What's Mine is Mine, Because it's Better if it's Mine:
A Defense of a Rule/Incentives-Based Theory of Intellectual Property Rights

Jeffrey L. Grinde Jr.
Ripon College
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I: An Introduction

What does it mean to say that we have a right to property? This murky question becomes murkier when we look at intellectual property because it is not the type of thing that we can physically hold or protect from being taken. What we want is a theory that explains why we have intellectual property rights. Thus, the goal of this paper is to determine what those rights are and how one can justify the claim that we have them.

In this paper, I will argue that we should accept the rule/incentives-based utilitarian theory as the best justification of the view that we have intellectual property rights. Firstly, I will argue that intellectual property rights are composed of three sub-rights. These sub-rights are the right to own intellectual property, the right to profit from intellectual property, and the right to be recognized for one's intellectual property. Secondly, I will argue that whatever theory best grounds the three sub-rights of intellectual property rights is the account that we should accept. The rule/incentives-based utilitarian theory best grounds the three sub-rights. Hence, we should accept the rule/incentives-based utilitarian theory.

II: Do Intellectual Property Rights Matter?

In today's world, a vast amount of wealth is generated as intellectual property. A principled theory of what intellectual property rights we have and what grounds our ability to have them is useful and important for several reasons. Firstly, a principled theory of intellectual property rights can be used in the court of law to adjudicate conflicts that arise when parties lay claim to intellectual property. Secondly, because intellectual property is a form of livelihood for many, knowing what rights one does and does not have to intellectual property allows individuals to "know the rules" that control the game they are playing. In essence, because intellectual property is so important to the world that we live in and to the people who live in it,

we want a theory that properly tells us what rights we have to intellectual property, and why we have those rights.

III: We Have Always Thought About Intellectual Property Rights

What exactly do we mean by intellectual property rights? In the following section, I will show that 'intellectual property rights' is an umbrella term that refers to three sub-rights: the right to own intellectual property, the right profit from intellectual property, and the right to be recognized for one's intellectual property. Intellectual property rights are grounded in legal and moral thinking about property. To show that this is the case, I will provide historical precedent for thinking about intellectual property rights and draw some important lessons from them.

The first documented case of talking about having a right to intellectual property was approximately in the year 500 B.C.E. (Bugbee 1967). It arose through rather strange beginnings, as it revolved around chefs in the ancient Greek colony of Sybaris. These chefs sought, and were granted by the governing body, protection of their culinary creations in the form of one year monopolies. During that time, no other chefs were legally allowed to prepare the same dishes under penalty of law. The chefs argued that they had sole claim to own the recipe and structure of their specific dishes on the grounds that each chef had spent considerable time, effort, and resources to create the unique dishes. In this case, what we should come away with is that a right to intellectual property is the right to own that property.

The ancient Romans also contributed to the history of thinking about intellectual property rights. This development came about as a result of the Roman poetic tradition and their tendency to celebrate the artist. Two cases will be presented in which issues arose akin to what we take today to be intellectual property rights. The first case involves the epigrammatist Martial, who accuses another epigrammatist, Fidentinus, of illegitimately using parts of Martial's work as his

own without properly offering the source. The second case revolves around the Roman's legal development to consider intellectual property as legitimate property without necessarily making intellectual property laws.

In this first case, Martial (41 C.E.-104 C.E.) catches Fidentinus reciting his own work without citing the original writer of the verses. In true poetic fashion, Martial confronts this literary theft with the versus:

> Fama refert nosotros te, Fidentine, libellos
> non aliter populo quam recitare tuos.
> *si mea vis dici,* gratis tibi carmina mittam:
> *si dici tua vis,* hoc eme, ne mea sint.
>
> Rumor has it, Fidentinus, that you recite my
> little books in public as if they were your own.
> If you have the poems called mine, I'll send you them for free:
> If you want them called yours, but this, so that they won't be mine.

The translator, Rimmel (2008), writes that, "the implication of the curious last line seems to be that Fidentinus need only buy this book, or pay Martial off, and he can pretend he wrote these *camina* with impunity." Martial was not primarily interested in having sole possession of his verses. Rather, what he wanted was to be recognized for creating the verses and to be compensated for having his verses used by someone else. The lesson from this example is that intellectual property rights entail the right to recognition of one's intellectual property and the right to profit from it.

The second case involves Roman law taking into consideration the fact that one can have a right to intangible property (Ver Steeg 2000). Roman law needed to consider that the efforts of artist's labor was genuinely considered to be property. An issue that Ver Steeg writes about in *The Roman Law Roots of Copyright* is that there was a difference between the tangible aspect of common types of property, such as land, resources, or tools, as opposed to paintings or pieces of poetry. In *An Introduction to Roman Law*, Barry Nicholas goes further to claim that, "The law of

things includes all those rights which are capable of being evaluated in terms of money" (1962). Since patrons were putting forth vasts amounts of money to support artists and their creations, the intellectual creations thereby became a member of the law of things.

These "things" (*res*) which were initially referred to as *res corporales*, were all types of physical, tangible property that could be evaluated in terms of their financial worth. However, as the prevalence of artists' works increased, Roman law developed to include *res incorporales* (Nicholas 1962). Thus, the law recognized that intangible creations could be a type of property. In the *Institutes*, the Roman jurist Gaius was the first recorded individual in Roman law to truly incorporate this thought of *res incorporales* into a distinct legal concept (G., & Reinach 1965). Roman law scholars and the legal system itself recognized that "technically speaking, intangibles could not be possessed in the same manner as tangibles" (Ver Steeg 2000). As a result, specific rules were eventually developed within Roman law pertaining to the purchase and transfer of things that fell under the category of *res incorporales*. The takeaway from this case is that Roman law adjusted itself to address a right to intellectual property. Namely, the lawful recognition and protection of the right to own intellectual property.

The Republic of Florence and England are two examples where the conception of intellectual property rights fundamentally changed. The case of Filippo Brunelleschi (1377 C.E.-1446 C.E.), an architect commissioned by the prominent Medici and Pazzi families illustrates a change to the intellectual property rights that were recognized. The Republic of Florence realized the importance of protecting the rights of authors because doing so would satisfy the wealthy patrons who demanded more art, and it sought to bring about a legal method of doing just that. Thus, on June 19th, 1421, just as Brunelleschi had been commissioned by the Medici family to

design the sacristy of San Lorenzo, the Republic of Florence granted him the first type of patent for his design (Hyman 1974).

This patent/statute had the effect of establishing that authors and inventors had a right to their intellectual work that others could not infringe under penalty of law. Furthermore, it created a system in which authors and artists were encouraged to produce more work on the grounds that their productions would be recognized by the state as having specific rights associated with them (Bugbee 1967). Bugbee has gone to so far as to say that the implementation of this statute was a significant contribution to the Renaissance in Florence. He argues that artists were more incentivized to produce greats works in virtue of having legal protections and recognition for their efforts.

Approximately 150 years after this monumental legal decision by the Republic of Florence, England followed suit with two legal decrees in 1624 and 1710: The Statute of Monopolies and the Statute of Anne, respectively. The Statute of Monopolies removed any previous and future patents or monopolies granted by the crown, except on future patents or monopolies granted for purely novel techniques, processes, or creations (Ramon 1959). Furthermore, that future patent or monopoly on a novel type of activity or creation would only hold for fourteen years before that exclusivity would expire (Coke 1624). One intellectual pursuit that was left out of the Statute of Monopolies was that of literary works. This changed when the Statute of Anne was enacted, which began with the following:

> "Whereas printers, booksellers, and other persons have lately frequently taken the liberty of printing, reprinting, and publishing books without the consent of the authors and the proprietors...to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for encouragement of learned men to compose and use books, be it enacted…" (Worltley 1710).

This statute explicitly stated that it was possible to steal intellectual property. In doing so, it lawfully recognized the right to profit from one's intellectual property on the grounds that authors depended on their works for their livelihood. Thus, because of this dependency, creators of intellectual property ought to be compensated for their work. If they were not compensated for having their work used by others without permission, thievery was being committed. In the eyes of the British legal system, reprinting a book without compensating the author was no different than taking a chair from a carpenter without paying him or her. Furthermore, this Statute implemented a new type of protection of intellectual property rights in the form of the first "modern" copyright law (Bentley 2010). The formation of this conception of a copyright established that governments and courts have the authority over private parties to determine intellectual property rights.

These historical cases demonstrate that we have had intellectual property rights codified into law ever since we have thought about property. The takeaway from the above cases is that when we say that we have the right to intellectual property, we really mean that we have three sub-rights to intellectual property. The three sub-rights are the right to own intellectual property, the right to be recognized for one's intellectual property, and the right to profit from intellectual property. From here, we can examine the three rival theories that I am considering, which attempt to justify these sub-rights: the personality-based theory, the Lockean theory, and the rule/incentives-based theory.

IV: Justificatory Theories of Intellectual Property Rights

The literature on intellectual property rights revolves around three theories that provide different justifications of intellectual property rights. There may be outlier theories that attempt to justify these three sub-rights. However, I am considering these three theories because they are

the most prevalent theories in the literature. I will address each theory in turn, and show how each theory grounds intellectual property rights. I will first address is the personality-based theory, then the Lockean theory, and finally the rule/incentives-based theory.

V: Personality-Based Theory

The first justificatory theory of intellectual property rights is the personality-based theory, developed by Hegel (1770-1831). An important component of Hegel's view relies on the absolutely free will. In his *Philosophy of Right*, he claims that there are stages in the development of "the Idea of the absolutely free will." These stages consist of Abstract Right, Morality, and Ethical Life. Property itself belongs under the category of Abstract Right (Hegel 1871). Hegel writes that the nature of abstract right entails that there is nothing that can "infringe personality and what personality entails." Furthermore, in order to exist as a being, "A person must translate his freedom into an external sphere in order to exist as Idea." He equates personality with "hav[ing] power over a thing." Hegel goes on to say:

> To have power over a thing *ab extra* constitutes possession...But I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of property, the true and right factor in possession. (*The Philosophy of Right*, 1871, p. 23)

Hegel views an individual as one who has power over oneself. Per the theory, if power over on object in the outside world entails possession, and one has power over oneself, then we have possession of ourselves. As a result of the fundamental nature of an individual in terms of personality, the individual must have some influence over the outside world as well as an expression of that personality and his or her freedom. Once one influences the outside world, Hegel thinks that one possesses what was influenced as an actualization of one's personality and freedom. Additionally, this is extended to intellectual property in that original thoughts can be seen as a type of "external sphere" that can be influenced by an individual's personality.

Our personality can become a part of some object, tangible or intangible, which allows the individual to make a claim to own that object Thus, ideas and intellectual work can be a form of property. Two examples of the personality-based theory granting a right to intellectual property are an author putting their "heart and soul" into writing a book or an artist making a painting. In such cases, the works themselves are extensions of the author's personalities, thereby granting the creator with the intellectual property rights to the work.

VI: Lockean Theory

The Lockean theory begins to find what grounds intellectual property rights by approaching a very basic question asked by John Locke (1632-1704) in his influential work, *Two Treatises of Government.* In the section "Property," Locke references the Bible, where "God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience" (Locke 1689). Essentially, all the contents of the earth were given to people in common, for them to use as they saw fit to benefit, sustain, and benefit their lives. There was no private property because all objects were bestowed to all individuals equally. Locke asks, how then, can private property exist? He claims that there is no doubt that "every Man has a *Property* in his own *Person* " (p. 305). This is similar to Hegel's claim that we have power over ourselves, which entails self-ownership. However, the mechanism of ownership between Hegel and Locke is different. For Hegel, that mechanism is "personality" and its extension into the rest of the world. For Locke, that mechanism is labor. Locke believes that since we are property to ourselves, our work as a result of our own self entails ownership. He concludes:

> Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property.* (Locke, 1689, p. 306)

Thus, property rights are grounded in labor. By investing one's own labor into an unowned object, one owns that object. Furthermore, once the labor is invested into that unowned object, the combination of the two cannot be separated. This does not mean that the individual who invests the labor into a particular unowned object is forever the sole owner of that object. Rather, it grounds that the individual will be the sole possessor until a point in which he freely enters into an agreement with another to make some sort of trade, usually a monetary exchange. This freely entered trade recognizes the labor invested into that particular object, which thereby gives that object the worth commanded for in the exchange. To borrow previous examples, an author who writes a book or artist who makes a painting do not have rights to that intellectual property in virtue of an extension of their personality, as Hegel would say. Rather, it is the investment of labor by the author and artist that grounds their intellectual property rights.

In essence, Locke says that you have an ownership right when you infuse your labor with something that is unowned by another. The process of investing your own labor grounds your claim to own that object because you already own yourself, so you thereby your own your labor. From there, the value of that object is proportional to the amount of labor that was invested, as well as the demand for that labored object. Its value will thereby be reflected when exchanged for another sort of property or for monetary exchange. Justifying a right to ownership on the grounds of labor investment includes intellectual property because one must invest mental labor in order to create it in the first place. Hence, intellectual property is included within the realm of buying and selling property based on a particular value.

VII: Rule/Incentives-Based Theory

The final justificatory theory of intellectual property rights is the rule/incentives-based theory. Throughout the paper, I have used utilitarianism and rule/incentives-based theory

interchangeably. Utilitarianism as a form of normative ethics was primarily developed by Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873). In Mill's book, *Utilitarianism, Liberty, and Representative Government*, he writes:

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. (Mill 1863)

Even though utilitarianism does not explicitly state that the theory applies to intellectual property, an implication of "Utility" is that it does. Utilitarianism as a theory focuses on maximizing. Since there are many versions of utilitarianism, the version that I am using is rule-utilitarianism. Rule-utilitarianism emphasizes that "the rightness or wrongness of a particular action is a function of the correctness of the rule of which it is an instance" (Garner & Rosen 1967). The reason for using rule-utilitarianism is that we ought to focus on the rights that are important to people in general, rather than what is important to individuals. Rule utilitarianism does not focus on individual acts or preferences. By focusing on rules that are based on what people in general take to be important with respect to intellectual property rights, rule-utilitarianism eliminates the need to tailor the theory to each individual person. Thus, the theory says that we ought to have rules in place that maximize utility. We can use the previous examples of the author writing a book or the artist making making a painting to show how the rule/incentives-based theory grounds intellectual property rights. In both examples, the author or artist has a right to own , profit from, and be recognized for their intellectual property because having these sub-rights maximizes utility.

What I have shown in the preceding sections are the three theories that justify the sub-rights of intellectual property. The personality-based theory justifies the three sub-rights of intellectual property on the grounds that control over the external world is essential to the self-

actualization of our wills and personalities. The Lockean theory justifies the three sub-rights of intellectual property on the grounds that investing labor into unowned into an object grants an ownership right to that object. Finally, the rule/incentives-based theory justifies the three sub-rights of intellectual property on the grounds that having these rules will lead to maximizing utility. The goal now is to determine which theory is the one that we should accept.

VIII: The Argument

The first premise of my argument is that whatever theory best grounds the sub-rights of intellectual property rights is the theory that we should accept. There are multiple reasons that we want a theory justifying the three sub-rights of intellectual property rights. Firstly, intellectual property rights have been codified into law ever since we have thought about intellectual property. What we want is a theory that explains why intellectual property rights were codified into law in the first place. Secondly, because our society revolves around intellectual property both as a source of livelihood and as a driving force of innovation, knowing what rights we have to intellectual property is relevant to our own lives. This is not an esoteric discussion of an abstract concept. Rather, having a theory of intellectual property rights provides principles to follow when adjudicating conflicts that arise when different parties make claims of rights to intellectual property. Hence, a theory of intellectual property is needed to serve as a game plan that establishes what one does and does not have a right to, and explain why that is the case.

The second premise of the argument is that only rule/incentives-based utilitarian theory grounds all three sub-rights of intellectual property. I will show that the Lockean theory fails to justify the right to profit, and the personality-based theory fails to provide a way of separating the influences of different personalities. I will argue that the rule/incentives-based theory is the only theory that can justify all three sub-rights. Finally, I will show that the rule/incentives-based

theory can provide a principled way of adjudicating conflicts of rights independent of another theory, while the Lockean and personality-based theories cannot.

IX: Objections to the Personality-Theory

The personality-based theory argues that one possesses what one influences as an actualization of one's personality and freedom. When we say 'possesses,' we mean that one has a right to own whatever was influenced. My objection to the personality-based theory is two-fold. Firstly, the personality-theorist must provide a way of determining how much intellectual property exists on account of our own personality, and how much intellectual property exists because of other personalities that have influenced our own. I will show that there is a way for the personality theorist to do this. Secondly, a deeper objection is that even if all three sub-rights to intellectual property can be justified by the theory, it does not tell us what to do when adjudicating conflicts of intellectual property rights.

The first objection revolves around the idea that the personality theory is misguided in thinking that our personalities are entities unto themselves. Rather, it strikes me as relevant that other personalities influence our own. For instance, this paper was influenced by the personalities of Joshua Filler, Ali Finken, and Ollie Voegeli. Each had their input and advice. This input influenced the overall outcome of the paper. Thus, these three personalities influenced intellectual property created by my own personality. If anything that is influenced by one's personality entails a right to own that intellectual property, then the Hegelian theory might say that Josh, Ali, and Ollie can each make a claim to this paper as well.

Furthermore, my writing style developed with the help of teachers and fellow students for many years. Each of their personalities indirectly influenced this paper, even if I am not cognizant of their influence. Per the theory, every person whose personality affected the writing

of this paper could potentially make a particular claim to own a portion of this paper. I do not think this is the case. The personality-based theory does not prescribe a way of differentiating how much of an intellectual property is the result of my own personality and how much of it is the result of other personalities.

Even though making such a differentiation would be difficult, it does not necessarily preclude the personality theorist from answering this first objection. What the personality theory might do is concede that it is true that other personalities influenced the intellectual property that I am creating (i.e., this paper). However, while other personalities influenced my work, since the work is primarily the product of my own personality, then it is my personality that grounds my right to own the work. This is conditioned upon the idea that my personality was responsible for the majority of the creation of the intellectual property. It is interesting to think about what the personality theorist would say if most of this paper was based almost exclusively on the personalities of others, where I simply was utilized as a typist. In such a case, I think that I would be unable to claim a right to own the paper because its creation was not a result of the influence of my personality. Regardless, the personality-based theory is partially able to reply to the objection that it is difficult to differentiate where one personality's influence ends and another begins. The theory does not tell us what to do from there.

The deeper objection to the personality-based theory is the same as the Lockean theory. Let us stipulate that the courts determined the exact percentage of personality that influenced a specific intellectual property. Per the theory, one has the right to own the same percentage of that intellectual property as their personality influenced. Firstly, the personality-theory does not provide any way of doing this metaphysically. Even if it could, it does not follow that from owning that specific percentage of the intellectual property that one has a right to profit from the

intellectual property. All the personality-based theory grounds is the right to own the property. Even upon a charitable reading of it, there is no connection between the right to profit and the right to own intellectual property. If multiple parties come into conflict with respect to the right to profit and the right to recognition, the personality-based theory does not provide any assistance with how to adjudicate that conflict. As a consequence, we are left with the rule/incentives-based theory.

X: Objections to the Lockean Theory

The Lockean theory argues that one can profit from intellectual property on the grounds that one owns it. Hettinger (1989) points out that on the Lockean theory, objects have little if any value until a human invests his or her labor into it. He objects to this notion because there are examples in which a minimal infusion of labor would grant an ownership right per the theory, but the right to profit is misgiven. The individual did not generate the object's value, s/he simply utilized it. Hettinger says, "One does not create 99 percent of the value of an apple by picking it off a tree." The Lockean theory is mistaken in claiming that something is inherently valueless until someone makes an ownership claim to it. Rather, value is already present within the property before an individual makes an ownership claim. They did not generate the value, but rather laid claim to the value that was not of their own doing. The Lockean theory makes it out to be that infusing labor generates value, when it is sometimes the case that the value already exists independent of ownership.

Hence, a Lockean must provide an account of the connection between the value of an object and the value that one is entitled to profit from by virtue of owning it. A hypothetical Lockean may claim that it is true that they did not generate all of the value of the property through their infusion of labor. Because they now have a right to own the property, they have a

right to profit from the entire value of the property, rather than just the value that they generated. This reply may be an effective response; however, there is a more substantial objection to the Lockean argument, which revolves around the market value of the intellectual property.

Hettinger explores the notion that appealing to a market value of an individual's intellectual property does not do the amount of work that a Lockean would like it to. The reason a market value would be used is that the Lockean theory could utilize this metric as a reflection of the labor infused into that object. Even if it were possible to separate the value that one has a right to profit from the value of the intellectual property overall, its value is determined by its market value. However, the market value of a particular object is a socially created circumstance. As such, the value of one's infusion of labor into intellectual property will be dependent on a host of other factors beyond simply owning the intellectual property. Hettinger goes on to say, "The intuitive appeal behind the labor argument—"I made it, hence it's mine"—loses its force when it is used to try to justify owning something others are responsible for: namely, the market value."

Thus, the Lockean theory needs to provide a principled way of determining how much value one is entitled to in virtue of having a right to profit from owning intellectual property. It also must provide a justification for why an individual can make a claim to profit from some intellectual property that he owns when the value of that intellectual property was not created by having that individual's labor infused into it. Upon charitable readings of Locke, there is a way of answering the first objection, which is by claiming that one owns the property, and thereby all of the value of that property. However, there is not a response addressing how one has a right to profit from owning property when the mechanism that determines its value, the market value, is socially determined and is not generated from the infusion of one's labor.

The biggest objection to the Lockean theory is that even if the theory can address the issues involved with the right to profit, it does not inform us well on how to adjudicate conflicts of the sub-rights. At the very least, the Lockean theory alone does not provide a satisfactory method of resolving conflicts when multiple parties lay claim to the same intellectual property. To illustrate this point, let us assume that this seminar paper was co-written with another student in the course. Some sentences and paragraphs were written by myself, the others were written by the other student. We conversed and agreed on what was going to be written. For some inexplicable reason, we had our falling out and now both of us wish to lay sole claim over this intellectual property. Using the Lockean theory, what can we get?

Firstly, what is mine and what is the other student's in terms of ownership is a product of the labor that each of us invested. A primary difficulty is determining how much labor I invested versus how much labor the other student invested. Lockean theory simply says that the investment of labor is the requirement for ownership, but not how much, or whether this investment of labor eliminates the inclusion of others participating and investing their labor in intellectual property. Furthermore, if ownership grounds the right to profit and recognition as the Lockean theory implies, we are still left with a number of issues that must be dealt with. Even if we determined that the other student invested 50% of the labor required to write this paper, it does not follow that the student automatically has a right to 50% of the profit and 50% of the recognition. The Lockean theory grounds the right to own intellectual property, but it does not what to do when multiple parties invest their labor into the same intellectual property. Furthermore, if those parties come into conflict, the Lockean theory does not provide any assistance with how to adjudicate those conflicts.

Upon a charitable reading of the Lockean theory, there is not enough contained within the theory to accept it as the best justification of intellectual property rights. While the theory may ground the right to own intellectual property, it does not directly establish a connection between the right to profit from and the right to own that property. Furthermore, the value of the property may not actually be created through the infusion of labor with object, as the theory claims. Finally, even if the objections to the theory were sufficiently addressed, it still leaves us unable to adjudicate conflicts that arise when multiple parties lay claim to the same intellectual property.

XI: Why The Rule/Incentives-Based Theory is the Best

The rule/incentives-based theory justifies all three of the sub-rights of intellectual property. It also provides a principled way of adjudicating conflicts that arise when different parties lay claim to the same intellectual property.

When I say the 'right to profit' or 'right to own,' I mean that these rights are the rules that should be followed to maximize a particular good. But we must clarify what that good is, and what specifically is the utility that we are trying to maximize. I propose that whatever rules lead to the greatest chance of an individual producing intellectual property in general are the rules that we ought to have.It makes little sense to talk about grounding rights for something that does not exist. The concern of maximization ought to be about what will generate intellectual property generally. We already have historical support for using this as our definition of utility. The Constitution uses this reasoning when it talks about specific forms of intellectual property rights, patents and copyrights, on the grounds that doing so allows the United States:

> To promote the Progress of Science and the Useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (*United States Constitution*, 1789, sec. 8, para. 8)

Hettinger (1989) points out that certain rights are offered to those who invest the labor required to make intellectual property in order to incentivize them to do so, because that property

is important to society. The creation of intellectual property is intended for both creator and user. The creator may create intellectual property because of its intrinsic value, or because of its value to society. Users of intellectual property consume it as a type of commodity, including reading books, watching films, or enjoying other forms of artwork. Likewise, many livelihoods depend on the creation of intellectual property and the ability to translate its creation into a means of survival (i.e., money to pay for necessary living costs). Therefore, whatever maximizes the chance that an individual will create intellectual property is good because intellectual property advances society as a whole, and provides a means of survival for many individuals within society. Our next concern deals with the best way of accomplishing this maximization.

Using a thought experiment in which there was no guarantee that their work would remain theirs or no recourse of action existed when the sub-rights of intellectual property were violated, would the creators of intellectual property continue to do so? If society wants to maximize the chance of intellectual property being produced, it must provide the intellectual laborers with legal guarantees that they will have rights to their intellectual property. Legal guarantees are the most important forms of guarantee because if these rights are infringed, the only meaningful recourse is through the legal system. It is the only meaningful recourse of action because the legal system has the authority to take action against the perpetrators of infringement and rectify wrongs.

Specific rights backed by the legal system are the rules to be followed in order to maximize the chance that an individual produces intellectual property. The reason that I am arguing for rule-utilitarianism instead of something like act-utilitarianism or preference-utilitarianism is that there are already rules in place (intellectual property laws) that establish a mechanism of maximizing the chance that an individual will produce intellectual property. I have

used the term ‘rule/incentives-based theory’ because it reflects the idea that rules should exist that increase the chance that intellectual property is created because individuals are incentivised to do so through such rules. Thus, the reason that the three sub-rights are justified by this theory is that having these sub-rights as rules to be followed maximizes the chance that intellectual property is created in the first place.

I will produce a series of thought experiments to show that having rules which justify the three sub-rights would in fact increase the chance that intellectual property is created. Let us imagine that you are a playwright and have been commissioned to produce a new Broadway musical. From here, the thought experiment takes different forms. We can gradually remove any of the sub-rights and then ask ourselves if we are more or less likely to produce the musical.

In the first case, a wealthy patron explains that you will receive a hefty sum for your work, and you will own the work itself upon completion. However, a condition of payment is that your name will not be associated with the work. No name, in fact, will ever be associated. You, the author, are legally and contractually obliged to remain completely anonymous. Thus, you have the right to own the intellectual property and the right to profit from it, but not the right to be recognized for creating it. Do you have the intuition that you produce the musical? The hundreds of hours spent hammering away writing this musical, only to be left with a manuscript without your name and a check? Some may answer yes, some may answer no. The lesson to draw is that most are inclined to think that they are less likely to create the musical in the first place under this particular set of circumstances.

What happens if we remove the right to profit as well. This wealthy patron is asking you to put the time and effort into producing this musical, but you will only receive an authorless manuscript and a check with $0.00 made out to ‘Anonymous.’ You will not receive recognition

for your work, or profit from it, but it is nonetheless yours. No one can make alterations to your work. Are you more or less likely now to produce this musical? My inclination is that you are even less likely to produce this musical. What if we remove all three rights to intellectual property? You only receive the check for $0.00, but you will not receive the manuscript. Even if you went out and bought a copy of it (which you would not receive any proceeds), your name would never be on it. You would not have the right to own, profit, or be recognized for the intellectual property that you created. Are you more or less likely to produce this musical now? I have the intuition that few would.

This thought experiment can occur in any combination. Begin with all three sub-rights to intellectual property, and gradually remove them while asking the question: "Am I more or less likely to produce it?" If the answer is "less likely", which I believe it would be for any case, then that right is one of the rules that we should have in our theory. Since the removal of each of the three sub-rights will generally result in a "less likely" answer, each sub-right is a rule that we should have in our theory. Thus, the rule/incentives-based theory is able to justify each of the three sub-rights to intellectual property on the grounds that having each sub-right increases the chance that intellectual property is created in the first place.

It is important to point out that there may be some individuals who may answer that they are just as likely, or even more likely, to produce the intellectual property without one of the sub-rights, or even all of the sub-rights. This may be seen as an objection because for some people, these three sub-rights do not in fact increase the chance that intellectual property is created in the first place. A classic counterexample may be Jonas Salk, who refrained from patenting the polio virus, missing out on billions of dollars worth of profit, because there were other factors that he found more compelling than a right to own or profit from his intellectual property. The theory is

not interested in individuals and the conditions that will maximize each individual chance of individually creating intellectual property. Rather, using this theory, we can maximize the chance that intellectual property is created in general, even if there are individuals who are not interested in having specific sub-rights protected.

Finally, the rule/incentives-based theory provides a method of adjudicating conflicts that arise when multiple parties lay claim to intellectual property. The rules that are to be followed are those that maximize the change that intellectual property is created in the first place. Thus, when multiple parties lay claim to the same intellectual property, what the courts should do is make a ruling in such a way as to maximize the chance that the parties will continue to create intellectual property in the future. While some may object to this idea on the grounds that it leaves out the component of justice, my response is that since the decision (whatever it may be) will maximize the chance that intellectual property is created in the first place, we ought to do it.

Intellectual property is important for the intrinsic value to the creator, the value to those who depend on its creation as a means of survival, and for its value to society as a whole. As such, intellectual property is something that we want created. Hence, under the rule/incentives-based theory, we should follow certain rules that maximize the chance that intellectual property is created in the first place. The three sub-rights maximize the chance that intellectual property is created, meaning that the rule/incentives-based theory justifies the three sub-rights of intellectual property. Likewise, the theory provides a way of adjudicating conflicts that arise when multiple parties lay claim to intellectual property. What should be done is whatever maximizes the chance that intellectual property is still created in the future. While this is rather vague, it must be in order to account for nuances that may occur when cases of conflicting rights arise.

Section XII: Objections to the Rule/Incentives-Based Theory

A major criticism of the rule/incentives-based theory is that in a sense there is no such thing as a right to anything. As a consequence of being a utilitarian theory, this is true. Absolute rights do not exist. There are only things that we think of as 'rights' because of the good that comes from them. The very feature that allows the theory to justify the three sub-rights, is different from how we commonly think of rights. According to the critics, this is not acceptable on the grounds that we want a right that will remain a right regardless of the consequences of having it.

My reply is that we need a kind of flexibility in our theory to take into consideration the fact that intellectual property is dynamic. The types of things that constitute intellectual property are constantly changing and developing. If a theory is too restrictive, it runs the risk of not aligning with the types of things that we think constitute intellectual property. It may also eliminate things that we would consider to be intellectual property in the future from warranting the three sub-rights we afford to individuals today. For instance, three hundred years ago, it would not have made sense to talk about having an intellectual property right to a movie. However, since intellectual property such as movies and television shows exist now, their existence supports the claim that we are justified in believing that intellectual property in the future may be things that we cannot conceive of now. If our theory is too inflexible, then this intellectual property and its creators would not be afforded the same rights as they are today.

The important takeaway from this example is that we need to have a degree of flexibility with our theory of intellectual property rights to take into consideration the changing nature of intellectual property. With the rule/incentives-based theory, that flexibility lies in the rules that are established and the outcomes that arise when those rules are followed. At a fundamental level, we ought to do whatever gets the best results. The best results, and the mechanism of

getting those results, can change through time. Currently, we believe that intellectual property rights mean the right to own, profit from, and be recognized for one's intellectual property. My thought experiment showed us that in general we are less likely to produce intellectual property when any one of these sub-rights are taken away. Furthermore, we become even less likely to create intellectual property when we gradually lose all three sub-rights to intellectual property. On account of the rule/incentives-based theory, if any of these sub-rights did not increase the chance that intellectual property is created, then we ought to change the rules to ones that would increase that chance. Hence, there is room for these sub-rights to change to other sub-rights, or include additional sub-rights, on the grounds that doing so will increase the chance that intellectual property is created in the first place.

Section XIII: Conclusion

The first goal of this paper was to show that when we say that we have intellectual property rights, what we really mean is that we have three sub-rights to intellectual property. By considering that intellectual property rights have been codified into law ever since we have thought about property, we were able to draw some lessons about what those sub-rights are. The three sub-rights are the right to own, profit from, and be recognized for one's intellectual property.

The second goal of the paper was to show that the rule/incentives-based theory best justifies the three sub-rights of intellectual property rights. The personality-based theory has difficulties with multiple personalities influencing the same intellectual property. The Lockean theory has issues with connecting the right to profit with the right to ownership. Both the personality-based and Lockean theories are unable to satisfactorily provide an account of how to adjudicate conflicts of rights when multiple parties lay claim to the same intellectual property.

The rules/incentives-based theory says that we should follow rules that lead to maximizing the chance that intellectual property is created in the first place. We should do this because of the benefits that the creator, consumers, and society as a whole enjoy when intellectual property is created. Thus, when addressing conflicts that arise when multiple parties lay claim to the same intellectual property, the way of adjudicating the conflict is that which maximizes the chance that intellectual property is created in the future.

Finally, I explored why the possibility of changing the rules involved in the rule/incentives-based theory is necessary to provide flexibility in the theory. This flexibility is necessary to address the dynamic nature of intellectual property. It will account for changes in what constitutes intellectual property in the future, and how the rules that maximize the chance that intellectual property is created may change.

XIV: Works Cited

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