Incomplete Rationales For Intellectual Property Ownership And A Social-Relations Perspective

by

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“One who is different always has an owner”

- Nelson
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Preface

Intellectual property is still property.¹ - Judge Frank Easterbrook

Property rights serve human values. They are recognized to that end, and are limited by it.² - Justice Joseph Weintraub

Intellectual property is everywhere in modern life, but the concept itself remains a controversial and highly divisive issue. It attracts debate from all schools of thought to determine the legitimacy of and the need for existing legal norms that govern intellectual property. The debate about intellectual property is not limited to academic discussions, but increasingly exhibits characteristics of activism and advocacy. Eben Moglen, for instance, compares the free software movement against copyright law to the Civil Rights Movement.³ Rosemary Coombe considers government regulations of copyright as a means to, willingly or unwillingly, support private censorship.⁴ While William Landes and Richard Posner suggest a law-and-economics approach to intellectual property to justify ownership claims based on a net gain of social benefits,⁵ Tom Palmer proposes a non-Posnerian approach questioning whether giving exclusive property rights is the best way to incentivize

³ Eben Moglen’s speech at Harvard University’s Berkman Center, quoted in Richard A. Spinello and Maria Bottis, A Defense of Intellectual Property Rights (Cheltenham, UK ; Northampton, MA: Edward Elgar, 2009), 1.
innovations and creative works. Michele Boldrin and David Levine contend that current intellectual property law is not only economically unsound because it yields more cost than benefit, but it also poses “a threat to our freedom [of expression].” Lawrence Lessig argues that intellectual property law with its rigidly circumscribed rules is unable to catch up with the rapid rise of new technologies that allow for new forms of creativity. Michael Perelman maintains that intellectual property law focuses too much on the shortsightedness of corporate profit-seeking and undermines the tremendous long-term social cost that eventually annihilates the market forces for ideas. On a more extreme side, Lysander Spooner in the nineteenth century insisted on having absolute and perpetual intellectual property rights because intellectual property is no different from property, which he also deemed absolute, whereas Stephan Kinsella posits that intellectual property is unjustifiable because “[one] cannot own information without owning other people.” The debate is seemingly never-ending and there has yet to be a definitive answer to the legitimacy of intellectual property rights.

Another aspect of the debate comes alive when intellectual property turns into an issue of national economic importance. As Senator Patrick J. Leahy of Vermont testified before the Senate Committee on the Judiciary in 2008, “intellectual property,

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and the creativity and innovation it represents, that is really the fuel in the engine of [the U.S.] economy. For the U.S. to maintain its position as the world’s economic leader, we have to focus on protecting its industries’ intellectual property.”

According to Senator Leahy, intellectual property accounts for over half of U.S. exports and almost half of U.S. GDP. Intellectual property issues are thus actively discussed and debated in most trade negotiations between the U.S. and other countries. Unsurprisingly, membership in the World Trade Organization (WTO) strictly requires compliance with the Agreement Trade-Related Intellectual Property Rights (TRIPS), which sets out rules of intellectual property protection across WTO member-states. On the other hand, critics of international trade politics point to an opposite trend along the historical development of American industrial power to attack the irony of current U.S. policies about intellectual property. As Trade Secrets by historian Doron S. Ben-Atar reveals, U.S. economy in its early days developed in large part thanks to a lack of stringent rules of intellectual property protection and the government was reluctant to protect foreign patents and copyright in order to expand the country’s industrial base faster. The controversy over intellectual property is not only inescapable, but more importantly, the issue necessitates a fresh understanding of intellectual property.

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13 Ibid.
WHAT IS INTELLECTUAL PROPERTY?

In this thesis, I refer to intellectual property as “creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce” in accordance with the World Intellectual Property Organization’s definition.  

15 Intellectual property rights are rights to control “creations of the mind” which are embodied in the form of a physical medium, such as books, photographs, machines, a physical mark or form, etc. Therefore, although intellectual property is the abstract object that one has created, intellectual property rights apply to the physical embodiment so that certain actions by others upon that physical embodiment are affected. In other words, as Adam Moore puts it, “intellectual property rights are rights that surround control of the physical manifestations or tokens of the idea(s).”  

16 Intellectual property under current law encompasses three major ownership models or subfields: copyright, patent and trademark.  

17 Copyright is the right to copy or reproduce materials from literary and artistic works. Patent is the right to exclude others from using the inventive ideas to reproduce an invention. Both copyright and patent are limited in the terms of protection, though copyrights generally have longer protection terms than patent. Trademark is the exclusive use of a symbol, name, image or design that represents a business to communicate with the general public about the business’ products for marketing purposes. Trademark is perpetual; however, it is subject to discontinuation if not in use for a certain period of time.

17 For specific rules and qualification requirements of each ownership model, see Appendix 1.
These three aspects of intellectual property are discussed extensively in this thesis in relation to the theoretical frameworks that explain them.

While surveying the literature of intellectual property, I have identified two important theoretical sources that provide plausible arguments about intellectual property. Each is based on a different discipline of moral philosophy and is regularly used to justify the legitimacy of intellectual property rights. The first theory with its source in utilitarian principles justifies intellectual property rights that serve as necessary incentives for promoting creation of knowledge and cultural enrichment. The second set of theories, which I entitle “the non-utilitarian theories,” conceptualizes intellectual property rights as fair rewards for creators of knowledge, or as moral rights to one’s personality. While the two theories are predicated on different premises of whether intellectual property rights are socially constructed or essentially derived from natural law, both arrive at normative specifications of the conditions under which intellectual property rights are justifiable. In my interpretation, these two competing theories seek logical answers to the question of who should own intellectual property and under what circumstances. However, if these theories could provide complete and convincing answers to how the intellectual property system should function, shouldn’t those answers settle the debate in question?

My thesis has two major tasks. First, I seek to examine each of the dominant theories of intellectual property critically and argue that they prove to be incomplete rationales for intellectual property when placed in specific social contexts with indeterminate contingencies. Second, I explore whether intellectual property could be
understood as property and consider what we can learn from the general theory of property to better explain intellectual property. In doing so, I propose an alternative theoretical framework, drawing from Joseph William Singer’s concept of property as social relations,\(^{18}\) to provide an empirical account of intellectual property that can explain different ownership models we see in different contexts.\(^{19}\) As a result, I argue that intellectual property is a social system of human relationships formalized through social processes to accommodate a range of mutual claims of both owners and non-owners regarding the use of intellectual goods as valued resources. In my framework, questions about the contour of social relationships resulting from certain ownership models of intellectual property arise and can be answered by reference to the relative power balance among different groups of social actors or other external opportunities. To put the social-relations framework to use, I provide case studies on the emergence of new ownership models of intellectual property that challenge the dominant ownership models of intellectual property. In both cases, I show that applying conventional understandings of intellectual property ownership fails to fully capture the intricacies of social reality that give rise to these new ownership models of intellectual property.

It is important, however, to note that the social-relations framework in this thesis differs from an attempt to strike an Aristotelian mean between intellectual property and no intellectual property to balance the virtues it has with the necessary


\(^{19}\) Note: In this thesis, I refer to “ownership models” as the different ways in which certain objects can be owned, such as copyright, patent, and trademark, each with different rules and structures. The term is thus not meant to indicate the different theories or explanations of intellectual property.
evil it can become.\textsuperscript{20} In fact, the social-relations framework does not advocate for any specific ownership model of intellectual property because it is not a normative theory. Rather, my goal in proposing the social-relations framework is to offer an analytical tool to account for the different ownership models of intellectual property in different temporal and spatial contexts. More importantly, the social-relations framework does not displace existing theories of intellectual property which offer normative guidance on justifying intellectual property rights whereas the function of the social-relations framework is to explain different ownership models in different contexts.

\textbf{OVERVIEW OF THE THESIS}

In order to achieve the two major tasks I outline above, I have organized my thesis into three parts. Part One of my thesis consists of extensive discussions about competing theories of intellectual property with substantial analysis of arguments in each theory. I also attempt to offer my own critique of each theory with observations from the debate on intellectual property. The utilitarian theory will be discussed in greater detail than the non-utilitarian theories because of the former’s dominant position in U.S. intellectual property law; however, both are treated as equally important in terms of their relevance to the subject matter.

The second part of my thesis discusses the classical conception of ownership based on title and the social-relations framework of property proposed by Joseph William Singer. Then, I apply the social-relations framework to intellectual property with specific allusion to the historical development and the contingencies that

\textsuperscript{20} Such an attempt has been undertaken by Spinello and Bottis, \textit{A Defense of Intellectual Property Rights}. (discussion about the balance between information capitalism and information socialism is on page 9-10)
accompany various ownership models of intellectual property. I also show that existing ownership models of intellectual property exhibit a distributive character of the relative power balance of the social actors at stake. I conclude this part with concrete definitions and statements about intellectual property as well as its implications for the contour of social relationships using the social relations framework. In addition, I attempt to address concerns about the social-relations framework that might affect its applicability.

In the last part of my thesis, I intend to develop two case studies on the development of emerging ownership models of intellectual property in recent years. The first case, called the native challenge, is on the content and implications of the Native American Graves Protection and Repatriation Act 1990 and the Indian Arts and Crafts Act 1990. The second case, called the digital challenge, is on the development of the Creative Commons. Both cases present challenges to the dominant existing ownership models of intellectual property because they extend beyond conventional understandings of intellectual property ownership. I argue that the social-relations framework developed in this thesis can sufficiently explain the development of both cases and each case results in new contours of social relationships for the involved social actors.

Within the limited scope of this thesis, I will focus primarily on issues surrounding intellectual property in the U.S. Therefore, many references to the historical developments of intellectual property are specific to the U.S. and may not apply to other national jurisdictions. Furthermore, I do not venture to discuss aspects of international trade and international law regarding intellectual property, nor do I
wish to go into any particular aspect of intellectual property to offer observations or
normative arguments. On the whole, my thesis concerns with theoretical reasoning
for intellectual property and general social theories that are relevant to ownership.
The best way to conceive of my framework would be to replace “rights” with
“ownership” in the commonly used term “intellectual property rights.”
COMPETING THEORIES OF INTELLECTUAL PROPERTY
1.1

THE UTILITARIAN THEORY OF INTELLECTUAL PROPERTY

The patent monopoly was not designed to secure the inventor his natural right in his discoveries. Rather, it was a reward, and inducement, to bring forth new knowledge.21 - Thomas Jefferson.

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that it is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.” The sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.22 - Supreme Court Justice Stanley Reed.

Bentham’s legal positivism made the liberty and property of every individual an instrument of the public interest, and freed government from any constraint on its authority not consistent with this broad and malleable collective purpose.23 – Richard Adelstein

Intellectual property law in the U.S. has an inherent relationship with utilitarianism.24 It is so not only because the constitutional language gives strong utilitarian foundations for the regulation and administration of intellectual property,

but also because judicial decisions invariably emphasize the utilitarian theory as the guiding principle of intellectual property law. According this theory, intellectual property law is strictly limited to the utilitarian-inspired goal of “promot[ing] Science and useful Arts.” Utilitarian principles pervade the discussion about intellectual property rights and offer a normative theory of this important social institution.

The basic theory of utilitarianism states that the moral worth of an action or social policy should be determined by its effect on promoting the general well-being aggregated across all members of society, or “the greatest good for the greatest number.” Morality is the consequence of internalizing human perceptions of natural and social events through pleasure and pain, rather than reflecting an external system of values pre-determined outside of the human agency. A utilitarian analysis is usually predicated on the notion that human actions are driven by instrumental rationality that maximizes personal utility, or relative satisfaction. Within the utilitarian framework, to justify a social practice or policy is to prove that it yields maximal utility in the aggregate for society, or that it yields greater relative utility than all other available possibilities.

The structure of this part of the thesis is organized as follows. Part I articulates the general utilitarian theory of intellectual property and details the three main propositions of a utilitarian argument. Part II offers a critique of the utilitarian theory of intellectual property and critically examines the theory’s capacity to fully capture

26 This simplified explanation “the greatest good for the greater number of people” of the utilitarian theory is culminated in the writing of Jeremy Bentham (1748 – 1832), founder of the utilitarian school of thought.
27 This is in stark contrast to the natural- or moral-rights theory which states that intellectual property rights belong to a set of rights deriving from natural law, so the role of social institutions is to recognize those rights and translate them into laws and norms. Non-utilitarian theories are discussed in Part 1.2.
the dynamics of intellectual property as a social institution. Equipped with substantial
analysis of the utilitarian theory of intellectual property rights, this part expresses
skepticism about the theory’s explanatory power as well as the general
methodological framework for justifying intellectual property rights.

**SECTION I. THE UTILITARIAN THEORY OF INTELLECTUAL PROPERTY**

Utilitarianism is attributed to English philosopher Jeremy Bentham (1748 –
1832) who advanced a theory of moral philosophy prominent in Anglo-American
intellectual traditions. I conceive of the utilitarian theory of intellectual property as
arguing two aspects of intellectual property. First, it conceptualizes property rights in
intellectual objects as social creations to serve a common social goal. By this premise,
it denies the notion of natural or moral rights inherent to every author, inventor or
artist in his or her intellectual works. A utilitarian description typically depicts
intellectual property rights as a form of instruments created through social
conventions to serve a social goal. Within the utilitarian framework, the “rights”
component in intellectual property rights is merely rhetorical, and reflects its
usefulness in achieving a social common goal, rather than a manifestation of actual
rights. For this reason, the utilitarian framework of intellectual property rights is often
seen as pragmatic, or free of ideologies (but the utilitarian ones) because it addresses
society’s needs to promote the general well-being of society as a whole. This is an
important premise in the utilitarian framework because it sheds light on how the
theory arrives at its recommendations for a proper intellectual property regime.

The second aspect of intellectual property rights in the utilitarian framework
concerns the normativity of such social creations, claiming that an intellectual
property regime is justifiable only if it can promote social utility, or the general well-being of society. The utilitarian theory offers a universal teleological system in which the moral worth of social policy in granting property rights in intellectual goods is to be judged by the outcome measured by a potential net gain in aggregate social utility. Accordingly, a good law or social policy about intellectual property is one that has been designed to conform to the utilitarian principle of utility maximization. In other words, the utilitarian theory of intellectual property rights specifies the circumstances under which they can be amply justified. This normative aspect of the utilitarian theory is a substantial part of its scheme in explaining intellectual property rights as reflected in the following three propositions.

**THE FIRST PROPOSITION**: Human agency is realized through rational calculation of personal utility to make personal choices. As more knowledge means more social utility, creation of new knowledge should be encouraged and incentivized to achieve the social goal of promoting social utility.

New knowledge generally means that the general well-being of society is improved because new knowledge improves economic growth and cultural enrichment. Therefore, promoting creation of new knowledge is consistent with the utilitarian goal of promoting social utility. However, if the creating of a particular knowledge area is shown to have a negative impact on social utility, a utilitarian recommendation would be to prevent that creating act from happening. Since most knowledge can be reasonably assumed to contribute to promoting social utility, it remains consistent to conflate the goal of promoting social utility with the goal of promoting new knowledge creation. Therefore, throughout Part 1.1 and this thesis, I
will use “economic” and “utilitarian”, “knowledge creation” and “social utility” interchangeable, unless otherwise noted.

Utilitarian principles reflect what most utilitarians understand as the rational and self-interested nature of human beings. In fact, utilitarianism is useful to understanding human society only because this aspect of human nature is relevant. The classic writing of Adam Smith outlines a fundamental principle of economics, of which utilitarianism is a central element:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages.28

Similarly, as utilitarians argue, society cannot idly expect to benefit from the innovator or artist’s benevolence to create works, nor can it rely on their sheer pleasure in creating. Since innovating is presumably an “unpleasant” activity, people would rationally choose a less unpleasant activity unless there are incentives for undertaking the unpleasant activity.

However, many have reasoned that Adam Smith’s reference to people’s “self-love” does not necessarily apply to intellectual goods because people are only “self-interested” if the things they want to have are scarce. Specifically, they have likened intellectual goods, or knowledge, to public goods to invalidate the first proposition of the utilitarian theory of intellectual property rights. Tom Palmer (1989), Stephan Kinsella (2001), Michael Perelman (2002), and Michele Boldrin (2008) have all argued that economic arguments for institutionalizing property rights only apply to scarce resources because it is scarcity that poses the economic question of efficient

use in the first place. On this view, while most physical objects are exhaustible and excludable, none of these characteristics are displayed by intellectual goods. In other words, an apple once eaten cannot be eaten by another person; an idea can be used simultaneously and infinitely as two or more people can benefit from using an idea without exhausting it. Once produced, intellectual goods lack an important element that for them is the raison d'être of any property rights system: scarcity. In other words, whereas real property rights manage scarcity of physical objects, intellectual property rights, as Kenneth Arrow says, create a kind of “artificial scarcity” for intellectual objects. Tom Palmer formulates this idea in the following argument:

[T]he current system of intellectual property [is] the remnant of a system of monopoly privileges; rather than emerging spontaneously, like other property rights, as responsive to scarcity, they could be seen as deliberate creations of scarcity through state action. Thus,

There is no compelling justification for singling out some goods and insisting that the state underwrite their production costs through some sort of state-sanctioned collective action, simply because of a decision to make the good available on a nonexclusive basis.

According to this argument, equating intellectual objects with physical objects by imposing a legal system of property rights is no less than a blatant manipulation of the nature of intellectual objects. Thus, many have argued that intellectual goods’

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[29] Not all of these thinkers follow the utilitarian thought. In fact, most of them are libertarian thinkers such as Tom Palmer, Stephan Kinsella, etc… However, since the arguments substantially use utilitarian reasoning to complicate the utilitarian case for intellectual property, it is appropriate to present them here to illustrate the internal debate about the utilitarian legitimacy of intellectual property rights.

[30] This point is discussed in depth in the Third Proposition.


[33] Ibid.: 285.
natural lack of appeal to economic sense undercuts the legitimacy of property rights for this kind of objects.

Specifically to this objection, utilitarian proponents of intellectual property rights would respond in the following arguments. First, they argue that it remains unclear, in the utilitarian framework, that the legitimacy of intellectual property rights, or any property rights for that matter, depends on whether or not the object under consideration is a public good or not. A highway is a public good that could be legitimately owned by somebody through privatization to install tollbooths and charge a fee for the traffic that passes through it. The exclusive rights that intellectual property law confers to owners of intellectual goods do not necessarily respond to the economic scarcity of knowledge, but to that of what creates knowledge: human efforts. If there is no good reason for an ingenious scholar to create and disclose his or her ideas, society as a whole will have no way to access that knowledge, not to mention benefit from it. People will simply keep their ideas to themselves, if they feel it is in their best interest to do so. As these utilitarians would argue, it is the scarcity of human efforts in the work of innovating and creating new knowledge that makes the case for intellectual property rights fit into the general framework of economic principles.

The “scarcity” that intellectual property rights manage is not artificial, but it is perhaps as relevant as the scarcity of any other commodities. In response to the “artificial scarcity” criticism, William Landes and Richard Posner have formulated this argument in the following point:

[U]nless there is power to exclude, the incentive to create intellectual property in the first place may be impaired. Socially desirable investments (investments
that yield social benefits in excess of their social costs) may be deterred if the creators of intellectual property cannot recoup their sunk costs. That is the dynamic benefit of property rights, and the result is the “access versus incentives” trade-off: charging a price for a public good reduces access to it (a social cost), making it artificially scarce, but increases the incentive to create it in the first place, which is a possibly offsetting social benefit.\(^\text{34}\)

Moreover, the fact that intellectual goods rely on a “social innovation” called intellectual property rights to have economic characteristics of a commodity does not necessarily diminish the legitimacy of property rights. Money is one of the social innovations that facilitate and enhance the efficiency of economic activities. Money is also a commodity and a form of property in the borrowing and lending activities in financial markets. Money is not a natural ether, but created by conventions and social agreement; yet, the institution of “money” does not necessarily illegitimize the use of money. If property rights in intellectual objects were proven illegitimate on utilitarian grounds, it would not be because they were unnaturally created by society.

Arguments inspired by the public good analogy to militate against the utilitarian case for intellectual property rights betray a misunderstanding of the *raison d’être* of the utilitarian theory. As has been shown, producing objects of any nature, tangible or intangible, is costly and requires an incentive mechanism for people who make a decision to produce things that are of value to society to recover the costs of producing them in the first place. As Ejan Mackaay puts the point, “information is costly. Its production requires resources and will occur only if one pays for the information.”\(^\text{35}\) The utilitarian theory essentially purports that the creation of so-called “artificial scarcity” does not make intellectual goods any less “property.”


contrast, it is this “artificial scarcity” that creates the necessary incentives for creation of new knowledge. Landes and Posner (2003) argue further that being a public good is not antithetical to property rights on grounds of economic reasoning. Many have also raised a point that because of the special properties of public goods (non-rivalrous and non-excludable), private propertization of public goods would lead to an efficient use of resources (human efforts in this case) to produce socially desirable products (knowledge).

On the defensive, Tom Palmer (1989) actually uses the public good analogy to substantiate another important point in his argument against imposing “artificial” property rights onto intellectual objects. He argues that there are many other “non-artificial” ways in which owners of intellectual goods can make a profit without relying on the monopoly power by state-sanctioned property rights. The reason he raises this point is that the public good nature of intellectual objects is inherently good for access to knowledge because it is necessary for future creation of knowledge, so it would not make sense to limit this access, albeit for a limited period, and then facing the limited access problems later when the exclusive control of intellectual goods becomes a cost to society by hindering access to knowledge. According to Palmer, incentives for creating intellectual goods could be achieved through other non-propertizing mechanisms.36 Because of this possibility, he argues that giving monopoly grants to intellectual goods owners contributes to disrupting the market order for ideas, because intellectual property rights promote monopolization of ideas. This monopolization takes place not because the invention or creative work is more

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36 These mechanisms are discussed in depth in the discussion about externalities on intellectual property within the Third Proposition of the utilitarian theory
useful or more competitive than others, but because the state has centrally decided to allow this monopolization. He claims that the no office of patent and copyright would be able to know how much monopoly power (in the number of years of protection) to give to the rightful owners while ensuring that the market (other intellectual goods creators) would still have the right amount of access to knowledge in order to create new knowledge.

Palmer’s argument re-iterates the utilitarian-inspired goal of promoting the “progress of science and useful arts” and proposes alternative ways to strike a market-determined balance between incentives and access without resorting to the state’s arbitrary power. He seems to suggest that the utilitarian reasoning underlying the intellectual property regime assumes away all other possibilities of incentivizing creation of new knowledge, besides private propertization. On this point, utilitarians would most likely agree with Palmer as long as they can see the benefits of alternative systems of managing the scarcity of human efforts in creating new knowledge, because their true concern is not to promote any form of private property regime, but to promote the creation of new knowledge, which is by assumption equivalent to the general well-being of society. However, they might point to lessons from “the tragedy of the commons” to show that the private property system has historically been the best option for the problem of allocating scarce resources.\(^37\) Moreover, if there are truly effective alternative systems where scarce resources can be efficiently allocated without a private property system, there should have been a revolutionary change in the whole private property system in the production of any goods, not only the creation of intellectual goods. Therefore, it is reasonable to doubt

that Palmer’s suggestions really have the same desirable effects as a private property system as he claims about them.

This leads to another point that Michael A. Heller raises about the underutilization of shared resources in his “tragedy of the anti-commons” metaphor. In the same scholarly journal that Garret Hardin published his influential article about “the tragedy of the commons” that warned about the excessive use of shared resources without private property rights,\(^\text{38}\) Michael A. Heller later advanced the idea that the proliferation of intellectual property rights would lead to a different kind of tragedy: the underutilization of shared resources.\(^\text{39}\) According to Heller, intellectual property rights on the one hand foster creation of new knowledge, but on the other hand, generate individual owners of intellectual goods. As the number of intellectual good owners increases over time, the market for intellectual goods becomes more competitive. As a result, these owners of intellectual goods would end up blocking one another from using the stock of intellectual goods that they own. Because people act rationally to protect their own interests, they would choose not to share their stock of intellectual goods whereas most new knowledge cannot be created without sufficient access to existing knowledge.\(^\text{40}\) As a result, access to existing knowledge is either prohibitively costly or simply denied because the intellectual property owners have complete control over their property and they might act in their best monopoly interests. Heller illustrates this point with a vivid example in biomedical research

\(^{38}\) Ibid.


\(^{40}\) This point is illustrated in the Second Proposition that the way most new knowledge is created is incremental, rather than independent of other existing knowledge. Therefore, access to existing knowledge is essential to creation of new knowledge.
where “a proliferation of intellectual property rights upstream may be stifling life-saving innovations further downstream in the course of research and product development.”\(^{41}\) This utilitarian attack on intellectual property accepts the self-interested human nature premise and the need to promote incentives for creation of new knowledge through private propertization, but warns about the negative effects of an overly stringent intellectual property system on the creation of knowledge.

The whole discussion of this section can be fully captured by Frederick Hayek’s succinct observation about intellectual property rights in the following statement:

\[\text{[W]hile ownership of material goods guides the use of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. Yet, it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process.}\(^{42}\)

Even though it is not clear what would be “the most effective way” that could satisfy Hayek and indeed utilitarians are divided over whether that would be the existing intellectual property regime, one thing is clear from this discussion is that all utilitarians agree that the most important issue in the creating of new knowledge as a human activity is the balancing of incentives for creation and access to existing knowledge, toward the end of maximizing social utility. The incentive-access paradox continues haunting utilitarian thinkers and is the starting point of the next proposition of the utilitarian theory of intellectual property.

\(^{41}\) Heller, "Can Patents Deter Innovation? The Anticommons in Biomedical Research."

**THE SECOND PROPOSITION:** As social creations, intellectual property rights should be designed through social policies to balance incentives and access to achieve the goal of promoting creation of new knowledge. Every social policy about intellectual property rights is to be justified by a showing of this balance which leads to new knowledge creation.

Both economic growth driven by innovations and cultural enrichment enabled by new ideas generate greater general well-being of society. Given this fact, utilitarians ask how to spur innovation and ideas to fuel economic development and foster cultural enrichment in an effective way. This question centers around how to allocate scarce resources, or “human efforts” in this case, to efficient use so as to promote the creation of ideas and innovations to the maximal level possible. As utilitarians recognize, creating incentives alone is not enough to achieve this goal. The incentives that intellectual property rights provide are often given in the form of owners’ limited exclusive rights to control their intellectual objects. The rights to control give owners of intellectual objects the ability to charge society a fee for access to their intellectual objects. A problem that comes with this is that it creates a paradox as exclusive property rights also restrain others from accessing existing knowledge to create new knowledge unless a fee is paid to the owners. For utilitarians, the social cost of restricted access to existing knowledge is only justified if it is outweighed by the usefulness of the knowledge created by incentivized creators.

Utilitarians emphasize the need to balance the stock of incentives with the overall public opportunity to access existing knowledge in order to create new knowledge. This is because utilitarians recognize that not all kinds of knowledge are
ground-breaking, ingenious and created independently of past knowledge. In fact, most of “new” knowledge is actually some extended form of existing knowledge. This incrementalist view of knowledge creation is an important part of the problem utilitarians try to solve which is how to create an incentive structure strong enough to induce innovations and creative works while allowing for a sustainable level of public access to existing knowledge.

Within the utilitarian framework, every social policy about intellectual property rights addresses the question of balancing incentives for creating new knowledge and access to achieve the social common goal of promoting social utility. A typical utilitarian analysis of social policy about intellectual property is therefore not so much concerned with how the claim to have property rights is morally justified, but how to balance incentives with access in order to legitimize ownership over intellectual goods. For utilitarians, to justify a social policy about intellectual property rights is to prove that it strikes a “right” balance between incentives and access because that is the only way, in the utilitarian framework, society can promote creation of knowledge, thus the general well-being of everyone. However, since the utilitarian framework does not necessarily pertain to the goal of promoting the creation of knowledge, utilitarians may choose to advocate for a policy that limits the creation of knowledge, but promotes social utility, in which case knowledge would not translate into utility. However, as it is not usually the case that the creation of knowledge is harmful in any specific way to social utility, a utilitarian argument would consistently defend policies that support the creation of knowledge through the balancing between incentives and access.
Many utilitarian economists have attempted to challenge the hypothesis that scarce resources, or human efforts in the case of intellectual property, would be best used in a private property system to produce creative works. They turn to a number of empirical studies that give mixed answers to whether the intellectual property system actually achieves the intended purpose of facilitating the development of new innovations and creative works after discounting all social costs. In patenting, Edwin Mansfield (1998) shows that most industries such as primary metals, electrical equipment, instruments, office equipment, motor vehicles, rubber, and textiles do not find patent protection helpful to their inventive efforts.\(^{43}\) On the other hand, Mansfield also shows that only in a few industries that are technology-intensive such as pharmaceuticals and chemicals, the effects of the patent system are substantial.\(^{44}\) It remains ambiguous whether granting intellectual property rights always leads to more inventive efforts at the firm level, although it does not definitively mean that intellectual property rights have no use in incentivizing innovations.\(^{45}\) However, some scholars have used this ambiguity of the effects of intellectual property rights on the creation of knowledge to ground a wholesale challenge to the intellectual property system. Michael Perelman (2002) cites a study by Charles Jones and John Williams in the *Quarterly Journal of Economics* that shows that the optimal rate of social return

\(^{44}\) For instance, Manfield’s study shows that pharmaceutical and medical industries depend sixteen times more than electrical equipment industry on the patent system to innovate, whereas there is virtually no effect of the patent system on office equipment, motor vehicles, rubber, and textiles industries.
\(^{45}\) Mansfield notes that his study does not mean firms find patent protection of no use. Moreover, he states that a conclusion about the effects of patent protection must be carefully reached because it could be the case that firms have chosen to have trade secret protection instead of patent protection, as demonstrated by the systematic shift from patents towards trade secrets and other forms of protection during the 1970s. However, he shows that his study shows little evidence to support this hypothesis.
to investment in research and development in the U.S. would be four times higher than the actual rate being experienced. However, this study only means that there could have been more innovation than at present, leaving the question of the effects of intellectual property rights unanswered. It could as well be the case that more protection of intellectual property would make the social return to research and development (more innovation) closer to the optimal rate. While it is necessary to understand that intellectual property rights may not always have the effects that utilitarians have intended them to have, empirical studies do not offer conclusive evidence that intellectual property rights are consistently harmful to the creation of knowledge, or social utility. It is thus problematic to ground a wholesale challenge to intellectual property rights on an obscure reason.

The utilitarian theory is fundamentally forward-looking as it is concerned with finding a way to prevent future underproduction of intellectual goods. Utilitarians try to answer the question of how society can make sure incentives are sufficient for investing in the creation of intellectual goods and how that can be done effectively and efficiently. It is at this point that economic reasoning plays into the bigger picture of institutionalizing legal property rights in intellectual objects. From an economic perspective, intellectual property rights are seen as a necessity, and a way to manage resource-ideas better. However, Williams Landes and Richard Posner, two authorities on law and economics, advance the idea that the economic case for intellectual property should not be reduced to the “access versus incentives trade-off” because in their view, there are more benefits and more costs from a legal system of intellectual

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property than those obvious from incentives and access. This leads to the next proposition of the utilitarian theory that is concerned with the larger consideration of costs and benefits when adopting any social policy about intellectual property rights.

**THE THIRD PROPOSITION:** Intellectual objects, or knowledge, exhibit special properties that require a complex balancing of costs and benefits. Social policies about intellectual property rights should ultimately reflect this balance in order to be justified on utilitarian grounds.

The forward-looking question that utilitarians typically ask about the creation of new knowledge is not sufficient to fully establish a case for intellectual property rights because it would not necessarily separate the creation of new knowledge, as an economic problem, from the production of any other goods. What is really at stake lies in the very characteristics of intellectual goods that essentially require a whole set of rules and regulations to govern the creation of incentives and to ensure the market order for intellectual goods. Economists typically refer to knowledge as a special kind of economic good because it has two key properties that are important to all social policies about intellectual property: intangibility and vulnerability to externalities. In what follows, I elaborate on these two characteristics of intellectual goods and present the Landes-Posner model of intellectual property.48

**Intangibility of intellectual goods**

The intangibility of intellectual goods makes them extremely hard to control and to institutionalize an appropriate private property system. Intellectual goods are

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48 I refer to the Landes-Posner model of intellectual property rights as shown in Ibid.
ultimately ideas embedded in a physical form and intellectual property rights are rights to control those embedded ideas, albeit for a limited time. For instance, copyrights are rights to exclude others from copying the ideas written down in a book, a scholarly journal article or a computer program. What is protected from non-copyright owners is the right to reproduce or express those ideas, not the actual physical form of ideas. Owners of the physical form of ideas, which could be a book that contains a story, or a CD-ROM that contains a computer program, are entitled to their property rights over that specific physical object: rights to use, exclude, and transfer. They are not, however, allowed to reproduce the ideas embedded in those works by expressing them in a different physical form because they do not own the right to do so. Likewise, patents and trademarks are proprietary rights over an invention (not the machine) and a symbol that represents a corporate entity (not the actual material that contains the symbol). What is problematic is the ability of intellectual good owners to exercise their right to exclude non-owners from reproducing their intellectual property. Since the ability to exclude the use of ideas is extremely limited, ideas are particularly difficult to own and control in the way tangible objects are often owned and controlled. If one owns a piece of land and one wishes to exercise their property rights over it by excluding others from trespassing, he or she may build fences around the land and put up a “no trespassing” sign to warn against violations of his or her property rights. This is, however, not the case for intellectual goods because there is no easy physical way to make people stop “trespassing” an idea whose right to reproduce is owned by others and prevent them from benefiting from that idea by reproducing it. Therefore, controlling one’s

49 It is important to note that recent efforts have been made to build similar “fences” in the realm of
property rights in intellectual goods is extremely difficult in practice, as compared with that in other goods. Moreover, copying and sharing technologies such as the digital data format and peer-to-peer networks have made it even harder to prevent people from infringing on intellectual property rights. This very nature of intellectual goods contradicts the fundamental purpose of constructing intellectual property rights which is to ensure that owners retain the right to exclude, thus having the power to exploit their ideas for a limited period. Economists point out a derivative problem from the intellectual property system in the consequence of public free-riding on the efforts of knowledge creation by intellectual property owners. If there is no way to fully enforce property rights in intellectual goods, which means that intellectual property owners have no effective way to make enough profits to recoup the cost of investing in the creation of knowledge, intellectual property owners would lose the incentives to innovate or to invest in innovative projects. Therefore, a proper intellectual property regime must provide strong and creative legal mechanisms to the effect that owners of intellectual goods have the means to effectively control access to their properties and to exclude others from copying and infringing on their intellectual property rights.

50 There are actually “physical fences” in the realm of intellectual property that can deter infringement in the same way as fences guarding against land-trespassing. Notably, many copyright holders have adopted Digital Rights Management (DRM) technologies to improve their control over access to their intellectual properties so that users of copyrighted material cannot reproduce the content. However, copying technologies are always developing rapidly and efforts such as DRM are more responsive than preemptive of infringement. I refer to this aspect of intellectual goods as an externality to the market order for ideas. This is discussed in depth in the next section.
**Negative externalities**

The second aspect of intellectual goods that is relevant to the utilitarian theory stems from the observation that intellectual goods are prone to externalities that might impair the market order for ideas. There are two major externalities pertaining to any intellectual property regime: technological change, and incompatibility among different legal systems.

As briefly explained in the previous section, copying and sharing technologies can make the control problems worse for owners of intellectual goods. The speed and easiness of information dissemination directly influences the way intellectual goods can be properly protected. Technology has historically played a crucial role in facilitating the dissemination of intellectual goods. For instance, not only can digital data be copied perfectly but also be disseminated almost instantaneously regardless of any geographical boundaries via the Internet. This fact on the one hand means consumers of information have better access to ideas and knowledge; it also means, on the other, that intellectual property regime now faces an increasingly greater problem of monitoring infringement. Since technology, especially that of copying and disseminating information, is developing so rapidly and almost uncontrollably from the perspective of intellectual good owners, it becomes extremely difficult to make consumers of intellectual goods comply with intellectual property law because the cost of monitoring may be prohibitive. When technology has made it much easier to get away with copyright infringement, for example, people will be induced to violate copyright law and the state cannot enforce the law even with the help of anti-copying technology because there is no effective way to hamper or outlaw the development of
copying technology. Moreover, anti-copying technologies are more responsive to copying technologies than preemptive of them. In other words, with the improvement of copying technology, owners of intellectual property exercise less control over their own property unless the law provides appropriate remedies. For instance, since anti-copying technology cannot preempt the act of unauthorized reproducing of intellectual property, the intellectual property regime has to impose more stringent rules such as the Digital Millennium Copyright Act of 1998 to criminalize the use of technology to copy and disseminate copyrighted content. In the absence of strong legal means to counter the effects of copying technology, creators and innovators will be discouraged from disclosing their ideas if they have no or little chance of recouping the costs of investing, which essentially leads to less knowledge creation - a net loss to society from a utilitarian perspective.

On the other hand, when a country participates in international trade involving intellectual goods, incompatible legal systems of intellectual property rights may pose a challenge to ensuring the integrity of the marketplace for intellectual goods. There are large discrepancies in both the concept and magnitude of intellectual property protection across legal systems. For example, continental European countries tend to have longer and more stringent rules of intellectual property protection because of the moral rights tradition (which is a separate matter from utilitarian principle, but relevant to international trade). On the other hand, many developing countries with inherently weak social institutions cannot instantaneously adopt a whole set of rules imported from other nations for both political and ideological reasons. These challenges are real and pose new questions about utilitarian intellectual property
rights: are utilitarian principles universally true in that they should and will inevitably influence the property regime in different national settings to adapt to the utilitarian explanatory framework? Or, are they essentially mere representations of the power structure, domestically and internationally? If the answer is an affirmative to the first question, the utilitarian framework will anticipate a convergence of different intellectual property regimes, or an integration of legal systems with a weak intellectual property regime into the economic utilitarian framework of global trade of intellectual goods. The reason for this prediction lies in the universal teleological nature of the utilitarian theory of intellectual property that strives for a fully integrated global market for intellectual goods. On the other hand, if the answer is an affirmative to the second question, the utilitarian framework will ultimately fail to explain the political forces working to influence the economic benefits of different nations, or groups of people.

THE LANDES-POSNER MODEL

+ Benefits of Intellectual Property Rights

Landes and Posner identify two major benefits society can reap from having intellectual property rights to meet the goal of promoting the general well-being of society by encouraging the creation of knowledge. First and foremost, intellectual property rights have a static benefit of reducing transaction costs, which for Landes and Posner is “the raison d’être of property rights.” In the absence of intellectual property rights, it would be necessary to get the agreement of every seller and buyer of knowledge before knowledge could be put to other uses. Buyers and sellers of


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knowledge would have to negotiate and draft the contract of each transaction on an individual basis. For instance, with no intellectual property law, anyone who wants to use an idea developed by a scientist would incur a cost in negotiating with the scientist, or drafting the contract stipulating the terms of use agreed to by both seller (scientist) and buyer (user). If everyone in society wants to use that idea from the scientist, each and every contract must be re-drafted everytime and is costly to both parties of the contract. The total cost of contracting would be excessively high to society in the aggregate, but the content of each contract might be very similar to one another. The scientist might agree that one can use his idea for developing a machine in return for a fee, but he might want to prevent his idea from being disclosed to others who would use it for other purposes. Landes and Posner argue that intellectual property rights can reduce the transaction costs between buyer and seller of intellectual goods by drafting a “common” contract for all potential sellers and buyers. This common contract stipulates the terms of use for the buyers and the conditions under which the sellers may file for damages for violations of the terms of use by the buyers. According to Landes and Posner, just as the enclosure movement led to an enormous increase in agricultural productivity in England, the propertization of intellectual objects would facilitate the transfer of ideas and knowledge from creators to users, thus putting ideas to use and improving social utility while saving enormous transaction costs between each and every pair of buyer and seller.

Intangible objects like ideas often make transaction costs higher than usual because it is more difficult to draft a contract to use an idea, than a contract to use a piece of land.\footnote{This is because intellectual goods are both intangible and non-excludable.} Moreover, negative externalities as described above may increase the costs of
transaction because they make the contract even more difficult to draft. Therefore, these characteristics of intellectual goods make the case for intellectual property rights stronger because they can reduce significantly the tremendous costs related to each transaction of using intellectual goods.

Intellectual property rights also have what Landes and Posner call a dynamic benefit. It is actually what previous sections have been referring to as incentives for creation. Since intellectual property rights provide creators of knowledge with the monopoly power for a limited period to exploit their ideas, creators of knowledge are induced to invest in the work of creating knowledge because they will be able to recoup the costs of investing. This benefit of intellectual property rights is reflected in the first and second propositions of the utilitarian theory, so there is no need for further elaboration here.

*Costs of Intellectual Property Rights*

1. Transaction costs

Landes and Posner argue that although intellectual property rights reduce transaction costs for sellers and buyers of intellectual goods, they have their own transaction costs in order to produce the best “common” contract. In other words, there are costs involved in the transferring of intellectual property rights to the creators of knowledge. These costs are particularly considerable because of the intangible nature of intellectual goods. Landes and Posner reason that since there is “no unique physical site” for intellectual goods, it is extremely hard to define what the boundaries of intellectual property rights are and how to determine violations of intellectual property rights because of the intangible and non-excludable nature of
ideas. Lawmakers have to decide how long a copyright or patent lasts without diminishing incentives for creation and allowing for public access. Moreover, lawmakers have to specify what activities of the knowledge users would violate proprietary rights of the owners. For instance, they have to decide whether a commercial photographic copy of a portion of an image in a copyrighted painting would constitute copyright infringement, or whether a photocopy of an entire scholarly journal article for research purposes would constitute copyright infringement.53 These problems are not present in physical property because rules are clearly defined for tangible excludable objects, whereas to define such rules for intangible non-excludable intellectual objects is extremely difficult. Moreover, negative externalities aggravate the problem because they increase transaction costs. Improvement in copying technology makes it even more difficult to determine the terms of an intellectual property right and to figure out ways to preempt violations of intellectual property rights. Also, negotiating with other governments about the “common” contract of intellectual property rights is costly. As a result, intellectual property law is complex and has undergone tremendous expansion since the 1970s because it has to capture the greatest possible contingencies of the “common” contract and overcomes the difficulties brought about by the intangible non-excludable nature and other externalities of intellectual goods.

53 The fair use doctrine can best exemplify the difficulties involved in determining violation of copyright because it is extremely hard to define what can constitute fair use. Though every fair use has been required to satisfy specific four factors stipulated in Section 107 of Copyright Law 1976 to qualify as fair use, the general rule to determine fair use by the courts has been “an equitable rule of reason” which is quite open to interpretation.
2. Rent-seeking cost

Each intellectual property right gives the owner of that intellectual property the power to monopolize the market of his intellectual goods for a limited time. The exclusive right to control property gives a powerful motive for seeking rents because the owner is the only legal seller of that intellectual property and can charge buyers a mark-up price beyond the marginal cost of production. The owner may seek profits even after the sunk cost of producing that intellectual good has been recouped as long as the term of protection still lasts. These profits translate into social cost because society has to pay beyond what is necessary for incentivizing the creation of that good. As a result, the costly access to existing knowledge would lead to less creation of new knowledge, though not necessarily eliminating creation of new knowledge. Therefore, intellectual property rights might be considered as a two-edged sword that gives the benefit of offering effective incentives for creation, but also generates the cost of giving motives for seeking rents.

3. Cost of protection and monitoring

Intellectual property law has an inherent enforceability problem because of the intangible non-excludable nature and other externalities of intellectual goods. Since what is protected by intellectual property law is not in the physical possession of the owners and law enforcement has limited resources, it is difficult and costly to protect the interests of intellectual property owners and to monitor the behavior of each user of intellectual goods. When Joe buys a copyrighted book from author Brown, Joe owns the physical medium – the book that contains a story written by author Brown. Joe does not own the story because it is the intellectual property of author Brown,
which means that Joe cannot copy the story and put it in another physical form (e.g., photocopying it). But once the book is in his physical possession, Joe is free to do whatever he wants to the physical book just as how he owns a physical object, except photocopying it. Knowing that he might commit copyright infringement, Joe might still be tempted to photocopy the book and sell copies of it to his friends at a cheaper price than the original to make a profit because he knows his chance of getting caught by the police is low. If there is a perfect copying technology on his computer (negative externality), Joe will be even more induced to commit copyright infringement because it will be much easier for him to copy the book and distribute it. He may also ship the copies to China where intellectual property protection is not as strict and profit from selling them there. The government cannot send police to every home for inspection and to find out whether Joe infringes on copyright because of resource constraints and privacy issues. Moreover, it is extremely hard (or just prohibitively costly) to design an intellectual property regime that functions like a panopticon to keep users of intellectual property thinking that they are being constantly monitored for infringement mainly because of the intangible non-excludable nature and other externalities of intellectual goods. The enforceability problem of intellectual property rights increases the cost of designing an optimal or near-optimal intellectual property system, which might or might not outweigh all the benefits of intellectual property rights.

In summary, the utilitarian theory of intellectual property depicts property rights in intellectual objects as social creations instrumental in achieving the social goal of promoting creation of knowledge, or general well-being in society. The
utilitarian principles dictate that any social policies regarding intellectual property rights conform to the utilitarian-inspired goal of maximizing creative works via two methods: promoting incentives for creation and ensuring the integrity of the marketplace for intellectual goods. The theory is both prescriptive and analytical of how these two methods can affirm the goal of utility maximization. A utilitarian account of intellectual property does not only tell us what intellectual property rights really are, but also what the norms of such social instruments should be in accordance with the paramount goal of promoting social utility.

SECTION II. A CRITIQUE OF THE UTILITARIAN THEORY OF INTELLECTUAL PROPERTY

Before venturing to critique the utilitarian theory of intellectual property as presented above, I critically examine the overarching utilitarian principles separately on matters related to the utilitarian case for intellectual property. Following this critique, I will offer a specific critical account of the utilitarian theory of intellectual property.

A critique of utilitarianism before thinking about intellectual property 54

Utilitarianism imposes negative responsibility on moral agents even though knowledge of the moral outcome may not become discernible. Utilitarian principles dictate that the moral worth of an action is to be judged by its outcome, which is either a positive or a negative contribution to the total good. One’s action or lack of action is justified not because it is in itself a rightful deed, but because it brings about

54 My goal in this section is limited to examining utilitarianism as a normative theory in areas that I deem relevant to my subsequent critique of the utilitarian theory of intellectual property rights. I do not therefore try to offer a complete treatment of utilitarianism as a school of thought to the extent that the scope of the theory requires.
a desirable outcome in terms of its effects on the total good. Therefore, one is morally responsible for what they do and also for what they allow to happen or fail to prevent from happening. This notion of negative responsibility is problematic because the contingencies upon which the moral outcome is to be determined are ultimately indeterminate. One may undertake a course of action because it is the “lesser of evils,” but it is so only because he or she believes that he or she has knowledge of all the contingencies necessary for determining the ultimate outcome of his or her action. However, knowledge of all the contingencies presented to a given action is not always available or discernible to the moral agent, thus making it impossible for the moral agent to make a fully informed decision that utilitarian principles demand.

In what follows, I illustrate the above general criticism of utilitarianism by expanding on an interesting example of a moral dilemma raised by Bernard Williams (1973) in his critique of utilitarianism. In his example, Jim goes to a small South American town where he witnesses twenty Indians arrested by a captain who is about to kill all of the Indians. After noticing that Jim is a tourist, the captain offers him the chance to shoot one Indian and promises that the rest will be freed. However, if Jim chooses not to shoot anyone, all twenty Indians will be killed. Williams argues that Jim’s act of killing one Indian will be justified on utilitarian grounds because it is the “lesser of evils,” resulting in the least pain in that particular situation. As he points out, Jim’s lack of action in this situation will not be justified on utilitarian grounds even though he himself does not directly cause the situation or the killing of the

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Indians. However, as suggested above, there is another serious problem with Jim’s choice to pursue the killing of one Indian to meet the utilitarian requirement. What if it turns out that the captain is someone who does not keep his promise and kills the rest of the Indians after Jim has killed one of them? If Jim knows that the captain will not keep his promise, the best utilitarian option for Jim would be to try his best to prevent the captain from killing the Indians by killing him or making him desist from his action, instead of killing one Indian. As a visitor, Jim does not know whether the captain will keep his promise or not, until after the fact. It is thus problematic on utilitarian grounds to produce any moral judgment of Jim’s action or lack of action unless we know what will ultimately happen in different scenarios. As we do not know all the contingencies that inevitably shape our determining of a moral outcome until they occur, a moral choice is not easy to justify in accordance with utilitarian principles within a limited set of known contingencies.

Utilitarianism offers a universal teleological system of morality by disallowing personal bias in making moral choices. In other words, utilitarian principles dictate that every moral agent must make the same calculation of utility and have the same knowledge of the contingencies necessary for making the decision that they ought to make in order to comply with utilitarian rules. As a result, utilitarians expect that any moral choice within the utilitarian framework is universal because the process of arriving at such a choice is identical across members in a moral community. As Bernard Williams’ critique indicates, utilitarianism presupposes the principle of impartiality in prescribing conditions for moral choices.

_56 Ibid., 158. (“What matters with respect to a given action is what comes about if it is done, and what comes about if it is not done, and those are questions not intrinsically affected by the nature of the causal linkage, in particular by whether the outcome is partly produced by other agents.”)
However, it is not clear whether people with different reasoning capacities will assign the same utility to a specific action when they do a utility calculation. Moreover, it is likely the case that different people have different kinds of knowledge of the contingencies that shape the moral outcome of their actions. As a result, the utilitarian decisions of the same situation might not be identical across all members in the moral community. Ironically, utilitarianism is often praised for its objectivity because of the impartial rule of achieving “the greatest good for the greatest number” whereas the means to achieve such objectivity are limited in practice.

To explain this criticism of utilitarianism, I will expand on the example given above by Bernard Williams. Suppose that Joe and Tom are in the same situation as Jim but at different times. Joe decides to plot a plan to kill the captain because he somehow senses from the captain’s words that he is not trustworthy and may break his promise of letting the other Indians go, after Joe kills one Indian. Joe’s action of killing the captain will be justified on utilitarian grounds because it is “the lesser of evils.” However, it is impossible for us to judge whether Joe or Jim’s action is more desirable based on the relative utility gained in each scenario within the utilitarian framework because Joe and Jim are under different conditions to perceive of the same situation. Moreover, we do not know whether Joe’s judgment that the captain is evil is correct to really justify his action of killing him instead of one Indian. In other words, utilitarian principles essentially cannot generalize a moral outcome of any course of action because of the limited nature of human perceptions of different contingencies.
On the other hand, Tom is squeamish and is strongly committed to his personal conviction that killing anyone is wrong under any circumstances. Utilitarianism still dictates that he takes the life of one Indian so that the rest can be saved, regardless of how uncomfortable he feels or how he is forced to violate his private ethics. Otherwise, he would be responsible for the killing of all twenty Indians because he let it happen even though he was given the chance to reduce the harm. What is problematic in the utilitarian framework is that he must violate his own convictions to satisfy the paramount goal of “maximizing the good.” Utilitarianism forces him to alienate himself from his private ethics to address the social concerns of achieving the optimal consequences. Under the utilitarian system, moral agents are separated from their own life projects and must forgo personal values and commitments because they are obligated under any circumstances to deliver the best consequences for every course of action they take.

In summary, utilitarianism as a normative theory has shortcomings stemming from its problematic assumption that moral agents have perfectly equal knowledge and identical reasoning capacity to perceive all possible contingencies of a given action to judge the moral worth of that action in order to justify it or the lack thereof. Therefore, it is ironic for the universal teleological system of utilitarianism to be unable to offer systematically coherent moral recommendations for actions aimed at satisfying the goal of utility maximization. Different utilitarian moral agents with unequal knowledge and unequal reasoning capacities will perceive differently the contingencies of the same situation, thus having different judgments on the moral worth of the courses of actions available to them. As a result, different utilitarians
produce different courses of actions that are justified on the same utilitarian grounds of utility maximization and applicable to the same situation. Thus, utilitarian principles are intrinsically problematic to pursue as a normative theory of social phenomena.

**A critique of the utilitarian theory of intellectual property**

From the above critique of utilitarianism, I offer the following arguments mainly skeptical of the utilitarian theory of intellectual property. I argue that the theory suffers the same systematic problem as the overarching utilitarian principles in prescribing how intellectual property rights as social instruments should be designed to promote the goal of utility maximization. It is useful to note that although the critique of utilitarianism given above is concerned with the moral judgment of actions, the following critique of the utilitarian theory of intellectual primarily focuses on the justification of social policies about intellectual property.

It may be impossible to balance costs and benefits of an intellectual property regime to maximize social utility. Just as Jim in the above example does not know and plainly has no feasible way to know whether the captain will keep his promise or not, we do not have perfect knowledge of all possible contingencies of balancing the cost and benefit involved in designing an optimal intellectual property system. In other words, costs may become benefits and benefits may become costs. The benefit of increased incentives for creation may translate into the cost of limited access due to rent-seeking behaviors of controlling access. The benefit of reducing transaction costs between individual seller and buyer of intellectual goods may translate into the cost of transferring property rights in intangibles as well as the cost of monitoring and
protection due to the intangible and non-excludable nature of intellectual property. Moreover, we simply do not know what the right balance between all these costs and benefits is and how we can feasibly reach such a balance. Meanwhile, it is probable that all social policies about intellectual property have been guesswork about striking that balance. There might be emerging contingencies such as the externalities of copying technology as well as of international trade of intellectual goods that human reasoning cannot fully capture in advance to preempt the costs and pre-promote the benefits. While the utilitarian theory emphatically focuses on the complex balancing of costs and benefits to justify any social policy about intellectual property, there is no simple way in reality to accomplish that monumental task, nor can the theory offer any definitive ways to do so effectively.

The available means to promote “the greatest good of the greatest number” may yield inconsistent results, making it difficult to affirm the utilitarian goal. In the above example, different kinds of people like Jim, Joe, and Tom are in the same situation figuring out the best solution to the problem of utility maximization. As it turns out, each of them was disposed to arrive at different solutions to the same moral question, all justified on utilitarian grounds. Joe is more sophisticated than Jim to detect that the captain will not keep his promise, thus choosing the course of action that he thinks yields a better consequence than Jim’s. On the other hand, Tom decides to give up on his personal values and overcome his own fear to achieve the pre-determined goal of utility maximization because he thinks that the social utility gain is greater than his personal utility loss. This means that there is absolutely no single one utilitarian solution pre-prescribed for any particular problem because people have
different reasoning capacities and derive different kinds of utility from a particular consequence. Therefore, intellectual property policies created under the assumption that they maximize utility are always justified while it is not necessarily the case. Moreover, many people partake in the creating of knowledge for a variety of reasons and they gain (or lose) different kinds of utility from the action that they have undertaken. One may argue that since the utilitarian theory is concerned with the aggregate consequence from the majority’s utility, the discrepancies in utility realization among people may be cancelled out and the end result might still be the “maximum” utility in the aggregate for society. However, if we assume that the only way to achieve the maximum social utility is through incentivizing creation of the maximum intellectual output by giving people exclusive rights, we will justify every social policy about intellectual property on only this condition. Lawmakers will be under the illusion that incentivizing creators of knowledge in materialistic ways is the most effective way to promote the greatest social utility. However, there might be other alternatives to achieve the “greatest good for the greatest number” (Jim, Joe, and Tom pursued different courses of action, all of which were justified on utilitarian grounds because each of them faced a different contingency or had a different capacity to perceive of the contingency). In other words, we will basically overlook and assume away the other ways in which people may gain more utility than what they would under the intellectual property system. As a result, the available means, which in this case consist of the balancing between costs and benefits of having intellectual property rights, may yield inconsistent results: more or less utility for each individual, thus making it problematic to affirm the goal of maximizing social
utility of intellectual property regime. For instance, an intellectual property regime for most utilitarians is greatly helpful to encouraging creativity because most people can be incentivized to create more works by having intellectual property rights, but some groups of people may purport that they are discouraged by the intellectual property regime because it restricts their creativity for some reasons. Alternatively, some may say that they are not incentivized by the materialistic profits that the law gives. Therefore, they may choose to pursue a different course of action (like Joe did) to gain more utility such as to stop creating intellectual works whereas the law as it stands still assumes that these individuals are still encouraged to create more works to yield the optimal results. On the other hand, it is impossible to make the law accommodate each and every one’s interest because all possible contingencies (who can gain how much utility from what) are indeterminate and the way the incentive structure works is through a “common” contract implicit in intellectual property law. Therefore, all the available means that we have to promote social utility in the creating of knowledge by using an intellectual property regime may yield results inconsistent or even contradictory with the intended effects of the system. In essence, it is necessary to be skeptical of the effects of maximizing social utility that the intellectual property system is supposed to produce.

Certain values and personal commitments important and uncompromisable to the community may be left out of the consideration in designing social policies about intellectual property because of society’s inescapable concerns with optimal consequences. Just as Tom has to give up on his personal commitments and values to pursue the course of action that he thinks yields the most utility for society, the
intellectual property regime may force society as a whole to alienate itself from its own projects of upholding fundamental values and principles that are integral to society as a human community. For instance, a strictly utilitarian system of intellectual property rights will dictate that there are no authors’ moral rights to the integrity of the intellectual content that they created because moral rights are perpetual and would restrict others from misusing that content,\textsuperscript{57} hence yielding less utility for society. Also, if authors claim personhood in their intellectual works and purport that their personhood is violated in derivative works that partially use or modify their works, the capacity to create more works will be diminished, thus warranting no justification under the utilitarian system. However, this also means that human agency is objectified from its own capacity to uphold values that are not directly or coherently translatable into utility in order to conform to a pre-determined, but inconsistent goal of maximizing utility for society. People are forced to give up on actions that yield smaller personal utility to pursue actions that supposedly yield greater social utility. Humans are brought perforce into servitude of the authoritarian project of obsessively maximizing social utility at the expense of forgoing values and commitments that they may hold dear and true.

It is important, however, to note that there is a clear distinction between a utilitarian explanation of intellectual property policies and the utilitarian theory of intellectual property. A utilitarian explanation of intellectual property policies states why an intellectual property policy is implemented or not implemented by comparing

\textsuperscript{57} Thomas P. Olson, "The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms since the 1909 Act," \textit{Journal of the Copyright Society of the U.S.A.} 36, no. 109 (1989): 110. ("Artists ask Congress to grant them a ‘moral right’ to prevent misuse of their works, and a right to share in the royalties from the resale of their works")
the social utility of that policy with that of another policy which may or may not be related to intellectual property. On the other hand, the utilitarian theory of intellectual property as discussed extensively in this section is concerned with how utilitarian principles can be applied to the creation of knowledge to achieve the greatest possible social utility. Therefore, while a utilitarian explanation of intellectual property may explain why policy X fails to be adopted because policy Y results in greater social utility, the utilitarian theory of intellectual property may still justify policy X because policy X generates the most social utility by maximizing creation of knowledge. The assumption that new knowledge is equivalent to utility is implicit in the utilitarian theory of intellectual property. Therefore, in most cases, the utilitarian theory of intellectual property only justifies social policies that promote creation of knowledge.

In sum, while the utilitarian theory of intellectual property emphasizes the non-absolute nature of intellectual property rights as socially constructed, it dictates the pursuit of the absolute rule of utility maximization. The utilitarian theory holds that intellectual property rights are justifiable only if more new knowledge, or utility, is produced as a result of granting intellectual property rights. Therefore, it legitimizes only ownership rules and ownership models that contribute to promoting the creation of knowledge. The utilitarian theory of intellectual property argues that creators of knowledge should have intellectual property rights as incentives for creating more works. As a result, the most important part of the utilitarian theory is focused on transferring the most effect incentives for knowledge creation to potential creators of knowledge as well as balancing the cost and benefit of having an intellectual property system. However, as shown throughout this section, the
utilitarian theory has problems with feasibility and consistency as a result of the problematic notion of utility.
1.2

THE NON-UTILITARIAN THEORIES OF INTELLECTUAL PROPERTY

A man has a natural and absolute right - and if a natural and absolute, then necessarily a perpetual, right of property, in the ideas, of which he is the discoverer or creator; that his right of property, in ideas, is intrinsically the same as, and stands on identically the same grounds with his right of property in material things; that no distinction, of principle, exists between the two cases.\(^{58}\) – Lysander Spooner.

[Lockean] government exists solely to protect the pre-existing rights of its individual creators, and has no warrant to make any person an instrument for the welfare of others, individually or collectively, without his consent.\(^{59}\) – Richard Adelstein.

If [intellectual property] rights are truly formed for a non-utilitarian purpose, after all, why should they expire?\(^{60}\) – James Boyle

Despite their importance in political philosophy, non-utilitarian theories of intellectual property are at best an undercurrent in the canonical doctrines of U.S. intellectual property law.\(^{61}\) Without a doubt, non-utilitarian theories are relevant to many ways in which intellectual property rights are viewed and justified. In fact, some prominent scholars have recently re-argued the case for intellectual property on

\(^{58}\) Spooner, *The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas.*, Chapter 1, Section IX (http://www.lysanderspooner.org/intellect/ch1s7s8s9.html)


natural- and moral-rights grounds, albeit with varying attitudes toward stronger or weaker protection. Others have tried to restore natural law in intellectual property by showing that the economic model based on utilitarianism provides “an unnecessarily cramped perspective.” On the other hand, recent legislative activity indicates a gradual transition toward the natural- and moral-rights rhetoric in reasoning for intellectual property. The Sonny Bono Copyright Term Extension Act 1976 was enacted in part to harmonize with E.U. Copyright Law that emphasizes individual authors’ and artists’ natural and moral rights. While the possibility that U.S. intellectual property law will officially favor non-utilitarian theories seems distant, theoretical leanings of intellectual property justifications toward the natural- and moral-rights tradition loom large and important in discussions about intellectual property.

The theories of intellectual property scrutinized in this part of the thesis refer to two main schools of non-utilitarian thought that expound general property rights: the labor theory based on the political philosophy of John Locke and the personhood theory based on that of G.W.H. Hegel. The former theory justifies intellectual property rights by alluding to one’s natural rights in his or her own body that translate into property rights to enjoy the fruits of his or her intellectual labor. The second

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theory justifies intellectual property rights by the argument that one has a morally protected right in the expressions of one’s personality for proper development of the self and for survival. As a whole, both theories conceptualize intellectual property rights as pre-social and pre-legal and that the role of the state is to protect them as natural or moral rights.

This part of the thesis is organized as follows. Section A articulates the labor theory of intellectual property and critically examines it in relation to its source in John Locke’s general theory of property. Section B presents and analyzes the personhood theory of intellectual property by Margaret Radin’s interpretation of Hegel’s theory of property. Section C offers a general critique of both theories and wraps up the discussion about non-utilitarian theories of intellectual property. On the whole, this part of the thesis gives a skeptical analysis of non-utilitarian alternatives of understanding intellectual property.

SECTION A. THE LABOR THEORY OF INTELLECTUAL PROPERTY

Justifications for private property based upon the labor theory are attributable to John Locke’s moral philosophy. In his famous chapter Of Property in The Second Treatise of Government, Locke describes the beginning of human social life as a state of nature. In that state, all goods and resources were given from God and commonly held for everybody to use. Locke explains that since people have a property right in their own body, if they exert labor upon the existing goods and resources, they can convert these goods and resources into private property:

Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his body and the Work of his Hands, we may say, are properly his. Whatsoever, then, he removes out of the State that Nature hath
provided and left it in, he hath mixed his Labour with it, 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. For this Labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.\textsuperscript{65}

Locke’s thesis rests on the presumption that one has natural ownership of his or her body, thus the mixing of one’s labor with external objects held in common justifies the propertization of natural resources. It is the act of one’s “mixing labor” that justifies one’s property claim over the product of his or her labor because it adds new value to the goods and resources held in common. It is useful to note that Locke does not propose that private property comes about by universal consent in the state of nature because he believes that would force people to perish in the state of nature before they can get agreement from everyone else. For Locke, property rights are pre-social and pre-legal because human action of “mixing labor” can be undertaken independently of social structures and it was done prior to the existence of any state.

Locke’s labor theory justifies reward for labor, but only on the condition that it satisfies the “enough and as good” proviso. One should have a property right in the good he or she has expended labor on without barring others from having the same opportunity to do so. This proviso is usually interpreted as an “equal opportunity provision.”\textsuperscript{66} But Locke’s proviso also requires that widespread accumulation of property should not lead to waste. This condition prohibits immoral greediness because waste does not satisfy the reason God has given humankind the world “to


make use of it to the best advantage of [man’s] life, and convenience.” For Locke, if these two conditions are met, a private property right is justified. The latter part of Locke’s Treatise deals with how government in a civil society should protect private property with fairness as conditioned by the proviso.

The labor theory is attractive to apply to intellectual property for a number of reasons. First, the theory concerns how the state can fairly reward inventors by granting property rights. The fairness implicated in Locke’s labor justification means that one should only be rewarded in equal amount of what has become part of the good through one’s labor in order to satisfy the non-waste condition. Therefore, intellectual property rights are justified to give intellectual laborers the rewards they rightfully deserve. Second, the notion of “the Earth… be common to all Men” is useful for claiming intellectual property rights over ideas, or knowledge, because the removal of ideas from the common “Earth” of ideas does not affect the “mak[ing] use of” that same common “Earth” by others, thus satisfying the proviso. In other words, while intellectual laborers ought to be rewarded, others’ opportunity to use the intellectual common would not be denied as long as they pay a fair amount of “rewards” to the intellectual property owner. Intellectual property rights are thus justified on grounds of fairness, not only for the intellectual laborers, but also for the general public.

However, the presupposition of a pre-existing common of ideas is hard to come to grips with. It is hard to believe that there exists some form of common

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68 One’s consumption of ideas does not affect others’ consumption of the same ideas. Moreover, more than one person can consume ideas simultaneously.
intellectual “soil” given to humankind in the state of nature. Unlike the universe of physical goods and other natural resources, ideas cannot credibly pre-exist or exist independently of the human mind. Ideas exist as a consequence of the thinking power of their human creators. The existence of ideas that are intelligible to humans is a post hoc entity ensuing from human existence. Thus, it does not seem plausible that humans in the state of nature were born with an existing stock of knowledge readily available for cultivation. However, it is true that there is knowledge that is not privately owned and resembles an intellectual common such as traditional folkloric knowledge and knowledge in the public domain, but it does not mean that ideas were given as manna from heaven before the existence of humans. *Romeo and Juliet* might have been based on a folk tale but it did not become available for consumption until William Shakespeare produced it. The labor justification for property when applied to intellectual property would therefore show at least some disagreeable understanding of the causality between humans as creators and ideas as creations of the human mind.

Even if there were an intellectual common such as a common of traditional knowledge and a public domain of knowledge that are not or cannot be privately owned, it is not clear why there should be private property over knowledge. The common of knowledge is presumably inexhaustible, so the “enough and as good” proviso cannot be violated under any circumstances. Perhaps, there should be no owners of knowledge at all, or at least for some kind of knowledge. In fact, this idea finds some support in patent law, which does not protect laws of nature, natural

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But this could arguably mean that knowledge can be created without giving rewards to creators of knowledge.
phenomena, and abstract ideas such as mathematical truths and scientific
discoveries.\textsuperscript{70} But this only seems to solve the obvious cases and obscure the not-so-
obvious ones. Patentability (whether some knowledge can be owned or not)
presupposes a clear distinction between patentable knowledge (inventions) and non-
patentable knowledge (discoveries), whereas the line in reality is extremely vague,
even arbitrary. For instance, there is no clear reason why human-made living
microorganisms are patentable\textsuperscript{71} whereas the invention of certain mathematical
algorithms is not,\textsuperscript{72} even though both involve significant scientific discovery. It
cannot possibly be the case that findings about living microorganisms require more
labor than the “discovery” of mathematical algorithms, thus justifying property rights
for the former, but not the latter.

Meanwhile, the crucial problem with the labor justification for natural
intellectual property rights does not disappear: if knowledge is external to human
existence (as presumably so in accordance with the notion of “intellectual common”),
why can one gain a property right by mixing labor with the intellectual soil that is
held commonly but not lose it? In other words, the causal relationship between labor-
mixing and property-claiming is not entirely clear. This problem with labor theory of
intellectual property applies also to physical property, as philosopher Robert Nozick
famously raises a \textit{reductio ad absurdum} point: “can the owner of a can of tomato
juice who dumps it into the ocean claim ownership of all the high seas?”\textsuperscript{73}

\textsuperscript{71} \textit{Diamond v. Chakrabarty}, 447 U.S. 303, 206 USPQ 193 (1980)
\textsuperscript{72} \textit{Gottschalk v. Benson}, 409 U.S. 63, 71 - 72, 175 USPQ 673, 676 (1972)
\textsuperscript{73} Robert Nozick, \textit{Anarchy, State and Utopia} (New York: Basic Books, 1974), 174-75.
According to Justin Hughes, the abovementioned problem stems from the fact that Locke’s labor justification for property in general is a justification by negation, which means that since there are no good reasons for not granting property rights if the two conditions are already met, property rights must be justified. This warrants new interpretations of the labor theory of intellectual property because it calls for identifying a “positive” reason for legitimizing intellectual property rights.

The first alternative interpretation of the labor theory is the avoidance view, which states that since mental labor is an unpleasant and arguably avoidable action, people should be fairly rewarded by having property rights over the product of their labor for taking such action to create knowledge. This is a plausible premise, but it also implies that the act of making ideas must be encouraged by rewards in the form of property rights to compensate for the unpleasantness the inventors have gone through. In other words, labor should be rewarded. There is a problem with the underlying premise of the avoidance view that laboring over creation of knowledge is unpleasant, thus justifying rewards in the form of property rights to the intellectual laborers. It is not at all clear whether mental labor is universally unpleasant for everybody involved in the making of ideas. While some other activities such as recreation are certainly less unpleasant than intellectual labor, people also experience different levels of unpleasantness when undertaking certain productive actions, intellectual or manual. Since the avoidance view justifies fair rewards in the form of intellectual property rights on grounds of labor unpleasantness, it seems only fair if the amount of rewards or property protection equals the amount of unpleasantness of

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74 Hughes, "The Philosophy of Intellectual Property," Part B.
the undertaken labor. If an inventor or author purports voluntarily or involuntarily that his or her work was “enjoyable,” should we deny property rights over his or her work? Moreover, manual labor is perhaps for most people more unpleasant than intellectual labor, but professors earn more income on average than construction workers. While this strange result from the avoidance view applies to all fruits of labor, not just intellectual property, it might actually suggest that the ground of rewarding property rights is not the unpleasantness of labor but the consequence of labor exerted on the intellectual common.

As a matter of fact, another interpretation of the labor theory is the value-added view that holds that a fair reward to intellectual laborers should not depend on the unpleasantness of the labors, but on the amount of “usefulness” of an invention or idea contributing to the current level of knowledge or the general public good. It follows that to qualify for property protection, an invention or idea must demonstrate actual use and application of it in real life. However, under current law, while “usefulness” is a requirement for filing for patent protection, application of it is not. In fact, once approved, a patentee may very likely shelve his or her invention and use it only to prevent others from utilizing the patented process or invention. Similarly, copyright law does not require the copyright holder to publish his or her work and recognizes intellectual property rights upon fixation. From the value-added view, it seems ironic that even though intellectual property is justified on “usefulness”

76 Many criteria for patentability are meant to fulfill the value-added requirement such as novelty, utility, non-obviousness, and operability. See Merges, Menell, and Lemley, Intellectual Property in the New Technological Age, 124.
grounds, the right to exclude that intellectual property confers may diminish its usefulness.

However, it is important to recognize that many of the extant doctrines of intellectual property law are in fact consistent with the value-added view. Since this view is concerned with the “usefulness” or utility, it could be seen as a harmonizing point between the labor theory and the utilitarian theory, which has been discussed in depth in Part 1.1. I will thus refer to that part of the thesis for a full treatment of the value-added view. There is, however, one point worth making here. If intellectual property rights are to be justified on grounds of the utility they generate, there might as well be cases where no intellectual property rights are justified and granted because no net gain in utility is evident. In such cases, the expended intellectual labor would not qualify for property protection no matter how unpleasant the labor is. This seems to contradict the natural-rights theory’s foundational concept as the principle of utility net gain can defy the raison d’être of intellectual property, which is the imperative to give fair rewards to creators of knowledge.

In sum, the labor theory of intellectual property is used to justify the legitimacy of intellectual property rights by reason of “labor-mixing” which can be reasonably generalized as the intentional effort of makers of ideas. However, its underlying premises are objectionable on at least two counts. First, its allusion to an intellectual common pre-existing humans and human society unconvincingly undermines the causality between the power of the human mind and human-made creations of intellectual character. Second, its “labor-mixing” justification for property rights by negation proves more problematic than helpful, as the causal link
between labor or effort and property remains questionable. On the other hand, even a charitable reading of the labor theory from the avoidance view does not help much because new problems arise as to how to determine fairness for labors with different levels of unpleasantness, or no unpleasantness. The last possibility is left to the value-added view of Locke’s labor theory. But it still suffers from the same kind of problems as the utilitarian theory when actually calculating the costs and benefits of certain actions or social policies about intellectual property. Moreover, harmonizing with utilitarianism does not prove much helpful in reinforcing the labor theory because the consequentialist aspect of utilitarianism would force the labor theory to contradict its own precept of the existence of natural rights.

**SECTION B. THE PERSONHOOD THEORY OF INTELLECTUAL PROPERTY**

If Locke’s labor theory defines property rights as a means to fulfill God’s purposes to cultivate the Earth, Margaret Jane Radin in *Property and Personhood* (1982) proposes a distinctive concept of personal property as a means to express one’s abstract self. Her argument rests on the Hegelian notion of free will and autonomy:

> The person has for its substantive end the right of placing its will in any and every thing, which thing is thereby mine; [and] because that thing has no such end in itself, its destiny and soul take on my will. [This constitutes] mankind’s absolute right of appropriation over all things.  

The idea of the embodied will in human action exerted upon external objects is appealing to Radin’s theory. It leads her to argue that people have an inherently “ongoing relationship” with things in the external world through the glue of one’s

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79 As discussed in Part 1.1.
80 G. W. F. Hegel, *The Philosophy of Right (1821)* (Cambridge: Cambridge University Press, 1967), Section 1, i: Property, 44.
personality. By acting freely and infusing external objects with one’s personality, one is able to exert oneself onto the outside world and thus achieve greater self-determination and subjective freedom. Radin believes that a person cannot achieve proper development of “personhood” if he or she does not have some control over resources in the external environment, which presumably does not have a personality until the human action by free will infuses one with it. A stronger interpretation about the relationship between one’s state of being fully a person (personhood in Radin’s terms) and the external world is expressed by Peter Drahos that “property is essential to individual survival in the world where survival refers not just to biological survival but also the ability to cope with life in the context of one’s given social system.”

In either case, the common conclusion is that one should be entitled to the moral claim of ownership over the expression of his or her personality embedded in external objects.

The personhood theory has a direct application to justifying intellectual property rights because of its notion of the “abstract self.” As intellectual and creative activities such as writing a book, performing a song, writing a computer software necessarily involve an externalization of personality onto the outside world and express personality in a physical medium such as paper, voice wavelengths, computer data, etc., one should have a moral property right to the expression of one’s ideas under the personhood scheme. Somewhat paradoxically, though, as Justin Hughes suggests, the creation of intellectual content actually “materializes” the abstract

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82 Ibid.: 1006.
features of personality. The personhood theory suggests that individual production of physical and intellectual objects justifies private property rights because they are the means to achieve full personhood (for Radin) and to survive materially and socially (for Drahos). In other words, the formulation of intellectual property rights “materializes” the self and gives personality itself a reality. As one has an inherent right in one’s own personality, one should also be able to own expressions of his or her personality. On the whole, intellectual property rights are justified on grounds of the inherent “ownership” of one’s personality and also on grounds of human survival.

While the personhood theory seems powerful in justifying property rights and intellectual property rights in particular, it remains unclear on a number of normative premises. First, the notion of “ownership of one’s personality” implies that the self is an independent entity developing out of an individual’s existence with no prerequisite relationship with others or society at large. If this premise is true, it leads to questions about whether the self can be affected, altered or lost as a result of social interactions. If the self is actually subject to change as a result of social interactions, it is questionable as to why any individual claims of property are justified at all because all “personalities” are not pure or authentic in a social setting and thereby products of “mixed” personalities are not any particular individual’s rightful property. If the self

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85 Similar to Locke’s interpretation of the inherent right of one’s labor in one’s body.
86 It is important to note that while this premise is an important one for the personhood theory, it is not a universally accepted one. For instance, Jean-Jacques Rousseau has argued that individuality develops as a result of interaction with other individuals in society. Similarly, Émile Durkheim argues that individuality is itself a social product.
87 This point can be attributed to Edwin C. Hettinger who writes: “invention, writing, and thought in general do not operate in a vacuum; intellectual activity is not creation ex nihilo. Given this vital dependence of a person’s thoughts on the ideas of those who came before her, intellectual products are fundamentally social products” in Edwin C. Hettinger, "Justifying Intellectual Property," in Intellectual
were not subject to change in any social setting, which is a much stronger claim, it would essentially undermine human capacity to learn from one another and to improve oneself in a social setting.

Moreover, ownership of personality seems to be a romanticized and highly rhetorical version of ownership that is ordinarily understood as consisting of certain rights and privileges. I “own” my personality because it cannot be anything else but my own, not necessarily because everybody else thinks it is my own and therefore cannot do anything to it.88 It is questionable, however, whether the actual relationship between a person and his or her personality is one of ownership after all, in the same way as an ownership relationship exists between a person and a house. As Kenneth Himma explains, “if I combine a shirt and slacks into an outfit that expresses my personality, I don’t have any ownership rights that would preclude someone else’s wearing a very similar outfit.”89 On the other hand, it is not clear how the transition from ownership of personality to ownership of the expressions that carry personality actually takes place. Radin’s premise points to the need for proper development as fully a person. Drahos suggests the necessary satisfaction of material needs and the capacity to cope with social life. Both reasons are plausible, but very individualistic.

Within the personhood theory itself, it is hard to see why one’s individual needs

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88 Therefore, “ownership of personality” is a version of the justification-by-negation argument, similar to the labor-mixing argument.

ought to be met by requiring others to accept his or her property rights over certain things that allegedly express his or her personality.\textsuperscript{90}

Another problem with the personhood theory is that it requires property rights for anything that expresses personality of some individual. Since personality does not necessarily mean or presuppose originality, there might be cases where, for instance, the same inventions while reflecting different personalities of their respective inventors are developed simultaneously.\textsuperscript{91} This problem complicates the basis for qualifying intellectual property rights, because the personality theory suggests both should have the same property rights. This suggestion, however, contrasts with the actual rules of intellectual property law. As a matter of fact, under current law, one of the important requirements to qualify for intellectual property protection is a showing of originality of the creative works or inventions. For instance, patent law requires the inventions filed for patent protection to be novel and inventive (or non-obvious) by comparison with prior art.\textsuperscript{92} Copyright law requires independent creation of the subject matter and demonstration of creativity for copyrightability.\textsuperscript{93} Moreover, copyright protection lasts much longer than patent while it would be implausible to say that copyrighted material is infused with “more” personality than patented invention.\textsuperscript{94} The personhood theory is plainly problematic to explain these

\textsuperscript{90} The argument about the transition from ownership of personality to ownership of expressions of personality could be strengthened by an introduction of the principle of moral reciprocity in human community. However, this would then require social structures to make morally binding rules for members of community, while the notion of both natural and moral rights is independent of social structures.

\textsuperscript{91} Spinello and Bottis, \textit{A Defense of Intellectual Property Rights}, 166.


\textsuperscript{93} 17 U.S.C. §102 (1976) (“original works of authorship” requirement)

\textsuperscript{94} Copyright lasts for the life of the author plus 75 years whereas a patent lasts for 20 years. For more, see Appendix 1.
qualification requirements as well as the differences in the level of property protection applied to each area of creativity.

Finally, the personhood theory does not really provide a fruitful avenue for conceptualizing exchanges of intellectual property, which is arguably one of the most vexing issues about intellectual property. If personality is naturally embedded in any piece of intellectual property, on what moral grounds can transactions of intellectual property take place? One of the reasons why authors and inventors need to have property rights over their intellectual works is that they need to secure a livelihood by selling their “personality-embedded” works to others. Would such a transaction amount to a transfer of personality from one individual to another such that the purchase of a painting means the purchase of the painter’s personality embedded in that painting? If that is the case, it is not clear at all why authors should retain a moral right over an expression that they have already sold. Since the U.S. joined the Berne Convention in 1989, U.S. intellectual property law has started adopting the concept of “moral rights” from the continental European legal system of intellectual property. Moral rights extend beyond ownership of economic control of works of authorship to protect the “personality” of the author. These rights entitle the author to attribution (having one’s name associated with one’s work) and integrity (protecting one’s work from mutilation or distortion). 95 On top of other economic rights, moral rights are not transferable and only exercisable by the author or the artist. 96 While moral rights over creative works are personal to the author and artist and should be treated as such, it is not clear why moral rights apply to intellectual property, but not to other forms of

95 17 U.S.C. §106A (a)
96 17 U.S.C. §106A (b), (e)
property. There is hardly any morally significant difference between a person’s act of altering the structure of a chair whose form and shape are linked to the personality of some chair-maker so that the chair is better fitted to his or her purpose and another person’s act of altering the content of a book whose creation is linked to the personality of an author. If the latter is condemned on moral-rights grounds, so should the former. As a matter of fact, when one buys a piece of furniture, one presumably has property rights over it, including but not limited to the right to physically transform it into something else. If moral rights do not apply to physical property, it is not clear why they should apply to intellectual property given that both are justified on the same grounds under the personhood theory.

In sum, the personhood idea offers an appealing thesis for justifying intellectual property rights since intellectual activities ordinarily symbolize creativity that is specific to a person and his or her personality. The problems with the personhood theory, however, lie in the romanticized notion of “ownership of personality” and its transformation into legal and moral ownership of personality-embedded works. Moreover, secondary questions arise as to how the actual continuity of personality embedded in physical and intellectual works can translate into enforceable property rights and how commerce of intellectual property can actually take place without inconsistency between the realms of physical property and intellectual property.
SECTION C. CONCLUSION

In a book that was published through a Creative Commons license,\(^9^7\) James Boyle sharply asks, “if [intellectual property] rights are truly formed for a non-utilitarian purpose, after all, why should they expire?"\(^9^8\) In a recent article, Hugh Breakey responds that accurate natural-rights thinking,\(^9^9\) if viewed in its entirety that incorporates the principle of “robust universalisability,” would actually support a strong public domain and weak intellectual property rights that expire.\(^1^0^0\) As demonstrated in this part of the thesis, the problems with non-utilitarian theories of intellectual property are not so much in the potential conflicts between natural intellectual property rights and other natural rights, but mostly in the unsound premises and conceiving property rights as arising from nature or non-social environment when applied to the realm of intellectual property.

Both non-utilitarian theories of intellectual property rights suffer from the same problem of reaching a morally and legally binding conclusion about granting and enforcing property rights. It is not clear why one’s individual actions, which constitute either an investment of labor or personality, can actually impose legitimate obligations on others who might disagree with that individual’s course of action or

\(^9^7\) Creative Commons is a non-profit organization that helps book authors and artists to publish their works online and allow others to freely copy and distribute their works with some conditions as stipulated by the authors and artists. These conditions are usually less strict than copyright law.


\(^9^9\) “Natural-rights thinking” for Breakey includes the labor and personality theories of intellectual property as described in this part of the thesis.

\(^1^0^0\) Breakey, "Natural Intellectual Property Rights and the Public Domain," 211. (arguing that every set of natural intellectual property rights is always accompanied by “close travelling partners” such as “the natural right to free speech, the right to privacy, the encouragement of independent, entrepreneurial activities, distaste for large-scale bureaucracies, a general approbation of the free-market, and a commitment to the development of science, learning, rationality and culture.” Breakey believes that the question is how to ensure “robust universalisability” when exercising each or a set of these rights in the political community.)
with the justification of property itself (labor or personality). Moreover, as suggested in the personhood theory’s section, it is difficult to believe that individual actions should generate a binding moral effect on others or that others would comply with that moral obligation, especially when property rights essentially imply non-interference from others.

One final point about the non-utilitarian theories is that both seem to provide answers to a creator-centric ownership model that presumes the primacy of justifying the legitimacy of the creator’s rights. In other words, both theories fulfill the primary task of conditioning how intellectual property rights are justifiable on the premise that property rights precede the state and require protection by the state. In contrast to the utilitarian theory that emphasizes the need to provide sufficient incentives to creators of knowledge to achieve the utility maximization goal, non-utilitarian theories as described in this part emphasize the need to provide fair rewards to creators of knowledge to conform to the law of nature. The nature of natural or moral intellectual property rights is thus absolute and uncompromising. For non-utilitarian theories, the need to identify the rightful owners of intellectual property proves primal. This is an aspect of the non-utilitarian theories that my next part of the thesis critically examines and challenges, as it looks into the intellectual property system in social life.
INTELLECTUAL PROPERTY AS SOCIAL RELATIONS

[T]here are obviously profound differences in the political character of states, and much of this variation can ultimately be traced to the attitude of their governing ideologies toward the nature and origins of property, or more specifically, to the answers they offer to the question of whether property precedes the existence of the state or is itself necessarily a product of the state.101 – Richard Adelstein.

[P]roperty rights do not have a built-in, inherent structure which can be discerned by logical deduction from either the concept of property or the social practices surrounding property use.102 – Joseph William Singer and Jack Beermann.

The concept of property reflects collective choices about what sorts of goods should be given the status of secure entitlements, and what sort of security and what sort of entitlement – and those choices change.103 - Jennifer Nedelsky.

Intellectual property rights are increasingly being understood as property rights that structure social relations.104 - Madhavi Sunder.

Is intellectual property really property? The work of conceptualizing or re-conceptualizing intellectual property cannot sufficiently be done without coming to grips with what has already been understood of property. It is not fortuitous that Peter Drahos, in an attempt to write the philosophy of intellectual property, starts by posing the question of “whether we can accommodate intellectual property within one or more domains of property rights.”

more of the existing general accounts of property or whether we should develop a distinctive theory of intellectual property.”105 While the major task of two dominant theories of intellectual property primarily is to determine the conditions under which intellectual property rights are justifiable, not much is said about how the right to hold intellectual property actually comes about in social life.106 In Part Two and this thesis as a whole, I offer an effort to revise these concepts of intellectual property, not to displace the existing theories, but to suggest a way to reconcile competing frameworks of intellectual property by explaining the intricacies of how rights to own intellectual objects arise in social life.

Drawing on the property-as-social-relations framework proposed by Joseph William Singer107 and subsequently discussed by Stephen Munzer,108 this part of the thesis explores similar theoretical possibilities of applying Singer’s framework to intellectual property. In doing so, it seeks to offer an empirical account of intellectual property rights and duties that can explain different patterns of ownership models in different contexts.109 As a result, the social-relations framework extends beyond the individualistic claims of ownership over intellectual objects. Starting with the initial

106 As elucidated in Part One (Competing Frameworks of Intellectual Property), the two existing theories conceptualize intellectual property as either a social creation to achieve social goals or a form of natural or moral rights by human interaction with external objects. They ask and answer who owns what and what one can do with what one owns. Their questions and answers provide important understanding of what and how intellectual property rights should be, but do not reflect how specific rules of intellectual property rights come into being in a social context with specific contingencies and social actors.
109 Note: “ownership models” or “models of ownership” in this thesis refer to the different ways in which objects are owned. They do not mean the different ways of conceptualizing “property” or “ownership.”
thought that property is meaningless in a social vacuum, this part of the thesis aims to explore the meaning of intellectual property ownership in the context of social life and recent debate. The running theme of this part of the thesis is that intellectual property should not be understood as an absolute or even quasi-absolute concept and that similar to other kinds of property, intellectual property is a set of social relations formalized among people through social processes to accommodate a range of mutual claims. As such, the social-relations framework of intellectual property does not offer normative arguments concerning what arrangements of rights are justifiable,\textsuperscript{110} but is a conceptual and analytical tool to inform the thinking about social relations among intellectual property holders and other members of society at large. At its best, the social-relations framework is a descriptive argument about intellectual property in the social context.

Part Two of this thesis is organized as follows. Part 2.1 illuminates the theoretical underpinnings of property-as-social-relations. Part 2.2 uses the concepts from Part 2.1 to develop a similar social-relations framework for intellectual property with allusion to the historical development of intellectual property law. Part 2.3 consolidates the social-relations framework of intellectual property by giving concrete definitions and statements about intellectual property based upon previous analysis. This part also attempts to address Stephen Munzer’s concerns about the social-relations framework by adapting his suggestions to the analytic framework of intellectual property. As a whole, this part of the thesis aims to articulate the social-relations approach to property and apply it to intellectual property with substantial

\textsuperscript{110} As shown in Part One, the justification task is the main focus of existing theories of intellectual property.
analysis and evidence of the historical development of intellectual property ownership.
PROPERTY AS SOCIAL RELATIONS

SECTION A. THE RHETORICAL-CLASSICAL CONCEPTION OF PROPERTY: TITLE AND OWNERSHIP

Classical concepts of ownership imagine property as a thing over which people have complete control. If someone owns something, he or she is the titleholder of all property rights over that particular object. The titleholder may use the object and benefit from the use of it (right to use). Because the titleholder is presumably the only owner of that object, he or she has the power to exclude others from using or benefiting from the use of that object (right to exclude). He or she may find it of benefit to transfer the title of ownership over that object to another titleholder in exchange for something else (right to transfer). Moreover, the titleholder is immune from the damages and loss of the owned object rendered by others (right to just compensation for damage or loss by others, or immunity). All of these rights are often thought as consolidated in a “bundle of rights.” In other words, the owner is entitled to all the benefits extracted from the object that he or she owns. Under this ownership model, the titleholder is entitled to a consolidated and inseparable bundle of all the privileges, related rights, powers and immunities that accompany his or her

112 The vocabulary of “bundle of rights” to express the correlative rights and duties was developed by Wesley Newcomb Hohfeld. Quoted in Eric Claeys, "Property 101: Is Property a Thing or a Bundle?," George Mason University Law and Economics Research Paper Series (2009): 18.
title to property. Thus, though subject to the law of crime and tort, possession of all property rights presumes the titleholder’s full power over the object in question.

It is important to note that implicit in property rights which consist of all benefits that could possibly be extracted from the owned object is a strong moral claim rooted in prevailing norms of autonomy, security and privacy. In other words, property rights often interpreted as a means to promote personal sovereignty, personal livelihood, and the private sphere. In her response to the notion that property presumes moral claims, Laura S. Underkuffler describes that “property is something that is objectively identifiable, that represents and protects the individual’s autonomous sphere.”

In the classical model of ownership, individualism is not only relevant, but crucial to identifying the title-holders and the accompanying moral claims.

In consequence, the title ownership model perfectly serves the legal and rhetorical function of identifying a particular person or entity as the owner of a particular object. It answers the question of who owns what and requires a legal structure or a set of norms to condition the legitimacy of ownership claims. The model asks what qualifies a person or entity as the owner of a particular object and what confers the legitimacy of ownership in general. Unsurprisingly, a normative theory of property often accompanies the title ownership model to specify the conditions under which property claims are justifiable. As Singer suggests, title is a powerful concept in the classical ownership model because it eliminates claims by

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non-titleholders in the property, thus making it easy to resolve property disputes by simply identifying the formal titleholder.\textsuperscript{114}

However, the classical ownership model is predicated on unsound assumptions of the amount of rights the title-holders have. The model assumes that there is always a distinct owner that is entitled to a full set of rights unquestionably consolidated in the property bundle. It thus presumes the possibility and ease of determining who the owner is by reference to title. Singer argues that the social reality of property substantially complicates this identifiable-single-owner model. In the case of a house mortgage, some jurisdictions grant the title to the mortgagor and reserve a lien to the mortgagee in the event of default so that the mortgagee may claim ownership over the house if the mortgage is defaulted. Other jurisdictions grant title to the mortgagee but only a right of “equity of redemption” to the mortgagor, which allows the mortgagor to redeem the property only when he or she has fully discharged all debt liabilities to the mortgagee.\textsuperscript{115} In either case, shouldn’t we think of the titleholder of the house as both the mortgagor and the mortgagee because neither of them have the full rights of ownership in the property as normally assumed of the owner’s rights?\textsuperscript{116} On the other hand, when a marriage dissolves, title to the home may be shifted from husband to wife or vice versa, as determined by the property division ruling of the court unless a prenuptial agreement stipulates otherwise.\textsuperscript{117} Shouldn’t we think of the non-title-holding spouse as another owner of rights in the

\textsuperscript{115} Ibid.
\textsuperscript{116} Full property rights in the classical model consist of four basic rights: right to use, right to exclude, right to transfer and immunity (described earlier).
\textsuperscript{117} Singer, "Property and Social Relations," 7.
house as would be confirmed by a property division on divorce? In the case of a
corporation, it appeals to common sense that all rights associated with ownership of a
corporation should belong to the shareholders. However, shareholders’ rights have
been strictly limited to the effect that they cannot interfere with the day-to-day
management of the business. Regulations have been made to block shareholders from
presenting independent candidates for the board of directors or communicating with
other shareholders. In response, there has recently been a movement to reassert the
rights of shareholders as owners. Moreover, corporate boards of directors are now
authorized to also take into account the interests of stakeholders such as workers,
creditors, and the communities where the corporations operate to develop corporate
policies. These examples complicate the notion of the formal titleholder having
complete rights over the owned property as they challenge the presumption that
resolving property disputes can simply be done by reference to title.

To situate the discussion in context, it is worth noting that any justification for
“rights” is more or less constrained by some other rights or specific contingencies.
When one talks about human rights, the implication is that everyone is endowed with
certain basic rights as humans. The ground for establishing human rights is reasoned
that every human being is equally entitled to human rights. But even so, human
rights are not absolute in terms of public policy-making and social organizing.

Freedom of speech is not unlimited to the extent that laws against libel are irrelevant.

118———, "Property and Social Relations," 5.
120Singer, "Property and Social Relations."
("Article 1: All human beings are born free and equal in dignity and rights. They are endowed with
reason and conscience and should act towards one another in a spirit of brotherhood")
National security concerns are sometimes supreme over protection of human rights. Even within the category of human rights, it is not unusual that some rights are in conflict with others. It is thus possible to complicate the discussion of rights of any kind by placing the rationale for rights in specific contexts where rights are in conflict.

In his critique of the classical model of ownership, Singer vigorously argues that property rights in reality are established to the effect that “property owners’ rights are often limited to promote the interests of non-owners.”\textsuperscript{122} In other words, property owners become owners of some combination of the abovementioned four basic rights in the property and, willingly or unwillingly, give up the rest to non-owners. While the conventional ownership model tends to draw an absolutely distinct border between owners and non-owners, most cases of property in social life show an extremely blurred line between owners and non-owners in terms of whose rights the law protects and does not protect. Singer considers public accommodation laws that guard against owners’ abuse of exclusive rights over their legally owned estate for discriminatory purposes in relation to the canonical right to exclude in property law.\textsuperscript{123} He shows that owners of private properties whose operations affect commerce such as hotels, restaurants, museums, retail stores, etc. categorized as public accommodation facilities\textsuperscript{124} do not have a complete right to exclude. The legal owners of these spaces cannot exercise absolute rights of property to decide who can enter their properties because being a public accommodation facility presumes the owner’s commitment to serve the general public. According to the classical title

\begin{footnotesize}
\bibitem{122} Singer, "Property and Social Relations," 7.
\bibitem{123} Ibid.
\bibitem{124} 42 U.S.C. §12181.
\end{footnotesize}
ownership model, the owners of these spaces are the titleholders while members of the public with an interest in using those spaces are non-owners. In the classical ownership model, the title-holding individuals should have the right to exclude whomever they wish not to enter their estate. Yet, public accommodation law prescribes substantial limits on the property rights of owners to exclude members of the public for discriminatory purposes such as racism. Singer traces this doctrine of law to the historical development of property law as follows:

In the antebellum era from 1800 to 1860, the law enacted a particular conception of private property in the context of businesses open to the public. Any business that presented itself as ready to serve anyone who came seeking services had an obligation to serve its customers. This rule of law rested on a combination of moral and social policy considerations.125

Similarly, as Michael A. Carrier suggests, numerous other doctrines in common law express this non-absolutist nature of property rights: adverse possession (forcing the transfer of property without compensation), eminent domain (state takings of private property for public purposes), easement (non-possessory right to use others’ property), zoning (restricting the development of land to certain uses and designated areas), and the Rule Against Perpetuities (preventing future interests beyond the time of perpetuities – usually twenty-one years after some life).126 The absolutism inherent in the classical ownership model is not only problematic, but typically misrepresentative of the social reality of property rights. Richard Epstein, a prominent scholar of property law, criticizes Blackstone’s absolutist concept of property rights for “injudicious overgeneralization” and suggests that we should take the traditional ownership model of property “as a cautionary warning on how not to think about

property regimes generally before getting down to the grubby particulars of any specific regime.”¹²⁷ Whereas the popular notion of property rights is private-minded and unqualified, property in social life proves to be opposite. As Stephen Munzer observes, “property is not the individualistic concept some believe it to be and... individualistic justifications for property fail.”¹²⁸ Property can no longer be understood as absolute rights claimed over resources, but as a mechanism through which competing values and interests of both owners and non-owners are taken into account.

**SECTION B. PROPERTY AS SOCIAL RELATIONS**

Property encompasses a range of rights for the property owner. As Richard Ely portrays the image, property is “a bundle of sticks” where each stick represents an individual right or a particular entitlement that belongs to the titleholder of that property.¹²⁹ Each stick corresponds to each property right: right to exclude, right to transfer, right to transfer, right to just compensation for damage, etc. Of this notion of property, Singer asks whether it is possible in actuality for all sticks in the bundle to fit comfortably together and whether a property system based on them is feasible in any way. In property, the right to use and benefit from the use of a resource as one sees fit may conflict with the community’s right to be immune from nonconsensual damage or loss.¹³⁰ Similar to what has been shown earlier, the owner’s right to

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exclude may be at odds with others’ right of access to the market without
discrimination based on race or sex or disability. Ultimately, property is relational:
one’s right to control property to a certain extent places duties on others not to
interfere with that control; and one’s right to use property means others may be
vulnerable to the effects of that use. If “others” from the public who are subject to the
same law and jurisdiction have no stick at all in the bundle of rights held by the
property owner, how can a property system possibly be created and function?

In contrast to the classical conception, the rights that altogether constitute
property should be disaggregated from the bundle into their component parts and
discussed separately. Singer and Munzer trace this view to the legal realist movement
in the early twentieth century. The movement developed around the idea that law
and legal reasons are rationally indeterminate because lawmakers are imperfect
human beings and the law itself cannot capture all possible contingencies. The
indeterminacy of law forces judges to base their decisions on specific situations and
contexts with concrete facts rather than simply adhering to encoded rules. As a result,
judges often “infuse[e] moral, political, and social values into their interpretation of

century debate about the impact on economic growth of extending or contracting nonconsensual
altruistic duties.”)

132 Singer, "Property and Social Relations," 3. (“[T]he legal realists criticized the classical conception and argued that we should disaggregate property rights into their component parts and discuss each particular entitlement separately,”) and Munzer, *New Essays in the Legal and Political Theory of Property*, 36. (“[T]he wellsprings of [the social-relations] approach to property lie in the legal realist movement that began in the early twentieth century… Influential legal realists include Karl Llewellyn, Jerome Frank, Morris R. Cohen, Felix S. Cohen, and Hale.”)
133 Brian Leiter, "American Legal Realism," in *The Blackwell Guide to Philosophy of Law and Legal Theory*, ed. William A. Edmundson Martin P. Golding (Oxford: Blackwell), 3. (“the law [is] rationally indeterminate, in the sense that the available class of legal reasons [do] not justify a unique decision…; the law [is] also causally or explanatory indeterminate, in the sense that legal reasons [do] not suffice to explain why judges decided as they did.”)
both law and facts.”134 The legal realists view property laws as essentially beset by conflicting values and competing interests, rather than a complete set of individual claims.135 Singer then situates the laws and norms of property in the legal realist tradition by pointing out that “the legal realist view shifts attention [to property] from relations between people and things to relations among people with respect to the valued resource.”136 If the rhetorical/classical conception imagines property as a thing, property in social and legal reality reflects more or less a separable bundle of different things.

Drawing from this legal realist view, Singer conceptualizes property as a social system including particular entitlements that shape and are shaped by the contours of social relationships.137 These relationships are established both at the macro level of society as a whole, and at the micro level in the context of specific circumstances. As social relations, property is defined through considerations of policy implications and social values regarding what rules should govern the interactions among owners and non-owners over valued resources. In one way or another, property is what people agree that it is, and what people consider and value in order to make individual decisions to influence that agreement depends on their own views of the legitimacy of property and their own power to influence others in reaching that agreement. Since there is no way to impose certain views and values on everyone, we have to look into the specific relationship between the social actors to determine which values are relevant. Moreover, as Singer points out, conceptualizing

134 Munzer, New Essays in the Legal and Political Theory of Property, 38.
136 Ibid.
property in this way helps understand “the ‘law in practice’ rather than the ‘law on the books’ to determine what norms actually govern behavior in the real world with respect to property.” Property rights are conceived and instituted through the social and political construction of human relationships, but they also influence and are influenced by the contours of social relationships. Simply put, there is no place for property rights, no matter how they are legitimized, in a social vacuum.

I. THE MULTIPLICITY OF OWNERSHIP MODELS

As a bundle of rights, property can be disaggregated and bundled again in different ways, hence the existence of various ownership models for defining and controlling property relationships. The variation of existing ownership models reflects the choices to be made about the kind of social life people experience. As Singer suggests, “the question of whether an African American man gets to sit next to a white woman on a bus or in a restaurant is not merely a question of how wealth and power are distributed – although it surely is that. It is a question about what form of social life we are going to have.” The fact that there are different ownership models in place means that there are multiple meanings of property ownership dependent on particular forms of social life in question.

Property norms and laws are about more than who owns what. They are also affected by the relationships between the parties involved in and influenced by the ownership of that property. Property in social life presents vivid evidence that property rights under formal law are recognized and legitimized in more than one

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138 Ibid., 16.
139 Singer, “Property and Social Relations,” 8.
140 Ibid., 15.
specific way based on the relations at stake that deliver not only rights, but also
duties. These relations are not only economic; they are also political, social, or even
ideological. The law’s recognition and legitimization of property rights correspond to
the nature of relations, which can only be comprehended by closely looking into the
relevant relations. On this point, Singer complicates the basic title theory of property
that assumes an identifiable, singular owner “possess[ing] the full bundle of
privileges, rights, powers, and immunities that accompany fee simple title to
property.”141 In each social sphere, there exist multiple ownership models;142 he notes
examples in the family,143 in housing,144 and in business.145 In other words, each
combination of different sticks in the property bundle constitutes a different
ownership model, largely depending on the relationships at stake. Therefore, as
shown in Singer’s examples above and in the footnote, there are numerous ownership
models since there are numerous kinds of relationships in society. It is also important
to note that these various ownership models do not constitute an anomaly or mere
variants on the basic title or full ownership theory. Many are indeed departures. For
instance, title is irrelevant to deciding interests vested by community property and
equitable distribution laws on divorce. In conflicts between shareholders and

\footnote{141}{Ibid., 4.}
\footnote{142}{Ibid.}
\footnote{143}{“during marriage and at divorce (community property versus separate property; enforceable antenuptial agreements versus equitable distribution), child support (children’s claims on family assets), inheritance, parental support, obligations to care for siblings or other relatives, and marital ownership of real estate (tenancy by the entirety).” (Singer 2000)}
\footnote{144}{“individual ownership, joint ownership (tenancy in common, joint tenancy), leasing arrangements (perhaps subsidized by government welfare payments), cooperatives, condominiums, subdivisions, homeowners’ home associations, ground leases, charitable land trusts, limited equity cooperatives, tribal property (including original Indian title, recognized tribal title and restricted trust allotments), public housing, and government property.” (Singer 2000)}
\footnote{145}{“individual proprietorships, partnerships (both general and limited), corporations (closed and public), quasi-public corporations and nonprofit charitable institutions (such as hospitals, universities, and museums), and private trusts and foundations.” (Singer 2000)}
managers in the corporation, title is of little help as shareholder rights have been limited and managers have been authorized to consider interests of stakeholders other than shareholders in managing corporate affairs.146 Therefore, as Singer argues, “if we see people as situated in relation to others, rather than as isolated and autonomous, our understanding of social life changes, and with it, our understanding of the source of legal obligations.”147 In essence, the rights and duties of owners and of non-owners in social life are in large part dependent on their relationships.

The multiplicity of ownership models in the social life of property frees us from the preoccupation with identifying the titleholder and what benefits must accrue to him or her because it directs attention to the social context in which property is operative. It gives reason to believe that consideration of the public interest in market access vested by public accommodation laws is applicable to shopping centers where commerce takes place, but not to the homes where privacy interests are crucial.148 The idea that ownership actually exists in manifold models forces us to depart from the problematic premise of the single-owner/titleholder ownership model. The next section explains why there is more than one way one can own property.

2. THE CONTINGENCY OF PROPERTY RIGHTS

Property is defined as social relations in contextual terms that express specific contingencies. Property in absolute form would be static, unchanging and completely independent of environmental factors such the effects of exercising property rights on others or social obligations. Judging from the social reality of property, Singer argues

that there are no absolute rules for property because they are highly contingent upon constantly changing circumstances.\textsuperscript{149} Singer’s argument speaks to the social reality of property rights where legitimate ownership develops in specific circumstances. All property rights in the legal system have always been contextualized, changing over time and dependent on the effects the exercise of property rights has on others.

Singer argues that the nuisance doctrine best exemplifies how property rights are qualified not by reference to title, but by reference to their effects on the non-title-holding public at large.\textsuperscript{150} The nuisance doctrine is predicated on the notion that “any action, if taken to the extreme, may become unlawful.”\textsuperscript{151} In other words, one cannot always exercise his or her property right to exclude as he or she sees fit. In reality, there are a lot of reasons to believe that property rights are not absolute. Estate owners’ rights of privacy are subject to court orders of house inspection for crime or evidence search. A lack of “reasonable care” may in fact render the owner of the estate liable for the injuries caused by the conditions of the estate to a child trespasser. But the nuisance doctrine does not always reduce the benefit of exercising certain property rights over owned objects. A “nuisance easement” (a claim to no liability) may “trespass” the private sphere and property interests of the owner, but it may also bring considerable benefits to the owner such as public road easements raising the value of the house, etc… In many aspects, property rights are usually qualified and re-qualified on consideration of their effects on the public at large.

\begin{flushright}
\textsuperscript{149} Ibid., 10. (“Property rights are contingent because changing circumstances change the rights that are recognized by the system”)
\textsuperscript{150} Ibid.
\textsuperscript{151} Ibid.
\end{flushright}
Likewise, there is usually strong historical reason for adjusting and readjusting the ownership model of private property that is not directly relevant to the holding of property title. For instance, public accommodation law as alluded to above was enacted during the antebellum era from 1800 to 1860, but was constantly changing and contested during the Civil War and until 1964. After the Civil War, some states required the public right to be served in public accommodation facilities, while others allowed segregation. The latter practice of property essentially gave rise to the Jim Crow system which required businesses to segregate customers on a racial basis. In the twentieth century, this legal system was overturned in many Northern states, but not until the civil rights movement in the 1960s were the whole legal system and the social practice of racial segregation completely altered and outlawed.

In each historical period, owners of public accommodation places had different sticks in their property bundle: the right to exclude others on racial basis was altered, re-established, limited and completely terminated from the seemingly consolidated property bundle. All of these changes happened in very specific circumstances that were linked to the varying public interest in accessing places of public accommodation for ideological and political reasons. The trajectory of the private property ownership model seems highly contextualized in both time and space.

The contingency of property rights forces us to recognize that there is no set of property rules that will stay unchanged. There are no rigid general rules for what property should be in every imaginable circumstance. Each circumstance with its own conceivable contingencies contributes to defining the specific rules and structure of the property system that applies to that circumstance. This aspect of property directs
our attention to the owner-public relationship in the social context where property operates to understand the actual property bundle that is in the hands of the titleholder.

3. THE DISTRIBUTIVE CHARACTER OF OWNERSHIP MODELS

Singer argues that property inescapably exhibits a distributive character based on the unequal power structure among the social actors with a stake in the property regime and its effects on their social life. These social actors have access to disparate power resources to influence the relations among people and the ensuing structure of the law to assert their interests. It is, however, worth noting that the resulting unequal distribution of property is not necessarily good or bad in the social-relations framework, though undoubtedly, too much inequality in property holdings may lead to injurious social relations between different groups of people. Social relations exist in every ownership model, but they can be good or bad relations. The point worth making here is that since property ownership models are fundamentally contingent and changing, they inevitably depend on the resources available to each social actor to achieve the bargaining power necessary to determine which right may belong in the property bundle of the owner, and which right may belong to the general non-owner public. As Munzer notes, “property is a matter of constant pushing and shoving.”152 For instance, despite strong conventions set by courts and the legal system, recent movements have started to challenge existing laws by reasserting the rights of shareholders as owners that had been traditionally been extremely limited in

152 Munzer, New Essays in the Legal and Political Theory of Property, 41.
the United States.\textsuperscript{153} Any property system with its specific rules and structure is no more than a result of the power structure among all social actors with a stake in the property system and the ensuing effects.

In sum, the social-relations perspective of property holds that property constitutes a set of human relations and as an institution it has social effects. Property is not absolute as both a concept and a practical matter because it is socially constructed to accommodate mutual claims that reflect diverse values and interests. Without a doubt, property has its meaning in a social environment and arises from social structures. As Singer and Beermann say, “the social origins of property… mean that property rights do not have a built-in, inherent structure which can be discerned by logical deduction from either the concept of property or the social practices surrounding property use.”\textsuperscript{154} Property is thus best understood as a web of social relations among people with respect to things.

The social-relations framework of property ownership shifts attention from the relationship between people and things (who owns what) to the relationship among different people with respect to things (what it means for someone to have certain rights of property in relation to others). Such relationships take place at both interpersonal and social levels. Property rights that arise from these relationships are not fully articulated at clear consistent decision points, but emerge spontaneously out of understandings developing over the course of relationships. In adopting a social-relations perspective, we are encouraged to ask various questions about the

\textsuperscript{153}Monks and Minow, Power and Accountability, 213.
\textsuperscript{154}Singer and Beermann, "The Social Origins of Property," 228.
implications of the relationships among all parties with a stake in the property as well as the effects of ownership on others.
FROM PROPERTY TO INTELLECTUAL PROPERTY

Intellectual property has been predominantly conceptualized as either a social instrument to achieve the rigidly circumscribed goal of knowledge creation (under the assumption that knowledge creation is translatable into social utility), or a reflection of natural and moral rights preceding social structures to promote fairness and the personhood of creators of knowledge. Yet, it is not clear what exactly gives rise to the rules of intellectual property in social life and whether these rules completely conform to the overarching organizing principles of either theory, or to a combination of both, or both and something else. Because of the indeterminacy of these theories, I propose that we reconceive intellectual property in terms of the social relations framework that has been described above for physical property. In what follows, I apply the social-relations framework to intellectual property to argue that intellectual property should also be understood as a social system consisting of different human relations with respect to the right to use intellectual goods as valued resources. In doing so, I show that there are in fact more similarities in the way both

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155 See Part One, 1.1: The utilitarian theory of intellectual property
156 See Part One, 1.2: The non-utilitarian theories of intellectual property
Property systems work than one would normally think. As this section unfolds, I argue that there exist multiple ownership models of intellectual property that specify different rights and duties of intellectual property owners. The specification of right and duties attendant on the formation of these models is highly contextualized and contingent upon specific circumstances. Then, I argue that intellectual property law generally exhibits a strong distributive character inherent in any property regime. Finally, I propose that the intellectual property system can be influenced by and influences the contour of social relationships among people with regards to the right to use intellectual goods. As Madhavi Sunder suggests, “while property and intellectual property remain distinct domains, there is in fact much that intellectual property can gain from the social relations approach to property.”¹⁵⁷ Intellectual property, being a subset of property, should be understood as social system with complex human relations with respect to the right to use intellectual goods.

Property-as-social-relations is a concept applicable to intellectual property not only because intellectual property is conceptually no different from property, but also because the extant doctrines of intellectual property law are consistent with the social-relations framework. Conceptualizing intellectual property as social relations frees us from relying on the tangibility, or the physical configuration of intellectual objects to establish property claims.¹⁵⁸ Intellectual-property-as-social-relations emphasizes the different human relations that contain a property dimension, as opposed to relations between owners and their right over an intellectual object.

¹⁵⁷Sunder, "Ip3," 316.
¹⁵⁸ Many economic critiques of intellectual property rights analyze the nonmaterial-ness of intellectual objects that makes them resemble public goods (non-rivalrous and non-excludable). Also, some suggest that intellectual property cannot be physically possessed, so it is problematic to claim property rights to unpossessed items.
Despite the conceptual differences in thinking about property,\textsuperscript{159} it remains the case that social acceptance of intellectual property as property is not accidental history, as some critics might suggest. On the whole, intellectual property is property not merely because semantics indicate that it is, but because the historical and social institutionalization of intellectual property rights has the same basis as any other property rights. Even if it is the semantics that conflate intellectual property with property, it is undeniable that there is a solid common ground between the extant legal doctrines of property and those of intellectual property. For that common ground to come to light, putting a stop to thinking of property in absolute terms is the first step.\textsuperscript{160} Beyond the myriad of issues regarding the legitimacy of intellectual property rights addressed by existing competing theories in Part One, a more important question to ask is what can be transferred from existing theories of property ownership to current understanding of intellectual property ownership.\textsuperscript{161} Neither property nor intellectual property is a monolithic concept. Rather, both function as umbrellas covering a whole array of subject matter. Failing to address these issues will lead to misconceptions of property ownership and wrong accusations or judgments of intellectual property ownership.

\textsuperscript{159} Either property rights in intellectual objects are socially constructed or derived from natural law.

\textsuperscript{160} The absolute terms here refer to the absolute principle of utilitarianism and the absolute nature of rights in the natural- and moral-rights rhetoric. The social-relations framework generally views both the nature of property and the rules of property as indeterminate and contingent on contexts.

\textsuperscript{161} This is also an important distinction between existing intellectual property theories as critiqued in Part One and the proposition of the social-relations framework to conceptualize intellectual property. Whereas existing theories qualify the legitimacy of intellectual property claims, the social-relations framework asks how rules governing rights and duties of intellectual property come into being.
I. THE MULTIPLICITY OF INTELLECTUAL PROPERTY OWNERSHIP MODELS

Intellectual property is owned and controlled in more than one specific way. Under current law, intellectual property encompasses three subfields: copyright, patent and trademark, each of which deals with considerably different rules and structures. Ownership of a copyright means the law’s protection against unauthorized copying of protected expression such as literary works, artworks, and computer programs. Ownership of a patent conveys exclusive rights over the use of a patented invention, even barring those who independently develop the invention without knowledge of the patented invention. Protection of both copyright and patent is subject to expiration after a certain period of time as determined by the relevant Copyright or Patent Acts, although patents generally have shorter protection terms than copyrights. After the copyright or patent term expires, the creative work or the invention becomes part of the public domain, freely available to everybody for use and reproduction without infringement. Ownership of a trademark conveys exclusive rights over the mark or symbol representing a commercial good or service. A trademark may become unprotectable if it is abandoned by its owner or when it has been genericized (i.e. the mark has become a colloquial or generic description). Each of these ownership models requires a separate set of rules and qualifications because of the different fields of creativity they apply to and the different purposes they serve.\footnote{For a summary of detailed rules, legal protection scope, and rights of others for each intellectual property ownership model, see Appendix 1.} Each owner of different kinds of intellectual property has different sticks in the bundle of their intellectual property rights. Meanwhile, the general non-owner
The bundle of rights in patent and trademark seems to exceed the rights of copyright holders in a copyrighted work: whereas the first two have nearly absolute control over the exclusive use and reproduction of their intellectual property, copyright only protects the right to reproduce copyrighted works. On the other hand, copyright protection is almost instantaneous (upon fixation) whereas patent and trademark protection must be filed by the owner and qualified by a government office. Moreover, copyright protection has longer terms than patent and is not subject to the abandonment rule of trademark. On the other hand, for each ownership model of intellectual property, the rights of others (non-owners) vary significantly. While non-copyright holders may make “fair use” of copyrighted material without infringement, non-patent holders have virtually no right in using or even independently making the same invention if it has already been patented. For trademark, non-owners must demonstrate a truthful reflection of the trademarked product when referring to the trademark for non-commercial purposes (e.g., comment). Each of the ownership models of intellectual property stipulates its own rules and has its own structures fitting into the field of creativity of each kind of intellectual property.

In more unusual cases, questions about intellectual property rights to tribal cultural artifacts and knowledge have continuously challenged the existing ownership

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163 See “Rights of Others” in Appendix 1.
164 Copyright protection lasts for the life of the author plus 75 years or a minimum of 95 years for entity authors. Patent protection is valid for 20 years from filing. Trademark protection is perpetual, but subject to abandonment if not in use for a period of 3 years or in case of dilution and genericide (when trademark becomes unprotectable due to popular use). For more, see Appendix 1.
165 Fair use is a legal doctrine in copyright law that qualifies non-infringing uses of copyrighted material based on purpose of use, nature of original work, scope of use, and effects on potential market of copyrighted work. (17 U.S.C. §107)
models of intellectual property. The issues raised by Native American tribes center around the history of government and private takings of native cultural artifacts from their community during the founding and expanding period of the U.S. It is useful to note that these issues attract public attention in part thanks to the rise of indigenous identity politics in modern America. Though these questions and issues have not been recognized by courts as relevant to the copyright and patent clause of the Constitution, they are raised in continuous attempts to expand the trust responsibility of the federal government towards Native American tribes’ alleged intellectual property rights over their cultural artifacts, tribal names and knowledge. The question of whether ownership of intellectual property should expand to new fields of creativity such as communal and traditional knowledge is increasingly contesting the dominant existing ownership models that conventionally conform to doctrinaire theories of intellectual property.

In essence, the fact that there are various ownership models within the umbrella rubric of “intellectual property” means that the question of the legitimacy of intellectual property rights requires careful understanding of how the rules for each ownership model of intellectual property come into being and how the underlying rationale qualifies for legitimacy. The multiplicity of intellectual property ownership models forces us to direct attention to how the rules are made in each ownership.

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167 Native American claims of property over artifacts, tribal names and traditional knowledge are often cited as inconsistent with the formally recognized ownership models for two main reasons: i) protection of existing knowledge that is already in the public domain does not help increase future creation of knowledge, ii) Current Native American tribes are not the original creators of the objects under question. More specifics are discussed in Part Three with a case study on the Indian Arts and Crafts Act 1990 and the Native American Graves Protection and Repatriation Act 1990.
model that, like any other kinds of property, is highly contingent and contextualized in time and space.

Moreover, each ownership model of intellectual property has profound implications about the social effects it has on the social actors at stake. On the one hand, intellectual property law plays an important role in fostering creativity and encouraging creation of new knowledge. Innovative works in science and creative works in arts help improve the general well-being of society and enrich the cultural life of members of society. On the other hand, intellectual property ownership may have negative effects on the social life of people in society. Intellectual property law gives owners the right to exclude others from using or reproducing the intellectual content, thus requiring others to ask for permission or pay a fee to the intellectual property holders before they can make use of the content. As intellectual property right is exclusive to the owners, they may not want to grant permission to others to use the content, or simply delay to give permission. As a result, the general public’s diminished ability to use the work of certain people or entities can lead to stifling free thought and interchange of opinions, which is crucial to exercising democratic rights. For instance, the Church of Scientology brought copyright infringement suits to restrain publications critical of Scientology and its founder. Eben Moglen likens the free software movement against the restrictions created by copyright law to the Civil Rights Movement. Lawrence Lessig argues that copyright law has considerable restraining impact on creativity because it prevents people from using

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new technology to create and share.\textsuperscript{171} Similarly, patent law gives owners the right to prevent others from using the invention, hence irresponsible profiteering through blocking competition. On the social effects of the patenting system, Michele Boldrin and David Levine show that “on the one hand, by making new seeds and animal species prohibitively expensive, agricultural patents render farmers from poor countries unable to compete on the global agricultural market. On the other hand, by monopolizing seeds and species that are and have been for centuries in the public domain, agricultural patents rob the same poor farmers of their capital.”\textsuperscript{172} As for trademarks, Rosemary Coombe argues that “the lexicon of brands is doubtless the most impoverished of languages: full of signification and empty of meaning. It is a language of signals. And ‘loyalty’ to a brand name is nothing more than the conditioned reflex of a controlled effect.”\textsuperscript{173} Coombe goes on to argue that the propertization of language by trademark is connected to excessive consumerism, which according to her deteriorates cultural development because the commodification of language reduces people’s capacity to make and remake meaning of the objective world. In essence, each ownership model of intellectual property has significant positive and negative social effects on the ability to express oneself, to freely think and innovate, and sometimes, even to earn a livelihood.

\textsuperscript{171}Lessig, \textit{Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity}. (More on this point is discussed in Part Three with a case study on the Creative Commons)  
\textsuperscript{172}Boldrin and Levine, \textit{Against Intellectual Monopoly}, 13.  
2. THE CONTINGENCY OF INTELLECTUAL PROPERTY OWNERSHIP MODELS

Every standard rule about intellectual property rights exhibits strong characteristics of impermanence. Under current law, intellectual property rights are not perpetual and terms of protection vary significantly among different kinds of intellectual work. Subject to the Patent and Trademark Office’s approval, a patent is valid for a term of up to twenty years. An approved copyright lasts for the life of the author plus seventy years, or a total of ninety-five years in the case of entity or corporate authors. Trademark protection is valid for the life of the person or entity that owns the trademark, but is subject to discontinuation if the trademark is considered abandoned by its owner for a period of three years or genericized.174 Unlike property rights of physical objects that are normally perpetual, intellectual property rights are distinctively impermanent and the impermanence for each subfield of intellectual property varies significantly.

More importantly, “impermanence” does not only mean “temporariness,” but also “a state of indefinite change.” There are two points worth making here. First, intellectual property law with its rule-specific structures has distinct courses of development contingent upon the historical and social context of the law. Second, there have been significant changes in the legal recognition of intellectual property as well as what kind of intellectual property qualifies for legal protection. The historical development of intellectual property law demonstrates its loose commitment to the rigidly defined principles of utilitarianism and non-utilitarian theories that are often used to characterize intellectual property. My goal is not to displace plausible theories...

174 See Appendix 1.
altogether in conceptualizing intellectual property rights. Rather, I am going to argue that the historical development of intellectual property law shows the law’s commitment to a plurality of values including but not limited to utilitarianism and non-utilitarian theories. As these values change in accordance with the historical and social context, the law appears to change to accommodate a constantly changing set of values.

The first American patent statute was enacted in 1790. As justified in Article I, Section 8 of the Constitution, patent laws aim to “promote the progress of Science and useful Arts” by providing exclusive rights for a limited period as an incentive and reward for the inventors’ inventiveness and research efforts. Patents can be seen as property rights that allow inventors to exclude others from making, using, selling and distributing their inventions. As nineteenth-century industries grew, the patent system’s attention was shifted to promoting better and higher quality inventions from the sheer need for more inventions. The Patent Act of 1836 established a formal system of examination with professional examiners to approve patent applications. Since then, there have been an increasing number of new requirements for patent applications. The non-obviousness requirement stipulates that an invention must be more than novel and represent an “inventive leap.” But this requirement was not effectuated until the mid-nineteenth century, seeking to limit the number of patents issued to raise the general quality of inventions. Another important point is that the attitude of the courts toward the enforcement of patent rights showed a high degree of fluctuation over the course of the development of the law. The twentieth-century

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176 Ibid.
history of the U.S. patent system typically consisted of alternating periods of greater and lesser protection of patent rights. During the industrial boom between the 1920s and 1930s, many began to voice concerns about the monopoly power over important industries of a few large companies with powerful patent portfolios. The courts during this time became more lax in enforcing protection of patent rights and were more willing to punish patentees for exceeding the scope of their patent grant. But then, when the need to promote more inventions became imperative in the 1940s, the courts once again began to prioritize patent protection.\footnote{177}{Ibid., 122.} During World War II, which Robert Merges characterizes as “the disequilibrium stage of technology law,” the government took command of the country’s industrial development. As a result, the need to develop technologically advanced equipment for the Army virtually took precedence over exclusionary acts of companies with patents through “mandatory cooperation.”\footnote{178}{Ibid. and Robert P. Merges, “One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000,” \textit{California Law Review} 88, no. 2187 (2000).} As the nation threw all available resources into the war effort, the government could no longer resolve patent disputes involving individualistic claims to intellectual property rights. As Ruth Schwartz Cowan recounts, “the government ordered the end to the dozens of patent suits that were holding up the manufacturing of various electronic components.”\footnote{179}{Ruth Schwartz Cowan, \textit{A Social History of American Technology} (New York: Macmillan, 1997), 281.} In particular, some patent rights were reportedly violated by the Navy, which “did not see any reason for inventors to earn steep royalties. Instead, when they wanted to purchase a particular apparatus, they would encourage competitors of the holder of the patent to make copies to sell to the
Navy at a cheaper price, disregarding patent rights altogether.\textsuperscript{180} Support of a strong patent system did not become prevalent again until after the war ended. Since the 1960s, patent law has once again grown and gone through significant expansion. In the history of patent law, it is clear that changes in the law have been responsive to the changing circumstances that influence the general conception of what the government should do in the public interest.

But it remains debatable as to what really constituted the public interest that justified the “mandatory cooperation” (which in normal times would mean violation of property rights of the inventive companies). As has been suggested, the alleged public interest could be economic, political or ideological, or indeed a bit of each. However, it is important to note that whether a utilitarian argument would recommend \emph{a priori} the policy that the government took to support the war at the expense of the inventors’ property interests is essentially different from whether the adopted policy is justifiable on utilitarian grounds after seeing all the realized benefits of national security in real terms. Arguably, the benefits of peace and government-created demand for inventions for military purposes outweighed the loss of property security, but that could only be speculated before the fact and actually demonstrated after the fact. The problem with a utilitarian argument for the fluctuation in patent law in general and during the war years in particular is that it is strictly predicated on the assumption that all values can be reduced to utility, or wealth in general, for comparison whereas there was a clear possibility of other confounding factors at work such as the public belief in defending democracy. Moreover, historically speaking,

\textsuperscript{180} Perelman, \textit{Steal This Idea : Intellectual Property Rights and the Corporate Confiscation of Creativity}, 50.
the reason behind the adopted policy remains unclear whether the government was actually motivated by a utilitarian calculus of cost and benefit, or as stated, an ideology of defending democracy. Therefore, it is not convincing enough to show that the lesser-protection trend of patent law during World War II could be definitively utilitarian-justified, although it could be so, but not entirely.

For the natural-rights theory\(^{181}\) of intellectual property, the pendulum of the development of patent law seems to violate their principles of protecting natural intellectual property rights as it is not clear whether the inventive companies received or whether they could demand any form of just compensation for accepting the government’s cooperation mandate. The problem seems to stem from their assumption that intellectual property rights as natural rights are pre-social and pre-legal and cannot be compromised with any public policy aimed at a social goal. The history of the development of patent law proves to be the opposite. Since the private sector could not exercise exclusionary acts over their patented inventions as they would during times of peace, it is clear the public interest indeed trumped the natural rights of intellectual property ownership.

The common problem with both the utilitarian theory and the natural-rights rhetoric is that each presumes some degree of absoluteness in their rationales for intellectual property ownership whereas the development of specific rules and structures of intellectual property law is highly contingent and contextualized. The natural- and moral-rights rhetoric presumes absolutism in the rights of intellectual property holder under any circumstances with no regards to the possibility that the

\(^{181}\) The personhood theory is excluded from the discussion here because moral rights do not apply to patent law. However, it still suffers the same kind of problems as the natural-rights/labor theory.
public interest may trump the property interests of the owners. The utilitarian theory presupposes absolute rules in deriving utility from specific events and social phenomena while it is plausible that some uncompromisable and incalculable values to the public might also contribute to the development of intellectual property law. The sweeping generalization typical of utilitarian principles does not and simply cannot capture all contingencies where other values are present. It thus remains unclear whether the development of intellectual property law strictly conforms to either utilitarianism or the natural- and moral-rights rhetoric, or whether it essentially responds to both, slightly more to the former than the latter, or both and something else.

On another consideration, copyright law also displays strong characteristics of impermanence. Since the first American Copyright Act of 1790, subsequent laws of copyright generally have a utilitarian overtone to promote incentives for creation of knowledge and cultural products. Copyright is the author’s right to exclude others from copying, distributing and adapting the original written work or creative products. The goal of copyright law remains strictly utilitarian: to balance the utility gained from new knowledge creation against the utility gained from expanded access to knowledge. The general trend of this law has been a steady expansion of copyright protection in both scope and scale, in the belief that more protection would create more effective incentives for creativity. Historically, the term of copyright

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182 This speaks to the distinction between a utilitarian explanation about intellectual property policies and the utilitarian theory of intellectual property that has been described in Part One, 1.1. There could be a plausible utilitarian explanation about the war policy that restricted intellectual property protection, but the utilitarian theory of intellectual property could not possibly have predicted this result, thus it had dictated a priori absolute rules about intellectual property ownership. My critique here mainly focuses on the latter version of utilitarianism (which is what Part One, 1.1. is about).

183 As discussed in Part One, 1.1.
protection has extended from fourteen years (the 1790 Act), to twenty-eight years (the 1909 Act) and finally to the author’s life plus fifty years (the Sonny Bono Act 1976).\(^{184}\) It is important to note that the need to harmonize with European copyright laws that are based on the authors’ moral-rights tradition was cited as one of the reasons for the 1976 extension of copyright protection. Moreover, the digital age witnessed a rise of statutes that aim to provide more stringent protection of copyright. Notably, the No Electronic Theft Act of 1996 expands criminal enforcement for piracy over digital networks. The Digital Millennium Copyright Act of 1998 affords copyright owners rights to litigate against those who circumvent copy protection technologies. It is debatable whether the extension of copyright protection, especially the latest one in 1976, was motivated by utilitarian calculation of cost-and-benefit because as Lawrence Lessig notes, “extending a dead author’s copyright won’t encourage him to write another book. Would Shakespeare have written *Romeo and Juliet* if he had to get permission from Bandello and pay royalties?”\(^{185}\) Richard Posner, famous for his law and economics approach to intellectual property, raises doubts about the economic benefits of the Sonny Bono Copyright Extension Copyright Act.\(^{186}\) On the other hand, one may effectively argue that these recent developments simply mean a conceptual shift from utilitarianism to the natural- and moral-rights rhetoric in reasoning for copyright. But since it is not a complete change, as these rights still have temporal limits and qualification requirements, it is not clear

\(^{184}\) Meanwhile, there has been significantly less legislative activity in the field of patents than that of copyrights during the same period. This shows different trends in the impermanence of each ownership model of intellectual property. See Landes and Posner, *The Economic Structure of Intellectual Property Law*, 418.

\(^{185}\) Quoted in Perelman, *Steal This Idea : Intellectual Property Rights and the Corporate Confiscation of Creativity*, 40.

why such a shift is happening at all, in accordance with either theory. In other words, utilitarians cannot account for the incrementalism toward the natural-rights rhetoric in reasoning for intellectual property while the natural-rights rhetoric cannot account for why intellectual property rights should still be limited in terms of legal protection. What could warrant this conceptual shift given that intellectual property is justified mostly on utilitarian grounds when the law is made but when technology makes copyrighted works more vulnerable to infringement, laws are made in some reference to the moral rights of the author to provide more protective means squarely corresponding to the natural-rights theory?

The fact that intellectual property rights are impermanent, highly contingent and contextualized forces us to recognize that the rules that govern intellectual property are constantly changing in ways that are hard to stay consistent with either dominant theory of intellectual property. Emerging rules of intellectual property law developed indeterminately out of specific contexts, rather than conforming definitively to any specific theory of intellectual property. Realizing this aspect of intellectual property brings into focus the importance of understanding the relationship among social actors to explain how rules of intellectual property ownership comes into being.

3. THE DISTRIBUTIVE CHARACTER OF INTELLECTUAL PROPERTY OWNERSHIP

The prevailing norms of intellectual property contain a tension between the norm of protecting the holders’ rights of copyright, patent and trademark and the norm of shaping intellectual property rules to ensure widespread access to the system
by which such rights are acquired. Social actors in intellectual property relations are not only the holders of copyright, patent and trademark, but also the public at large represented by their politicians who take part in the process of making specific rules for intellectual property. Just like property, intellectual property is also “a constant matter of pushing and shoving.” With extensive historical evidence of the law-making of intellectual property and copyright law in particular, Thomas Olson notes:

Congress is generally not in the business of satisfying abstract concerns about ‘good copyright policy’. Rather, Congress is an intensely political body, loath to impose one-sided losses on legitimate interest groups. Since ‘good copyright policy’ would often require precisely such one-sided losses, copyright reforms may languish for decades before being enacted, or may simply be abandoned.

Moreover, Olson shows that there is no conclusive evidence by lawmakers as well as industry lobbyists involved in the historical enactment and expansions of the Copyright Act that the law really provides a net gain of benefits to society or is less undesirable than alternatives. Therefore, there is reason to believe that the rules that shape the intellectual property regime are perhaps created not simply through a utilitarian economic calculation, nor as a reflection of the natural-rights rhetoric, but in a strong political contest. As two authorities on law-and-economics William Landes and Richard Posner have suggested, the making of intellectual property law has increasingly become a political economic issue with different interest groups possessing different power resources influencing the structure and rules of intellectual

187 It is important to note that “access” here means access to the legal system to make rules, not “access” to knowledge to create new knowledge.
188 Munzer, New Essays in the Legal and Political Theory of Property.
189 Olson, "The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms since the 1909 Act,” 111.
property law. In the last paragraph of *The Economic Structure of Intellectual Property Law* (2003), Landes and Posner wrap up their treatise on intellectual property law with an important observation:

> [T]he body of intellectual property law and its expansion in recent decades seem explicable only by a combination of public-interest and public-choice theories of the political process. What is more, it seems necessary to add political and ideological factors to the combination, and to blur the sharp distinction in some of the previous literature between the efficiency orientation of legislatures and of courts.\(^\text{191}\)

Like every social structure, the system that governs intellectual property with specific rules and various ownership models is a product of the larger power structure of resources unequally distributed among different people and different groups in the political economy. The intellectual property system appears to be a platform that translates the distribution of power resources into the distribution of rules favoring or disfavoring interests of different groups of people, creator or non-creator. This aspect of intellectual property forces us to turn to the distributive character of property to derive understanding of the effects of different social relationships on certain rules and legal structures of intellectual property ownership.

2.3 INTELLECTUAL PROPERTY AS SOCIAL RELATIONS

Drawing from Singer’s property-as-social-relations framework, the last section has discussed the multiplicity of ownership models, the contingency of those models and the distributive character of intellectual property ownership. It has also shown that intellectual property cannot be defined rigidly within a creator-centric model; or a social system attuned to a circumscribed goal of promoting social utility because it is not entirely clear whether all human values of such a system are coherently reducible to comparable “pleasure” and “pain.” Intellectual property rights grow out of social relations among people, creator and non-creator, with different interests and power resources to influence the rules that govern the intellectual property regime.

SECTION A. THE SOCIAL-RELATIONS FRAMEWORK OF INTELLECTUAL PROPERTY

Intellectual property is a social system consisting of human relations formalized through social processes to legitimize claims over the use of intellectual goods as valued resources. The social relations in an intellectual property regime arise from the social actors’ interests in the creation and the use of intellectual content and
knowledge. The social process through which these social actors’ interests are accommodated takes place formally and informally as a result of bargaining based on relative power and resources of different groups rather than the neutral balancing of different social values. Since people’s interests and values are changing and heterogeneous, the social process that formalizes relationships among social actors in an intellectual property regime does not stay unchanged. As a result, intellectual property exists in various ownership models that depart completely from the classical ownership model. Most importantly, different ownership models reflect different balances of power among the members of a society with regards to the use and creation of knowledge and cultural products.  

The social-relations framework encourages lawmakers and judges to see these social actors as situated in various relationships with one another over time. Rights over the use and the creation of intellectual goods emerge from the social processes that reflect different understandings of the nature of intellectual property rights. These understandings may or may not in their entirety reflect the principles of dominant intellectual property theories, namely utilitarianism, the labor theory and the personhood theory. These understandings also develop over the course of the relationships rather than being fully articulated at clear decision points. Therefore, the social-relations framework encourages us to ask what it means for someone to own intellectual property, besides who owns intellectual property.

The social-relations framework is an analytical tool to comprehend intellectual property in social life, rather than a normative theory of intellectual

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192 It has been shown in “The Distributive Character” section that law-making bodies make rules of property as a result of different interests and power represented in the process.
property rights such as the utilitarian theory and the natural-rights rhetoric. However, it incorporates these competing theories of intellectual property into developing different understandings of the social process that formalizes the relationships and shapes the intellectual property regime. In a liberal democracy, people have diverse interests and values whose explanation may or may not in its entirety correspond to the normative theories of either utilitarianism or the natural- and moral-rights rhetoric. More importantly, it is impossible to impose a set of values from top-down (utility-maximization or respect for natural- and moral-rights) on people who share a stake in the system of specific rules and processes that govern intellectual property. The social-relations approach interprets intellectual property law as responsive to the emerging human conditions and the constantly changing relations among people in those conditions.

SECTION B. THE STABILITY QUESTION

In A Theory of Property (1990), Stephen Munzer revitalizes legal and political theory by arguing that property can only be justified and evaluated if it equally and sufficiently addresses the principles of utility-and-efficiency; justice-and-equality; and desert based on labor.\(^{193}\) His pluralist conception of property proves useful in sustaining political, moral, and legal justifications for ownership that reflects a multiplicity of private and public demands in society. Perhaps, Munzer’s general pluralist stance on property has prompted him to dedicate his own essay to embracing and critiquing the social-relations approach to conceptualizing property rights in New Essays in the Legal and Political Theory of Property (2001), which is a collection of

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new scholarly articles on property rights. Specifically for Joseph William Singer’s social-relations framework upon which my work is based, Munzer offers important insights.

Munzer suggests that it is not clear which and how social relations constitute, or help to constitute property rights. He asks: “how can one squeeze a legal, or a moral, justification out of the fact of a relation of mutual dependence?” In other words, Munzer contends that the social-relations framework is not clear on what kind of social relations can really give rise to legal property relations and how they do so. Therefore, he thinks that the social-relations framework does not have the kind of structural stability necessary for making clear legal rules, and that it actually makes the goal of having clear rules much harder to achieve.194 In other words, while the social-relations framework encourages us to look into the relationships among social actors to determine property or vice versa, it does little to guide us how to achieve full considerations of all relationships or all aspects of property to arrive at an accurate and fruitful judgment. As he suggests, we will still always miss out on some minor or major factors that are not discernible to us, but should play a role in determining the content of intellectual property ownership. In fact, it occurs to Munzer that the social-relations framework does not have a concrete and feasible methodology to provide a complete treatment of property beyond the points it makes about how property works in social life.

He then offers two possibilities for the social-relations framework. First, the social-relations approach essentially amounts to an ideal type of a theoretical framework of property law that we could aspire to by emphasizing the variety of fully

194 Munzer, New Essays in the Legal and Political Theory of Property, 63-64.
situated social relationships. Specifically, it encourages us to hold judges and lawmakers responsible for being sensitive to these manifold relationships in rendering decisions. However, he warns that it is a separate matter from determining how much sensitivity should be required or whether there is a limit of sensitivity to social relationships without risking a desirable stability of property law. On the other hand, Munzer also suggests that if the social-relations approach aims to be descriptive and neutral, there must be relevant normative premises that could support such neutral claims. In other words, in order for the social-relations framework to be structurally stable, it has to rely on some normative premises that stipulate certain requirements for determining the legitimacy of property relations that arise from social relations. As a result, he recommends a reintroduction of personal autonomy in the matrix of social relations to reinforce the framework’s structural stability in explaining property rules.

In response to Munzer’s first suggestion and in its relation to the social-relations framework applied to intellectual property, the discussed approach is perhaps better understood as an analytical tool to comprehend and explain the legal system that governs intellectual property ownership, rather than being treated as a normative or comprehensive theory of intellectual property rights. In other words, while the social-relations framework shifts attention from what the rights and duties of intellectual property ownership ought to be to the question of what the rights and

195 Ibid., 65.
196 Ibid.
duties of intellectual property ownership are. Indeed, a fully informed social-relations analysis of intellectual property ownership inevitably incorporates normative aspects of “rights” and “social goals” when it discusses the specific values purported by social actors involved in the social processes that formalize intellectual property relations. The social-relations framework, therefore, does not substitute, or displace competing intellectual property theories. Quite the contrary, it complements both in explaining how legal and social norms of intellectual property come into being in specific social contexts.

On the second suggestion, normative premises for the social-relations framework would indeed be necessary to support the social-relations framework. Social actors are the subjects of social relations associated with intellectual property. Munzer suggests that these social actors could be seen as autonomous moral agents with inherent capacity to make free choice and take free action. They are also capable of aligning their choices and actions with their own sense of moral responsibility that is evoked in fully contextualized relationships with others. Indeed, this notion of moral responsibility is relevant to what Singer refers to as mutual obligations among social actors:

Mutual obligations among property owners and between owners and non-owners are dictated partly by the enlightened self-interest of owners themselves and partly by considerations of justice. Some obligations on owners of property toward non-owners are morally justified, and even required, even when this entails some measure of sacrifice of self-interest on the part of owners.

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197 A generous reading of Singer’s theory would show that he does not refute the question of “who owns what” in understanding “ownership,” rather he raises the importance, or at least equal importance, of considering the social relationships among owners and non-owners.  
198 Singer, "Property and Social Relations," 17.
Thus, it is plausible that the social-relations approach favors the development of human capacity for free choice and action in conformity with mutual obligations toward other human social actors and needs it as a premise. As Singer and Beermann argue, a fair and presumably legitimate property system reflects a “fair distribution of social obligations.” But if everybody could reasonably be assumed to have such a capacity, or identical capacity of moral responsibility, there perhaps would not be any conflicts in the world, or at least in the field of intellectual property. Every law would be a universal law. On the other hand, the social-relations framework shifts attention to the social relationships implicated by certain ownership models of intellectual property to raise questions about these social relationships as a result of the relative balance of power in the bargaining process of making rules. In liberal democratic societies where distributive justice is strongly valued and applied, the prospect of approaching the “ideal type” of the social-relations framework is perhaps closer to achieving than not. When intellectual property ownership boils down to policy- and rule-making, the social-relations framework simply advocates for equal and fair opportunity for people with a stake in intellectual property ownership to take part in that bargaining process in a democratic and transparent way. That is perhaps how a legal system of intellectual property can achieve both stability and coherence. However, it is worth noting that the social-relations framework as proposed in this thesis conceptualizes the directionality of intellectual property rules as indeterminate because of the indeterminacy of the interests and values at stake, the relative power balance, and the unpredictable contingencies that could affect the former two factors. Therefore, the social-relations framework is indeed structurally unstable, but that is

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because it is committed to reflecting the social reality of the inevitably indeterminate making of rules for intellectual property ownership.

**SECTION C. THE LEGITIMACY QUESTION**

Given that intellectual property is a set of social relations, a question arises as to what social relations can legitimize intellectual property claims. This is indeed a practical question. The utilitarian approach is to translate human values and interests into some comparable pleasure and pain, balance the cost and benefit, and arrive at a normative judgment about what would legitimize intellectual property rights in hypothesized circumstances. As described in Parts 1.1 and 1.2, the utilitarian theory has feasibility and consistency problems, as well as the problematic notion of “utility.” The natural-rights approach seems simpler because it is based on the creator-centric ownership model to legitimize intellectual property claims. But as we observed, the natural- and moral-rights rhetoric contradicts the social reality of intellectual property because its absolute conception of natural/moral intellectual property rights. On the other hand, the social-relations approach does not offer a definitive list of conditions for qualifying intellectual property rights. It conceptualizes rules of intellectual property as socially constructed through social processes to legitimize claims and deems such processes as indeterminate. The social-relations approach does not stress the work of balancing interests like the utilitarian theory but suggests that a social system of intellectual property is a product of the work of bargaining by social actors with diverse interests, personal values and power resources. Thus, the legitimacy of rules that govern intellectual property ownership essentially depends on who makes the rules and whether there is equal and fair
opportunity for everyone with a stake in the intellectual property regime to participate in the process of making rules. As John Rawls in *A Theory of Justice* has suggested, questions about ownership are perhaps derivative, rather than primary issues in political philosophy and that the abstract principles of justice should precede the establishment of any social institutions, property included. For Rawls, justificatory arguments for property are fundamentally attempts to settle *a priori* questions of social and economic strategy, rather than establishing foundational and normative concepts of political philosophy for society. Likewise, David Hume has said: “the origin of justice explains that of property. The same artifice gives rise to both.”

Thus, any *a priori* attempts to justify a modern social institution called “intellectual property” are eventually elusive and inevitably subjected to the primary question of justice in human society. However, questions about the legitimacy of intellectual property rights are concerned with a normative aspect, if any, of the social-relations framework. Within the limited scope of this thesis, the proposed social-relations framework only serves the analytical purpose to account for why there are certain rules about intellectual property ownership, as opposed to advocating for a certain set of “legitimate” rules about intellectual property ownership.

In conclusion, intellectual-property-as-social-relations reimagines the way we conceptualize property claims to intangible intellectual objects. We first have to conceptually depart from the classical ownership model to realize that rights to own intellectual property do not merely depend on individualistic claims, but largely on

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the relationship among owners, non-owners and society at large. In fact, claims of ownership always constitute some combination of rights and duties. People are entitled to the right to own objects as a bond with society, rather than requiring property titles from society. Intellectual property is a social system of human relationships with a multiplicity of ownership models that are highly contingent and contextualized. Intellectual property also exhibits a strong distributive characteristic that is implicated in the power structure and the resources available to different groups of people to influence the shaping of rules and policies governing intellectual property ownership.

Many scholars have tried to separate intellectual property from property by arguing that U.S. intellectual property law with its strong utilitarian foundations does not conform to the property paradigm.202 Others point to the incoherence between the impermanence of intellectual property rights and absolute nature of intellectual property rights in the natural-rights rhetoric to argue that the “property” language imposed on intellectual property is misleading.203

This thesis has tried to do the opposite: it navigates through the competing theories of property to identify a way to integrate intellectual property into the larger literature of property and explain the development of intellectual property ownership in social life. It refers to the common ground rooted in the non-absoluteness of both property and intellectual property to illustrate the theoretical integration. Specifically,

202 Kinsella, "The Libertarian Case against Intellectual Property," 15. (“To ask whether a [property] law should be enacted or exist is to ask: is it proper to use force against certain people in certain circumstances? It is no wonder that this question is not really addressed by analysis of wealth maximization.”)

203 Lessig, Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, 237. (“in the context of intellectual property, the general problem is magnified by another blindness, the error induced by thinking of intellectual property as property”)
there are two kinds of absolutism in the existing theories that the social-relations framework is skeptical of: the absolute nature of natural and moral rights existing independently or externally to human society, and the absolute rules about promoting utility maximization. As has been shown, the truths of intellectual property ownership and property ownership give the concept of property the power of unifying, rather than of disaggregating. As Michael Carrier argues, intellectual property could integrate the property paradigm into the rationale for its own balance and limits. If any, the distinction between property and intellectual property is only a matter of degree, not of nature.


Intellectual-property-as-social-relations deemphasizes the individualistic claims of ownership on intellectual objects and shifts the main focus of the property question to human relationships with regards to the right to use intellectual content. The social-relations model humanizes understandings of intellectual property ownership by showing that the effects of ownership on the social life of people are at least as important as the attempt to find a perfect answer to who should own intellectual property. These effects vary across different ownership models of intellectual property and also across the social actors at stake. The social-relations framework accounts for these effects as a result of the rules about intellectual property ownership, without offering normative judgments on whether the ownership is legitimate or just.

If this part of the thesis has done justice to the literature of intellectual property, there is also a need to demonstrate its applications to real cases of

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intellectual property ownership. In Part Three of this thesis, I study two specific cases of intellectual property to test my framework’s applicability. In particular, these case studies show trends from two distinct sources of challenges to the dominant ownership models prescribed by current intellectual property law in their own unique ways.
CASE STUDIES: TWO CHALLENGES TO THE DOMINANT OWNERSHIP MODELS OF INTELLECTUAL PROPERTY

The U.S. Constitution gives intellectual property law an important task to promote economic well-being and cultural enrichment. To achieve that goal, intellectual property law provides different ownership models, each with its own rules and structures. Copyright law provides protection of original expressions in literary and artistic works. Patent law provides protection of novel ideas and inventions. Trademark law provides protection of a company’s name and symbols. In this part of the thesis, I present two case studies on two emerging challenges to these existing ownership models of intellectual property. These challenges come from different concerns about the effects that the intellectual property regime has on social relationships as well as the power resources and external opportunities available to different groups of social actors. In the first case, I look into the development and implication of two important legislations the Indian Arts and Crafts Act 1990 and the Native American Graves Protection and Repatriation Act 1990. In the second case, I
study the development of the Creative Commons as a modern alternative ownership model of intellectual property within the creative community. These two case studies with interesting aspects unique to their very different contexts and origins shed light on the analytical power of the social-relations framework to understand multiple aspects of intellectual property ownership, other than those prescribed by intellectual property law. Both instances adopt distinct approaches to challenging the dominant ownership models of intellectual property, but reflect the kind of social relationships that people involved in delivering them are committed to developing and the power resources they have in influencing the status quo. On the whole, this chapter shows that common rationales underlying the current intellectual property regime cannot account for these two trends of intellectual property ownership.
A NATIVE CHALLENGE: NAGPRA AND IACA

Indians declared that Native American concern for the dead must override scientific objectives.  

[205] – David Hurst Thomas

[NAGPRA] is going to be a terrible loss of knowledge. To me, it’s like burning books.  

206 - Bones of Contention (documentary)

The cultural and intellectual property rights of Native Peoples are worthy of being addressed during this time of increased appropriation of Native national names, religious symbology, and cultural images.  

207 – Suzan Shown Harjo

Measured by the symbolic arithmetic of identity politics, 1990 certainly seemed a good year to be an Indian.  

208 – William J. Hapiuk, Jr.

Congress enacted the Indian Arts and Crafts Act (IACA) in 1990 under public pressure to reinvigorate Native American cultures and promote the socioeconomic well-being of Native American tribes.  

209 The Act was seen as a result of ongoing legal contestations in the U.S. about Native American governance and

209 Note: throughout this chapter, “Indian” and “Native American” are used interchangeably to indicate members of indigenous tribes inhabiting the territory that now becomes the United States.
identity politics.\

In that same year, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). The new law protects the preservation of Native American objects and cultural patrimony by mandating the return of Native American cultural items and human remains from museums and other institutions to their respective tribes. Together, IACA and NAGPRA protect cultural and intellectual property of Native Americans in different contexts. As Richard Guest points out, “NAGPRA established protection for and repatriation of Native American objects and cultural patrimony in a historical-sacred context” whereas “IACA offers protection for and encourages production of Native American arts and crafts in a contemporary-economic context.”

The ratification of these two pieces of legislation responded directly to the growing concern about protecting cultural and intellectual property of Native American tribes. But equally importantly, the new laws represent a genuine challenge to the dominant ownership models of intellectual property law. Both NAGPRA and IACA warrant a new conception of intellectual property ownership in the social context of different social actors with diverse interests and values pushed forward by their different power resources and historical conditions. In recounting the development and meaning of NAGPRA and IACA, I contend that the dominant ownership models of intellectual property fail to justify the two legislations, and that the social-relations framework offers an analytical tool to understand the motivating force for implementing two important laws regarding intellectual and cultural property of Native American peoples.

IACA: THE LOGIC OF INTELLECTUAL PROPERTY?

IACA prohibits and criminalizes the sale of arts and crafts whose marketing “falsely suggests” they are made by Native American and Alaskan Native artists.\textsuperscript{212} One of the concerns raised at the time of the law’s passage was the flood of counterfeit Indian-made products imported from Asia, distorting the market for authentic Indian arts and crafts estimated at one billion dollar a year.\textsuperscript{213} But an equally important concern for Native American tribes was the misrepresentation of their cultures by counterfeit products. As Representative Jon Kyl testified before a House Committee Hearing, “[counterfeit] costs Indian tribes very serious money. But more is at stake than dollars and cents. It does misrepresent the native culture itself and, in that sense, poses a threat to its continuation.”\textsuperscript{214} The passage of IACA by Congress in 1990 serves a dual purpose to enrich both cultural and socioeconomic life of Native Americans as it fits in well with the overall governmental goal of promoting tribal self-sufficiency.\textsuperscript{215}

IACA strengthened the Indian Arts and Crafts Board under the aegis of the Department of the Interior.\textsuperscript{216} The Board is the functionary arm of IACA. It organizes training for Native American artists to help them keep up with the growing demands for Indian arts and crafts. The Board also helps provide public education to promote interests of Native Americans in the arts and crafts industry. But most importantly,

\begin{itemize}
\item \textsuperscript{212} 18 U.S.C. § 1159 (Supp. II 1990)
\item \textsuperscript{213} Committee on Indian Affairs, To Expand the Powers of the Indian Arts and Crafts Board, Second, May 17, 2000 1989. ("today’s market for Indian made goods is roughly $1 billion a year. But by some estimates, one-half of that demand, nearly $500 million, is satisfied by counterfeit goods, much of which is produced offshore and imported into the United States.")
\item \textsuperscript{214} Ibid., statement of Rep. Jon Kyl, 24
\item \textsuperscript{215} Jon Keith Parsley, "Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990," American Indian Law Review 18, no. 2 (1993), p496
\item \textsuperscript{216} The Board was originally created by the 1935 Act.
\end{itemize}
the Board monitors and prosecutes the counterfeiting of products advertised as “Indian-made.” The 1990 Act defines “Indian” as “any individual who is a member of an Indian tribe.” In other words, IACA grants automatic and perpetual intellectual property protection to cultural products created by members of Indian tribes. Being a member of a federally recognized tribe, an Indian artist has a federally protected monopoly over the production of their artistic and cultural items. Under IACA, membership of Native American tribes awards ownership of the exclusive right to make cultural products that express and represent Native American culture.

The ownership model proposed by IACA starkly contrasts with dominant ownership models of intellectual property that are characterized by independent creation, novelty and impermanence. Both copyright and patent laws require that the knowledge embedded in the literary or artistic products and inventions result from an independent effort of a clearly defined entity. This entity could be an individual or a group of individuals. Also, intellectual property is ordinarily understood as novel expressions or original inventions that add to the existing stock of knowledge. Most importantly, intellectual property protection under current law is not perpetual. IACA defies the law’s understanding of intellectual property ownership. As a matter of fact, IACA acknowledges and requires that the techniques of making Indian arts and crafts stem from folkloric practices that were originally developed by tribal ancestors, so these techniques do not necessarily represent any novel knowledge, as

218 Guest, "Intellectual Property Rights and Native American Tribes," 115. ("IACA provides exclusively to tribal members “the rights to the knowledge of medicinal qualities inherent in indigenous fauna and flora; the embodiment of oral traditions and religious ceremonies; the expressions of native art and designs; the use of tribal names and symbols; and most importantly, the right to prohibit their use by others.")
219 As discussed in Part Two. For more details, see Appendix 1.
intellectual property law would require. Under IACA, all tribal members using these
techniques to create arts and crafts have the right to represent Native American
culture, whereas intellectual property law only gives rights to the creators of new
knowledge. In other words, being a member of a Native American tribe endows a
Native American with the exclusive right to express that tribe’s culture and to benefit
commercially and culturally from the expressions he or she creates. IACA is often
understood as a truth-in-marketing law in the sense that “Indian” is a trademark of
Native American culture. But this is far from the same as the ownership model of
trademark law, which grants legal protection to companies, not a demographic group
of people, to distinguish their products from others. In essence, perpetual
intellectual property ownership under IACA is defined by tribal background. IACA
grounds an unprecedented challenge to the canonical ownership models of intellectual
property law.

IACA is not just an economic policy aimed to promote the well-being of
Native Americans, but more importantly an illustration of the stakes in the debate
over Native American collective identity, tribal sovereignty, and cultural/artistic
representations. Without a doubt, IACA provides a solid means for tribal members to
earn a living, as Michael J. Evans and Sandra Lee Pinel suggest, “the sale of arts and
crafts provides one of the few opportunities for the Pueblo people to both be in
business and participate in a traditional cycle of activities within the community.”

But the process through which IACA grants intellectual property rights suggests that

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220 For instance, there is no U.S. trademark law protecting Chinese ownership of the right to run
Chinese take-out restaurants.

221 Sandra Lee Pinel and Michael J. Evans, "Tribal Sovereignty and the Control of Knowledge - a
Sourcebook," in Intellectual Property Rights for Indigenous Peoples, ed. Tom Greaves (Oklahoma
it resembles an affirmative action policy for socioeconomic development of certain demographic groups, rather than a socioeconomic policy to promote general well-being of society, as intellectual property law seems to do. As such, IACA provides protection of and raises awareness about indigenous cultures and affirms societal commitment to respecting Native American cultural identity and preserving native cultures. As Richard Guest points out, “the intellectual property of Native American tribes would encompass the expressions of their cultural identity and the embodiments of their indigenous heritage.”

By challenging the dominant ownership models of intellectual property, IACA creates new meaning of ownership over intellectual property.

**NAGPRA: SCIENCE VS. NATIVE CULTURE?**

If you desecrate a white grave, you wind up sitting in prison. But desecrate an Indian grave, you get a Ph.D. The time has come for people to decide: are we Indians part of this country’s living culture, or are we just here to supply museums with dead bodies? 

— Terry Echo-Hawk

NAGPRA must ... be seen as more than a set of mandates; rather, it must be seen as a dense trope that is in the process of being encoded into our practices and discourses concerning the speaking, teaching, writing about, and possessing of culture.

— Kathleen Fine-Dare

The passage of the Native American Graves Protection and Repatriation Act by Congress in 1990 was an official government response to ongoing concerns about the practice of excavating Native American graves and the keeping of human remains and cultural artifacts in national museums and institutions all over the country. These

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artifacts include sacred, ceremonial items or clothing and accessory items attached to the bodies when buried. The Act mandates the return of excavated cultural items that are in the possession of federally funded museums and institutions. NAGPRA requires careful inventory preparation, consultation with tribal leaders and reparation of cultural items to the original Native American tribes. NAGPRA also establishes conditions and procedures for excavating or removing human remains and objects and prohibits the sale, purchase or transport of human remains and cultural artifacts. NAGPRA provides a solid legal means to protect Native American cultural items and to implement just practices of treatment and disposition of these items. However, it is important to note that NAGPRA is only part of the larger historical repatriation movement that dates back to at least the 1880s. Prior to NAGPRA, there had been some successful repatriation projects such as the return of the Zuni war gods from the Smithsonian in 1987.

The implementation of NAGPRA reportedly poses significant difficulties to the scientific community, at least to the archaeologists. Because of NAGPRA, the practice of excavating Indian graves for archaeological fieldwork and research is hindered. Many archaeologists alarmed that knowledge about the past of Native America would be lost with the implementation of NAGPRA because “if archaeology is not done, the ancient people remain without a history and without a record of their

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226 Ibid.
227 Fine-Dare, Grave Injustice: The American Indian Repatriation Movement and Nagpra, 118.
228 Ibid., 47.
229 Ibid., 177.
existence.” Moreover, some archaeologists pointed to the fact that a number of Indians were actually willing to sell sacred and ceremonial artifacts to museums (which they were not supposed or allowed to do because of tribal community rules and customs). On a somewhat extreme note, an archaeologist has compared the advent of NAGPRA to “the dark age of science.” In addition, many claimed that insufficient research of human anatomy on ancient bodies may also hamper progress of medical science which could help develop important cures for illnesses. Strong reactions from the scientific community to NAGPRA may suggest that there is at stake a dichotomy between common interests in scientific progress and Native American interests.

On this point, Kathleen Fine-Dare argues that the true dichotomy is not between Native American communities and science, but between Native American communities and discourses of domination. She notes that that is not to equate science with discourses of domination. NAGPRA does not generate opposing camps, Indians vs. science; because the fact of the matter is “many Indians are… scientists and many scientists are open to other theories of knowledge and truth other than those narrowly delineated by Baconian precepts.” According to Fine-Dare, the true target of Native Americans in defending NAGPRA is the “language of control…couched in terms of the universal science and the pursuit of truth.” Native Americans resisted the dominant culture that might favor scientific research on dead bodies of their

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231 An interview in Peck, "Bones of Contention: Native American Archaeology."
232 Interview with an archaeologist in Ibid.
234 Ibid., 147-8.
235 Ibid., 167.
ancestors not because they deemed science harmful to their culture and identity, but because it is degrading to human dignity to use bones and skulls of their ancestors’ dead bodies as objects in the lab or on the exhibition shelves of museums. With NAGPRA, the public loss of an invaluable source of information and research material for history and archaeology is inevitable, but appropriately necessary to restore the humanity and the perceived divinity of sacred items that were never supposed to leave where they belonged. Perhaps, as David Hurst Thomas puts it, “the profession of archeology almost uniformly misread the depth of belief among many elders and spiritual leaders who were deeply concerned about their dead.”

Furthermore, NAGPRA poses great challenges to the dominant ownership models of intellectual property. In essence, NAGPRA invalidates property rights held by museums and institutions over human remains and cultural artifacts even if they acquired these items in a lawful way. Museums and scientific institutions’ loss of these cultural items means diminished opportunities for the general public to learn about the past, conduct scientific research, and appreciate artworks of Native American culture. Archaeologists will have no copyright protection over their research articles about ancient Native Americans because they cannot conduct research on Indian bodies anymore. Loss of Native American cultural items may lead to fewer patrons to museums and lower donations from wealthy donors. From the vantage point of dominant ownership models of intellectual property, NAGPRA

236 Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity*, 211.
237 Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and Nagpra*, 33. (“Native American artifacts have always served as fine art investments, personal souvenirs, war booty, ‘power objects,’ research material, and ‘bait’ to attract the wealthy donors who are the lifeblood of museums.”)
hinders access to and creation of knowledge and perhaps should not be justified. Ultimately, NAGPRA defies dominant ownership models of intellectual property.\textsuperscript{238}

Moreover, it is important to understand that the “ownership” model of cultural property that NAGPRA creates extends beyond the conventional model of copyright, which is arguably the closest legal analogy. The cultural artifacts that were requested for repatriation were not artistic creations of the contemporary Native Americans, but of their ancestors. Under current copyright law, their ancestors may have rights to ask for the return of those items if they were removed from the community unlawfully, but not the contemporary Native American rights advocates who obviously did not contribute to creating those objects. Moreover, for the human remains, it is important to understand that even the most advanced technology cannot trace the accurate human genealogy for each human remain to associate with a certain tribe. Indeed, this is what gave rise to the Kennewick Man controversy, because at least five tribes claimed to be associated with the 9000-year old bones excavated by a group of archaeologists.\textsuperscript{239} However, this is not to dispute the strength of spiritual or emotional connectedness between the present Native Americans and their ancestors. On the other hand, the practice of human anatomy on dead bodies violates religious beliefs of certain tribes that have specific taboos about treating people after death. For both the physical sacred objects and the human remains, NAGPRA creates an “ownership” model of cultural property rights for indigenous groups to affirm their identity in the present and their connection with the past. The basic rationales underlying dominant


intellectual property ownership models fail to capture this aspect of human society.

As a legal framework, NAGPRA should be seen as a societal effort to correct past injustices and foster “new relationships of collegiality building, new understandings emerging painfully in light of old errors, and new humilities forming in the face of old arrogances.”240 The existence and the meaning of NAGPRA in terms of cultural property ownership reinforce Michael Brown’s argument in *Who Owns Native Culture?* that we need to find a way to “strike a balance between the interests of indigenous groups and the requirements of liberal democracy.”241 The purpose of NAGPRA is not really to trace who should own cultural items, but to establish the kind of social relationships created by Native American ownership of those cultural items. As Brown argues, “we should be asking not ‘who owns native culture?’ but ‘how can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?’”242 The social-relations framework as proposed in this thesis looms large, which deemphasizes the view of intellectual property in a creator/owner-centric model where title is identifiable and determinative, and conceptualizes intellectual property ownership as a social system involving different kinds of human relationships formalized through historical and social processes. As a result, the social-relations framework forces us to understand NAGPRA as a progressive act with the societal aim to construct future human relationships based on equal and mutual respect for members in a political community.

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240 Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and Nagpra*, 137.
242 Ibid., 10.
Kathleen S. Fine-Dare even elevates the importance of NAGPRA to a higher level to perceive it as a historic cultural document for Native Americans. According to her, NAGPRA is a compromise between the dominant culture and indigenous cultures with an effort to develop better relationships among people. But even so, it is unclear how much of repatriation can actually revive Native American identity and cultures, and to what extent repatriation can satisfy all parties’ claims. There are losses that can never be regained, but that does not mean NAGPRA is unnecessary. As Richard Guest points out, “[NAGPRA] seems to be driven by an innate societal value for the preservation of historical objects which express, identify, and memorialize our humanity.” With NAGPRA, society pays respect to indigenous cultures and shows a societal commitment to cultural preservation. These values are what a creator-centric model of intellectual property essentially fails to capture.

**Social relations matter**

NAGPRA and IACA best illustrate the ongoing challenge to the dominant ownership model from a Native American perspective. Richard Guest suggests that these two landmark legislations provide “a potential source of protection of Native American intellectual property. It can be applied to each of the Native American intellectual property issues.” If Guest is right, should intellectual property law be rewritten altogether, or should there be a different NAGPRA and IACA for each issue about Native American intellectual and cultural property that arises? Perhaps, there is

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243 There have been conflicting claims over the cultural items by different tribes, such as the Kennewick man controversy where five tribes in the Pacific Northwest claimed themselves to be affiliated with the remains of a man who is forensically not “Indian.” See Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and Nagpra*, 149.


245 Ibid.: 114. (Other issues such as patent protection for the Zuni seeds crops, copyright protection for Hopi Kachinas, and trademark protection of tribes’ names used in commerce).
a more important question to ask: What is the real motivating force behind NAGPRA and IACA?

Identity politics is an important consideration that goes into many scholars’ understanding of NAGPRA and IACA. For Fine-Dare, NAGPRA came about as a “result of lobbying by American Indian and Native Hawaiian peoples.” But she does not seem to think that NAGPRA and IACA actually balanced competing interests as one would think of the process of making laws. Perceiving NAGPRA as a cultural and legal product and on the false dichotomy between Indians and science, Fine-Dare writes, “the point of the law [is] not ‘balancing’ the interests of the possessors and the dispossessed. Nowhere in American history can it be said that the ‘scientific community’ has been discriminated against, prevented from recognizing its heritage, or stripped of its personnel and products by marauding invasive forces. And nowhere in NAGPRA is anything said about achieving balance.” The question for both NAGPRA and IACA is not on the abstract goal of promoting “the greatest good,” because whom the good is for matters as in the case of NAGPRA and IACA, but essentially a question of advocacy and justice. Perhaps, there is nothing good in accepting an intellectual property regime “to promote the Progress of Science and the useful Arts” when the haunting past remains fresh in Native American minds that the procurement of Indian heads was at one time an official U.S. policy. Undoubtedly, Native Americans have a special history in the U.S. that gives them a special kind of power and influence on the making of social policy. As Carole Goldberg argues, “the Native American example [of NAGPRA and IACA] should not serve as a universal

246 Fine-Dare, _Grave Injustice: The American Indian Repatriation Movement and Nagpra_, 252.
247 Ibid., 161.
248 Native American Rights Fund et al. 1990 quoted in Ibid., 117.
model because other racial and ethnic groups entered North America as individual slaves or immigrants and lack sovereign political structures; nevertheless, the efforts to protect Native American cultural products offer important lessons for other groups.”

Understanding each group’s cultural past and its relationship to the dominant group helps refresh perspectives on the social relationships that the related social policy may imply. By challenging the dominant ownership models of intellectual property, NAGPRA and IACA broaden our views about the complex history and the intricate relationship between Native American communities and the dominant group in society.

Moreover, the cultural and intellectual property rights conferred by NAGPRA and IACA do not seem to be justified on the familiar grounds that intellectual property rationales normally rely on. Contemporary Native Americans do not have natural or moral intellectual property rights over the cultural artifacts (in the case of NAGPRA) or expressions of their culture (in the case of IACA) because they are not the individuals who created them, in the same way as an author owning the copyright of a book he or she wrote. Will they necessarily promote creation of new knowledge and useful arts once they have certain rights over these objects? It is a likely possibility, but we cannot know for sure. One thing we certainly know, however, is that it was not the major motivation for either law. IACA promotes economic well-being of Native Americans but that goal is secondary to promoting the cultural richness of Native Americans and reinvigorating the Native American identity as a human community. NAGPRA does not necessarily and directly incentivize Native

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American descendents to create new artworks based on the repatriated cultural artifacts, though more Indian artists might be motivated to do so. Both NAGPRA and IACA passed precisely because sufficient attention was paid to ethical issues of human dignity and cultural preservation with an aim to foster a new contour of relationship between Native American communities and the rest of society. As prominent Native American activist Suzan Shown Harjo says, “the major policy achievement and the hardest-fought battle in the development of [NAGPRA and IACA] has been the humanization of Native Peoples.”

One may argue that the success of IACA and NAGPRA contributes to greater social utility for both Native Americans and non-Native Americans, albeit at some expense of the progress of science and public enjoyment of arts. Therefore, the two laws are justified on utilitarian grounds. This is indeed a utilitarian explanation about NAGPRA and IACA as social policies, but it is not the same as the utilitarian theory of intellectual property. Even if we have to accept a utilitarian explanation, such an explanation is still unsound. What if it is hypothetically discovered that NAGPRA in fact took away an opportunity from an ingenious scientist who could have invented a cure for cancer that could potentially save millions of lives? What if it is found out that IACA in fact took away jobs and livelihoods of thousands of people in Asia who would then starve to death? These two hypotheses would not invalidate the case for NAGPRA and IACA simply because the motivation for these two laws was not based on a utilitarian accounting of foreseeable cost and benefit.


251 The distinction between a utilitarian explanation and the utilitarian theory of intellectual property has been made clear in Part 1.1
Moreover, as suggested in the previous part of this thesis, the major problem with utilitarianism is that we do not know what “the good” is until we see it. The utilitarian theory of intellectual property sees “the good” as promotion of science and culture and dictates that social policies about science and culture must follow the canonical ownership models that intellectual property law provides. “The good” that the utilitarian theory of intellectual property pursues is one in which scientists conduct anatomy research on the dead bodies that they excavated in Indian graves in the name of science, museums keep skulls on exhibitions in Washington in the name of native arts, and imported products misrepresent indigenous cultures. As Fine-Dare puts the point, “[the scientists] point to a future time when improved technology can yield heretofore undreamed-of secrets, but they do not connect propositions in present time to theories that can be linked, as all social theories must, to ethical ramifications of the uses of the particular knowledge in question. In such a context, the invocation of ecumenical science as a rationale for holding onto bones and artifacts in perpetuity can therefore only sound like the invocation of religious dogma, which, in fact, it is.”

NAGPRA and IACA challenge the dominant ownership models of intellectual property not as an antithesis to science and culture, but perhaps as a powerful question to the seemingly misguided universality of utilitarian principles embedded in intellectual property law in human social life.

The success of NAGPRA and IACA promises a new contour of social relationships between Native American communities and the public at large. In the case of NAGPRA and IACA, the social-relations framework of intellectual property forces us to look into the relationships between Native American groups and the rest

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of society in the larger context of the history of Native American social and cultural
development in North America. The social-relations framework helps us focus on the
relationships among people at stake and encourages us to take reasons purported by
NAGPRA and IACA advocates seriously. History matters, but only when we are
ready to accept it and to develop better relationships in a human community.
3.2

A DIGITAL CHALLENGE: THE CREATIVE COMMONS

Information wants to be free.  
Stewart Brand at the Hackers’ Conference in 1984.

Our markets, our democracy, our science, our traditions of free speech, and our art all depend more heavily on a Public Domain of freely available material than they do on the informational material that is covered by property rights.  
James Boyle.

We work to increase the amount of creativity (cultural, educational, and scientific content) in “the commons” — the body of work that is available to the public for free and legal sharing, use, repurposing, and remixing.  

What is Creative Commons?

Once [the free culture] movement has its effect in the street, it has some hope of having an effect in Washington.  
Lawrence Lessig.

Creative Commons was founded by prominent legal scholar Lawrence Lessig in 2001 as part of the Free Culture movement, originating in fierce opposition to legislative trends in extending copyright protections such as the Sonny Bono Copyright Extension Act enacted in 1998.  
As a non-profit organization, Creative

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254 Creative Commons, "What Is Cc?," http://creativecommons.org/about/what-is-cc.
256 The Sonny Bono Copyright Extension Act 1998 signed into law by President Bill Clinton extended copyright terms in the United States by twenty years. The law was criticized for influence from big media’s corporate interests such as Disney and Universal, though some argue that the 1998 Act was
Commons provides a free legal licensing platform for authors and artists to expand the availability of their creative works for any users to build upon freely and legally. Under current copyright law, all creative works are subject to protection upon fixation with “All Rights Reserved” by the authors. With simplified legal tools enabled by an innovative electronic licensing platform, authors and artists of creative works licensed under Creative Commons get to choose which right they wish to retain and which right public users may have when using their works. By allowing flexible options for authors, artists and the general public with an interest in using their works, Creative Commons increases the opportunity for new authors and artists to access knowledge and build upon it. As James Boyle puts it, “Creative Commons was conceived as a private “hack” to produce a more fine-tuned copyright structure, to replace “all rights reserved” with “some rights reserved” for those who wished to do so.”

Creative Commons was founded in the firm belief that new information builds on past information and there are a lot easier ways of making more and better new information creatively with the help of fast-growing technologies. New information technologies such as computer software and the Internet give everyone the ability not only to consume information better, but also to creatively reutilize, remix and recreate information. In particular, the rise of Web 2.0 technologies, such as blogging, social networking, and user-generated information websites, has led to new forms of expressing, communicating and sharing information with others. However, copyright law as it stands gives one-size-fits-all rules for every creative work while the author or artist of that work may wish to have his or her own work freely available to

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Boyle, The Public Domain: Enclosing the Commons of the Mind, 182.
everyone for certain purposes. Lawrence Lessig argues that the canonical rules of copyright law are too stringent to really provide a creativity-fostering environment and that individuals should be able to decide how others can use their works. In essence, on Creative Commons, authors and artists get to choose what sticks they want to have in the intellectual property bundle, as opposed to being told by the government what sticks they should have.

Creative Commons is not an isolated phenomenon; it is spreading and it is among many others. Since 2001, Creative Commons claims to have licensed more than 130 million works in 52 national jurisdictions under its model while continuously expanding its model to more countries. The model also led to the establishment of the Science Commons to help license scientific works on a similar licensing platform. In other areas, there are many existing non-legal models of intellectual property ownership, such as the norms-based intellectual property system sharing recipes among French chefs on an individual basis without legal interference, comedians protecting jokes on an informal contractual basis, alternative effective norms used in scientific communities in place of full-blown

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258 Lessig, Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity.
259 Creative Commons, "What Is Cc?." (History page)
260 Ibid
261 Emmanuelle Fauchart and Eric von Hippel, "Norms-Based Intellectual Property Systems: The Case of French Chefs," MIT Sloan School of Management Working Paper 4376-06 (2006). (this empirical study shows that norms-based systems of intellectual property may have similar advantages as a law-based system in terms of delivering economic returns to participants of the system, as demonstrated in the case of French chefs with different ranks in the profession sharing recipes)
262 Dotan Oliar and Christopher Sprigman, "The Emergence of Intellectual Property Norms in Stand-up Comedy," American Law & Economics Association Annual Meetings, no. Paper 41 (2008). (this article argues that costs of using the copyright system are too high for comedians and resort to a community-based norms system that challenges the copyright norm that only protect expressions of ideas, but not appropriation of “joke ideas.” The article shows that an informal norms-based system of intellectual property works best for the comedians’ community)
intellectual property rights, etc. In other words, the dominant ownership models of intellectual property with rigid rules created by lawmakers are challenged in every aspect of knowledge creation from literary and artistic works to inventions. While sharing the same concern about the law’s deficiency in maximizing creativity, Creative Commons is distinct from other norms-based systems in that it actually provides a common legal system (as opposed to a norms-based system in other cases) for everyone with an interest in sharing their creative works to be able to do so in a legal way without any unwanted legal restrictions.

More importantly, Creative Commons poses challenges to fundamental understandings of the role of copyright law as it raises questions about the core assumptions of intellectual property law. First, the Creative Commons model questions the utilitarian assumption that the only way to incentivize production of creative works is through full copyright protection. Under copyright law, every expressive work is subject to protection upon fixation without regards to whether the creator of that work consents to protection or not. On the other hand, Creative Commons was built around the idea that people may be more interested in sharing their works with others than the economic profits from exclusive rights to control their works. Therefore, as there is a more flexible way that allows people to efficiently share their works, more creativity will be encouraged because people are able to access Creative Commons-licensed works without worrying about copyright infringement. Moreover, the license allows people to retain the right to make

\[263\] Arti Kaur Rai, "Regulating Scientific Research: Intellectual Property Rights and the Norms of Science," Northwestern University Law Review 94, no. 1 (1999). (this study identifies science research norms within the scientific community, especially biotechnology, such as patent pool arrangement, mutual agreement to not use patent enforcement..., that promote more effectively inventions and development goals through the public domain through privatization)
commercial profits from their works, or the right to the integrity of the content if they wish to do so. The rationale behind Creative Commons, according to its founder, stems from a free-market ideology which is allegedly contrary to copyright law: “[In free markets,] we don’t grant every merchant a guaranteed market; we don’t reward every new marketing plan with a twenty-year monopoly; we don’t grant exclusive rights to each new way of doing business.” Creative Commons gives more freedom to authors and artists in deciding how their works can be used; otherwise, they would have to abide by centrally decided rules of copyright law. In short, Creative Commons proves that creativity can be encouraged in creative ways.

Second, Creative Commons calls into question the utilitarian economic assumption that copyright law is the most effective way to reduce transaction costs between individual sellers and buyers of intellectual content. In fact, Creative Commons can still reduce significant transaction costs whenever an author or artist wants to publish their works to the public because it offers a common “contract” between producers and users of information while allowing room for individual adjustments. By providing a free licensing platform with the help of technology, Creative Commons can reduce transactional effort between providers and users of creative works without resorting to the copyright law system. Creative Commons is no doubt a novel ownership model of intellectual property in which owners of

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264 Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, 77.
265 See The Landes-Posner Model in Part 1 (The Utilitarian Theory of Intellectual Property)
266 When one licenses their works on Creative Commons, he or she will be asked two basic questions: i) whether he or she agrees to allow use of the licensed work for commercial purposes, and ii) whether he or she agrees to allow modification to the licensed work.
intellectual property have the freedom to decide at their discretion how their works can be used to promote more creativity.

Third, and most importantly, Creative Commons provides a platform where social relationships between different generations of makers of ideas are fostered. Owners of 130 millions works licensed under Creative Commons are evidently interested in sharing information with others. Together with other user-generated websites, such as Wikipedia and YouTube that extensively use Creative Commons licenses, Creative Commons contributes to producing an enormous amount of new information and creativity, which would otherwise be limited by copyright law. The creative community also has better means to communicate their works with one another and foster new relationships among them. Creative Commons was founded on the belief shared by the creative community that creativity should be encouraged in alternative ways other than stringent intellectual property law, which can be contaminated with corporate interests. As Creative Commons’ slogan says, it “saves the world from failed sharing.”

The development of Creative Commons poses challenges, at least on a conceptual level, to the dominant ownership models of copyright law. Creative Commons increases the freedom that authors and artists get to choose which combination of sticks in the intellectual property bundle they wish to retain. The motivating force behind Creative Commons, however, is the need to connect generations of creative thinkers, develop a new relationship conducive to sharing information among them, and provide more public access to their works without legal restrictions. Creative Commons is especially creative in that it works along with

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267 Creative Commons, "What Is Cc?"
copyright law to protect certain rights of the authors at their request, but effectively enables them to share their works with others. Common rationales for intellectual property essentially fail to capture the dynamic of relationships among makers of ideas on the Creative Commons. These relationships do not have the same kind of power as the NAGPRA and IACA case because the challenges that Creative Commons poses are not necessarily aimed at legislative changes, though they certainly have the potential of influencing changes in copyright law. Rather, Creative Commons’ challenges to the dominant ownership models of intellectual property stem from a grassroots movement to share ideas without legal restrictions in the creative community. The power resource that Creative Commons mobilizes to challenge existing ownership models is not wholly political (as in NAGPRA and IACA), but a combination of community interests in sharing ideas and the technology that can facilitate the sharing of ideas. However, as Lawrence Lessig says, “once [the free culture] movement has its effects in the street, it has some hope of having an effect in Washington.”268 Certainly, successful models like Creative Commons will leave important implications on legislative changes in the future.

Creative Commons, however, is different from the “intellectual commons” in the Lockean labor theory of intellectual property rights. The common that Creative Commons creates is not the public domain, but a common platform for using legal tools to license creative works as the individual authors and artists see fit. In other words, Creative Commons modifies the rules of copyright and gives traditional copyright holders the options for their works to be shared and used without legal

restrictions. The success of Creative Commons makes us take seriously reasons
purported by scientists, authors and artists that their work should be shared without
legal restrictions. With Creative Commons, the future contour of social relationships
is one that fosters creativity within the creative community. The two streams of
cultural production – the commercial one that relies on copyright protection and the
Free Culture-inspired models such as Creative Commons that relies on authors’ good
will and users’ good faith – will help foster a thriving competition for cultural and
intellectual enrichment.

Viewing intellectual property as social relations helps us understand why
Creative Commons could become successful. Common rationales for intellectual
property using the language of incentives and rewards cannot sufficiently explain the
development of Creative Commons. The existence of Creative Commons and its
success also mean that the social effects of dominant ownership models of intellectual
property do not meet the need of the creative community for alternative measures to
channel their creative efforts. Preoccupation with justifying the legitimacy of
individualistic claims of intellectual property blindfolds us to the human relationships
at stake that are far more complex than the common rationales for incentives and
rewards.
Conclusion

TO COMPLETE THE INCOMPLETE

At the Americas Forum on “Culture As Property: Owning and Othering in the Americas” at Wesleyan University on April 9, 2010, I asked Professor Rosemary Coombe of York University whether the social reality of intellectual property invalidated the basic theories of intellectual property. She responded, “theories of intellectual property are never meant to be complete.” It dawns on me that most theories in the social sciences are constantly challenged, not just by other theories, but by the reality that they are supposed to reflect. New theories tend to complicate understandings of reality, rather than negate altogether past theories.

This thesis project has not resolved every discernible issue about intellectual property, nor is it the goal of this thesis to do so. Instead, within its limited scope, this project has attempted to suggest that none of the existing theories really offer a complete rationale for intellectual property, especially when we examine them in the context of social life. On the conceptual side, the utilitarian theory, though influential and significant in the U.S., is structurally incoherent because of its feasibility.

269 Professor Rosemary Coombe presented a paper on “Possessing Culture: Exploring Political Economies of Community Subjects and Cultural Rights” at the Americas Forum.
problems and the problematic notion of utility. The natural- and moral-rights theories, on the other hand, fail to capture the changing contingencies and new conditions of human relationships that could influence different ownership models of intellectual property. Combining two existing theories to explain intellectual property is not viable nor persuasive, as both conceptualize intellectual property rights as two different species: one that is socially constructed and a product of the state; and one that is derived from natural law and precedes the state.

In my thesis, I have proposed the social-relations framework to broaden significantly questions about intellectual property as a social system and to complicate common understandings of what intellectual property ownership entails. The proposed framework itself, however, does not identify what rules there should be for intellectual property, as I do not aim to offer a normative theory, nor do I advocate for any specific ownership models. Instead, I suggest that we reconceptualize intellectual property as social relations formalized through social processes to legitimize mutual claims over the use of intellectual goods as valued resources. These social processes may or may not correspond to the rationale offered by existing theories of intellectual property, as the case may be, but they help us understand the contour of social relationships that result. In other words, by looking at specific rules of different ownership models of intellectual property, we can derive important understandings of the relationships among social actors at stake. Moreover, the social-relations framework also suggests that new understandings of social relationships have the potential to encourage changes and challenges to the dominant

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270 A comparison between the social-relations framework and other competing theories of intellectual property is offered in Appendix 2.
ownership models. In essence, the contour of social relationships and the set of rules about intellectual property are parallel, and one can influence and be influenced by the other.

In my two case studies, NAGPRA and IACA challenge the dominant ownership models of intellectual property by raising issues of past injustices and the need for indigenous cultural preservation. Applying the existing theories of intellectual property cannot explain why NAGPRA and IACA can “violate” the canonical rules of intellectual property ownership. On the other hand, by shifting attention from the question of who owns intellectual property, the social-relations framework looks into the historical social relationships between Native American groups and society at large to make sense of NAGPRA and IACA. Without a doubt, NAGPRA and IACA would not have happened, had there been no historical reasons of past wrongdoings done to Native American groups. Moreover, NAGPRA and IACA represent a societal effort to respect minority groups’ interests in the political community and to develop a better future contour of social relationships.

In my second case study, I use the social-relations framework to detail the development of the Free Culture movement, exemplified by the emergence of Creative Commons as a licensing platform for authors and artists to encourage more creativity. Creative Commons challenges the dominant ownership models by mobilizing individual interests in sharing intellectual content and by utilizing the power of technology to construct a more flexible ownership model of intellectual property for the creative community. While conventional understandings of intellectual property ownership cannot account for the rise of Creative Commons and
would perhaps count it as an exception, the social-relations framework takes seriously the motivating force for Creative Commons that originate in the common interest in sharing ideas. The existence of Creative Commons gives rise to new relationships between generations of authors, artists and anyone with an interest in sharing ideas. Creative Commons is not a substitute for dominant ownership models, and is probably better understood as a complementary alternative. The two streams of cultural production, one relying on law-based ownership models and one relying on community-based ownership models, offer healthy competition for creativity. More importantly, the success of Creative Commons suggests ideas for legislative changes in the future. Stemming from a grass-root desire to develop a new relationship within the creative community, Creative Commons proves to have the potential to influence the legal norms that govern intellectual property ownership.

My approach to intellectual property is unique in that I started from a basic understanding of property ownership, with the historical development of property rules as a social institution, to make sense of intellectual property rather than relying completely on the widely accepted theories of intellectual property rights. I drew on Joseph William Singer’s social-relations framework to view intellectual property from a property ownership’s perspective. I have then argued that intellectual property is an interlocked network of social relationships that are formalized through indeterminate social processes, rather than conforming to specific rationales. In other words, the social-relations framework questions the objective truths purported by theories of intellectual property. On the other hand, I showed that in order for intellectual property to become a social system, those social processes are constantly
adapted, modified and revised in response to the social relationships at stake. Like property, intellectual property can influence and be influenced by the nexus of human relationships in society.

I intended my social-relations framework to take a different direction from contemporary arguments about intellectual property. For instance, in criticizing current intellectual property law, Lawrence Lessig states that,

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\text{in the context of intellectual property, the general problem is magnified by another blindness, the error induced by thinking of intellectual property as property. By simplifying the nature of the rights that IP law protects, by speaking of it as property, just like the ordinary property of cars and homes, our thinking is guided in a very particular way. When it is viewed as property, we see endless arguments for strengthening IP and few for resisting that increase.}^{271}
\]

Instead, I have argued that the trajectory of intellectual property is closely connected with property if ownership is the point of reference. As shown throughout the thesis, property has never been seen or accepted as restrictive rights or unchanging or independent of social relationships. Rules about property are influenced by the relative power balance of the social actors at stake and they can shed light on the contour of social relationships of property. The social-relations framework shows that intellectual property is no different from property and should be understood as social relations.

Throughout my thesis, I have repeatedly emphasized that the social-relations framework is an analytical tool, not a normative theory, of intellectual property because it does not advocate for any specific kinds of intellectual property ownership. However, toward the end of Part 2.3 where I addressed the question of legitimacy

\[^{271}\text{Lessig, Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity.}, \text{p237.}\]
within the social-relations framework, I implied that who makes the rules for intellectual property matters. Although the social-relations framework as I present and argue for in this thesis does not offer normative guidance on intellectual property ownership, there is certainly an arguable normative side to it. I would suggest future research on intellectual property to focus on the formulation of norms about making rules such as the Rawlsian original position and distributive justice to expand on the normative implications of the social-relations framework. Such a project would not only encompass the making of rules for intellectual property, but also the basic foundation of how fair and just rules can be made.

Alternatively, future social-relations frameworks can adopt a Durkheimian approach to the law to argue a normative position on intellectual property rights. In this respect, rules that govern social relations in any property regime should contribute to social cohesion because the law, for Émile Durkheim, reflects the nature of social solidarity. I would argue that such an approach could find substantial support and evidence from history. Regarding the French Revolution, Edmund Burke, for instance, has suggested that the institution of property is crucial to stabilizing social order.272 Moreover, Hegel once explained the important role of the landed class in maintaining social stability because the decision-making process will avoid incoherence and “accidental character.”273 If property is a set of social relations, which could include good and bad relations, it would follow that the law that governs property should produce good social relations. Whether the notion of social cohesion

273 Hegel, *The Philosophy of Right (1821)*, p313
can provide a convincing answer to the “goodness” of social relations will be a fruitful avenue for future research and studies.

Professor Coombe’s answer to my question at the Americas forum prompted me to change the title of this thesis to “Incomplete Rationales for Intellectual Property Ownership and A Social-Relations Perspective.” As this thesis has attempted to show, the existing ownership models reflect incomplete rationales for the social reality of intellectual property. This is, however, not to suggest that my social-relations framework is the final step of completing the incomplete rationales, as new questions tend to arise and need to be addressed whenever we reconstruct conventional concepts in a certain way.\textsuperscript{274} This thesis at its best is only a modest effort to contribute to completing the incomplete existing rationales for intellectual property by adopting an alternative perspective that emphasizes empirical accounts of the human relationships at stake.

\textsuperscript{274} One question that arises from the application of the social-relations framework is how judges can decide intellectual property cases presented to them without stepping into the realm of judicial legislating.
# Appendix 1

## Principal Modes of Legal Protection for Intellectual Work

<table>
<thead>
<tr>
<th>Source of law</th>
<th>Patent</th>
<th>Copyright</th>
<th>Trademark</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent Act</td>
<td>Patent Act (federal)</td>
<td>Copyright Act (federal); common law</td>
<td>Lanham Act (federal); common law</td>
</tr>
<tr>
<td>Subject matter</td>
<td>Process, machine, manufac.</td>
<td>Literary, musical, choreographic,</td>
<td>Trademarks; service marks;</td>
</tr>
<tr>
<td>Patent Act</td>
<td>or composition of matter;</td>
<td>dramatic and artistic works as well as</td>
<td>certification marks (e.g., Good</td>
</tr>
<tr>
<td>Trademark</td>
<td>plants (asexually</td>
<td>computer software and aesthetic</td>
<td>Housekeeping); collective marks</td>
</tr>
<tr>
<td>Patent Act</td>
<td>reproducing); designs</td>
<td>elements of useful articles limited</td>
<td>(e.g., Toy Manufacturers of</td>
</tr>
<tr>
<td>Patent Act</td>
<td>— excluding: laws of</td>
<td>by idea/expression dichotomy (no</td>
<td>America); trade dress (§43(a)); no</td>
</tr>
<tr>
<td>Trademark</td>
<td>nature, natural</td>
<td>protection for ideas, systems,</td>
<td>protection for functional features,</td>
</tr>
<tr>
<td>Patent Act</td>
<td>substances, printed</td>
<td>methods, procedures); no protection</td>
<td>descriptive terms, geographic</td>
</tr>
<tr>
<td>Patent Act</td>
<td>matter (forms), mental</td>
<td>for facts/research</td>
<td>names, misleading aspects, or</td>
</tr>
<tr>
<td>Patent Act</td>
<td>steps</td>
<td></td>
<td>“generic” names (e.g., thermos)</td>
</tr>
<tr>
<td>Patent Act</td>
<td></td>
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</tbody>
</table>

### Standard for protection

| Patent Act      | Novelty; non-obviousness; and utility (distinctiveness for plant patents; ornamentality for design patents) | Originality; authorship; fixation in a tangible medium | Distinctiveness; secondary meaning (for descriptive and geographic marks); use in commerce (minimal); famous mark (for dilution protection) |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |

### Scope of protection

<p>| Patent Act      | Exclusive rights to make, use, sell innovation as limited by contribution to art; extends to “equivalents” | Rights of performance, display, reproduction, derivative works; limited protection for attribution and integrity afforded some works of visual art; protection against circumvention of technical protection measures | Exclusive rights in U.S.; likelihood of confusion; false designation of origin (§43(a)); dilution (for famous marks) |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |
| Patent Act      |                                                                                                            |                                                                                                           |                                                                                                                                  |</p>
<table>
<thead>
<tr>
<th><strong>Period of protection</strong></th>
<th>20 years from filing (utility); extensions up to 5 years for drugs, medical devices and additives; 14 years (design)</th>
<th>Life of author +70 years; “works for hire”: minimum of 95 years after publication or 120 years after creation</th>
<th>Perpetual, subject to abandonment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Disclosure</strong></td>
<td>Right to patent lost if inventor delays too long after publishing before filing application; full disclosure is required as part of application; notice of patent required for damages</td>
<td>© notice and publication no longer required, but confer certain benefits © notice optional; establishes <em>prima facie</em> evidence of validity, constructive knowledge of registration, confers federal jurisdiction, becomes incontestable after 5 years of continuous use, authorizes treble damages and attorney fees, and right to bar imports bearing infringement mark</td>
<td></td>
</tr>
<tr>
<td><strong>Rights of Others</strong></td>
<td>Only if licensed; can request reexamination of patent by Patent Office</td>
<td>Fair use; compulsory licensing for musical compositions, cable TV, et al.; independent creation</td>
<td>Truthful reflection of source of product; fair and collateral use (e.g., comment)</td>
</tr>
</tbody>
</table>

Appendix 2

A comparison of existing intellectual property theories with the social-relations framework

<table>
<thead>
<tr>
<th></th>
<th><strong>Utilitarianism</strong></th>
<th><strong>Natural/Moral-rights</strong></th>
<th><strong>Social-relations</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Nature of intellectual property rights (IPRs)</strong></td>
<td>Rights are social constructs and a product of the state. IPRs are correct incentives.</td>
<td>Rights are derived from natural law and precede the state. IPRs are fair rewards.</td>
<td>Rights are social constructs and a product of the state. IPRs are social relations.</td>
</tr>
<tr>
<td><strong>Nature of the theory</strong></td>
<td><strong>Normative:</strong> which arrangements of IPRs are justifiable.</td>
<td><strong>Normative:</strong> which arrangements of IPRs are justifiable.</td>
<td><strong>Descriptive:</strong> how to describe and explain the structure of IP law.</td>
</tr>
<tr>
<td><strong>Goal of law, social structures</strong></td>
<td><strong>Singular/Absolute:</strong> Conformity with utility maximization.</td>
<td><strong>Singular/Absolute:</strong> Conformity with laws of nature.</td>
<td><strong>Indeterminate:</strong> Dependence on individual personal values, power structure and social contexts.</td>
</tr>
</tbody>
</table>


Creative Commons. "What Is Ce?" http://creativecommons.org/about/what-is-cc.


New York: Clarendon Press ;

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