents or guardians. Thus, one may say that if ownership of one's self and of one's labour is in question, then the underlying premise of the Lockean argument is challenged and the significance of the theory seriously undermined.

iii. Ideas are Non-Rivalrous

In relation to ideas, it is emphasised time and again, that they are non-exclusive in nature. So, unlike tangible material resources which are rivalrous in nature, in the sense that use/consumption of the good by one disallows the other the use of the same good, ideas are not 'consumed' or 'destroyed' by their use. Also, physical goods undergo erosion due to which they suffer a depreciation in value over time with wear and tear. However, the same is not true for ideas. Ideas though may be rendered devalued because of the coming up of better technologies and innovation, yet it is only when other ideas succeed them, that they lose their entire worth.¹⁷

Closely related to the premise of ideas being non rivalrous goods, is the issue of the marginal cost at which the intellectual object can be

¹⁶ *Id.*

¹⁷ Attas, *supra* note 11, ¶ 33.

made available to an additional user. For the communication of the intellectual work to a new user, this cost which may be called as marginal cost, is almost zero. This is so because with the modern communication and information technology, any intellectual work can be disseminated among large groups at a very low cost.¹⁸ “*This characteristic of intellectual objects grounds a strong prima facie case against the wisdom of private and exclusive intellectual property rights. Why should one person have the exclusive right to possess and use something which all people could possess and use concurrently?*”¹⁹

Further, ideas being non rivalrous goods, cannot be consumed in the same manner in which material goods can, and moreover, are not subject to physical deterioration. Thus, the argument based on the ‘tragedy of commons’ that is offered in relation to material goods, offers little valid justification here as ideas cannot be overexploited or undermaintained. In fact, it is the contrary – if there is free exchange of ideas, it may lead to proliferation of innovation and creativity. Such an exchange would add to the common pool of resources rather than depleting it. However, Adam Moore points out in his work that this view is sometimes rebutted by some who argue that in a no-protection regime, individuals and companies would seek to protect their intellectual efforts by keeping them a secret.²⁰ This secrecy would lead to a different kind of tragedy in the sense of a loss

¹⁸ Hettinger, *supra* note 1.

¹⁹ Balew Mersha G. & Hiwot Hadush, *Justifying Intellectual Property*, ABYSSINIALAW (Apr. 2, 2012), <https://www.abysinialaw.com/component/k2/item/469>.

²⁰ Adam D. Moore, *Intellectual Property and the Prisoner’s Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 831-869 (2018) [*hereinafter* “**Moore**”].

of potential value since this would hinder dissemination of information. Thus, the tragedy in case of a “*no-protection rule*” is secrecy, restricted markets, and lost opportunities and not the commonly known issue of overuse/over exploitation.²¹

iv. Problems with Metaphor of ‘Mixing One’s Labour’

It has been pointed out by some scholars that the idea of mixing one’s labour is incoherent.²² They question if actions can ever be mixed with objects. Also, it is argued that why does mixing what one owns (i.e., one’s labour) with what he doesn’t own, doesn’t imply losing what one originally owns rather than gaining what he doesn’t? Robert Nozick gives an example and asks if he empties his can of tomato juice into the ocean, would that imply that he would come to hold the property rights in the whole ocean since what he possessed has been mixed with the resource?²³ In relation to intellectual property, as we are moving towards creation of more and more digital content, this requirement of mixing of labour with the resource/object is problematic. The mixing of labour with something like clay, an object, as a sculptor sculpts a statue is easier to be imagined but similar mixing of labour is not possible in relation to several other intellectual works in the digital domain.

v. Problems with the Lockean Proviso

²¹ *Id.* ¶ 850.

²² Jeremy Waldron, *Two Worries about Mixing One’s Labour*, 33 PHIL. Q. 37, 37–44 (1983) as cited in MOORE, *supra* note 20.

²³ ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) as cited in Moore, *supra* note 20.

The Lockean proviso as discussed above is quite ambiguous. Taken literally, the original Lockean proviso appears overly demanding in relation to material resources. With limited resources at our disposal, any appropriation would necessarily worsen the position of others by diminishing the stock of resources available for them, thus it would never be left ‘as enough’ and ‘as good’ in common for others. This would imply that any acquisition could never be justified. However, the proviso appears to be easily fulfilled in the case of intellectual property since ideas being non-rivalrous goods, use of ideas by one, leaves ‘enough’ and ‘as good’ in common for others. Though the argument seems appealing, scholars have been quick to point out that the same interpretation is probably due to the difficulties with adoption of baselines of comparison. The following discussion would make it clear.²⁴

Intellectual appropriation is regarded as fulfilling the Lockean proviso by Moore because as per him, “*the number of ideas, collections of ideas, or intangible works available for appropriation is practically infinite*”.²⁵ Before transposing Locke’s arguments here, it is essential that corresponding to the Lockean notion of ‘commons’, correct analogy is drawn and the identification of the ‘commons’ in the realm of intellectual property is

²⁴ The idea expressed here has been presented in Maxime Lambrecht, *On water drinkers and magical springs: Challenging the Lockean proviso as a justification for copyright*, 28(4) *RATIO JURIS* 504, 504-520 (2015) (hereinafter “**Lambrecht**”) wherein he discusses Nozick’s revised version of the proviso alongside the original proviso. A complete analysis of the Lockean proviso and its varying interpretations is out of the scope of this paper.

²⁵ ADAM D. MOORE, *INTELLECTUAL PROPERTY AND INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES* 114 (Transaction Publishers ed., 201) as cited in LAMBRECHT, *supra* note 24.

done carefully. How does one define these ‘commons’? Would that imply “*a set of all possible ideas/all factually existing ideas/the set of reachable ideas/set of all ideas and expressions*”?²⁶ Since these are questions to which there are no certain answers, Moore’s account seems deficient.

Deriving the same conclusion through a different argument is Hughes who relies on the idea-expression dichotomy in copyright law. He states that “*because creating property rights in an idea never completely excludes others from using the idea, it need not be justified by Locke’s legerdemain that increases in privately produced goods necessarily benefit the commonwealth*”.²⁷

Hughes’ argument appears to have a circular reasoning fallacy. It excludes expression from its definition of the “*common*” relying on the idea-expression dichotomy, and then uses this as evidence that the appropriation satisfies the Lockean proviso. As pointed out by Lambrecht in his paper, “*if one defines the set of what shouldn’t be depleted and the set of what can be appropriated in a way that they do not intersect, it is not surprising that the proviso appears to be necessarily satisfied*”.²⁸

Moving on to another sort of reasoning, we have Nozick’s interpretation wherein he contends that “*an inventor’s patent does not deprive others of an object which would not exist if not for the inventor*”.²⁹ Thus, he argues

²⁶ LAMBRECHT, *supra* note 24.

²⁷ Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287 (1988) as cited in LAMBRECHT, *supra* note 24.

²⁸ LAMBRECHT, *supra* note 24.

²⁹ ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA*. 181(1974).

that without the author, the work would not have been created and thus, in the absence of the work itself, there could be no question of depriving others in any way. By appropriating something that would otherwise not have existed, one does not deprive anyone. This reasoning ignores the possibility of there being independent creation by different individuals of a remarkably similar work. It is a real possibility that an almost identical creation can be made independently by two different individuals and this may happen even simultaneously. Thus, it can be argued that the situation of potential independent creators is worsened off by the appropriation, in that they could have otherwise used their creation and no longer can.

vi. Right to Property as a Natural Right – Distinguishing it from a Consequentialist Justification

It is important to highlight that a Lockean justification based on the natural right approach is based on the notion of entitlement, a direct right and not any contractual right.³⁰ A contractual right would imply the right to be consequential in the sense that it arises out of any agreement subject to conditions attached to selling of a material object that embodies the idea. Natural rights are rights in perpetuity and thus, it becomes interesting how this aspect would be reconciled with the ‘limited in duration’ protection given to intellectual property in regimes under copyright and patent.³¹ Since Locke’s theory was originally used to justify property rights in material things, why should these rights be limited by time? This poses a significant difficulty as most forms of intellectual

³⁰ Attas, *supra* note 11, ¶ 30.

³¹ *Id.*

property today are durational. Thus, it is sometimes argued that the Lockean theory fails to account for this aspect of intellectual property rights.

However, as a counter-argument, some may argue that since the Lockean theory does not permit one to harm others (based on the Lockean proviso of leaving as good and as enough), the placing of limits on the right is capable of a justification and fits perfectly in the theory. Having said that, one needs to also point out how such an argument may seem paradoxical. For the private right in intellectual work to come into existence, the complete satisfaction of the Lockean conditions with the two provisos is mandatory. Since serious objections as to the satisfaction of the Lockean proviso remain, the very idea of the accrual of the private right in the intellectual work in the first place, comes under contestation. The ‘existence of the right’ under the Lockean theory is a pre-requisite to offer justifications for the ‘nature of the right’ (whether it should be perpetual/limited) using the provisos of the same theory. Attempts at justifying the nature of the right using the Lockean proviso, when the right itself is not established owing to the non-satisfaction of the proviso, would be akin to putting the cart before the horse.

III. THE CONSEQUENTIALIST / UTILITARIAN THEORIES

Contrary to the labour theory which is based on the ‘natural right’ of man to fruits of his labour, “*Anglo-American systems of intellectual property*

are typically justified on utilitarian grounds”.³² The US Constitution grants limited rights to authors and inventors of intellectual property “to promote the progress of science and useful arts”.³³ As per the utilitarian justifications, the rationale for protection of intellectual property is the maximisation of scientific and cultural progress through creation of devices such as copyright and patent to adequately recompense the creators/inventor before the information created by them is diffused in public.³⁴ Devoid of such mechanisms, it is argued, that the incentive to create would be lost. Rational agents would not create the same amount of work without IPR protection. Further, the more the intellectual creation in any society, the more social progress we have. Thus, the IPR regime is justified on utilitarian grounds. To use William C. Robinson’s words:

“...institution of patent protection is fully justified because, in general, adopting such a system leads to good consequences for society as a whole: The granting of a patent privilege at once accomplishes three important objects; it rewards the inventor for his skill and labour; it stimulates him,

³² Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case against Incentive Based Arguments*, 26 *HAMLIN L. REV.* 602, 602-630 (2003) [hereinafter “**Intellectual Property, Innovation, and Social Progress**”].

³³ US CONST. art. I §1 cl. 8.

³⁴ S. Chesterfield Oppenheim, *A New Approach to Evaluation of the American Patent System*, 33 *J. PAT. OFF. SOC.* 555 (1951); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 *HARV. J.L. & PUB. POL’Y* 817 (1990); Leonard G. Boonin, *The University, Scientific Research, and the Ownership of Knowledge*, in *OWNING SCIENTIFIC AND TECHNICAL INFORMATION: VALUE AND ETHICAL ISSUES* 253, 257-60 (Weil and Snapper ed.1989); Edwin C. Hettinger, *Justifying Intellectual Property*, in *INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS* 17, 30-33 (Adam Moore ed. 1997) as cited in *INTELLECTUAL PROPERTY, INNOVATION, AND SOCIAL PROGRESS*, *supra* note 32.

*as well as others, to still further efforts in the same or different fields; it secures to the public an immediate knowledge of the character and scope of the invention. Each of these objects, with its consequences, is a public good, and tends directly to the advancement of the useful arts and sciences.”*³⁵

Thus, the justification is based on the premise that if IPR rights are conferred on authors and innovators, it incentivizes the production of intellectual works. The premise though intuitively appealing is not free from contestation. Adam Moore in his work questions the truth of this premise.³⁶ Following the same line of thought, Seana Valentine Shiffrin develops an elaborate argument against the ‘incentive’ based justification wherein she contends that for many artists, the motivation to create is independent of pecuniary rewards.³⁷ Similarly, it can be said that necessity rather than any pecuniary motivation has been the propelling force behind many significant inventions. Daniel Attas while giving certain examples in this regard writes, “*Many of the most valued discoveries and works of art were produced and developed without the protection of intellectual property. To name the most obvious: the wheel, the alphabet, the Bible, the works of Homer, Archimedes, Shakespeare, Guttenberg, Bach, Leonardo, Newton, and so on*”.³⁸ Though there exists a basic interest to recoup at least the investment costs, it is noted that “*the primary interest is often just in their art and in the process of creation, and*

³⁵ INTELLECTUAL PROPERTY, INNOVATION, AND SOCIAL PROGRESS, *supra* note 32, ¶ 610.

³⁶ *Id.*

³⁷ Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, 4 J.L. PHIL. & CULTURE 49, 49-58 (2009) [*hereinafter* “Shiffrin”].

³⁸ Attas, *supra* note 11, at 48.

for many, in its wide dissemination to others".³⁹ An elaboration on this argument is provided in the next section.

A. OBJECTIONS AGAINST THE UTILITARIAN THEORIES

Seana Shiffrin argues that in order to justify IPR regimes on incentive based arguments, one needs to advance the argument beyond merely claiming that creators need funding to recoup creation and labour costs, and because of cheaper ways of copying available to infringers, the funds needed by the creator would usually exceed what they would be able to secure in an unprotected market for their creations. She proposes a critique of the incentive argument on both evaluative and justificatory grounds, pointing out *firstly*, how it is extremely difficult to empirically support the claim that such incentives foster intellectual creations. *Secondly*, even if it is established that incentive-based regimes lead to more content creation, is it justified to act on the idea that such incentives are necessary to promote optimal cultural production?⁴⁰ Incentive-driven arguments may imply that such attempts to reward the creator/inventor by granting monopoly rights may ultimately lead to industry-monopolisation. However, such monopolistic regimes are rarely in the best interest of the society and would in fact, run contrary to the whole utilitarian premise of maximising social progress through such protection.

Shiffrin in her work goes on to derive an analogy from the Rawlsian theory of justice and tries to apply it in the framework of

³⁹ Shiffrin, *supra* note 37, ¶ 51.

⁴⁰ *Id.* ¶¶ 55-56.

intellectual property. She notes that in Rawlsian theory, distribution of social primary goods must be on principles of equality in a just society. There can be no derogation from this principle except when introducing an inequality in the system serves to be to the maximal advantage of the least well-off. If by introducing unequal distribution, the position of those enjoying the smallest allotment of social primary goods is made better off, Rawls argued that it may be justified, even required, to distribute resources unequally. Specifically weaving the argument in context of copyright protection, Shiffrin argues that the society has a commitment to freedom of speech and expression, and thus free and equal access to and use of expressive materials. According to the incentive argument then, it is only if unequal access to cultural materials “*produces a richer array of such materials that benefit everyone, particularly those whose use is more restricted, that restrictions on speech necessary for such incentives may be justified*”.⁴¹

Drawing upon G.A. Cohen’s arguments,⁴² she observes that there is a need to distinguish between the different incentives and motives before the content creator. She stresses that the mere fact that an incentive is required for production does not necessarily mean that its provision is justified or that the conditions that make it requisite are justified. One needs to question why the incentive is required. Incentives to create in the form of IPR protection may be needed in order to make creators able to

⁴¹ *Id.* ¶ 56.

⁴² G.A. Cohen, *The Pareto Argument for Inequality*, 12 SOC. PHIL. & POL’Y 160 (1995); G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3 (1997) as cited in Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, 4 J.L. PHIL. & CULTURE 49, 56 (2009).

recoup their investment costs. If the incentive is required because the extra production is especially taxing or time-consuming, that would be one thing. However, if incentives are demanded by people as a way of ‘ransoming’ their talents, wherein they withhold their creations only in order to seek greater compensation, then these motives are not in line with the motives of a just person.

Motives as described above, other than seeking a just compensation for their investment, are inconsistent with the idea that inequalities are justified only if they are to the advantage of the worst off because in that situation, the inequality to access would be created for a selfish gain. The creator could be just as productive and accept an equal share of the surplus.

In the Rawlsian theory, it is accepted that social and natural talents as well as one’s market position are arbitrary. Thus, one’s original position is arbitrarily decided. Basing one’s argument on that assumption, it will create a conflict if one justifies accrual of a private advantage by demanding premiums for some productive work merely because of the possession of their ‘talent’ which is purely coincidental and arbitrary. To use Shiffrin’s words:

“ .. a just citizen accepts that social and natural talents as well as one’s market position are arbitrary from a moral point of view. One could not accept these tenets and also use one’s happenstance command over socially useful talents for private advantage by demanding premiums for an

especially productive work. This would be to treat one's talents and market position as morally relevant, which is inconsistent with believing they are morally arbitrary.”⁴³

Focusing next on the State responding to the demand for incentives for creation of intellectual product, she raises the question that if such incentive demands are inherently unjust, new questions of justice emerge about whether this response of State, amounts to acquiescing in, endorsing or encouraging injustice?

Thus, an analysis of these arguments suggests that merely asserting the incentive argument is not sufficient and there is a need to further inquire as to the reason for which the incentive is required and as to the motives of those who demand the incentive.

Further, it requires us to look for better ways, or equally good ways, of stimulating production without granting private property rights to authors and inventors.

IV. PERSONHOOD THEORIES

The personality/personhood theories are attributed to G.W. Hegel and there are different formulations of the same. The core idea underlying this theory is that “*an individual enjoys an exclusive moral claim to the acts and*

⁴³ Shiffirin, *supra* note 37, ¶ 56.

content of his or her personality".⁴⁴ One's personality is considered to be constituted of one's character traits, preferences, experiences, predispositions and knowledge. One has a rightful claim over the attributes of one's personality. Such a claim would extend to cover situations where expenditure of these personality traits leads to creation of a product. This theory is somewhat similar to the Lockean theory of ownership over one's bodies and its activities. Except instead of labour as the owned substrate that is mixed with an external thing in the traditional Lockean account, one's will or personality is seen to be mixed with or manifested in an external thing in personality theory.⁴⁵ In the words of Justin Hughes, the creation of intellectual content "*materializes*" the dimensions of personality.

If one looks at the rights accorded in the copyright regime in certain countries, not only do we have economic rights which secure to the author/creator rights such as of reproducing the copy of his work, allowing for adaptations, etc., which yield an economic benefit to him, but there has been an inclusion of 'moral' rights as well which include rights of paternity, right of disclosure, withdrawal and integrity. These rights assure the author that he shall be allowed the perpetual use of the title of author in connection to his work, and has a right to restrict the mutilation/destruction of the work which in anyway impairs the integrity of his work. These moral rights are justified because creative works are

⁴⁴ Kenneth Einar Himma, *The Justification of Intellectual Property: Contemporary Philosophical Disputes*, 59 J. AM. SOC'Y. FOR INFO. SCI. & TECH. 1155 (2008).

⁴⁵ Michael A. Kanning, *A Philosophical Analysis of Intellectual Property: In Defense of Instrumentalism* (Mar. 21, 2012) (unpublished Graduate Theses and Dissertations, University of South Florida) (on file with Scholar Commons, University of South Florida).

understood to be an extension of one's personality. A piece of work is regarded as an integral part of creator's personality.

Immanuel Kant's account of this theory has also been significant. According to Kant, the words and thoughts of a person constitute an integral part of one's personality. Thus, an exclusive ownership of the same by the author is warranted.⁴⁶ Since intellectual property rights are seen as a medium through which the expression of an individual's personality is facilitated in the community, they can be regarded as moral rights. Personality theories seem to offer the best explanation for intellectual property practices surrounding literary and artistic work since it is seen as a natural extension and expression of one's self. However, they may not be suited to apply to all kinds of works. The following section discusses these difficulties with this theory.

A. OBJECTIONS AGAINST THE PERSONALITY THEORY

As discussed above, the personality theory is regarded to be particularly effective while justifying certain types of intellectual property, specifically literary, artistic, musical, or dramatic work. In such works, it is relatively easy to imagine one's personal attributes being reflected in the work and thus to see the work as an embodiment of the traits of the artist. But it is difficult to support with the same degree claims for justification of protection in relation to works such as industrial processes, computer

⁴⁶ See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1797); Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books* in IMMANUEL KANT, *PRACTICAL PHILOSOPHY* 23 (Mary J. Gregor ed., 1996).

software etc., things which are not seen as direct expressions of individual ‘will’ or personality. So, the question arises that “*if personality is manifested in varying degrees in different objects, how do we know that an IP creation embodies more personality than another? Should more personality imply more protection of IP? What about those IP products which reflect little or no personality from their creators?*”⁴⁷

Interesting questions come up in cases such as in relation to a work which an author has created which is about, say, the adventures/biography of a famous person. Though copyright protection is accorded based on the concept of ‘who clothes the idea into expression enjoys the copyright’, the right would be difficult to be explained in such case on personhood theories. Some may argue that the personality of both the writer and the ‘famous person’ are embodied in the work. In such cases, theories based on labour would grant the right to the writer/author. On the other hand, proponents of personhood theories might prefer granting the right to the person whose life is portrayed in the work, since it is his personhood that is reflected in the work. Such arguments indicate that these theories are of limited help while attempting an understanding of the rationale behind all the features of the IPR regime.

⁴⁷ Theo Papaioannou, *Human Gene Patents and the Question of Liberal Morality: Department of Development Policy and Practice*, 4 GENOMICS, SOC’Y., & POLY 64, 64-83 (2008) [*hereinafter* “**Theo Papaioannou**”].

V. NEW APPROACHES – GAME THEORETICAL EXPLANATION

Game theoretical explanations for intellectual property protection have also been offered in recent times.⁴⁸ The model utilises the classic ‘prisoner’s dilemma game’⁴⁹ to illustrate how without an IPR regime there would be sub-optimal results for all.

The game can be modelled as between two IP creators, A and B, each having two options, either to copy the intellectual creation of the other or not. The best situation for each player is that they get to copy the creation of the other while their own work is not copied. This is the best situation for the ‘copier’ and worst for the player who does not copy. The player who copies has a positional advantage. He has access to more content compared to the other player. This leaves him with more options of recouping research and development costs through selling, trading, or bartering with the other player. On the other hand, the non-copier does not enjoy these possibilities. Thus, this becomes the worst payoff for the non-copier. If both do not copy, each will avoid the worst outcome, as both will be left with the option of exchanging their content to recoup investment costs. This appears to be an ‘okay’ payoff. This is better than the position where the person does not copy while his work is copied by the other person. However, this is less rewarding than the ‘best’ option as

⁴⁸ This section presents the game theoretical model as developed by Adam D. Moore in his paper cited as MOORE, *supra* note 20.

⁴⁹ For an explanation of the concept, *see* MOORE, *supra* note 20.

discussed above, where one gets to copy while his own work is not copied by the other player.

A third situation arises if both players copy the work of each other. In such a situation, both have additional content. Thus, none is at a positional disadvantage. However, the possibility of exchange of content between them for money/barter is lost in this situation. So, this may be called as a 'bad' payoff.

If we summarise the three situations in terms of payoffs, the following conclusions emerge.

1. When both copy, the outcome is 'bad' for both the players.
2. When both don't copy, the outcome is 'okay' for both the players.
3. When one copies and the other does not, the outcome is 'best' for the copier and the 'worst' for the non-copier.

The following payoff matrix represents these three situations.

A ↓	B →	COPY	DON'T COPY
COPY		Bad Bad	Best Worst
DON'T COPY		Worst Best	Okay Okay

Fig. 1 Prisoners' Dilemma Game (With No IP Protection Framework) [Source: Adam D. Moore, Intellectual Property and the Prisoner's Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets, Fordham Intell. Prop. Media & Ent. L.J. 843 (2018).]

An analysis of the choices available to both, A and B shows that the dominant strategy in this game is of copying. If A analyses the options available to him, he will reason in the following manner:

When B doesn't copy, the best option available for A is to copy since it gives the best payoff as explained above. When B copies, A would not have the chance to trade off his research with B. So, the most he can do to slightly better his condition is to himself copy, since that will leave him more content. Similarly, B would reason in an identical way, and thus for both the players copying is the dominant strategy.

The above model can serve to be a justification for the need to prevent copying. Since both the content creators are aware of the possible scenario involved, neither would find it prudent to engage in creative pursuits if they are not ensured that their work would be protected from being copied. Whatever costs A would have incurred have been avoided by B when he copies. Thus, B has a comparative advantage over A and can outsell him by offering the same good at a lower price. Further, complications to the model can be added if we attempt a more realistic experiment where the research and development costs of both the creators are not identical. In such a situation say if A has incurred higher costs, then

B by copying it, has a significant advantage. B by selling off the content created by A, which has higher investment costs, could recoup investment costs incurred in development of his product sooner than A who copies B's content, whose development cost is merely a fraction of that of A's content. After B has recouped his investment and made good enough profit, he may in fact offer his content for free which would completely destroy the income capacity for A. The above game captures the situation involving two content creators. A situation may be imagined where there are two actors, one a content creator and the other a content consumer. Here the content consumer has nothing to lose since he isn't incurring any research and development cost, while the content creator has no incentive to engage in research if he is not assured that his content would not be copied.

Adam Moore, in his work, remodels the same situation with a regime for IPR protection in order to explain how the changed payoffs will affect the content creation in the society.⁵⁰ In this model, consider A and B again playing a prisoner's dilemma game. Both have the same option of copying other's work and are determining their best possible choice. In this new game, the wilful infringement of a copyright results in a \$150,000 penalty and up to five years in jail. With these sanctions, the payoffs change, and the dominant strategy becomes to not copy.

⁵⁰ *Id.* ¶ 863.

A ↓	B →	COPY	DON'T COPY
COPY		150K Fine 150K Fine	150 K Fine Bad
DON'T COPY		Bad 150K Fine	Okay Okay

Fig. 2 Prisoners' Dilemma Game (With IP Protection Framework) [Source: Adam D. Moore, Intellectual Property and the Prisoner's Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets, Fordham Intell. Prop. Media & Ent. L.J. 863 (2018).]

Thus, by putting IPR regime in place, one can avoid the possibility of sub-optimal results. However, the question arises as to why copyrights, patents and trade secrets, and not some other alternative. What is needed is any efficient mechanism which changes the payoffs, and it is not the case that the same can be performed only by the existing institutions of copyright, patent, and trade secret. These institutions may be sufficient to perform this function, but they clearly are not the only means available to ensure collective optimality. Nothing necessitates the systems to exist in their present form. In order to incentivize creation of intellectual work and to dissuade copying, other legal/societal instruments can also be explored. However, it would be impractical to demand a complete repeal of the system. There could be tweaks suggested in the system but a complete

shift would imply massive costs, and to advocate such a strategy would be rather imprudent.

VI. CONTEMPORISING THE JUSTIFICATION THEORIES

An analysis of some of the popular justification theories makes it amply clear that the prescriptive powers of all these is severely limited. None perhaps can provide for an explanation for all features of our existing IPR regimes. This has given rise to a new kind of approach which is based on economic pragmatism, wherein as opposed to any ‘grand theory’ which provides a foundation for systems of intellectual property, the systems are seen as mechanisms protecting certain economic interests. Thus, there appears to be a divide between the ‘theorist’ and the ‘economic pragmatist’. “*Pragmatic theories do not require any underlying principle guiding or justifying it, the agent does what works without being limited by theory or principle. To be economically pragmatic would be to do what works in an economic sense*”.⁵¹ There is a debate as to the desirability of one approach over the other but such an analysis is beyond the scope of this paper.⁵²

⁵¹ THEORY, PRIVILEGE, AND PRAGMATISM, *supra* note 2, ¶ 193.

⁵² For a detailed debate, see THEORY, PRIVILEGE, AND PRAGMATISM, *supra* note 2, ¶ 193; wherein Moore argues that “*pragmatic considerations, doing what works economically, in terms of wealth enhancement, for everyone affected-will only be appropriate when theory gives no guidance and advocates... Institutions of intellectual property ruled by economic privilege and group pragmatism cannot be embraced with conviction. It has been argued that legal pragmatism, whether radical or moderate, is unstable. While privilege and group economic pragmatism have shaped systems of copyright, patent, and trade secret this need not be so and we can revise our institutions of intellectual property to eliminate or weaken such influences*”.

What this work attempts at pointing out is that revisiting the theoretical and jurisprudential underpinnings from time to time, is important in order to assess if the existing regime and the new developments in the regime, such as arguments for protection of traditional knowledge, gene patenting, etc., are deserving of our moral and political allegiance.

For instance, the claims of protection of traditional knowledge can hardly be covered by justification under the labour theory since traditional knowledge cannot be seen as the result of individual labour. Since labour theory is based on the premise of reward to the last person who laboured on the work, it would necessarily eliminate the traditional community from any reward. Similarly, incentive theory too would offer little help. However, “*traditional knowledge protection could possibly benefit from the personality theory since the knowledge is so closely connected to the cultural and spiritual life of the holders of the traditional knowledge*”.⁵³

Further, if one considers the case of gene patenting, it is argued that DNA sequences are not something that can be produced by human labour, it is a natural phenomenon. Thus, the naturally existing DNA sequences cannot be privately owned. This raises questions as to the moral justification for patents of diagnostic tests and research tools. Moreover, the question of satisfying the Lockean proviso seems absurd in such a case. Personality theories too fail to explain it since these are natural phenomena

⁵³ M. Du Bois, *Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism*, 21 POTCHEFSTROOM ELEC. L.J. 2 (2018).

and not artificial creations and rather than reflecting one's personality, they depict interactions between biological and environmental factors. There are doubts as to the feasibility of application of utility theory as well in this regard.⁵⁴

The above examples only go on to show that our existing framework of theories may not prove to be adequate in dealing with contemporary challenges. However, that must not automatically imply that one must discard these theories as merely academic. As Moore argues, "*institutions of intellectual property, and legal systems in general, must be grounded in and constrained by our best theories*".⁵⁵

These theories at times can be effective starting points in ascertaining the relative value of an intellectual property right wherein conflicting interests such as fundamental right such as the right to health, education or freedom of expression are involved. Attempts at balancing these interests devoid of a theoretical understanding would have a weak foundation, and thus it is needed that one engages with the different justification theories while dealing with modern-day developments.

⁵⁴ See THEO PAPAIOANNOU, *supra* note 47.

⁵⁵ THEORY, PRIVILEGE, AND PRAGMATISM, *supra* note 2, ¶ 216.