Intellectual Property:
Theory, Privilege, and Pragmatism

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Introduction

Modern times have been marked by what may be described as an intellectual property land grab. Recently there has been an alarming rush to patent human DNA.[1] Government and corporate data mining activities have produced massive information data files on most US citizens.[2] In the name of security or better profits, sensitive personal information is held, sold, and traded as intangible property. Moreover individuals have little control over these activities. In the area of personal information control, it seems as if we are moving into an age of transparency.[3]

Yet Anglo-American systems of intellectual property are coercive and protect vast holdings. The Bern Convention,[4] TRIPS agreement,[5] and numerous other treaties,[6] allow authors and inventors to control intellectual works worldwide. Those countries that resist signing these treaties are excluded from profitable markets and are thus forced to consent to a Western model.[7] Moreover, it is not typically the original authors or innovators who retain control of intellectual property rights; it is the middlemen, distributor, company owner, and profiteer.[8]

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1. See James Meek, "Patenting life: Human genetic patenting: Why you are first in the great gene race: The rush for rights to your body is under way and already patents have been applied for on a fantastic 127,000 bits of your genes", *Guardian Special Supplement* 4 (November 15, 2000). For an in-depth analysis of many of the issues that surround patenting gene fragments (ESTs), see Molly A. Holman & Steven R. Munzer, "Intellectual Property Rights in Genes and Gene Fragments: A Registration Solution for Expressed Sequence Tags" (2000) 85 Iowa L. Rev. 735.
2. Jeffrey Rosen *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000).
3. See David Brin, *The Transparent Society: Will Technology Force Us to Choose Between Privacy and Freedom?* (Reading, MA: Addison-Wesley, 1998).
4. *Berne Convention for the Protection of Literary and Artistic Works* (Sept. 9, 1886) (as last revised at Paris, July 24, 1971) (amended 1979).
5. See *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (April 15, 1994), Annex IC: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, reprinted in "The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts" edited by GATT Secretariat (Geneva, 1994), 119, 365403. See also, Marci Hamilton "The TRIPS Agreement: Imperialistic, Outdated, and Overprotective" in Adam D. Moore, ed., *Intellectual Property: Moral, Legal, And International Dilemmas* (Lanham, MD: Rowman & Littlefield, 1997) 243.
6. See, for example, *Patent Cooperation Treaty* (Washington June 19, 1970), (amended September 28, 1979), (modified February 3, 1984, and October 3, 2001), and *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure*, (Budapest, April 28, 1977), (amended on September 26, 1980).
7. See Hamilton, *supra* note 5.
8. See, for example, Raymond Shih Ray Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology" (2002) 69 U. Chi. L. Rev. 263.

Nevertheless, Anglo-American systems of intellectual property are necessary for social progress—or so it is argued.[9] Within the Anglo American tradition what justifies systems of intangible property is that these models are supposed to bring about social progress. When compared to other sorts of models governing the creation, use, and control of intangible works, Anglo-American systems produce more social utility—or so it is claimed. It is in the name of social progress that the U.S. Constitution empowers the federal government to protect intellectual property. "Congress shall have the Power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] Brian Fitzgerald has noted a similar basis in the intellectual property system of the United Kingdom, Canada, and Australia.[11]

In the most basic terms the theory that provides the foundation for Anglo-American systems of intellectual property is a particular sort of cost benefit analysis. The benefit sought is social progress. The costs are the rights that limit public access to intellectual works necessary for incentives. In essence there is a trade-off of access to intellectual works in order to stimulate production and maximize social progress.

A system or institution has theoretical underpinnings when the rules that make up the system are limited or justified by theoretical principles. For example, if a social progress cost-benefit analysis theory is adopted, then the rules of Anglo-American copyright and patent will be justified or limited by some version of the principle of utility. Society ought morally to adopt a system or set of rules if and only if the system will lead to, or is expected to lead to, the maximization of overall net utility for everyone affected.

Standing against those who would defend a "grand theory" that provides a foundation for systems of intellectual property are those who believe that these systems protect certain economic interests. The rules that make up copyright, patent, and trade secret institutions are simply a pragmatic response to economic concerns. For example in the United States the passage of the Sonny Bono Act[12] and the suit against Napster[13] seemed to have little to do with a social progress cost benefit analysis and more to do with protecting the vast holdings of certain businesses.

In the debate between theorists and economic pragmatists, and in relation to Anglo-American systems of intellectual property, there are at least three important questions to consider. First, what is economic pragmatism; what it would mean to be economically pragmatic? Second, have Anglo-American systems of intellectual property been grounded on pragmatic considerations, theoretical

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9. See *infra* notes 37-49 and accompanying text.

10. U.S. Const. art. I, § 8, cl. 8.

11. Brian Fitzgerald, "Digital Property: The Ultimate Boundary?" (Fall 2001) 7 Roger Williams U. L. Rev. 47. Fitzgerald cites *Welcome Real-Time SA* v. *Catuity Inc* [2001] F.A.C. 445 at para. 129; David Vaver, *Intellectual Property Law* (Concord, ON: Irwin Law, 1997) 613; David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) U.T. Fac. L. Rev. 55 at 187-93.

12. *The Sonny Bono Copyright Term Extension Act*, signed into law on October 27, 1998. *Eldred* v. *Ashcroft* (01618) 239 F.3d 372, affirmed.

13. *A&M Records, Inc.*v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

considerations, or both. As a matter of historical concern we may wonder about the theoretical and pragmatic origins of intellectual property. Finally, independent of what is the case, should Anglo-American systems of intellectual property be determined or limited by theory?

Section I of this article will focus on the nature and definition of economic pragmatism. It will be argued that while economic pragmatism comes in many flavors each is either unstable or self-defeating. Section II will advance the view that Anglo-American systems of intellectual property have both theoretical and pragmatic features. In the third section a sketch of a theory will be offered: a theory that may limit applications of economic pragmatism and provide the foundation for copyright, patent, and trade secret institutions.[14] To be justified—to warrant coercion on a worldwide scale—systems of intellectual property should be grounded in theory. Pragmatic considerations will only be appropriate for "hard cases", at the margin, or when theory gives no guidance.

I. The Nature and Definition of Economic Pragmatism

Economic Pragmatism

On a common language notion of "pragmatic" an action that was purely pragmatic would have no underlying principle guiding or justifying it—the agent does what works without being limited by theory or principle. To be economically pragmatic would be to do what works in an economic sense. An institution or system of rules, such as copyright or patent law, that was purely pragmatic would have no theoretical component limiting the kinds of rules adopted except the general prescription that the system should aim at doing what works economically.

This view of economic pragmatism is rendered unworkable as soon as the question "works for whom?" is asked. If the question is answered "works for some specific individual," then we may justifiably ask why the individual in question is so privileged. If "works for some specific group" is the answer, then again we may question privilege. Finally, if the "for whom" question is answered by considering everyone affected by the act or system, then we are getting perilously close to theory—systems of intellectual property should aim at doing what works for everyone affected.

A second worry concerns the nature, scope, and definition of the notion "works economically." An institution of patent protection, for example, could work economically in terms of maximizing profits, enhancing economic equality, making the least well-off economically as well-off as possible, or by promoting the efficiency of information distribution. Whatever answer is given, a question of privilege arises again albeit at a different level: why should any one of these be the standard?

In answer to the question of privilege—why should some individual or group be economically advantaged—we include everyone affected by the institution. In

14. For an in-depth presentation and defense of a Lockean theory of intellectual property and information control see Adam D. Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick, NJ: Transaction Publishing, 2001).

terms of the measure we could aim at wealth enhancement (in the broadest terms) or social utility. Notice that this version of economic pragmatism has turned into the social progress theory mentioned earlier. Anglo-American systems of intellectual property are structured to promote social utility by granting limited rights to authors and inventors as incentive for innovation.

Arguably the most common form of economic pragmatism practiced in recent times is group oriented, namely, do what works economically for some group, say citizens of the United States, employees of Microsoft, or the disadvantaged. We will return to this form in considering the historical question. Presently a more radical form of economic pragmatism will be considered.

Radical Pragmatism

A more nuanced and sophisticated form of economic pragmatism draws from the philosophical theories of Peirce,[15] James,[16] Dewey[17] and their modern counterparts Heidegger,[18] Habermas,[19] and Rorty.[20] At the heart of this view stands an assault on the notion of "objective" truth, that is, truths that obtain independent of human perception. Truth, for the radical pragmatist, is something we create and depends on language, culture, habits, and experiences. Knowledge is thus contextual, relative, and subjective. The radical pragmatist denies the very existence of objective facts or knowledge. Moreover, given that contexts and ways of perceiving are ever changing, the radical pragmatist denies the possibility of grand theories comprised of rules or principles grounded in objective facts. Since our ways of perceiving and modes of perception are ever changing, truth, falsity, rules, principles, and grand theories are each socially and historically contingent.

If correct, then it is a mistake to ground systems of intellectual property in a theory like social progress utilitarianism. According to the radical pragmatist, judges and legislators, upon recognizing that their perceptions of reality arbitrarily color the decision making process, should reject theory and do their best to be fair and just. Catharine Wells writes:

> The idea that it is possible to make legal decisions in an atmosphere of judicial detachment has seemed less compelling in the face of an increasingly complex and diverse society. As this reality has sunk deeper into the collective unconscious, scholars have begun a reexamination of the phenomena of legal reasoning and legal judgment with a view towards understanding their "situated" character. These theorists reject the notion that there is a universal, rational foundation for legal judgment. Judges do not,

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15. See, for example, Charles S. Peirce, "Questions Concerning Certain Faculties Claimed for Man" (1868) J. Speculative Phil. 103.

16. See, for example, William James, *Pragmatism and Other Essays* (New York: Washington Square Press, 1963).

17. See, for example, John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (New York: Putnam, 1929).

18. Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (New York: Harper, 1962).

19. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996).

20. Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, NJ: Princeton University Press, 1979).

> in their view, inhabit a lofty perspective that yields an objective vision of the case and its correct disposition. Instead, these scholars understand the role of judging more pragmatically; they recognize that all judges bring their own situated perspective to the case and do the best they can under all the circumstances to reach a fair and just disposition.[21]

Moreover, radical pragmatists argue experience has demonstrated that following grand theories either fails to yield answers to tough legal questions or leads to absurd results. In the place of theory the pragmatist urges judges and legislators to adopt practical reason as a method for understanding the historical, cultural, contingent, and radically subjective views of those participating in a legal system.[22]

While pragmatists have defended different conceptions of practical reason—Wellman offers an instrumentalist approach,[23] Farber defends a non-deductive, common sense guided by tradition and precedent, approach,[24] Posner suggests various methods including, introspection, empathy, analogy, intuition, and metaphor—each contends that a suitably relativized and subjective approach to practical reason will provide a method for solving legal and economic problems.[25]

These are deep waters and a rich analysis of all the forms of radical pragmatism is beyond the scope of this article. Nevertheless, several considerations will be offered that point to deep failings within the pragmatist tradition, failings that would also impact economic pragmatism. The goal here is not to present an argument that eliminates radical pragmatism as a plausible view full stop. Rather the worries presented are intended to call into question the very ability of pragmatic theory to provide usable decision methods.

The radical pragmatist denies the existence of "objective" truth, truths that hold independent of our perceptions and cultural biases. First we may ask, is this claim about truth subjective and contingent as well? If not, then two worries immediately arise. In claiming that there are no objective truths except the claim that "there are no objective truths" we may wonder about privilege and how objectivity is determined. It would seem impossible to support a claim of objective truth built upon subjective and contingent foundations. Yet if this is the *only* objective truth, then we are left with nothing else. Moreover, if we could somehow build an objective truth out of subjective and contingent foundations, then why couldn't this method be used to establish other objective truths—here again the question of privilege arises.

Suppose the radical pragmatist claims that there are no objective truths including the claim "there are no objective truths." Here we are left with the puzzle of just

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21. Catharine Wells, "Situated Decisionmaking" in Michael Brint & William Weaver, eds., *Pragmatism in Law & Society* (Boulder, CO: Westview Press, 1991) at 275 quoted in Thomas Cotter, "Legal Pragmatism and the Law and Economics Movement" (1996) 84 Geo. L.J. 2071 at 20-79.

22. See Cotter, *ibid.* at 2087-88.

23. Vincent Wellman, "Practical Reasoning and Judicial Justification: Toward an Adequate Theory" (1985) 57 U. Colo. L. Rev. 45.

24. Daniel A. Farber, "The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law" (1992) 45 Vander. L. Rev. 533.

25. Richard Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990) at 71-73.

how such a claim would be established—by what method could this claim be proved and couldn't it be rejected by simple appeal to subjective preference. "I don't agree with your view." Would this response be a discussion stopper?

Consider the weakest from of the principle of non-contradiction. It is not the case that for every statement *P* that both P and not P. Alas, for this claim to turn out false every single statement and its opposite would have to be true at the same time. Rejection of this objective truth would seem absurd and lead one to suspect that opponents would themselves be in the grip of some sort of superstitious theory worship. Robert Nozick writes:

> When all facts are viewed as social constructions, then facts (in general) lose authority. They need not be accepted as limitations upon what one might do. ... However, it cannot be that everything is a social construction; it cannot be that all truths and facts and things are social constructions. For to say that something, for instance, gender differences, is a social construction is to say there are social processes that cause this phenomenon to exist or to take a certain form. If gender differences are a social construction, then it is a fact that certain existing social processes produce those gender differences. And that fact—that those social processes exist and produce gender divisions—is not itself a social construction.[26]

Returning to Catharine Wells' view that judges should recognize the cultural, historical, and contextual nature of truth and try to reach a decision that is just and fair we may wonder about the decision procedure. Assuming as the radical pragmatist must that the notions of justice and fairness are situationally dependent—there are no theories that illuminate justice and fairness—there would be no principled way to decide a case. For example, the libertarian may think of justice as not violating property rights, the communist as equality of distribution, and the fascist as maximizing utility for one's group. Without any way to determine which view of justice and fairness is correct, a judge or legislator would be left with no nonarbitrary way to proceed. Radical pragmatists may reply that the decision should aim at a beneficial outcome or a good result, but beneficial outcomes and good results would themselves be subjective, culturally, and historically contingent. Why should a liberal conception of justice, fairness, and good outcomes provide the standard? This line of worry leads to a second problem.

We would like to think that political, legal, and economic systems, or at least parts of these, should command a kind of moral reverence—that sometimes we have a moral obligation to obey the law or aid political institutions. But if radical pragmatism is correct, it is hard to see how such reverence would arise, especially if a kind of arbitrariness infects the entire system. It would seem that political and legal systems would be about power, control, manipulation, and little else. Dworkin notes, "only by regarding law as the expression of a single, coherent set of principles

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26. Robert Nozick, *Invariances: The Structure of the Objective World* (Cambridge, MA: Belknap Press of Harvard University Press, 2001) at 26. "William James tells the story of a person approaching him after a lecture and saying 'The world rests on a large turtle.' 'And what does the turtle rest upon?' James asked. 'Another turtle,' said the person. 'And what ...' began James, who was then interrupted: 'Professor James, it's turtles all the way down.' There cannot be social constructions all the way down." *Ibid.*

can we achieve a 'community of principle' whose law will have legitimacy and moral authority."[26a] In reply to these words Rorty claims that "a belief can still regulate action, can still be thought worth dying for, among people who are quite aware that this belief is caused by nothing deeper than contingent historical circumstance."[27] But surely this is a questionable view—it seems near impossible thoughtful persons would have a deep commitment to a view they know to be groundless.

When Stanley Fish[28] and Duncan Kennedy,[29] two radical pragmatists, claim that legal systems are built upon ideology, politics, and privilege they leave these institutions deprived of any status—they are the mafia family, the terrorist network, the slave holder writ large. Martha Nussbaum notes,

> Highly intelligent people, people deeply committed to the good of women and men in developing countries, people who think of themselves as progressive and feminist and antiracist, are taking up positions that converge ... with the positions of reaction, oppression, and sexism. Under the banner of their radical and politically correct "anti-essentialism" march the ancient religious taboos, the luxury of the pampered husband, ill health, ignorance, and death.[30]

Nussbaum rightly admonishes anti-essentialist views like radical pragmatism. A view that could sanction almost anything—discrimination, torture, mutilation, and the like—is not a view we should take seriously. If truth is subjective "all the way down" and every value claim equally weighty, claims it would seem that the radical pragmatist must endorse, then anything is possible.

Richard Posner attempts to stop this slide by noting that practices of slavery, torture, and the like violate "the unshakable moral intuitions of Americans which is a good enough reason to prohibit them, regardless of any conceivable instrumental value that they may have."[31] Posner and other pragmatists would have intuitions provide a check on pragmatism run amuck. But surely, this will not help the pragmatist. At one time, most white Americans thought blacks and native-Americans were subhuman and we could assume with some probability that their intuitions reflected these beliefs. This list could be extended indefinitely. In short, intuitions,

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26a. Ronald Dworkin, *Law's Empire* (1986) at 188.

27. Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge, NY: Cambridge University Press, 1989) at 189.

28. Stanley Fish, "Almost Pragmatism" in Brint & Weaver, eds., *supra* note 21.

29. Duncan Kennedy, "Legal Education as Training for Hierarchy" in David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Basic Books, 1998).

30. Martha Nussbaum, "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism" (1992) 20 Pol. Theory 202. At the end of his contribution to this volume Brian Fitzgerald claims that theory will not accommodate all interests and preferences. Echoing Nussbaum, I am happy that some interests—say those of the pedophile, racist, or slave owner—are not accommodated.

31. Richard Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995) at 379. See also Richard Posner, *The Problematics of Moral and Legal Theory* (Cambridge, MA: Belknap Press of Harvard University Press, 1999) at 241. In the first part of this work Posner offers a critique of what he calls "academic moral theorizing." I can't help but note that one criticism Posner offers is that academic moral philosophers offer critiques of economic theory when such theories are specialized fields of study. Posner thinks that these critiques are laughable because most, if not all, of their authors will not have had the time to master the science of economics. But surely morally theory, including normative ethics, metaethics, and applied ethics, is an equally rich and specialized field of study. Posner's critique of moral theory is equally laughable.

even those held by most members of a group, are still groundless. Steven Smith notes,

> But "intuition" hardly constitutes a "method" of, or even an "approach" to, theorizing. The hard questions, after all, are not whether to use "intuition," but rather what "intuition" means, which intuitions to accept, how much weight to give them, and how to put "intuitions" to constructive use. Pragmatism provides no method of answering these questions.[32]

While not decisive, such considerations cast serious doubts on radical pragmatist views of law and economics. If truth, belief, desire, value, and method are each arbitrary constructs built upon the ever-shifting foundations of culture, social practice, and subjectivity it would seem that law and legal systems are reflections of power and control and nothing more. While such sentiments may warm the radical pragmatist's heart we may wonder about the point of all; it would seem that pragmatism would just offer more of the same.

II. The History and Theory of Intellectual Property

Anglo-American systems of intellectual property have been influenced by both theory and economic pragmatism. While the "moral rights" tradition has played a small role, the dominant theory underlying systems of intellectual property is incentives based and forward looking in the sense of trying to promote social progress. Nevertheless group economic pragmatism has had an important role in shaping intellectual property systems as well.

The Dominance of Economic Pragmatism and Privilege

Prior to the enactment of formal systems of intellectual property many early patents and copyrights had little to do with innovation—economic pragmatism and privilege was the dominate force.[33] For example, one of the earliest cited patents (1469) granted a monopoly over printing to John of Speyer and "awarded him exclusive printing privileges in Venetian territory, and forbade the importation of competing books of foreign imprint"[34] Tom Palmer continues,

> Even the prohibition on monopolies set forth in the Statute of Monopolies (1624), a significant influence on the development of intellectual property rights, in addition to exempting specified industries such as printing and glass and alum production, exempted from the prohibition grants to "any Corporacions Companies of Fellowshipps of any Art Trade Occupacion or Mistery, or to any Companies or

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32. Steven Smith, "The Pursuit of Pragmatism" (1990) 100 Yale L.J. 409 at 434.

33. "Those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, 'property,' for a word that had an unpleasant ring, 'privilege.'" Machlup & Penrose, "The Patent Controversy in the Nineteenth Century" (1950) 10 J. Econ. History 1 at 16.

34. Bruce Bugbee, *Genesis of American Patent and Copyright Law* (Washington, DC: Public Affairs Press, 1967) at 21.

> Societies of Merchants within this Realme, erected for the mayntenance enlargement or ordering of any Trade of Merchandize."[35]

Similar points have been made about copyright. Barbara Ringer has argued:

> The pro-copyright theologians argue that copyright as a natural property right emerged from the mists of the common law and took definite form as the result of the invention of the printing press and the increase in potential and actual piracy after 1450. They dismiss the historical ties between copyright and the Crown's grants of printing monopolies, its efforts to suppress heretical or seditious writing, and to exercise censorship control over all publications. This line of argument tends to infuriate the anti-copyright scholars who point out that the first copyright statute in history, the Statute of Anne of 1710, was a direct outgrowth of an elaborate series of monopoly grants, Star Chamber decrees, licensing acts, and a system involving mandatory registration of titles with the Stationers' Company.[36]

The genesis of American protection of foreign works traces from the point where American authors and inventors were being pirated and felt the economic pinch so to speak—surely such provisions were motivated by group economic pragmatism.[37]

Nevertheless, the Statute of Monopolies (1624) and the Statute of Anne (1709) pushed intellectual property institutions away from mere economic privilege and pragmatism and toward a justifying theory. Anglo American institutions of intellectual property protection are based on the English system. Although many changes have since been made, the Statute of Monopolies is considered the basis of the British and American patent systems today. Bruce Bugbee writes:

> Generally regarded as the foundation of the present British patent system, the Statute of Monopolies—in keeping with its name—was concerned mainly with the problem of ending royally granted, monopolistic privileges.[38]

The statute granted fourteen-year monopolies to authors and inventors and ended the practice of granting rights to "non-original/new" ideas or works already in the public domain.

The Statute of Anne [8 Anne, c. 19 (1710)] is considered the first statute of modern copyright. The statute began, "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 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 the encouragement of learned men to compose and write use books, be it enacted ...." The law gave protection to the author by granting

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35. Tom Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach" in Moore, ed., *supra* note 5 quoting Bugbee, *ibid.* at 40.

36. Barbara Ringer, "The Demonology of Copyright" in Philip G. Altbach & Sheila McVay, eds., *Perspectives on Publishing* (Lexington, MA: Lexington Books, 1976) at 38.

37. See James Parton, "International Copyright" in *The Atlantic Monthly* (October 1867). See also Mark Ward, "Copyright rows ring down the centuries", Online: BBC World News http://news.bbc.co.uk/1/hi/sci/tech/2002379.stm (date accessed: May 22, 2003).

38. Bugbee, *supra* note 34 at 39.

fourteen year copyrights, with a second fourteen year renewal possible if the author was still alive.

In the landmark case *Miller* v. *Taylor* (1769)[39] the inherent rights of authors to control what they produce, independent of statute or law, was affirmed. While this case was later overruled in *Donaldson* v. *Becket* (1774)[40] the practice of recognizing the rights of authors had begun.

The Dominance of Theory

Anglo-American systems of intellectual property are typically justified on utilitarian grounds.[41] Limited rights are granted to authors and inventors of intellectual property to promote social progress.[42] Thomas Jefferson, a central figure in the formation of American systems of intellectual property, expressly rejected any natural rights foundation for granting control to authors and inventors over their intellectual work. "The patent monopoly was not designed to secure the inventor his natural right in his discoveries. Rather, it was a reward, and inducement, to bring forth new knowledge."[43] Society seeks to maximize utility in the form of scientific and cultural

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39. *Miller* v. *Taylor* (1769), 4 Burr. 2303.

40. *Donaldson* v. *Becket* (1774), 4 Burr. 2408.

41. See Fitzgerald *supra* note 11, citing W. Fisher, "Theories of Intellectual Property" in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2000), Brian Fitzgerald distinguishes four different theories of intellectual property. 1. Economic/utilitarian: intellectual property is justified in terms of economic efficiency. 2. Lockean/labor desert: intellectual property rights are natural rights earned through adding labor to the common resource of information with the proviso that enough and as good is left for others. 3. Personhood: intellectual property is an emanation of the person and the law should facilitate this personal aspect. 4. Social planning: intellectual property law should be designed to culturally enrich democratic society. The utilitarian view, as I understand it is to aim at cultural enhancement or 'social progress.' Economic efficiency is only one part of maximizing social progress. Access restrictions are supposed to bring about more cultural enhancement—in the long run. In fact, on this view the only reason to give authors and inventors intellectual property rights is to insure social progress–intellectual property rights are supposed to ensure that there will be more access to more intellectual works. If correct there is no important difference between Fisher theory 1 and 4.

42. See generally, C. Oppenheim, "Evaluation of the American Patent System" (1951) 33 J. Pat. Off. Soc'y; Palmer, *supra* note 35 and "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects" (1990) 13 Harv. J. L. & Pub. Pol'y 817; Ejan Mackaay, "Economic Incentives in Markets for Information and Innovation" *ibid.* at 867; Roger Meiners & Robert Staaf, "Patents, Copyrights, and Trademarks: Property or Monopoly?" *ibid.* at 911; Leonard G. Boonin, "University, Scientific Research, and the Ownership of Knowledge" in Vivian Weil & John W. Snapper, eds., *Owning Scientific and Technical Information: Value and Ethical Issues* (New Brunswick and London: Rutgers University Press, 1989) at 257-60; Arthur Kuflik, "Moral Foundations of Intellectual Property" in Weil & Snapper, eds., *ibid.* 219; Edwin C. Hettinger, "Justifying Intellectual Property" in Moore, ed., *supra* note 5 at 30; David Carey, *The Ethics of Software Ownership* (1989) (unpublished, Ph.D. dissertation, University of Pittsburgh); Patrick Croskery, "Institutional Utilitarianism and Intellectual Property" (1993) 68 Chi.-Kent. L. Rev. 631; William Landes & Richard Posner, "An Economic Analysis of Copyright Law" (1989) 18 J. Legal Stud. 325; and Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton, NJ: Princeton University Press,1962).

43. See W. Francis & R. Collins, *Cases and Materials on Patent Law: Including Trade Secrets Copyrights Trademarks*, 4th ed. (St. Paul, MN: West Publishing Company, 1987) at 92-93. *Wheaton* v. *Peters* 8 Pet. 591, (1834). See also "Copyright Enactments of the United States, 1783-1906" (1906) 3 *Copyright Office Bulletin* at 14. "Unquestionably, the 1834 decision marked an important turning-point, in that it distances American copyright law from the natural law

progress by granting rights to authors and inventors as an incentive toward such progress. This approach is, in a way, paradoxical. In order to enlarge the public domain permanently, society protects certain private domains temporarily. In general, patents, copyrights, and trade secrets are devices, created by statute, to prevent the diffusion of information before the author or inventor has recovered profit adequate to induce such investment.[44]

The justification typically given for Anglo-American systems of intellectual property "is that by slowing down the diffusion of information ... [it] ensure[s] that there will be more progress to diffuse."[45] Moreover, utilitarian based justifications of intellectual property are elegantly simple. Control is granted to authors and inventors of intellectual property because granting such control provides incentives necessary for social progress. Coupled with the theoretical claim that society ought to maximize social utility, we arrive at a simple yet powerful argument.[46]

Owning an intellectual work confers certain economic rights on the property holder. While these rights differ depending on the domain of what is protected, they center on the control of physical expressions or embodiments of intellectual works. Our economic life takes place in the realm of physical objects, and so economic rights to intellectual works confer control over concrete expressions. Almost to the exclusion of all other rights, Anglo-American systems of intellectual property have been concerned with the economic rights of authors and inventors.[47]

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perspectives which were very much in evidence at the end of the eighteenth century." Alain Strowel, "Droit d'auteur and Copyright: Between History and Nature" in Brad Sherman & Alain Strowel, eds., *Of Authors and Origins* (Oxford: Clarendon Press, 1994) 245. Edward C. Walterscheid, "Inherent or Created Rights: Early Views on the Intellectual Property Clause" (1995) 19 Hamline L. Rev. 81. Nevertheless anomalies still pop up. "In 1984 the Supreme Court cited Locke when it held that intangible 'products of an individual's labor and invention' can be 'property' subject to the protection of the Takings Clause." Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 Yale L. J., 1533 at 1557, citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984).

44. This view is echoed by the committee report that accompanied the 1909 Copyright Act. "In enacting a copyright law Congress must consider ... two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly." Committee Report accompanying the 1909 Copyright Act, H.R. Rep. No. 2222, 60th Cong., 2nd Sess. 7 1909. See also, *Sony Corp. of America* v. *Universal Studios Inc.*, 464 US 417, 78 L. Ed 2d. 574 (1984).

45. See Dorothy Nelkin, *Science as Intellectual Property: Who Controls Research?* (New York: Macmillan, 1984) at 15.

46. See the Committee Report accompanying the 1909 Copyright Act, *supra* note 44. The courts have also reflected this theme: "The copyright law ... makes reward to the owner a secondary consideration." *United States* v. *Paramount Pictures Inc.* 334 US 131 (1948) "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims on the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts." *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975).

47. In 1988 the United States became the seventy-eighth nation to join the Berne Copyright Convention, *supra* note 4. Along with the economic rights previously mentioned, the Berne Convention grants authors rights of paternity and integrity. In recent years, to reflect statutes found in the Berne Convention Treaty, the United States has moved to expand copyright protection to include creator's rights. See 17 U.S.C. § 106(a)(1990). These rights are non-economic, however, and in many cases run against social progress justifications.

In the United States the economic rights that are conferred on a copyright holder are the rights to reproduce, adapt and distribute copies, and to control public displays or performances of the work.[48] Patent holders have the economic rights of production, use, sale, and transfer.[49] Similar rights protect trademarks and mere ideas.[50] In any case, these rights allow the control of physical embodiments of intellectual works.

Creator's Rights

Leaving aside economic rights authors and creators have rights to control abstract ideas.[51] Take, for example, the non-economic rights that surround the creation of new theories of science, history, literary criticism, philosophy, and the like. Einstein's control of his Theory of Relativity is more than just a right to be given due credit as the original author of the theory. He also has the right to create and publish in any form desired, the right to prevent any deformation, mutilation or other modification of the expression, and a right against misappropriation or plagiarism.[52] This latter right is understood by many within the Western academic tradition to be moral bedrock. There is something deeply wrong with copying the ideas of someone else and claiming that they are your own or knowingly misrepresenting a theory or argument.

Within the French system of intellectual property there are four personal rights that are retained by the author even after she has transferred her economic rights.[53] These rights are: the right of attribution (due credit as the author); the right to disclosure (to publish in any form desired); the right of integrity (similar to rights against deformation etc.); and the right of retraction.[54] In a 1902 French court case focusing on whether the ex-wife of an artist had the right to share in the economic rights of her husband, the court ruled that she did. At the same time the court made

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48. See 17 U.S.C. § 106.

49. See 35 U.S.C.A. § 154 (1984 and Supp., 1989).

50. See 15 U.S.C.A. § 1057(b), 1060, 1065, 1072.

51. The well-known German classical liberal Wilhelm von Humboldt also championed the non-economic rights of authors and inventors. Humboldt argued that the full development of individual potential, capacities, and talents, requires the protection of both economic property rights and creator's rights. See, W. von Humboldt, *The Limits of State Action*, trans. J. Coulthard (London: Cambridge University Press, 1969).

52. The colorization of movies provides an interesting case with respect to creator's rights. Would coloring old black and white movies and rebroadcasting them constitute deformation or mutilation? Many European systems give authors such control. An even better example comes from the case of Alan Douglas and the Jimi Hendrix estate. At one time, Douglas remastered a number of Hendrix songs adding new bass and drums, a second guitar, and backup singers. Needless to say, the Hendrix faithful were outraged that these altered songs were advertised as Hendrix *originals*.

53. My exposition in the next few paragraphs draws directly from Tom Palmer's analysis. See Palmer, "Are Patents and Copyrights Morally Justified?" *supra* note 42 at 841-43.

54. C. civ. art. 543, Code Pénal [C.pén.] arts. 425429 ("Law of March 11, 1957 on literary and artistic property"); see Loi du 11 mars 1957 sur la propriété littéraire et artistique, 1957 Journal Officiel de la République Française [J.O.] 2723, 1957 Recueil Dalloz Législation [D.L.] 102 (for amendments and cases interpreting the statute); and Edward Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors" (1988) 23 Ga. L. Rev. 1.

it clear that this decision did not "detract from the right of the author, inherent in his personality, of later modifying his creation, or even suppressing it."[55]

Josef Kohler, a prominent defender of creator's rights, summarizes the view nicely:

> The writer can not only demand that no strange work be presented as his, but that his own work not be presented in a changed form. The author can make this demand even when he has given up his copyright. This demand is not so much an exercise of dominion over my work, as it is of dominion over my being, over my personality which thus gives me the right to demand that no one shall share in my personality and have me say things which I have not said.[56]

Thus, misrepresenting what an author says or mutilating a work of art and allowing those who view it to think that it is *entirely* the original author's creation is to (potentially) damage the personality of the creator. It should also be noted that these rights have been extended to include resale royalty rights which grant monetary compensation to creators when their work is resold for substantial profits.[57]

The primary thrust of these non-economic rights is to protect the integrity of the author or inventor from slanderous attacks and public ridicule. Also protected is the creator's right to control initial disclosure which can be understood as an extension of her rights to control the initial disclosure of her own thoughts. Once an author or inventor voices her idea, the cat is out of the bag, so-to-speak.[58] In such cases the idea has entered the public domain of thought and language, but it does not follow that the author or inventor has automatically renounced all economic and non-economic claims to the intellectual work.[59] Even though the ideas have entered the public domain there are certain restrictions on what can be done with them. For example, an individual may not claim that the ideas of another are his own, nor may he knowingly alter or distort these ideas and then attribute them to the original author.

Moreover, it should be noted that it is up to the author or inventor to disclose her intellectual work or to keep it a secret. This view is summed nicely by Lynn Sharp Paine and Lysander Spooner.

> If a person has any right with respect to her ideas, surely it is the right to control their initial disclosure. A person may decide to keep her ideas to herself, to disclose them to a select few, or to publish them widely. Whether those ideas are best described as views and opinions, plans and intentions, facts and knowledge, or fantasies and

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55. *Cinquin* v. *Lecocq* Req. Sirey, 1900.2.121, note Saleilles (1902)(cited in S. Stromholm, *I Le Droit Moral De L'Auteur* (1966), 285.

56. Josef Kohler, *Urheberrecht An Schriftwerken Und Verlagsrecht* (1907) at 15, quoted in Damich, *supra* note 54 at 29.

57. See Thomas Markey, "Let Artists Have a Fair Share of Their Profits," *New York Times* (December 20, 1987) sec. 3, at 2, col. 2.

58. Thus when the Scientologist preaches to us telling us how we ought to live she is throwing ideas out into the commons of thought and discussion. Minimally, if no expressions are copied a critique of these ideas is perfectly appropriate. See *Maxtone-Graham* v. *Burtchaell*, 803 F.2d 1253 (2d Cir.), *cert. denied*, U.S. 1059 (1987).

59. Would this would be akin to arguing that by allowing others to see your car you have thereby renounced all claims to it?

> inventions is immaterial. While it might, in some cases, be socially useful for a person to be generous with her ideas ... there is no general obligation to do so.[60]

> Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation, than thought. It originates in the mind of a single individual. It can leave his mind only in obedience to his will. It dies with him, if he so elect.[61]

Arguably the creator's rights tradition has played minor role in the formulation and application of Anglo-American systems of intellectual property. Even in those countries where these rights are codified in the law, they are apt to be overshadowed by the aforementioned economic rights and incentive based social progress arguments.

In any case, the dominance of theory—at least as a check on economic pragmatism and privilege—appears to be waning. The globalization of intellectual property, rapid growth of digital networks, and expanding power of multinational corporations, have pushed systems of intellectual property away from theoretical foundations and back toward privilege.

The Return of Pragmatic and Economic Privilege[62]

One reason to question the theoretical foundations of modern systems of intellectual property is the ever-increasing number of economic studies indicating that a different arrangement of rights or a different system altogether would be better than current institutions. In the face of mounting evidence, or no evidence at all, the dominant policy had been to go merrily along granting monopoly privilege with the hope that social progress will be maximized.

Building on the work of Michael Polanvyi[63] and Brian Wright,[64] Steven Shavell and Tanguy Van Ypersele offer a compelling case for a reward model.[65] As Shavell and Ypersele note, "[u]nder a reward system innovators are paid for innovation directly by the government (possibly on the basis of sales), and innovations pass immediately into the public domain."[66] This system avoids the monopoly power

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60. Lynn Sharp Paine, "Trade Secrets and the Justification of Intellectual Property: A Comment On Hettinger" in Moore, ed., *supra* note 5 at 41.

61. Lysander Spooner, "The Law of Intellectual Property: or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas" in C. Shively, ed., *The Collected Works of Lysander Spooner* (Weston, MA: M & S Press, 1971).

62. Parts of this section draw from Adam D. Moore, "Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments" Hamline L. J. (forthcoming April 2003). Graeme Austin in his contribution to this volume notes that theoretical notions like 'natural rights' play almost no role in modern intellectual property lawmaking. What *is* the case, however, should not hinder progress toward or cause us to lose sight of what *should* be the case.

63. Michael Polanvyi, "Patent Reform" (1944) 11 Rev. Econ. Stud. 61.

64. Brian Wright, "The Economics of Invention Incentives: Patents, Prizes, and Research Contracts" (1983) 73 Am. Econ. Rev. 691.

65. Michael Kremer offers an auction model where the government would pay inventors the price that obtains from the public sale of the innovation. See Michael Kremer, "Patent Buyouts: A Mechanism for Encouraging Innovation" (1998) 113 Q.J. Econ. 1137. See also Michele Boldrin & David K. Levine "Perfectly Competitive Innovation", Online: http://www.econ.umn.edu/~mboldrin/Papers/pci37.pdf (date accessed: May 22, 2003).

66. Steven Shavell & Tanguy Van Ypersele, "Rewards versus Intellectual Property Rights" (2001) 44 J. Law. & Econ. 525.

provided by patents while maintaining strong incentives. If rewards—paid annually—are based on sales, then both of the worries mentioned above would fall away. Innovators would still burn the midnight oil chasing that pot of gold and governments would not have to decide which projects to fund or determine the amount of the reward before its "social value" was known. Taxes or collecting percentages of the profits of these innovations may provide the funds necessary to pay the rewards.

Two other benefits are also obvious. One criticism of the patent system is that monopoly power allows monopoly prices.[67] Under a reward system, consumers would avoid these prices and likely purchase other goods and services. A second criticism is that patents hinder subsequent innovations and improvements of intellectual works.[68] "A famous example of this occurred when James Watt, holder of an early steam engine patent, denied licenses to improve it to Jonathan Hornblower and Richard Trevithick, who had to wait for Watt's patent to expire in 1800 before they could develop their high pressure engine."[69] As with monopoly pricing, a reward system avoids this social cost because the intellectual works pass immediately into the public domain. [70]

Certainly the promise of huge profits is part of what drives authors and inventors to burn the midnight oil, but the promise need not be guaranteed by ownership.[71] Consider, for example, the initial profits generated by the sales of certain software packages. The market share guaranteed by initial sales, support services, and the like, may provide adequate incentives. Moreover, given the development of advanced copy-protection schemes software companies can protect their investments and potential profits for a number of years.[72]

A reward model may also be more cost effective than copyright protection, especially given the greater access that reward models offer.[73] Alternatively, offering

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67. See Meiners & Staaf, *supra* note 42 at 929.

68. See Machlup, *supra* note 42 at 36.

69. See *supra* note 66 at 543.

70. Fritz Machlup suggests that large corporations (who own the majority of patents) may hinder general technological progress by controlling entire industries. See Machlup, *supra* note 42 at 168-75. An obvious example would be Microsoft's control of computer operating systems. Microsoft has captured between sixty and eighty percent of the world market and has patented and copyrighted its operating systems.

71. Machlup argues that patent protection is not needed as an incentive for corporations, in a competitive market, to invest in the development of new products and processes. The short-term advantage a company gets from developing a new product and being the first to put it on the market may be incentive enough. *Ibid.* at 168-69.

72. Copy-protection schemes are currently available for any kind of intellectual property that takes digital form. See John Perry Barlow "The Economy of Ideas: Everything You Know About Intellectual Property is Wrong" in Moore, ed., *supra* note 5 at 349.

73. Trade secret protection appears to be the most troubling from a social progress perspective. Given that no disclosure is necessary for trade secret protection, there are no beneficial trade-offs between promoting behavior through incentives and long-term social benefit. From a rule-utilitarian point of view the most promising aspect of granting intellectual property rights is the widespread dissemination of information and the resulting increase in social progress. Trade secret protection allows authors and inventors the right to slow the dissemination of protected information indefinitely—a trade secret requires secrecy. Unlike other regimes of intellectual property, trade secret rights are perpetual. See the Restatement (Third) of Unfair Competition § 39-45 (1995). This means that so long as the property holder adheres to certain restrictions, the idea, invention, product, or process of manufacture may never become common property. The two

a set of more limited rights may provide the requisite incentives while allowing greater access. Many authors, poets, musicians, and other artists, would continue to create works of intellectual worth without proprietary rights being granted. A number of musicians, craftsman, poets, and the like, simply enjoy the creative process and need no other incentive to produce intellectual works.

The justification typically given for the "fair use" rule is that the disvalue of limiting the rights of authors in this way is overbalanced by the value of greater access.[74] However, more limitations could be justified in this way; maybe all that is needed is a prohibition against piracy or a prohibition against the direct copying and marketing of intellectual works. Needless to say, even if the incentives argument is correct, the resulting system or institution would be quite different from the modern Anglo-American systems of intellectual property.[75]

Another worry that infects copyright, but not reward models, is the conversion of intellectual works into a digital form. A basic rule of rule utilitarian copyright (and patent law) is that while ideas themselves cannot be owned, the physical or tangible expressions of them can.[76] Ideas, as well as natural laws and the like, are considered to be the collective property of humanity.[77] It is commonly assumed that allowing authors and inventors rights to control mere ideas would diminish overall social utility and so an idea/expression distinction has been adopted.[78]

But digital technology and virtual environments are detaching intellectual works from physical expression. The "bit streams" that inhabit the world wide web seem to be much less tangible than paper and ink or machines and processes of manufacture. This tension between protecting physical expressions and the status of online intellectual works leads to a deeper problem. Current Anglo-American institutions of intellectual property are constructed to protect the efforts of authors and inventors and, at the same time, to disseminate information as widely as possible. But when intellectual works are placed online there is no simple method of securing both protection and widespread access. Once a person has access to a work that is placed online, he or she can download it or send copies to friends.

The current reaction to these worries has been to strengthen intellectual property protection in digital environments, yet it is unclear that such protection will yield greater social utility. For example, see the Digital Millennium Copyright Act of 1998.[79] Reward systems or further limiting copyrights would likely avoid the disutility of restricting access in digital environments.

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restrictions on trade secrets are the requirements of secrecy and competitive advantage. See *Forest Laboratories, Inc.* v. *Pillsbury Co.*, 452 F.2d 621 (7th Cir. 1971), and *E.I. duPont deNemours & Co., Inc.* v. *Christopher*, 431 F.2d 1012 (5th Cir. 1970).

74. 17 U.S.C. § 107. See also, *Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

75. For radical deconstructionist arguments calling for the elimination of copyright and patent protection see Palmer, *supra* note 42.

76. 17 U.S.C. § 102(b) (1988) states, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

77. See *ibid.*; *International News Service* v. *Associated Press* 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918); *Miller* v. *Universal City Studios, Inc.* 224 USPQ 427 (1984, DC Cal); and *Midas Productions, Inc.* v. *Baer* 199 USPQ 454 (1977, DC Cal).

78. *Midas, ibid.*

79. H.R.2281 Digital Millennium Copyright Act (1998).

Recently Raymond Shih Ray Ku has argued that copyright is unnecessary in digital environments. "With respect to the creation of music, this Article argues that exclusive rights to reproduce and distribute copies provide little if any incentive for creation, and that digital technology make it possible to compensate artists without control."[80] In brief, Shih Ray Ku argues that copyright protects the interests of the publisher—large, up-front distribution costs need to paid for and copyright does the job. Digital environments, however, eliminate the need for publishers with distribution resources. Artists, who receive little royalty compensation anyway, may distribute their work worldwide with little cost. Incentives to innovate are maintained, as they have been, by touring, exhibitions, and the like. Thus, if Shih Ray Ku is correct the incentives based argument would lead us away, not toward, copyright protection for digital intellectual works.

Finally there are numerous cases and the implementation of several international treaties governing intellectual property that have been justified without appeal to social progress arguments. In the debate over Napster[81] and peer-to-peer file sharing systems the primary argument offered by plaintiffs concerned lost revenue due to copyright violations. Digital environments make copying relatively simple and virtually costless. The Recording Industry Association of America (RIAA) claimed $300 million in lost sales. But this is only one side of the equation. Balanced against this bloated figure[82] is the benefit obtained by more that 70 million people accessing and enjoying music. Shih Ray Ku's position is also clearly relevant; copyright in digital environments tends to protect distributors when distribution has been liberated by the world wide web. Little of this held sway in the end, Napster was shut down, and the result was an economic victory for RIAA. Here it seems as if theory played little or no role in the decision.

In a more recent case, *Eldred* v. *Ashcroft,*[83] the Supreme Court of the United States—in reviewing a challenge to the Sonny Bono Act and a twenty year extension on copyright protection—seemingly failed to conduct a social progress analysis and the result was a cash windfall for Disney and numerous other companies. Arguably no further incentives to innovate were offered by the twenty-year extension of copyright. Moreover, access to a host of works that were due to fall into the public domain was curtailed.[84]

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80. Raymond Shih Ray Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology" (2002) 69 U. Chi. L. Rev. 263.

81. *A&M Records, Inc.* v. *Napster, Inc., supra* note 13.

82. 'Bloated' because the RIAA assumed that those who received free copies would have purchased a copy.

83. *Supra* note 12.

84. "As Lord Macaulay said of a piece of legislation that would have increased copyright term to a length less than that granted by the Bono Act, 'it leaves the advantages nearly what they are at present, and increases the disadvantages at least four fold.'" Wendy J. Gordon, "Symposia: The Constitutionality of Copyright Term Extension: How Long Is Too Long?" (Panelists included Jane C. Ginsburg, Wendy J. Gordon, Arthur R. Miller, William F. Patry) (2000) 18 Cardozo Arts & Ent. L. J. 678, quoting Thomas Macaulay in *Macaulay: Prose and Poetry* (Cambridge, MA: Harvard University Press, 1967) at 733. One reply typically given is that legislators were trying to bring US legal code into harmony with Berne Convention standards of the near future. But again, no world wide cost benefit analysis was conducted to see if such extensions would maximize social progress.

Empirical questions about the costs and benefits of copyright, patent, and trade secret protection are notoriously difficult to determine. Economists who have considered the question indicate that either the jury is out, so-to-speak, or that other arrangements would be better. George Priest claims that "[t]he ratio of empirical demonstration to assumption in this literature must be very close to zero ... [recently it] has demonstrated quite persuasively that, in the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."[85] This echoes Machlup's sentiments voiced twenty-four years earlier and Clarisa Long's view "Whether allowing patents on basic research tools results in a net advance or deterrence of innovation is a complex empirical question that remains unanswered."[86] If we cannot appeal to the progress enhancing features of intellectual property, then *the theorist can hardly appeal to such progress as justification.*

On the other hand recent economic studies have tended to support other arrangements such as granting fewer rights or a reward model as superior to current Anglo-American institutions of intellectual property.[87] If so, then the incentive based social progress argument will justify these other models and not the current instantiations of copyright, patent, and trade secret.

As noted earlier, in the face of such evidence the common theme has been to strengthen intellectual property institutions along with treaties that would protect intellectual works globally. Arguably such developments point toward an ever-marginalized role for theory in favor of a more pragmatic positions and arrangements. One problem is that such arrangements appear to be unjustified while at the same time protecting wealth, status, and privilege. For example part of what gives the sometimes violent protests related to WTO meetings impetus is that the globalization of trade appears to protect, strengthen, and maintain the positions of those economically well off.

III. A Lockean Theory of Intellectual Property [88]

If the views expressed in the first two parts are largely correct, then a return to theory, or affording theory a more prominent role, is warranted. But not just any theory. As indicated, social progress incentive based arguments will likely lead us

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85. George Priest, "What Economists Can Tell Lawyers about Intellectual Property" (1996) 8 Research In Law and Economics: The Economics of Patents and Copyrights 19 at 19, 21.

86. See Machlup *supra* note 42. Clarisa Long, "Patents and Cumulative Innovation" (2000) 2 Wash. U. J. L. & Pol'y 229.

87. "We conclude in our model that intellectual property rights do not possess a fundamental social advantage over reward systems ..." *Supra* note 66 at 525. "The article concludes ... that in the case of the fine arts the intellectual property laws do not perform the stimulative purpose that is commonly ascribed to them." Daniel Gifford, "Innovation and Creativity in the Fine Arts: The relevance and Irrelevance of Copyright" (2000) 18 Cardozo Arts & Ent. L. J. 569.

88. A more detailed discussion of the issues taken up in this section are addressed in earlier works. See Adam D. Moore, *supra* note 14; "A Lockean Theory of Intellectual Property" (1997) 21 Hamline L. Rev. 65; "Intangible Property: Privacy, Power, and Information Control" (1998) 35 Am. Phil. Quart. 365; and "Toward A Lockean Theory of Intellectual Property" in Adam D. Moore, ed., *supra* note 5.

away from protecting the intellectual efforts of authors and inventors.[89] Below a Lockean model of intellectual property will be sketched. The goal here is not to defend a new theory of intellectual property against all comers—that, alas, is another project.[90] Rather what will be offered is an argument that justifies moral claims to intellectual works, recommendations for changes in intellectual property institutions, and an indication of where pragmatic considerations will be appropriate.

Consider the following argument.

1. If the acquisition and exclusion of an intellectual work makes no one worse off, then the acquisition and exclusion are justified.
2. Some acts of intellectual property creation and exclusion makes no one worse off.
3. So, some intellectual property rights are justified.

There is here a notion called weak Pareto-superiority.

> One state of the world, S_1, is Pareto superior to another, S_2, if and only if no one is worse-off in S_1 than in S_2, and at least one person is better-off in S_1 than in S_2. S_1 is *strongly* Pareto-superior to S_2 if everyone is better-off in S_1 than in S_2, and *weakly* Pareto superior if at least one person is better-off and no one is worse-off. State S_1 is Pareto optimal if no state is Pareto superior to S_1: it is *strongly* Pareto optimal if no state is *weakly* Pareto superior to it, and *weakly* Pareto optimal if no state is *strongly* Pareto superior to it.[91]

Actually, the notion employed in my argument above might be called super-weak Pareto-superiority because no one is required to be *bettered* by an action; all that is required is that no one is worsened. It may be plausibly argued that if an action worsens no one—if it leaves everyone else unaffected or in a better position—then no one could rationally complain. A suitably characterized "no harm, no foul" rule is an argument stopper, so to speak. One strand of this idea traces back to John Locke's water drinker. "Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same left him to quench his thirst ...."[92]

There are two primary questions to consider when considering a Pareto based proviso. First, what are the terms of being worsened or bettered? This is a question of measurement, of how we are to measure moral harm and benefit. The second question, sometimes called the baseline problem, is what two situations or conditions are we going to compare to determine moral bettering and worsening. Whenever someone is bettered or harmed we are comparing two states or situations. In defending the first premise of the argument for intellectual property rights both of these questions will be considered.

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89. For an in-depth critique of social progress incentive arguments for intellectual property see Adam D. Moore, "Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments", *supra* note 62.

90. See *supra* note 88.

91. Adapted from G. A. Cohen, "The Pareto Argument For Inequality" (1995) 12 Social Phil. & Pol'y 160.

92. John Locke, *Two Treatises of Government*, edited by Peter Laslett (New York: New American Library, 1965) § 33.

First please note the strength of this sort of Pareto principle. To adopt anything less than a super-weak Pareto principle would permit individuals, in bettering themselves, to worsen others. Such provisos on acquisition are troubling because at worst they may open the door to predatory activity and at best they give anti-property theorists the ammunition to combat the weak presumptive claims that labor and possession may generate. Part of the intuitive force of a Pareto based proviso is that it provides little or no grounds for rational complaint. Moreover, if we can justify intangible property rights with a more stringent principle, a principle that is harder to satisfy, then we have done something more robust, and perhaps more difficult to attack, when we reach the desired result.

To require individuals, in bettering themselves, to better others is to require them to give others gifts. In the absence of social interaction, what reason can be given for forcing one person, if she is to benefit herself, to benefit others?[93] If, absent social interaction, no benefit is required then why is such benefit required within society? The crucial distinction that underlies this position is between worsening someone's situation and failing to better it[94] and I take this intuition to be central to a kind of deep moral individualism. This view is summed up nicely by Anthony Fressola.

> Yet, what is distinctive about persons is not merely that they are agents, but more that they are rational planners, that they are capable of engaging in complex projects of long duration, of acting in the present to secure consequences in the relatively distant future, of ordering their diverse actions into programs of activity, and ultimately, into plans of life. [95]

In principle, the Lockean theory of intangible property being sketched is consistent with a wide range of value theories. So long as the preferred value theory has the resources to determine bettering and worsening with reference to acquisitions, then Pareto superior moves can be made and acquisitions justified on Lockean grounds. For now, assume an Aristotelian eudaimonist account of value exhibited by the following theses is correct.

1. Human well-being or flourishing is the sole standard of intrinsic value.
2. Human persons are rational project pursuers, and well being or flourishing is attained through the setting, pursuing, and completion of life goals and projects.[96]

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93. I have in mind is Robert Nozick's Robinson Crusoe case in *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 185.

94. The distinction between worsening someone's position and failing to better it is a hotly contested moral issue. See David Gauthier, *Morals By Agreement* (Oxford: Clarendon Press, 1986) at 204; Shelly Kagan, *The Limits of Morality* (New York: Oxford University Press, 1989) at ch. 3; John Harris, "The Marxist Conception of Violence" (1973-74) 3 Phil. & Pub. Affairs 192; John Kleinig, "Good Samaritanism" (1975-76) 5 Phil. & Pub. Affairs 382; and Eric Mack's two articles, "Bad Samaritanism and the Causation of Harm" (1979-80) 9 Phil. & Pub. Affairs 230, and "Causing and Failing To Prevent" (1976) 7 Southwestern J. Phil. 83.

95. Anthony Fressola, "Liberty And Property: Reflections On The Right of Appropriation In The State of Nature" (1981) 18 Am. Phil. Quart. 317 at 320.

96. For similar views see: John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at ch. VII.; Aristotle, *Nicomachean Ethics*, bks. I and X; Immanuel Kant, *The Fundamental Principles of the Metaphysics of Morals*, trans. T.K. Abbott (Buffalo, NY: Prometheus Books, 1987); Henry Sidgwick, *Methods of Ethics*, 7th ed. (London, Macmillian Publishing, 1907); R. B. Perry, *General Theory of Value* (New York: Longmans, Green, 1926);

3. The control of physical and intangible objects is valuable. At a specific time each individual has a certain set of things she can freely use and other things she owns, but she also has certain opportunities to use and appropriate things. This complex set of opportunities along with what she can now freely use or has rights over constitutes her position materially; this set constitutes her level of material well-being.

While it is certainly the case that there is more to bettering and worsening than an individual's level of material well being including opportunity costs, I will not pursue this matter further at present. Needless to say, a full-blown account of value will explicate all the ways in which individuals can be bettered and worsened with reference to acquisition. Whatever value theory that is ultimately correct, if it has the ability to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds.

Turning to the baseline problem, it is arguably the case that since an individual's level of well being changes over time the baseline of comparison must also change. This is to affirm a dynamic, rather than, static comparison point.

In general, the problem with static base points is that they fail to include morally relevant changes in well being. The appropriate baseline for determining bettering and worsening with reference to acquisition is the acquisitive case compared to the moment before the acquisition. If Fred has produced some new intellectual work and is considering if his acquisition of it will worsen Ginger, the correct baseline would be how she is after the acquisition compared to how she was immediately before the taking.

But consider the following counter-example to my account. What if a perverse inventor creates a machine that will save lives but decides to not allow anyone to use the machine. Those individuals who had, before the creation, no chance (opportunity) to survive now have a chance and are worsened because of the perverse inventor's refusal to let others use the machine.

The baseline this case implies cannot be correct. On this view, to determine moral bettering and worsening we are to compare how individuals are before the creation of some value (in this case the life saving machine) to how they would be if they possessed or consumed that value. But we are all worsened in this respect by any value that is created and held exclusively. Fred is worsened by Ginger's exclusive possession of a car because he would be better off if he exclusively controlled the car—even if he already owned a thousand cars. Any individual, especially those who have faulty hearts, would be better off if they held title to Fred's heart compared to anyone else's holding title. Fred is also worsened when Ginger creates a new philosophical theory and claims authorship; he would have been better off (suppose it is a valuable theory) if he had authored the theory, so Ginger has worsened Fred. Right? No. Clearly this account of the baseline makes the notions of bettering and worsening too broad.[97]

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and Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987).

97. For a similar, yet still mistaken, view of the baseline see Jeremy Waldron "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 Chi.-Kent L. Rev. 841 at 866. This sort of baseline confusion infects Wendy Gordon's work on Locke. See, for example, Wendy J. Gordon, *supra* note 43.

The defense of the second premise—some acts of intellectual property creation and exclusion satisfy a Pareto based proviso—is relatively straightforward. Given that intellectual property is non rivalrous and non-zero sum, it is quite plausible to maintain that some acts of intellectual property creation and exclusion do not harm anyone. Intellectual works are non-rivalrous because there is no necessary rivalry between individuals over possession; each may possess a copy. Moreover, the use, possession, and exclusion of an intellectual work does not automatically mean that others are left impoverished.

A slightly different way to put the Lockean argument for intellectual property rights is:

Step One: *The Generation of Prima Facie Claims to Control*—Suppose Ginger creates a new intangible work (a poem perhaps). Creation, effort, etc. yield her prima facie claims to control (similar to student desert for a grade).[98]

Step Two: *Locke's Proviso* If the acquisition of an intangible object makes no one (else) worse off in terms of their level of well-being compared to how they were immediately before the acquisition, then the taking is permitted.

Step Three: *From Prima Facie Claims to Property Rights* When are prima facie claims to control an intangible work undefeated? Answer: when the proviso is satisfied. Alas, no one else has been worsened—who could complain?

Conclusion: So long as no harm is done (the proviso is satisfied), the prima facie claims that labor and effort may generate turn into property claims. [99]

If correct, this account justifies rights to control intangible property. When an individual creates or compiles an intangible work and fixes it in some fashion, then

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98. Justification for the view that labor or possession may generate prima facie claims against others could proceed along several lines. First, labor, intellectual effort, and creation are generally voluntary activities that can be unpleasant, exhilarating, and everything in-between. That we voluntarily do these things as sovereign moral agents may be enough to warrant noninterference claims against others. A second, and possibly related justification, is based on desert. Sometimes individuals who voluntarily do or fail to do certain things deserve some outcome or other. Thus, students may deserve high honor grades and criminals may deserve punishment. When notions of desert are evoked claims and obligations are made against others—these non-absolute claims and obligations are generated by what individuals do or fail to do. Thus in fairly uncontroversial cases of desert, we are willing to acknowledge that weak claims are generated and if desert can properly attach to labor or creation, then claims may be generated in these cases as well. Finally, a justification for the view that labor or possession may generate prima facie claims against others could be grounded in respect for individual autonomy and sovereignty. As sovereign and autonomous agents, especially within the liberal tradition, we are afforded the moral and legal space to order our lives as we see fit. Simple respect for individuals would prohibit wresting from their hands an unowned object that they acquired or produced. I hasten to add that at this point we are trying to justify weak noninterference claims, not full-blown property rights.

99. Suppose Fred appropriates a grain of sand from an endless beach and paints a lovely, albeit small, picture on the surface. Ginger, who has excellent eyesight, likes Fred's grain of sand and snatches it away from him. On this interpretation of Locke's theory, Ginger has violated Fred's weak presumptive claim to the grain of sand. We may ask, what legitimate reason could Ginger have for taking Fred's grain of sand rather than picking up her own grain of sand? If Ginger has no comparable claim, then Fred's prima facie claim remains undefeated. An undefeated prima facie claim can be understood as a right. For a defense of this view of rights see George W. Rainbolt, "Rights as Normative Constraints on Others" (1993) 53 Phil. & Phen. Research 93, and Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton, NJ: Princeton University Press,1992).

labor and possession create a prima facie claim to the work. Moreover, if the proviso is satisfied the prima facie claim remains undefeated and rights are generated.

If legal systems are to reflect moral norms and if the preceding argument is largely correct, then our intellectual property institutions will have to be modified. Although a full analysis and presentation of the changes required by a Lockean model of intellectual property is beyond the scope of this article, a brief list of proposed changes will be offered.

Elimination of Patent Monopolies Current practice excludes someone who independently invents an already patented intellectual work from ownership.[100] But surely being excluded from obtaining intellectual property rights worsens those who have independently created a patented process—relative to the absence of the owner or prior to the taking. There is room for rational complaint in these cases. A Lockean model of intellectual property seemingly cannot embrace a policy of exclusive patent monopolies.

Fixed Term Limits for Patents and Copyrights After disclosure, whether in terms of patent or copyright, the notion of "independent creation" or "discovery" becomes murky. Companies may even engage in advertising campaigns to "get the word out" so that these notions become ever more strained. Thus a Lockean model may be able to offer a justification for term limits on patents and copyrights—not based on social progress arguments—but upon a non-worsening requirement.[101] Robert Nozick suggested that intellectual property rights be limited because allowing perpetual or lengthy rights will worsen others.

> Furthermore, a known inventor drastically lessens the chances of actual independent invention. For persons who know of an invention usually will not try to reinvent it, and the notion of independent discovery here would be murky at best. Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.[102]

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100. See 35 U.S.C. § 154.

101. Another, quite different, problem is the assumption that had X not been invented it would have been invented sometime later by someone else. This may be true for some intellectual creations but it is most likely not always true. Some creations are so ingenious and unique that had their original inventor not created them they may have never existed. Take for example, J. R. R Tolkien's famous trilogy *The Lord of the Rings*. Is it really plausible to maintain that had Tolkien not created this expression that someone else would have sometime later? Is it even plausible to maintain that someone else would have come up with something substantially similar? I think not. It may be actually worse than this, especially in the realm of fine arts. Is it plausible to maintain that had Picasso not painted or Bach not created that someone else sometime later would have created similar expressions? Lysander Spooner puts the point nicely. "Who can say, or believe, that if Alexander, and Caesar, and Napoleon had not played the parts they did in human affairs, there was another Alexander, another Caesar, another Napoleon, standing ready to step into their places, and do their work? Who can believe that the works of Raphael and Angelo could have been performed by other hands then theirs? Who can *affirm* that anyone but Franklin would ever have drawn the lightnings from the clouds? Yet who can say that what is true of Alexander, and Caesar, and Napoleon, and Raphael, and Angelo, and Franklin, is not equally true of Arkwright, and Watt, and Fulton, and Morse? Surely no one." Spooner, *supra* note 61 at 67.

102. Nozick, *supra* note 93 at 182.

Elimination of Fair Use Rules[103] General and sweeping rules, like fair use, that allow governments to violate the property rights of individuals, without just and fair compensation, cannot be embraced by the Lockean. Life rights and liberty rights are not to be traded for incremental gains in social utility. Tangible property rights may be overridden in the name of social utility but only on a case-by-case basis and only with just and fair compensation and recourse to the courts. On a Lockean model, fair use would be contractual between the buyers and sellers—it is up to the owner of an intellectual work whether or not she wants to allow her property to be used, without compensation, in various ways.

Elimination of First Sale Rules Within Anglo-American copyright institutions once an author sells an expression or physical embodiment of her intellectual work she loses control over its further distribution.[104] The owner of the copy can do whatever she wants with the expression except violate the economic rights of the intellectual property holder.

On a Lockean account the issues surrounding the first sale rule largely dissipate and become a matter of contracts.[105] Public information storehouses, like libraries and data banks, would not be protected under the auspices of promoting education and social utility. Currently owned intellectual works and their physical expressions may be included in a public information storehouse only if the relevant agreement has been made. As a matter of legal expediency we may adopt a first sale rule unless a contract has specified otherwise. But, whatever the default position is, contracts may serve to restrict what can be done with the physical embodiments of intellectual works.

Conclusion

Pragmatic considerations—doing what works economically, in terms of wealth enhancement, for everyone affected—will only be appropriate when theory gives no guidance. The default position will always be in favor of individual rights and the protection thereof. This position may cause great alarm for some. Libraries will be gutted and education curtailed—the commons of thought and speech will

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103. For more about fair use see: *Sony Corporation of America* v. *Universal City Studios, Inc., supra* note 44; *Pacific and Southern Co., Inc.* v. *Duncan,* 744 F2d 1490, *cert denied* 471 U.S. 1004, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985); *Time Inc* v. *Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968); *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Companies, Inc.* 621 F.2d 57 (2nd Cir., 1980); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises,* 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985); *Salinger* v. *Random House, Inc.,* 811 F.2d 90, cert denied 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987); *Fisher* v. *Dees,* 794 F.2d 432 (9th Cir., 1986).

104. See 17 U.S.C. § 109(a).

105. There is also the following problem. "The first sale doctrine does not translate easily to the online environment, where most versions of the work are in an intangible format, whether stored, transmitted, or viewed onscreen. Until the work is printed onto paper (or perhaps saved to a floppy disk), there is no corporeal version of the work under traditional copyright notions. The online environment makes it tempting to view copyright law a relic of the past or the first sale doctrine as a simple inconvenience." Hamilton, *supra* note 5 at 249.

become impoverished[106] The charge seems to be that we must override individual rights to intellectual works with respect to first sale and fair use because of the loss of social utility if we did not. But this has all too often been the calling card of oppression and is the first step down a very slippery slope. Loren Lomasky puts the point nicely.

> Even when arguments for overriding rights are couched in the most high-minded terms, laced with references to the general welfare or the need for mutual sacrifice in a just cause, one may suspect that the rhetoric is meant to veil the quest for power or personal advancement. History is a textbook for cynics. Having read from it, we may be prompted to insist on undeviating respect for rights, no matter how beckoning are inducements to the contrary, because we have no confidence in people's ability to discriminate accurately and dispassionately between incursions that will maximize public good and those that will debase it. If we are to err either on the side of too much flexibility or excess rigidity, better—far better!—the latter.[107]

The view is not that rights should hold even though the heavens may fall. A more moderate position leaves open the possibility, in certain cases, for rights to be trumped when the consequences are dire. It would not, however, allow rights to be overridden for mere incremental increases in overall social utility. Social progress theorists who claim that defenses of robust rights are "radical" or "extreme" have misplaced these terms in most cases. For we may ask, is there any room within social progress theory for rights that stand independent of all but the most dire of consequences?

While the elimination of fair use and first sale may cause a decrease in the overall amount of available and useful information, information storehouses will not dry up. First, much of the information found in libraries and the like is non-commercial information. For example, new theories explaining the fall of the Roman Empire, philosophical views, and books on literary criticism, have little or no market value. The creators of these kinds of works would have little incentive to restrict the distribution of their ideas. And given that, in many cases, careers, tenure, and reputation are at stake, these authors would actually desire the widest distribution of their ideas and theories as possible.[108] In these cases, libraries would serve the career and long-term economic interests of authors and inventors. It may be the case that other economically viable information may be distributed in the hopes of fostering profits through licensing agreements and to preempt independent creation.

Moreover, if a company or an individual wants to keep information out of the public domain and information storehouses like libraries, then they can keep the idea or ideas as a trade secret. This seems a perfectly sensible notion, for if we have absolute dominion over anything it is our own thoughts—the corollary in the business domain are trade secrets. Surely no one who voices the concern we are considering would advocate that individuals should disclose their thoughts or

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106. When hearing these sentiments I sometimes get the feeling that turf is being protected rather than lofty ideals being voiced.

107. Lomasky, *supra* note 96 at 18: "A century that has witnessed the Holocaust and the Gulag is not one which can aptly be characterized as paying too much heed to basic rights."

108. In many cases the 'Library market' is the primary area of sale.

companies their secrets so that libraries can be filled with lots of information.

Finally, libraries and other information storehouses are already filled with works that are available for use. These works are not available for appropriation and make up a vast block of knowledge that anyone can access and build upon. Thus given market forces, licensing strategies, and the like, it is arguably the case that information warehouses will not become impoverished.

To deserve our moral and political allegiance institutions of intellectual property, and legal systems in general, must be grounded in and constrained by our best theories. Institutions of intellectual property ruled by economic privilege and group pragmatism cannot be embraced with conviction. It has been argued that legal pragmatism, whether radical or moderate, is unstable. While privilege and group economic pragmatism have shaped systems of copyright, patent, and trade secret this need not be so and we can revise our institutions of intellectual property to eliminate or weaken such influences.

As noted above, within the Anglo-American tradition, rights to life, liberty, and physical property are viewed as near absolute moral entities that are not to be overridden for mere incremental increases in social utility. Legal instruments like the Bill of Rights, due process, and recourse to the courts ensure that these rights are appropriately respected. Moreover, it has been argued—albeit briefly—that intellectual property rights are, in essence, no different than these other rights. Intellectual property rights are neither pure social constructions nor bargains without foundations.