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Intellectual Property Law: Philosophical Foundations, Theoretical Frameworks, and Cross-Pollination[1]

This comprehensive study provides an in-depth analysis of the philosophical underpinnings and theoretical frameworks that shape intellectual property (IP) law. It embarks on a scholarly journey that explores various foundational theories, including John Locke's labour theory, utilitarianism as influenced by Bentham and Mill, Hegelian personality theory, and others. The study examines how these theories have influenced the formation and evolution of intellectual property law, highlighting the complex interplay between individual creativity, societal needs, and cultural expression. It examines the application of these theories in real-world legal scenarios, offering insights into how they inform current IP law and policy. It also explores the intersection of these theories, demonstrating their multifaceted nature and the balanced approach they bring to IP law, addressing issues such as creators' rights, the public interest, economic incentives, and cultural diversity. This exploration provides a nuanced understanding of IP law as a dynamic field where philosophical, economic, and social considerations converge to shape laws that reflect broader societal values and priorities.

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1 Introduction

This research delves into the intricate tapestry of theories that shape the world of intellectual property (IP) law. It embarks on a journey through various philosophical foundations, beginning with John Locke's theory of labour, venturing through the terrain of utilitarianism as espoused by Bentham and Mill, and exploring the Hegelian influence within the theory of personality. These diverse perspectives have significantly influenced the formation and evolution of intellectual property law, highlighting the complex interplay between individual creativity, societal needs, and cultural expression[2].

Locke's labour theory, rooted in natural law, forms the foundation of modern IP concepts, emphasizing moral and legal rights over intellectual work. Labour theory is complemented by Hegelian personality theory, economic theory, the common good argument, and the theory of the social good. The research also examines democratic theory and the theory of justice in the context of intellectual property.

Real-world applications and case studies are interwoven to illustrate these concepts in action, demonstrating the practical implications of these philosophical theories in current IP law scenarios. This includes an analysis of how Locke's theory of labour and Hegel's theory of personality are used in legal cases, as well as the role of economic theory in fostering innovation and the common good argument's emphasis on societal benefits.

2 Michele Boldrin, David Levine, „The Case Against Intellectual Property" *American Economic Review*, 92.2 (2002): 209–212.

2 Foundations and frameworks: understanding intellectual property through diverse theories

The philosophical underpinnings of intellectual property (IP) are rooted in several key principles and theories that can be broadly categorized as follows:

1. Lockean Labour Theory: John Locke's theory argues that individuals have a natural right to own property derived from their labour. In the context of intellectual property, this theory supports the idea that creators have a natural right to control and profit from what they create because their intellectual work is an extension of their labour[3].
2. Utilitarianism: This perspective, largely influenced by Jeremy Bentham and John Stuart Mill, suggests that laws, including those governing IP, should be designed to maximize general happiness or utility[4]. In terms of IP, this means creating a system that encourages innovation and creativity for the greater good, while ensuring that the benefits of such creations are available to the public[5].

3 Adam D. Moore, „A Lockean Theory of Intellectual Property Revisited" *San Diego Law Review*, 49 (2012): 1069; Ken Shao, „From Lockean Theory to Intellectual Property: Marriage by Mistake and its Incompatibility with Knowledge, Creativity and Dissemination" *Hong Kong Law Journal*, 39 (2009): 401; Adam Mossoff, „Saving Locke from Marx: The Labor theory of Value in Intellectual Property Theory" *Social Philosophy and Policy*, 29:2 (2012): 283–317.

4 Estelle Derclaye, Tim Taylor, *Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach*, 2015, papers.ssrn.com.

5 Patrick Croskery, „Institutional Utilitarianism and Intellectual Property" *Chicago-Kent Law Review*, 68 (1992): 631; Giovanni Tamburrini, Sergey Butakov, „The Philosophy Behind Fair Use: Another Step Towards Utilitarianism" *Journal of International Commercial Law & Technology*, 9 (2014): 190; Adam D. Moore, „Personality-Based, Rule-Utilitarian, and Lockean Justifications of Intellectual Property", [in:] *The Handbook of Information and Computer Ethics*, ed. Kenneth Einar Himma, Herman T. Tavani (Hobocken: John Wiley and Sons, 2008), 105; Elizabeth L. Rosenblatt, „Intellectual Property's Negative Space: Beyond the Utilitarian" *Florida State University Law Review*, 40 (2012): 441.

3. Personality theory (Hegelian Perspective): Influenced by Georg Wilhelm Friedrich Hegel[6], this theory holds that individuals have a moral right to control the external manifestations of their personality, which includes their creative expressions[7]. Thus, IP rights are seen as an extension of an individual's personality and identity[8].
4. Economic theory: This approach views IP as a necessary incentive for innovation and creativity. By granting temporary monopolies (through patents, copyrights, etc.), the theory posits that creators are incentivized to create, which ultimately benefits society through technological advancement and cultural enrichment[9].
5. Common good argument: This perspective focuses on the balance between individual rights and the common good. It argues that while creators should be rewarded for their work, IP rights should not be so extensive that they impede the dissemination

6 Kanu Priya, „Intellectual Property and Hegelian Justification" *National University of Juridical Sciences Law Review*, 1 (2008): 359.

7 Justin Hughes, „The Personality Interest of Artists and Inventors in Intellectual Property" *Cardozo Law's Arts & Entertainment Law Journal*, 16 (1998): 81; Jeanne L. Schroeder, „Unnatural Rights: Hegel and Intellectual Property" *University of Miami Law Review*, 60 (2005): 453; Moore, „Personality-Based, Rule-Utilitarian, and Lockean Justifications of Intellectual Property"; William W. Fisher, „Theories of Intellectual Property", [in:] *New Essays in the Legal and Political Theory of Property*, ed. Stephen Munzer (Cambridge, UK: Cambridge University Press, 2001). https://dash.harvard.edu/bitstream/handle/1/37373274/iptheory.pdf?sequence=1.

8 David Vaver, „Does Intellectual Property Have Personality?", [w:] *Rights of Personality in Scots law: A Comparative Perspective*, ed. Reinhard Zimmerman, Niall R Whitty (Edinburgh: University of Dundee Press, 2009),403; Radu Uszkai, „Intellectual Property has no Personality" *Annals of the University of Bucharest. Philosophy Series*, 66.2 (2017): 181–205; Cheng-chi Chang, „The Clash of Theories: Semiotic Democracy and Personality Theory in Intellectual Property Law" *Law & World*, 26 (2023): 14.

9 Joseph E. Stiglitz, „Economic Foundations of Intellectual Property Rights" *Duke Law Journal*, 57 (2007): 1693; Bart Verspagen, „Intellectual Property Rights in the World Economy", [in:] *Economics, Law and Intellectual Property: Seeking Strategies for Research and Teaching in a Developing Field* (Boston, MA: Springer US, 2003), 489–518; Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures* (London: Routledge, 2015); Livia Ilie, „Intellectual Property Rights: an Economic Qpproach" *Procedia Economics and Finance*, 16 (2014): 548–552.

of knowledge and cultural materials that could benefit society as a whole[10].

6. Democratic theory: This theory emphasizes the role of intellectual property in supporting a democratic society. t argues that the free flow of ideas and information is essential to democracy, and that IP laws should strike a balance between protecting the rights of creators and ensuring public access to information and cultural works[11].
7. Theory of social good: As discussed above, this theory emphasizes the societal benefits and ethical considerations of knowledge creation and dissemination. It advocates intellectual property laws that promote broad public access to knowledge, balance the rights of creators with the public interest, and prioritize innovation for societal benefit. This theory is closely linked to the idea that intellectual property serves the public good and is a tool for social and ethical progress[12].

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10 Amitai Etzioni, *The common good* (Hoboken: John Wiley & Sons, 2014); Dennis D. Crouch, „The Patent Lottery: Exploiting Behavioral Economics for the Common Good" *George Mason Law Review*, 16 (2008): 141; Aaron Poynton, „The Incentive Argument in Pharmaceutical Patent Law" (2022), available at SSRN 4204148; Lynn M. Forsythe, Deborah J. Kemp, „Creative Commons: for the Common Good" *University of La Verne Law Review*, 30 (2008): 346; Peter Johan Lor, Johannes Britz, „Knowledge Production from an African Perspective: International Information Flows and Intellectual Property" *The International Information & Library Review*, 37.2 (2005): 61–76; Richard T. de George, „Intellectual Property and Pharmaceutical Drugs: An Ethical Analysis" *Business Ethics Quarterly*, 15.4 (2005): 549–575; David Harvey, „The Future of the Commons" *Radical History Review*, 109 (2011): 101–107.

11 Oren Bracha, Talha Syed, „Beyond Efficiency: Consequence-Sensitive Theories of Copyright" *Berkeley Technology Law Journal*, 29 (2014): 229; David A. Snyder, „Two Problems with the Value of Participation in Democratic Theory and Copyright" *Texas Law Review*, 89 (2010): 1019; Rosemary J. Coombe, „Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue" *Texas Law Review*, Vol. 69 (1990): 1853; Spencer McKay, *Democratic Theory and the Commons: Conceptualizing the Relationship Between Deliberation, Publics, and the Internet* (University of British Columbia, 2013); Yoonmo Sang, „Revisiting Copyright Theories: Democratic Culture and the Resale of Digital Goods" *Communication Theory*, 29.3 (2019): 277–296; Chang, „The Clash of Theories: Semiotic Democracy and Personality Theory in Intellectual Property Law".

12 Lateef Mtima, „IP Social Justice Theory: Access, Inclusion, and Empowerment" *Gonzaga Law Review*, 55 (2019): 401; Irina Heim, „The Protection of IP" *Intellectual Property Management: Interdisciplinary Knowledge for Business Decision-Making* (2023): 37–52; Christophe Geiger, „Can IP Rights Be Freely Reformed,

8. Theory of justice: This theory, particularly as articulated by philosophers such as John Rawls, focuses on fairness and equity in the distribution of rights and resources. In the context of IP, the theory of justice can be applied to ensure that IP laws are fair and do not disproportionately benefit certain individuals or groups at the expense of others. It seeks a balance where creators are rewarded for their contributions, while ensuring that the wider society also benefits from access to knowledge and cultural works[13].
9. Cultural theory: This perspective views IP through the lens of cultural impact and diversity. It recognizes that intellectual creations are not only economic commodities, but also integral parts of cultural expression and identity. Cultural theory in IP argues for the protection of cultural heritage, traditional knowledge and expressions of folklore from exploitation. It also emphasizes the importance of maintaining a diverse cultural landscape in which different voices and forms of expression are protected and encouraged. This theory often intersects with discussions of the impact of globalization on local cultures and the need to preserve cultural diversity in the face of dominant cultural influences[14].

Each of these philosophical underpinnings contributes to the ongoing debate about the scope, nature, and enforcement of intellectual property rights, highlighting the complex interplay between individual rights, the public interest, economic incentives, and cultural development.

Limited or Repealed, or Are There Restrictions Resulting from Constitutional Theory and Fundamental Rights?" *Jotwell: The Journal of Things We Like*, (2021): 1.

13 *Intellectual property and theories of justice*, ed. Axel Gosseries, Alain Marciano, Alain Strowel (London: Palgrave, 2008); Madhavi Sunder, „Review of Intellectual Property and Theories of Justice" *Erasmus Journal for Philosophy and Economics*, 3.1 (2010); Giovanni Battista Ramello, *Access to vs. Exclusion from Knowledge: Intellectual Property, Efficiency and Social Justice* (London: Palgrave Macmillan, 2008); Rémy Guichardaz, „4. What would be a Fair Intellectual Property? A Dynamic Inquiry Through the Rawlsian Theory of Justice" *Cahiers d'économie politique*, 1 (2022): 91–125.

14 Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven: Yale University Press, 2012); Ronald V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (London: Routledge, 2018); Julie E. Cohen, „Creativity and Culture in Copyright Theory" *Copyright Law*, (2017): 473–527.

2 From Locke to modern law: The evolution of intellectual property through labour theory – unravelling core concepts and modern challenges

The Lockean theory of labour, developed by the 17th century English philosopher John Locke, plays a crucial role in the philosophy of property rights, and its applicability extends to intellectual property (IP). Originally presented in his seminal work *Two Treatises of Government* (1689)[15], Locke grounded his theory in natural law[16]. He posited that individuals rightfully own property through their labour. His notable proviso was that the appropriation of property is just if there is sufficient quality and quantity left over for others. This theory gained momentum during the Enlightenment and profoundly influenced contemporary thinkers' understanding of property and rights. Locke's principles became a cornerstone in shaping modern concepts of individual rights and capitalism. In addition, his ideas have had a significant impact on the core values of several modern states, including the United States, particularly with regard to property rights and individual liberties[17]. These foundations originally laid by Locke have since been adapted and applied to modern contexts, including the field of intellectual property, demonstrating the enduring relevance and adaptability of Locke's philosophy[18]. Delving deeper into the nuances of Lockean labour theory and its implications for intellectual property (IP), the labour desert theory and the value added theory offer more specific insights.

Labour theory builds on Locke's idea that labour justifies property. It goes beyond mere ownership to emphasise a moral dimension. According to this theory, when an individual invests labour in creating something, it's not just a matter of physically owning the result; there is a moral claim. This claim is rooted in the effort, skill and time invested. For example, in the context of intellectual property, a writer or inventor doesn't just create a book or a gadget; they put parts of themselves – their knowledge,

15 John Locke, *Locke: Two Treatises of Government Student Edition* (Cambridge: Cambridge University Press, 1988); John Locke, *The Works of John Locke*. Vol. I (T. Longman, 1794).

16 John J. Jenkins, „Locke and Natural rights" *Philosophy*, 42.160 (1967): 149–154.

17 Steven J. Heyman, „The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty" *Marquette Law Review*, 101 (2017): 705.

18 Moore, „A Lockean Theory of Intellectual Property Revisited"; Shao, „From Lockean Theory to Intellectual Property: Marriage by Mistake and its Incompatibility with Knowledge, Creativity and Dissemination".

creativity and time – into those creations. The theory therefore supports the idea that creators have a moral right to own and benefit financially from their work. This is particularly important in industries where creations are easily replicated, such as digital content, where the labour desert theory argues for the protection of creators' rights[19].

Value-added theory extends this concept by focusing on the enhancement that work brings to materials or ideas. It's not just the creation of something new that's important, but the added value that labour brings. In terms of intellectual property, this theory emphasises the transformation of basic ideas or raw materials into something of greater value. For example, a musician doesn't just record a series of notes, but creates a composition that resonates emotionally with listeners, adding value through their artistic expression. Similarly, a software developer takes basic code and turns it into a sophisticated program. The value-added theory argues that this enhancement process gives creators a right to the added value, legitimising claims to intellectual property rights based on the qualitative improvement their work brings[20].

Taken together, these two theories strengthen the case for intellectual property rights. They suggest that the act of creation, driven by individual labour and resulting in added value, justifies both moral and legal claims to ownership. This perspective is crucial in today's knowledge-based economy, where intangible assets such as IP form a significant part of value creation. These theories help to shape policies and legal frameworks that recognise and protect the rights of creators and ensure that they benefit from the value their labour adds to society. Locke's theory of labour, as applied to intellectual property (IP), holds that the products of one's intellectual labour, such as literary works, inventions, music or software, are inherently personal property, giving creators the exclusive right to control and profit from their creations. This principle is intricately woven into the fabric of moral rights within intellectual property law, which are deeply personal to the creator and include rights such as attribution and protection against derogatory treatment, recognising that creative works

19 Brian Fitzgerald, „Theoretical Underpinning of Intellectual Property: »I Am a Pragmatist but Theory Is My Rhetoric«" *Canadian Journal of Law & Jurisprudence*, 16.2 (2003): 179–189.

20 Michael Morrissey, *An Alternative to Intellectual Property Theories of Locke and Utilitarian Economics* (Baton Rouge: Louisiana State University and Agricultural & Mechanical College, 2012); Moore, „A Lockean Theory of Intellectual Property Revisited".

transcend mere economic assets to become integral to personal identity. Locke's ideas underpin the philosophical underpinnings of copyright and patent laws, which are designed to grant exclusive rights to creators as a reward for their intellectual labour, allowing them to control and profit from their creations for a period of time. This reflects the Lockean principle of property rights derived from labour.

The duration and limitation of these rights also reflect Locke's theorem, which justifies the appropriation of property as long as there's enough left over for others. In practice, this is seen in the finite duration of copyright, which is typically the life of the author plus a number of years (typically 70 years in many jurisdictions), after which the work enters the public domain. Notable legal cases reflecting these principles include the U.S. Supreme Court decision in Authors Guild v. Google, where the Court held that Google's digitisation of books for a search database constituted fair use, a ruling that balanced the exclusive rights of authors with broader societal interests[21]. Similarly, in Diamond v. Chakrabarty, the US Supreme Court upheld a patent on a genetically modified bacterium, reflecting the extension of Locke's theory to modern biotechnology by recognising the inventor's labour in creating something new and useful[22]. These cases demonstrate the continuing relevance and adaptation of Locke's theory of labour in contemporary intellectual property law.

The application of Locke's theory of labour to intellectual property (IP) is subject to considerable criticism and faces evolving challenges in the modern context. A primary criticism is the incongruity of applying a theory originally concerned with tangible property to intellectual works. Intellectual creations are inherently non-rivalrous; the use of an idea or creative work by one individual does not diminish its availability to others. This characteristic challenges Locke's theorem, which was more appropriate for physical property, where exclusive possession is clear and necessary[23]. There is also an argument that strict intellectual property

21 804 F.3d 202 (2d Cir. 2015), *cert. denied* __ U.S. __ (2016) (No. 15-849); Victoria Campbell, „Authors Guild v. Google, Inc." *DePaul Journal of Art, Technology & Intellectual Property Law*, 27 (2016): 59; Varsha Mangal, „Is Fair Use Actually Fair? Analyzing Fair Use and the Potential for Compulsory Licensing in Authors Guild v. Google" *North Carolina Journal of Law & Technology*, 17.5 (2016): 251.

22 Douglas Robinson, Nina Medlock, „Diamond v. Chakrabarty: a Retrospective on 25 Years of Biotech Patents" *Intellectual Property & Technology Law Journal*, 17.10 (2005): 12–15.

23 Moore, „A Lockean Theory of Intellectual Property Revisited".

laws, while intended to protect creators, can paradoxically stifle creativity and innovation. This occurs when overly restrictive IP laws inhibit the free exchange of ideas and collaborative improvements that are essential to innovation and cultural development. Such a scenario seems at odds with Locke's emphasis on work and value creation, where the intention is to encourage, not restrict, productive endeavours. In the digital age, these criticisms take on greater significance. The ease with which creative works can be reproduced and distributed over the Internet presents a unique challenge in maintaining a balance between protecting the rights of creators and allowing the free flow of information that is critical to societal progress and innovation. Digital technology blurs the lines of traditional intellectual property boundaries, requiring a nuanced approach to intellectual property rights that takes into account both creators' incentives and public access. The impact of globalisation further complicates the application of Locke's theory. The extension of IP rights to international markets brings with it a host of enforcement challenges and ethical considerations, particularly evident in debates over IP rights in international trade agreements and the global accessibility of essential medicines under patent law. These discussions often revolve around the extent to which Lockean principles should influence global IP regimes, with arguments ranging from advocating strong protection to promote innovation to urging more lenient IP laws to ensure equitable access to knowledge and essential technologies. In addition, the evolving nature of creative work, especially in the digital and information age, poses a challenge to the traditional Lockean view. The rise of collaborative efforts, open source projects and AI-generated content challenges the notion of singular, individual labour as the sole basis for property rights.

3 Utilitarianism in intellectual property law: balancing innovation, access, and societal welfare – exploring rule, act, and negative approaches

Utilitarianism, a philosophical doctrine rooted in the works of Jeremy Bentham and John Stuart Mill, has had a significant influence on the

development of intellectual property law[24]. This perspective advocates laws that maximise aggregate happiness or utility, a principle deeply embedded in the IP legal framework. It emphasises the importance of incentivising individuals and organisations to innovate and create, which is achieved by granting temporary monopolies such as patents, copyrights and trademarks. These legal protections encourage investment in new ideas and technologies, creating an environment ripe for innovation. In addition, utilitarianism in intellectual property law emphasises the need to balance the rights of creators with the public interest. This balance is essential to ensure that the benefits of creative works and technological innovations are widely available and thus contribute to a wider social good. Furthermore, from a utilitarian perspective, IP laws serve as tools to promote economic growth and general social welfare. By protecting the rights of creators, these laws stimulate economic activity, leading to job creation, market expansion and increased social welfare. The utilitarian approach to IP thus represents a nuanced blend of encouraging creativity while ensuring public access to innovation, reflecting the historical evolution of utilitarian thought in the legal and ethical spheres[25].

There are subcategories of utilitarianism in intellectual property law that offer different approaches to the formulation and application of law, each with its own focus and implications.

1. Rule Utilitarianism
2. Act Utilitarianism
3. Negative Utilitarianism

Rule utilitarianism in intellectual property law holds that laws should be based on rules that generally promote the greatest good for the most people. This approach favours the creation of overarching legal principles that provide the greatest long-term benefit to society. In the context of intellectual property, this means laws that encourage innovation and

24 Jeremy Bentham, John Stuart Mill, *Utilitarianism and Other Essays* (Hoboken: Penguin, 2004); Jacob Viner, „Bentham and JS Mill: The Utilitarian Background" *American Economic Review*, 39.2 (1949): 360–382. Paul Joseph Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (London: Clarendon Press, 1990).

25 Rosenblatt, „Intellectual Property's Negative Space: Beyond the Utilitarian"; Croskery, „Institutional Utilitarianism and Intellectual Property"; Tamburrini, Butakov, „The Philosophy Behind Fair Use: Another Step Towards Utilitarianism".

creativity and ensure a thriving environment for intellectual endeavour. For example, a rule-utilitarian perspective might support robust patent laws that incentivise research and development, in the belief that such laws will ultimately lead to greater technological progress and societal benefits. However, these laws might also include safeguards to prevent monopolistic practices that could hinder competition and accessibility, reflecting a balanced approach that considers the broader impact of IP laws on society[26].

A prominent example of rule utilitarianism in action is the series of legal battles over smartphone patents[27] between major technology companies such as Apple, Samsung and others. These cases revolved around the enforcement of patents related to smartphone technology. From a rule-utilitarian perspective, these patents are essential to fostering innovation by protecting companies' investments in research and development. Despite the conflicts, the overall legal framework supporting strong patent rights is seen as beneficial for promoting technological progress and economic growth.

Act Utilitarianism, on the other hand, argues that each IP case should be assessed on its own merits, focusing on the actions involved and their utility-maximising potential. This approach leads to more individualised and situational decision-making in IP disputes. It allows for flexibility and adaptability in legal judgments, taking into account the unique aspects of each case[28]. For example, in a copyright infringement case, a utilitarian

26 Moore, Personality-Based, Rule-Utilitarian, and Lockean Justifications of Intellectual Property; Robert P. Merges, „Philosophical Foundations of IP Law: The Law and Economics Paradigm" *Forthcoming in the Research Handbook on the Economics of IP Law*, ed. Peter S. Menell, Ben Depoorter, David Schwartz, Vol. I (Cheltenham: Edward Elgar Publishing House, 2016); Ioannis Lianos, *A Regulatory Theory of IP. Implications for Competition Law*, 2008; Evan G. Williams, „Rule Utilitarianism and Rational Acceptance" *The Journal of Ethics*, (2023): 1–24.

27 Sarah Burnick, „The Importance of the Design Patent to Modern Day Technology: The Supreme Court's Decision to Narrow the Damages Clause in Samsung v. Apple" *North Carolina Journal of Law & Technology*, 18.5 (2017): 283; Alan Devlin,Neel Sukhatme, „Self-Realizing Inventions and the Utilitarian Foundation of Patent Law" *William & Mary Law Review*, 51 (2009): 897; Peter Lee, Madhavi Sunder, „Design Patents: Law Without Design" *Stanford Technology Law Review*, 17 (2013): 277.

28 Moore, „Personality-Based, Rule-Utilitarian, and Lockean Justifications of Intellectual Property"; Merges, „Philosophical Foundations of IP Law: The Law and Economics Paradigm"; Peter Lewin, „Creativity or Coercion: Alternative Perspectives on Rights to Intellectual Property" *Journal of Business Ethics*, 71 (2007):

approach would weigh the pros and cons of the infringement in that particular situation, taking into account factors such as the creative value of the work, its impact on the original creator, and the benefit or harm to the public. This case-by-case analysis could lead to more nuanced decisions, tailored to the specific needs and contexts of different IP situations.

The Google Books case, in which Google scanned millions of books for an online library, demonstrates act utilitarianism[29]. The dispute centred on whether such scanning constituted fair use under copyright law. A fair use analysis would consider the specific circumstances of the case, weighing the benefits of public access to knowledge against the rights and potential economic losses of authors and publishers. The courts sided with Google in this case, finding that the project provided significant public benefits without unduly harming the interests of copyright holders.

Negative utilitarianism in IP focuses on the minimisation of suffering or harm rather than the maximisation of happiness or utility. In IP, this perspective is particularly relevant in discussions about access to essential knowledge or technologies, especially in areas such as pharmaceuticals or educational resources. Negative utilitarianism would advocate for IP laws that prevent or minimise the negative consequences of overly restrictive IP rights, such as laws that could limit access to life-saving medicines or educational materials[30]. This approach could support policies such as compulsory licensing or educational exceptions to reduce the negative impact of IP protection on vulnerable populations or critical societal needs. This perspective ensures that IP laws do not disproportionately disadvantage certain groups or hinder critical societal development.

A striking example of negative utilitarianism at work in IP law is the issue of compulsory licensing of HIV/AIDS drugs in developing countries. In the early 2000s, countries such as Brazil and South Africa faced severe HIV/AIDS epidemics but were hampered by the high cost of patented

441–455; Michael Boylan, Michael Boylan, „Utilitarianism" *Teaching Ethics with Three Philosophical Novels*, (2017): 45–62.

29 Emily Anne Proskine, „Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project" *Berkeley Technology Law Journal*, 21.1 (2006): 213–239; Pamela Samuelson, „The Google Book Settlement as Copyright Reform" *Wisconsin Law Review* (2011): 479.

30 Elizabeth L. Rosenblatt, „Intellectual Property's Negative Space: Beyond the Utilitarian"; Patrick Croskery, „Institutional Utilitarianism and Intellectual Property"; Robert P. Merges, „Philosophical Foundations of IP Law: the Law and Economics Paradigm".

antiretroviral drugs[31]. Using provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, these countries issued compulsory licences to produce generic versions of these life-saving medicines, prioritising public health needs over the patent rights of pharmaceutical companies. This move, based on negative utilitarian principles, aimed to minimise the suffering caused by lack of access to essential medicines.

Each of these case studies illustrates how different utilitarian approaches can be applied in real-world IP scenarios. Rule utilitarianism emphasises the creation of laws that generally promote innovation and economic growth. Act utilitarianism focuses on the specific circumstances of each case, balancing various interests to maximise utility. Negative utilitarianism, on the other hand, prioritises minimising harm, particularly in situations where IP laws may impede access to essential goods or services. These cases illustrate the complexities involved in applying utilitarian principles to intellectual property law.

4 Exploring the self: personality theory in intellectual property law through a Hegelian lens

Personality theory in intellectual property, particularly from a Hegelian perspective, offers a profound understanding of the relationship between creators and their works[32]. Deeply influenced by the philosophical ideas of Georg Wilhelm Friedrich Hegel, this theory has evolved significantly over time, incorporating different perspectives and nuanced interpretations. While Hegel did not directly address intellectual property, his concepts

31 Emmanuel Kornyo, „Patent Protection and the Global Access to Essential Pharmaceuticals During Patent Infringements under TRIPS" *Voices in Bioethics* (2015); Matthew B. Flynn, *Pharmaceutical Autonomy and Public Health in Latin America: State, Society and Industry in Brazil's AIDS Program* (London: Routledge, 2014).

32 Andrew Seth Pringle-Pattison, *Hegelianism and Personality* (Edinburgh-London: W. Blackwood and Sons, 1887); Jeanne L. Schroeder, „Unnatural Rights: Hegel and Intellectual Property" *University Miami Law Review*, 60 (2005): 453; Dudley Knowles, „Hegel on Property and Personality" *The Philosophical Quarterly*, 33.130 (1983): 45–62; Karla M O'Regan, „Downloading Personhood: A Hegelian Theory of Copyright Law" *Canadian Journal of Law and Technology*, 7.1 & 2 (2010).

of personal identity and self-expression laid the groundwork for later interpretations of personality theory in intellectual property law. His ideas suggested that creations were not merely economic commodities, but extensions of the creator's personality. During the 19th and 20th centuries, Hegel's philosophy was further explored and applied to intellectual property law. Legal scholars began to recognise that creations of the mind were expressions of the creator's personality, warranting protection beyond mere economic considerations. This period marked a shift in the understanding of intellectual property, emphasising the personal connection between creators and their works.

Johann Gottlieb Fichte, another influential German philosopher, made a significant contribution to these ideas. Fichte proposed that a person's self-expression through their creations was a direct extension of their personality. His ideas fit well with the emerging view of intellectual property rights as personal rights.

Immanuel Kant, a contemporary of Hegel and Fichte, also influenced this theory, albeit indirectly. His emphasis on moral imperatives and respect for individual autonomy played a crucial role in shaping the moral rights aspect of personality theory in intellectual property law[33].

In the 20th and 21st centuries, the debate has evolved with contributions from modern legal theorists and scholars[34]. In addition, cultural and arts scholars such as Martha Woodmansee and Peter Jaszi have contributed to the understanding of intellectual property as a form of personal expression. Their work emphasises the unique, personal value of authorship and argues for a more nuanced approach to IP protection that takes into account cultural and personal significance[35].

Through the contributions of these and other scholars, personality theory in intellectual property law has evolved into a multifaceted concept. It views creations not just as economic assets, but as integral

33 James Alexander Clarke, „Fichte and Hegel on Recognition" *British Journal for the History of Philosophy*, 17.2 (2009): 365–385.

34 Fisher, „Theories of Intellectual Property".

35 Martha Woodmansee, Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durnham: Duke University Press, 1994); Laura Biron, „Creative Work and Communicative Norms" *The Work of Authorship*, (2014): 19; Peter Jaszi, „Toward a Theory of Copyright: The Metamorphoses of »Authorship«", [in:] *Intellectual Property Law and History*, ed. Steven Wilf (London: Routledge, 2017), 61–108.

components of the creator's identity and personality, deserving of protection that reflects this deep connection.

In the field of personality theory as it relates to intellectual property, while there aren't strictly defined "subcategories" in the way that other theories might have, there are several nuanced dimensions or interpretations that reflect different aspects or emphases within the theory. These dimensions can be thought of as thematic variations or foci within the broader framework of personality theory.:

1. Focus on moral rights; non-economic values. This interpretation emphasises the creator's continuing personal connection to his or her work. It includes concepts such as the right to attribution (the right to be recognised as the author) and the right to integrity (the right to protect the work from distortion). This concept argues that intellectual property laws should recognise and protect the cultural, educational or personal value of artistic and intellectual works over and above their commercial value.
2. Expression of identity. Here the theory is used to explore how creations are expressions of the cultural, personal or social identity of the creator. This dimension considers how intellectual property laws affect not only the economic interests of creators, but also their personal identity and cultural heritage.
3. Personhood and dignity. This aspect emphasises the protection of the dignity and personhood of the creator. It suggests that creators should have control over how their works are used or altered because these works are extensions of their personality. This interpretation often intersects with discussions of defamation or the misuse of a person's creativity, image or likeness.
4. Creative autonomy. This dimension focuses on the autonomy of creators to express themselves through their works. It emphasises the importance of a legal framework that allows creators the freedom to develop and express their ideas without undue restrictions, as this is essential for personal development and autonomy.
5. Public interest and access. Some scholars have extended the theory to consider the balance between the personal rights of the creator and the public interest, including the public's right to access cultural and intellectual works. This dimension addresses the tension between protecting personal expression and promoting a rich public domain.

Each of these dimensions reflects a different way in which the core ideas of Personality

Theory can be applied or interpreted in the context of intellectual property. They highlight the various considerations involved in balancing the personal rights of creators with other interests and values in intellectual property law.

Critics argue that personality theory places too much emphasis on the moral rights of creators, potentially at the expense of other considerations such as the public domain and fair use. This could lead to excessive restrictions on how works can be used or adapted, limiting cultural and technological innovation. Implementing personality theory in a legal framework can also be challenging, as determining the extent of a creator's personal connection to their work and how this should be legally protected can be subjective and difficult to quantify. There's a potential conflict between the personal rights advocated by personality theory and the economic rights that are central to common law IP laws. This tension can complicate legal decisions, particularly in cases where there's a strong commercial interest.

5 Incentives and innovations: unpacking the economic rationale behind intellectual property

The economic theory behind intellectual property (IP) is crucial to understanding how IP laws and practices affect innovation and creativity in society. Its history and key sub-concepts reflect a complex interplay between individual rights and societal benefits.

The roots of the economic theory of intellectual property can be traced back to the early development of copyright and patent law in Europe in the 17th and 18th centuries. The British Statute of Anne of 1710 and the French Patent Law of 1791 were among the first formal recognitions of intellectual property rights. Philosophers such as John Locke and Adam Smith significantly influenced early IP concepts, with Locke's theory of labour and property and Smith's ideas on free markets and the division of labour providing a philosophical basis for considering IP as a form of personal property[36]. The Industrial Revolution marked a turning point, increasing the

36 Ilie, „Intellectual Property Rights: An Economic Approach".

need for IP protection as inventions and artistic works became integral to economic growth. In the 19th and 20th centuries, international agreements such as the Paris Convention and the Berne Convention standardised some IP laws across nations, reflecting the growing recognition of the economic importance of IP.

In modern times, the late 20th and early 21st centuries have seen the expansion of intellectual property rights with the advent of digital technology and globalisation. TRIPS is a notable example.

Central to the economic theory of IP is the concept of the incentive to create, which posits that creators and inventors are more likely to invest time and resources in new creations if they can expect to receive exclusive rights to profit from their work. IP laws aim to balance the interests of creators and the public by providing exclusive rights to creators, but ensuring that these rights are temporary and that the public eventually has free access[37].

The theory also recognises the spill-over effects of IP rights, acknowledging that while they benefit individual creators, they also have wider societal benefits through the diffusion of knowledge and technological progress. Intellectual property rights foster dynamic competition, where continuous innovation is necessary to stay ahead, thereby driving technological progress and economic growth[38].

With globalisation, intellectual property has become a central issue in international trade, influencing negotiations and treaties and affecting global economic relations. The digital age has brought new challenges to the enforcement and conceptualisation of IP rights, particularly in relation to digital copying and distribution.

37 Stiglitz, „Economic Foundations of Intellectual Property Rights"; Verspagen, „Intellectual Property Rights in the World Economy".

38 Brett M. Frischmann, Mark A. Lemley, „Spillovers" *Columbia Law Review*, 107 (2007): 257; May, „The Global Political Economy of Intellectual Property Rights: The New Enclosures"; Zoltan J. Acs, Mark Sanders, „Patents, Knowledge Spillovers, and Entrepreneurship" *Small Business Economics*, 39 (2012): 801–817.

6 Public domain to open source: embracing the common good in intellectual property through key sub-concepts

The common good argument in intellectual property law and policy is a nuanced perspective that emphasises a critical balance between individual rights and the broader interests of society. With roots in ancient and Enlightenment philosophical debates, this approach has evolved significantly, influenced by different historical contexts and technological advances.

Historically, the concept of balancing individual rights with the public interest dates back to the philosophical musings of thinkers such as Rousseau and Kant[39]. These philosophers reflected on the nature of property and the public interest, often arguing that knowledge and creation should be part of the public domain for the benefit of all. With the Industrial Revolution and the rise of mass media in the 19th century, the tension between private rights and public interests became more pronounced. There was a growing awareness that overly restrictive intellectual property rights could potentially stifle innovation and limit public access to information and culture.

In the post-World War II era, the establishment of international bodies such as UNESCO marked a growing global consensus on the importance of cultural exchange and the free flow of ideas. This period also saw the 1948 Universal Declaration of Human Rights, which emphasised the right to share in scientific progress and its benefits, and highlighted the need for a balance between individual intellectual property rights and the common good.

In the late 20th century, the digital revolution and the advent of the Internet brought new challenges to maintaining this balance. Modern discussions in the intellectual property field now focus heavily on issues such as open access, fair use and digital rights management systems. These

39 Viktor Mayer-Schonberger, „In Search of the Story: Narratives of Intellectual Property" *Virginia Journal of Law and Technology*, 10 (2005): 1. Maja Andjelkovic, „Intellectual Property Rights and Access to Knowledge Models: Managing Innovation, Public Goods and Private Interest" *BSIS Journal of International Studies*, 3.1 (2006): 1–15.

discussions are central to understanding and implementing the common good argument in today's digital and globally connected world.

Digging deeper into the sub-theories of this argument, we find different schools of thought. The public domain theory is a cornerstone, arguing that a robust public domain is essential for creativity, innovation and cultural development. It emphasises the importance of keeping certain works free for public use to inspire new creations and spread knowledge[40]. The Access to Knowledge (A2K) movement has been pivotal, emphasising the right of individuals to access, use and share knowledge, particularly in education, science and culture. This movement challenges the traditional notion that intellectual property rights should unduly restrict the flow of information and ideas[41].

A key aspect of the common good argument is the balancing of rights and interests. This approach seeks to protect the rights of creators while ensuring public access to cultural and intellectual works. This balance is often achieved through limitations and exceptions in intellectual property laws, such as fair use provisions, which allow copyrighted material to be used without infringement under certain conditions. Social welfare theory views IP protection through the lens of overall societal well-being. It suggests that IP policies should be evaluated based on their impact on social welfare, including considerations of economic development, access to information and cultural diversity[42]. Finally, the rise of Open Source and Creative Commons has been transformative[43]. These movements offer the concept of open collaboration and sharing in the creation and use of

40 Hugh Breakey, „Natural Intellectual Property Rights and the Public Domain" *The Modern Law Review*, 73.2 (2010): 208–239; Diane Leenheer Zimmerman, „Is There a Right to Have Something to Say-One View of the Public Domain" *Fordham Law Review*, 73 (2004): 297.

41 Keith E. Maskus, Jerome H. Reichman, „The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods" *Journal of International Economic Law*, 7.2 (2004): 279–320.

42 Joseph E. Stiglitz, „Knowledge as a Global Public Good" *Global Public Goods: International Cooperation in the 21st Century*, 308 (1999): 308–325; Gregory Shaffer, „Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who decides? The case of TRIPS and Pharmaceutical Patent Protection" *Journal of International Economic Law*, 7.2 (2004): 459–482; Tom W. Bell, *Intellectual Privilege: Copyright, Common Law, and the Common Good* (Mercatus Center at George Mason University, 2014).

43 Jyh-An Lee, „New Perspectives on Public Goods Production: Policy Implications of Open Source Software" *Vanderbilt Journal of Entertainment and Technology Law*, 9 (2006): 45; David S. Evans, Anne Layne-Farrar, „Software Patents and Open

intellectual works. They promote licences that allow creators to specify how their works can be used, shared and modified by others, fostering a culture of openness and innovation.

In essence, the common good argument in IP law and policy represents a sophisticated and evolving approach. It seeks not only to balance the rights of individual creators with societal needs, but also to adapt to changing technological landscapes and global dynamics. This perspective remains particularly relevant and challenging in the digital age, where access to information and cultural works is at the heart of global discussions about innovation, education and cultural exchange.

7 Free expression: navigating democratic theory in IP with key sub-theories

Democratic theory in the context of intellectual property intertwines the ideals of democracy with the dynamics of intellectual property rights, advocating a balance that supports a democratic society. This theory, with its deep historical roots and various sub-theories, emphasises that the free flow of ideas and information is not only beneficial but essential to a healthy democracy, and that IP laws should be designed to support this balance. The foundations of democratic theory in IP can be traced back to the Enlightenment, an era marked by a growing emphasis on individual rights, freedom of expression and democratic ideals. Philosophers such as John Locke and Immanuel Kant discussed concepts of personal property and freedom of expression, laying the intellectual groundwork for later discussions of IP in a democratic context[44]. Their ideas highlighted the importance of access to information as a pillar of democratic society.

In the 19th century, as democratic institutions matured alongside the industrial revolution, the relationship between private intellectual property rights and public access to information became more complex. The

Source: The Battle Over Intellectual property rights" *Vanderbilt Journal of Entertainment and Technology Law*, 9 (2004): 1.

44 Elisabeth Ellis, *Provisional Politics: Kantian Arguments in Policy Context* (New Heaven: Yale University Press, 2008); Bracha, Syed, „Beyond Efficiency: Consequence-Sensitive Theories of Copyright".

spread of printing technology and widespread literacy underscored the need for public access to information for democratic participation. Intellectual property laws began to be scrutinised for their potential impact on this access. The 20th century, with the rise of mass media such as radio and television, further complicated the role of intellectual property in a democratic society. Governments and policymakers faced the challenge of ensuring that the media, often controlled by entities with significant IP holdings, facilitated rather than hindered the democratic process[45]. This era underscored the need for a balance that would prevent IP laws from stifling freedom of expression or limiting access to essential information. The advent of the digital age and globalisation in the late 20th and early 21st centuries brought a seismic shift in the IP landscape. The Internet opened up unprecedented opportunities for the free flow of information and ideas, challenging traditional IP paradigms. This period has been marked by intense debates about how best to balance the rights of creators with democratic values in an increasingly interconnected world[46].

Within the democratic theory of intellectual property, several key sub-theories are integral to understanding its application and implications:

First, the belief that freedom of expression and access to information are fundamental to a functioning democracy is central[47]. This aspect of the theory argues that overly restrictive intellectual property laws can inhibit the free exchange of ideas that is essential to informed public discourse and the democratic process.

Second, there is a strong emphasis on the Access to Knowledge (A2K) movement, which, similar to the common good argument, emphasises the

45 Snyder „Two Problems with the Value of Participation in Democratic Theory and Copyright"; Coombe, „Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue".

46 Spencer McKay, *Democratic Theory and the Commons: Conceptualizing the Relationship Between Deliberation, Publics, and the Internet*. dissertaion; Sang, „Revisiting Copyright Theories: Democratic Culture and the Resale of Digital Goods"; Chang, „The Clash of Theories: Semiotic Democracy and Personality Theory in Intellectual Property Law".

47 Jack M. Balkin, „Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society", [in:] *Law and Society Approaches to Cyberspace*, ed. Paul Schiff Berman (London: Routledge, 2017), 325–382; Pamela Samuelson, „Copyright and Freedom of Expression in Historical Perspective" *Journal of Intellectual Property Law*, 10 (2002): 319; Mark A. Lemley, Eugene Volokh, „Freedom of Speech and Injunctions in Intellectual Property Cases" *Duke Law Journal*, 48 (1998): 147.

right of individuals to access and share knowledge. In a democratic context, this access is seen as essential for citizen participation in democratic processes and for holding power structures to account[48].

This perspective seeks to ensure that these laws allow for the use of copyrighted material in ways that benefit the public, such as in education, journalism and research, without undermining the legitimate interests of creators.

In sum, the democratic theory of intellectual property represents an ongoing effort to reconcile the rights of creators with the democratic imperative of a free and open exchange of ideas and information. As technology and global dynamics continue to evolve, this theory remains a critical lens through which the implications of IP laws and policies are analysed and understood in the context of their impact on democratic societies.

8 Shaping progress: the role of intellectual property in the theory of social good

The theory of the social good in the context of intellectual property is an evolving perspective that places societal benefits and ethical considerations at the forefront of the creation and dissemination of knowledge. Rooted in Enlightenment thought, the theory advocates IP laws that not only protect the rights of creators, but also promote public access to knowledge and prioritise innovation for the greater good of society[49]. Throughout history, the development of this theory has reflected changing understandings of the role of IP in social progress. Originating in the Enlightenment, the theory of the social good was shaped by philosophers such as John Locke and Jean-Jacques Rousseau, who emphasised the role of knowledge and creativity in driving social progress. These early discussions laid the groundwork for a broader discourse on the relationship between intellectual property and social welfare.

48 Peter Johan Lor, Johannes Jacobus Britz, „Is a Knowledge Society Possible Without Freedom of Access to Information?" *Journal of Information Science*, 33.4 (2007): 387–397.

49 Mtima, „IP Social Justice Theory: Access, Inclusion, and Empowerment"; Heim, „The Protection of IP".

The Industrial Revolution in the 19th century further highlighted the importance of inventions and creative works for societal development. This period saw the establishment of formal IP laws, initially aimed at encouraging innovation. Over time, these laws began to incorporate considerations of societal benefit, reflecting a growing awareness of the social responsibilities associated with intellectual and creative activity.

The 20th century, particularly in the post-World War II era, witnessed significant global developments in trade and international law, including intellectual property. The focus expanded to include balancing the rights of creators with public interests, particularly in contexts such as global health and education, marking a shift towards a more comprehensive understanding of the role of IP in society.

With the advent of the digital age and the emergence of the information society, the theory of the social good took on new dimensions. The Internet revolution brought to the fore the critical importance of knowledge diffusion for social progress, raising complex questions about the role of IP in an interconnected world.

Within the theory of social good in intellectual property (IP), several interrelated sub-theories articulate different aspects of how IP can contribute to social welfare and ethical progress.

The sub-theory of public access to knowledge emphasises the critical importance of making information and knowledge widely available. It argues for intellectual property laws that enable the wide dissemination of educational and scientific materials, thereby promoting social enlightenment and progress. This approach promotes the idea that knowledge should not be restricted, but should be shared widely to benefit society as a whole[50].

Innovation for societal benefit is a sub-theory that focuses on the premise that innovation should primarily serve the broader interests of society[51]. It argues that IP laws should be structured to incentivise research and development in areas that address societal challenges, such as health,

50 Mtima, „IP Social Justice Theory: Access, Inclusion, and Empowerment"; Rolf H. Weber, Ulrike I. Heinrich, „IP Address Allocation Through the Lenses of Public Goods and Scarce Resources Theories" *SCRIPTed*, 8 (2011): 69.

51 Claude Henry, Joseph E. Stiglitz, „Intellectual Property, Dissemination of Innovation and Sustainable Development" *Global Policy*, 1.3 (2010): 237–251.

the environment and education. This perspective sees IP not just as a means of individual gain, but as a tool for societal progress and problem solving[52].

Balancing rights and public interest emphasises the need to strike a balance between the rights of creators and the wider interests of the public. This sub-theory advocates a nuanced approach to intellectual property laws, ensuring that while creators receive the recognition and reward they deserve, these laws do not restrict the flow of knowledge and cultural enrichment to the wider society[53].

Ethical considerations in IP introduces a moral dimension to the discourse on IP, arguing that decisions in this area should take into account their impact on social justice, human rights and ethical norms. This perspective reflects a growing awareness of the ethical implications of IP in a globalised context, and emphasises the need to align IP policy with broader ethical standards[54].

Finally, the sub-theory of cultural development and diversity recognises the vital role of IP in promoting cultural development. It advocates IP policies that support and promote cultural diversity and the preservation of cultural heritage. This view positions IP as an instrumental tool for cultural enrichment and the promotion of diverse cultural expressions[55].

Taken together, these sub-theories within the theory of social good in IP articulate a vision in which IP is used not just for individual or corporate benefit, but as a means of promoting broader societal welfare, ethical progress and cultural diversity.

9 Equity and ethics in intellectual property: the theory of justice perspective

The theory of justice in the context of intellectual property (IP) offers a nuanced perspective deeply rooted in philosophical discussions of

52 Alina Ng Boyte, „The Social Value of Intellectual Property" *IP Theory*, 12.3 (2023): 1.

53 Mario Biagioli, „Weighing Intellectual Property: Can we Balance the Social Costs and Benefits of Patenting?" *History of Science*, 57.1 (2019): 140–163.

54 Mtima, „IP Social Justice Theory: Access, Inclusion, and Empowerment".

55 Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Heaven: Yale University Press, 2012).

fairness and equity. Influenced by thinkers such as John Rawls, the theory advocates a balanced approach to IP rights that ensures fair distribution and access[56].

Historically, the development of intellectual property law, initially designed to incentivise creativity and innovation, has evolved to address broader societal concerns. During the Enlightenment, philosophers such as John Locke emphasised the importance of property rights derived from labour. However, as society moved into the industrial and digital age, the impact of intellectual property rights on social justice and access to knowledge became increasingly apparent. This shift brought to the fore the need to re-evaluate IP laws from a justice perspective.

Central to the theory of justice in IP is the fair distribution of rights and resources. This aspect focuses on ensuring that IP laws do not disproportionately benefit certain individuals or groups, such as large corporations or wealthy creators, to the detriment of others, particularly marginalised communities[57]. It also emphasises the right of the public to access knowledge and cultural works, arguing that while creators deserve to be rewarded for their contributions, the public should also benefit from these creations, especially in areas such as education, science and culture.

Another key element of this theory is the balance between creators' incentives and the public interest. It seeks a middle ground where creators are incentivised for their work, but not to the extent that public access to knowledge and cultural enrichment is hindered[58].

In addition, ethical considerations in IP enforcement is an important sub-concept that addresses the ethical aspects of IP enforcement to ensure that enforcement mechanisms are fair and do not lead to unethical outcomes, such as overly punitive measures for minor infringements[59].

By reflecting on the theory of justice in IP, it challenges the traditional view of IP as a mere tool of economic incentive. Instead, it reframes IP rights as a social contract between creators and society, in which each party has rights and responsibilities. This perspective encourages a holistic view of

56 Darryl J. Murphy, „Are Intellectual Property Rights Compatible with Rawlsian Principles of Justice?" *Ethics and Information Technology*, 14.2 (2012): 109–121; Thomas Nagel, „Rawls on Justice" *The Philosophical Review* (1973): 220–234; Dustin S. Nelson, „Justice in Intellectual Property" *Ethics, Politics & Society*, 3 (2020): 49–72.

57 Murphy, „Are Intellectual Property Rights Compatible with Rawlsian Principles of Justice?".

58 Nelson, „Justice in Intellectual Property".

59 Nagel, „Rawls on Justice".

IP, considering its impact on social welfare, ethical practices and equitable access to cultural and intellectual works.

In practice, the application of the theory of justice to IP law requires a careful balancing act. Legislators and policymakers must consider not only the economic impact of IP laws, but also their social and ethical implications. In the pharmaceutical industry, for example, this may involve balancing patent protection with the need for affordable medicines in low-income countries. In summary, the theory of justice in IP represents an approach that calls for fairness and equity in the distribution of rights and resources. It emphasises the need to balance the rights of creators with the broader interests of society and is becoming increasingly relevant in modern debates where issues of access, equity and ethical considerations in IP are at the forefront of legal and societal debates.

10 Preserving identity and diversity: the role of cultural theory in intellectual property

Cultural theory in the context of intellectual property offers a nuanced perspective that views intellectual property through the lens of cultural impact and diversity. This theory, which has evolved in different historical and social contexts, recognises intellectual creations not simply as economic commodities but as integral parts of cultural expression and identity. Its development is rooted in ancient civilisations, where artistic and literary works were often intertwined with cultural and religious practices, and it has been significantly shaped over time, especially with the advent of globalisation[60]. When discussing cultural theory in IP, specific names of individuals who have made significant contributions to the theory are not usually highlighted in the same way as in other fields such as philosophy or science. This is partly because the development of cultural theory in IP has been more of a collective and interdisciplinary effort, involving contributions from various fields such as law, anthropology, cultural studies and international relations.

60 Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice*; Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*; Cohen, „Creativity and culture in copyright theory".

In the 20th century, the formal notion of protecting cultural expressions under IP law gained prominence. This period was marked by a growing awareness of the need to protect and preserve unique cultural identities and expressions as cultures began to interact more frequently and intensively due to globalisation. International conventions and treaties for the protection of cultural heritage, traditional knowledge and folklore expressions emerged, recognising that cultural expressions are essential components of cultural identity and heritage.

A key aspect of cultural theory in IP is the emphasis on the protection of cultural heritage and traditional knowledge[61]. This perspective argues for the need to protect these elements from exploitation, advocating for laws and policies that ensure that communities retain control over their cultural expressions and are fairly compensated for their use. Another key element is the emphasis on maintaining a diverse cultural landscape, with a focus on ensuring that different voices and forms of expression, especially those from marginalised or minority cultures, are protected and promoted. The theory recognises the importance of a rich cultural tapestry in fostering a vibrant and dynamic global culture.

Cultural Theory also engages in discussions about the impact of globalisation on local cultures and recognises the challenges posed by dominant cultural influences. It emphasises the importance of preserving cultural diversity and recognises that unchecked globalisation can lead to cultural homogenisation.

In essence, cultural theory in IP is a comprehensive framework that seeks to balance the protection of cultural heritage and diversity with the realities of a globalised world[62]. It advocates for IP policies and laws that respect economic values while preserving and celebrating cultural diversity and integrity. This theory continues to evolve, especially in the digital age where the distribution and appropriation of cultural content has become increasingly complex.

61 Susan Scafidi, „Intellectual Property and Cultural Products" *Boston University Law Review*, 81 (2001): 793.

62 Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property.*

11. Critics and cross-pollination of ip theories

Table 1: An Overview of theories – critics and overlay. Own work.

Theory	Critics	Cross-Pollination
Lockean labour theory:	Overemphasis on individual rights, potentially overlooking societal needs and the communal nature of creativity.	It overlaps with economic theory in its emphasis on individual incentives, but differs in its foundation on natural rights, as opposed to the utilitarian approach of the latter.
Utilitarianism:	Potentially justifying the sacrifice of individual rights for greater societal utility.	It overlaps with economic theory in its focus on societal utility, but goes beyond economic incentives to encompass overall societal welfare.
Personality theory (Hegelian perspective):	Potentially leading to overly broad moral rights that could impede the free flow of ideas.	It shares common ground with cultural theory in recognising creative expressions as extensions of personal identity and culture.
Economic theory:	Risk of over-commercialization of IP, where the focus on economic incentives may overshadow public interest and accessibility.	Risk of over-commercialisation of IP, where the focus on economic incentives may overshadow public interest and accessibility. This theory often overlaps with utilitarianism in its focus on societal benefits, but differs in its specific focus on economic incentives.
Common good argument:	Vagueness in defining the 'common good' and the balance between individual rights and societal interests.	It is closely aligned with the theory of the social good and democratic theory, all of which emphasise public access and societal benefits.
Democratic theory:	Challenge in defining the scope of ‚public access' and ensuring it doesn't undermine creators' rights.	This theory overlaps with the theory of the social good in emphasising the societal role of IP and the importance of public access.

Theory of justice:	Complex application of Rawlsian principles to IP, especially in defining what constitutes fairness in diverse cultural and economic contexts.	It overlaps with the common good argument in its focus on equity, but has a distinct emphasis on fairness and distributive justice.
Theory of social good:	Potentially prioritizing societal needs over the rights and incentives of creators.	It shares similarities with democratic theory and the common good argument, focusing on societal benefits and ethical considerations.
Cultural theory:	Challenge in ensuring cultural protection without leading to cultural isolation or hindering cultural exchange.	It intersects with personality theory in recognising creative works as extensions of identity, and with justice theory in its focus on the protection of minority cultures.

12 Examples of cross-pollination

Examples of cross-fertilisation between different intellectual property theories illustrate the multifaceted nature of intellectual property law and its implications.

In the case of utilitarianism and the theory of the social good, the adaptation of copyright law for educational purposes is a prime example. Here, allowing the use of copyrighted materials in educational settings not only meets the utilitarian goal of maximising social welfare, but also supports the social good of widespread education.

The development of open source software illustrates the intersection between economic theory and utilitarianism. Open source allows for widespread use in accordance with utilitarian principles, while at the same time promoting innovation and economic growth, which is a key aspect of economic theory.

Policies promoting open access to academic research demonstrate the intersection between democratic theory and the theory of the social good. Democratising access to knowledge serves a social good, in line with the aims of both theories.

The development and implementation of 'fair use' policies in copyright law is where democratic theory and economic theory converge. These

policies allow limited use of copyrighted material without permission for a variety of purposes, encouraging innovation, a key tenet of economic theory, while ensuring access to information, a fundamental aspect of democratic theory.

Policies that promote multilingual content in broadcasting and digital platforms represent a fusion of democratic and cultural theory. Such policies ensure access to information in different languages, a priority of democratic theory, and protect linguistic diversity, a core concern of cultural theory.

Efforts to protect indigenous cultural expressions from commercial exploitation reflect the principles of cultural theory and personality theory. They emphasise both the cultural importance of these expressions and their role in the collective identity of the community, in keeping with the ideals of both theories.

Policies and laws that prevent the cultural appropriation and commercial exploitation of traditional cultural expressions are where cultural theory and the theory of justice meet. These policies ensure that the communities of origin are recognised and compensated, in line with cultural theory, and advocate for a fair distribution of the benefits from the use of these cultural assets, a concern of the Theory of Justice.

The common good argument and the theory of justice intersect in the implementation of compulsory licensing in the pharmaceutical sector. In situations such as public health crises, governments allow generic production of patented drugs without the consent of the patent holder. This approach reflects a balance between rewarding innovation, a component of the common good argument, and ensuring equitable access to essential medicines, a priority of the theory of justice.

Finally, open access publishing in academia, where research is made freely available to the public, is an example of the social good and utilitarian theories working together. This model supports the dissemination of knowledge for the greater good, in line with the theory of social good, and is consistent with the utilitarian principle of maximising general happiness by increasing public access to information.

13 Summary

In sum, this exploration traverses the diverse landscape of intellectual property theories, from Lockean labour theory to the theory of the social good, each of which contributes to the ongoing debate about the scope, nature and enforcement of intellectual property rights. The rich mix of perspectives illuminates the complex balance between individual rights, the public interest, economic incentives and cultural development in the field of intellectual property.

The cross-pollination of these theories in real-world scenarios underlines the multifaceted nature of IP law. Examples include the use of copyrighted materials in educational settings, the development of open source software, and policies promoting open access to academic research. These cases demonstrate the integration of different theories, from utilitarianism to economic theory, and from democratic theory to the theory of the social good, each of which plays a critical role in shaping a holistic approach to IP law.

Diving deeper, specific takeaways from this exploration reveal how these theories intersect and diverge, affecting the practical application of IP law. For example, labour theory's emphasis on moral rights underpins the rationale for copyright protection, ensuring that creators have control over and benefit from their works. This is in line with economic theory, which sees IP as a driver of innovation and economic growth, highlighting the crucial role of exclusive rights in motivating creative endeavour.

Furthermore, the theory of social good and the public interest argument highlight the need to balance individual creators' rights with broader societal interests. This balance is exemplified by policies that allow exceptions to intellectual property rights, such as fair use and compulsory licensing, particularly in critical areas such as education and public health. These policies reflect an understanding that while the protection of creators is essential, ensuring public access to knowledge and essential resources is equally important for societal progress.

In addition, democratic theory's focus on the free flow of information as essential to a healthy democracy has become increasingly relevant in the digital age. The rise of digital technologies and the Internet has changed the way information is disseminated and accessed, prompting a reassessment of intellectual property laws to ensure that they do not unduly restrict the free exchange of ideas and information that is vital to democratic discourse.

The impact of cultural theory is also notable, particularly in the context of globalisation. It advocates the protection of diverse cultural expressions and traditional knowledge, and addresses the challenges posed by dominant cultural influences and the potential for cultural homogenisation. This theory underscores the importance of IP laws in safeguarding cultural diversity and promoting a rich global cultural tapestry.

In essence, the study of IP theories represents a dynamic and evolving field in which various philosophical, economic and social considerations converge to shape IP laws. These laws, in turn, not only influence the creation and distribution of intellectual works, but also reflect broader societal values and priorities. The ongoing dialogue between these theories continues to inform and shape the development of fair, equitable and effective IP laws that balance the rights and interests of individuals, communities and societies at large.

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