

Moral Groundworks for the Establishment and Analysis of Rights to 'Intellectual
Property'

by

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DALHOUSIE UNIVERSITY
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Abstract

Historically, there have been two moral theories which have dominated the analysis of 'intellectual property': Natural law theory and Utilitarianism. The former argues that authors have an inalienable right to control the products of their minds while the latter argues that the moral status of a law establishing 'intellectual property' is inextricably tied to the attempt to maximize societal well-being. In this thesis I argue that few justifiable natural rights to the products of our minds can be found and, subsequently, the justification of such rights must stem from the latter theory. I argue that Utilitarianism places many strong limitations on the extensiveness of the powers granted to 'intellectual property' right-holders by a moral law. Finally, I argue that independent of a given societal state-of-affairs, we have two moral obligations: to follow the trend set by moral authors, and to lend them our support.

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Chapter One: Introduction

In this thesis I seek to explicate the moral reasoning which goes into answering the question: what moral justification is there for an individual having exclusive control of their authorial works? There are two moral theories which are utilized to provide an answer to this question: natural law theory (and its central attribute 'natural rights') and utilitarianism.

In chapter two of this work I evaluate two extensions of John Locke's account of natural rights to physical property. The first, offered by Seana Shiffrin, is an extension of what has come to be commonly known as the 'labour-mixing' model of Lockean natural rights. The second view, or the 'maker's right doctrine', here offered by Jonathan Peterson, asserts that authors have an inherent right to their work simply in light of being makers of a piece of authorial work. Both these views have an immediate and pressing challenge to overcome which stems from the fundamental difference between physical objects (which are naturally scarce) and those 'objects', namely ideas and expressions, which make up authorial works (which are naturally non-scarce). The challenge of applying justifications for private physical property to non-physical objects is not easily overcome and, in short, I argue that Shiffrin's account is stronger for its handling of it. In keeping with her view, I conclude that there is no plausible justification for natural rights to authorial works (save some minor qualifications noted at the end of the second chapter).

Due to this justificatory vacuum, I turn my attention to utilitarianism. Chapter three outlines the basic moral theory which I use to determine the justifiable moral limits to a law which establishes 'intellectual property'. I take Classical Utilitarianism, *via*

Jeremy Bentham, to be basic starting point for this theory. Against this starting point I present three challenges; one from J.S. Mill, one from Robert Nozick, and finally one from Henry Sidgwick. In order to overcome these difficulties, I distance myself from Classical Utilitarianism and ultimately adopt Peter Railton's Pluralistic Consequentialism. With this moral theory in hand, I move on to chapter four in which I argue that the very structure of positive laws, positive rights, and property brings to bear practical limitations and influence onto the moral status of any law and, therefore, a law codifying the right to possess 'intellectual property'. In chapter five, I focus upon the specific moral issues at stake in devising 'intellectual property' law, specifically the moral ends most plausibly identified as those which go into the justification of such a law. Also with this chapter, I establish a standard of societal harm which such a law must avoid if it is to retain a positive moral status. Finally, in chapter six I argue that the need to meet the moral ends adopted by a plausible justification of 'intellectual property' can be satisfied by an incentive system; yet the nature of this system places additional conditions upon the law. I further argue that giving more incentive than is necessary to meet the ends adopted will make the law's moral status negative. In short, these chapters are utilized to argue for a moral standard for a law establishing 'intellectual property'.

With this this standard in place I turn to the issue of the individual's involvement in achieving the ends argued for in chapter five. Drawing from Iris Marion Young's definition of 'empowerment', I argue that we have at least two methods of achieving these ends independent of societal policy: first, we must become moral authors ourselves (the definition of 'moral author' is, as I take it, one who seeks the moral ends adopted by a law establishing 'intellectual property' without requiring any sacrifice from those around

them); and second, we must seek out methods of supporting moral authors in ways that promote their retaining their moral status.

Chapter Two: Of One's Having Natural Rights to Authorial Works

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

Thomas Jefferson¹

2.1 Introduction

One of the earliest champions of the natural rights view of intellectual property was the French encyclopedist Denis Diderot, who in 1763 wrote:

What property can a man own if a work of the mind - the unique fruit of his upbringing, his studies, his evenings, his age, his researches, his observations; if his finest hours, the most beautiful moments of his life; if his own thoughts, the feelings of his heart, the most precious part of himself, that which does not perish, which makes him immortal - does not belong to him?...Who has a greater right than the author to dispose of what he has made by gift or sale?²

1 Jefferson, Thomas, Andrew A. Lipscomb, Albert E. Bergh, and Richard H. Johnston. *The Writings of Thomas Jefferson*. Washington, D.C: Issued under the auspices of the Thomas Jefferson Memorial Association of the United States, 1905.

2 Goldhammer, Arthur, and Denis Diderot. "Letter on the Book Trade." *Daedalus*. 131.2 (2002): Pages 53 – 54.

What lies beneath such questioning is an appeal to intuitions which implores us to see that authors have default, or de facto, rights to the works they produce. However, we would do well to ask for good reasons in support of such intuitions. In other words, in response to Diderot's questions we ought to ask a question of our own: What justifies the intuition that products of the mind are solely owned by their producers? It is unlikely that Diderot himself will offer a satisfactory answer to such a question for he sees the matter as plainly self-evident. In his eyes the suggestion that authors are *not* the default owners of their work would be so counter-intuitive that it would border on absurdity to do so. This will not suffice for those of us who wish to place the discussion of intellectual property rights upon the solid ground of good reasoning, or conversely, to come to the realization that no such ground is available. Therefore an analysis of the reasoning behind claims like those made by Diderot is in order.

At the center of the natural rights view of property ownership (and, in turn the natural rights view of intellectual property ownership) stands John Locke. In fact, Locke is one of the few who place property within the realm of natural rights. While there are many who accept life and liberty as members of the set of natural rights, Locke is unique in his adding estate, or property, to the mix. Therefore, in order to seek out the justificatory merit of claims made by individuals such as Diderot, I will begin with an exegesis of Locke's view on property rights. Upon the completion of this exegesis I will turn my attention to those authors who attempt to extend, and argue against extending, Locke's view to include a type of property that he did not directly discuss (i.e. intellectual property). I will argue that there are two different interpretations of Locke's work which yield two different, and contradictory, views of natural intellectual property rights. The

first, which I will refer to as the 'labour-mixing model', belongs to a long list of Locke scholars; however, for simplicity's sake I will take one author's work as exemplar: Seana Shiffrin's account as explicated in "Lockean Arguments for Private Intellectual Property". The second view, called the 'workmanship model' has been offered by, among others, James Tully, Gopal Sreenivasan, and Jonathan Peterson. The first and second of these authors have applied this model to property rights in the most traditional sense, the owning of physical property (apples, fields, houses, etc.). Peterson, however, has taken this view, outlined in "Lockean Property and Literary Works", and applied it to the intellectual property rights debate in response to Shiffrin's work.

The first task of this section, therefore, is to outline the different stances contemporary thinkers have taken on whether Locke's view of property can justify claims along the lines of those made by Diderot. To these ends I will, as I have mentioned above, outline Locke's view of property ownership with regard to physical property. Following this I will offer an exegesis of two different attempts to extend Locke's view into the realm of intellectual/authorial products. It will be shown that Shiffrin, through stressing Locke's egalitarian overtones, concludes that there can be no justification for the exclusive ownership of intellectual products with one exception (i.e. in cases of work-in-progress). Peterson, on the other hand, emphasizes the workmanship model; and, from this model he derives what he calls 'strong' maker's rights. What this entails will be explained soon enough. Thirdly, I will argue that Peterson's derivation of these rights from the workmanship model stems from a gross misunderstanding regarding the conceptual differences between physical objects and intangible 'objects'. Upon correcting his misunderstanding it will be shown that there is no justification for his strong authorial

rights; however, some new rights are produced. Finally, I will argue that if we take natural rights as the bedrock upon which we build positive rights there will be virtually no necessary positive law regarding literary products. This does not suggest that a programme of positive law akin to contemporary copyright laws will be necessarily unjust. It simply means that if there are to be such laws there must be some alternative justification for them, since natural rights offers no such justification.

As a result of this justificatory vacuum, I will shift the focus of my attention to an alternative of the natural rights view: Social Utilitarianism. What this alternative consists of, and whether it justifies copyright laws, will be the subject matter for the following chapter. For the time being I devote my attention to the attempt to justify intellectual property rights from a natural rights perspective.

2.2 On Lockean Natural Rights With Regards To Physical Property

In his “Second Treatise of Government” Locke attempts to outline how individuals can be justified in claiming a piece of property as their own. His aims are not, however, to argue for a particular form of positive law which justifies the private ownership of property. Quite the contrary, he states that his desire is to offer an answer to the question “...how men might come to have a *property* in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners”.³ To put it another way, Locke wishes to explain how it is that one individual can claim some aspect of the earth as their own in the absence of positive law, or, while said individual is in what Hobbes referred to as the 'state of nature'. One thing that immediately complicates matters is that, in Locke's mind, God has granted the earth,

3 Locke, John, and C B. Macpherson. *Second Treatise of Government*. Indianapolis, Ind: Hackett Pub. Co, 1980. Page 18.

and all non-human components of it, to humankind equally. So to put the question Locke is responding to in the most concise fashion possible would be to state it thus: How, given that God has granted the entirety of earth to us equally, can one of us justifiably call a piece of it our own while in the state of nature?

For Locke the answer can be found in understanding all that God has granted humankind. Aside from the earth itself, God has given us the capacity to use reason which we in turn employ to bring about our sustenance. So much is evident when Locke writes that the earth “has been given to men for the support and comfort of their being”.⁴ Here then is the puzzle that Locke faces: if God has given humankind the earth in order to support our flourishing, and He has given it equally, there must be some way for one individual to take something which is held in common (say, an apple) and make it their own in order to (in the case of apples) eat it and thereby sustain one's own well-being. Furthermore, such an act of appropriation is a necessity on Locke's account because much of what God has granted must be appropriated by a single individual in order to be of any use. The question becomes one of how humankind fulfils this necessary act of appropriation. Locke's answer is as follows. Every human has a natural right to their own body. While this may seem like a counter-intuitive view, what Locke is essentially attempting to outline is that no one can have a justifiable claim (read: a right) to the body of another person. Furthermore, since each person has a natural right to their own body they, by extension, have a right to the products of their body's efforts. Therefore the key for justifiable appropriation on Locke's account is labour. This can be seen in the following oft-quoted statement:

4 Locke, John, and C B. Macpherson. *Second Treatise of Government*. Indianapolis, Ind: Hackett Pub. Co, 1980. Page 18.

...every man has a *property* in his own *person*: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.⁵

Up to this point, Locke's view can be interpreted as justifying my laying claim to an apple if I were to labour over it. But Locke is quick to note that there are limitations to justifiable appropriation. These have come to be known as the 'spoilage' and 'enough and as good' provisos. The former limitation, the 'spoilage' proviso can be easily brought to light by way of an example. Suppose I were to pick an apple from a tree and polish it vigorously until it had a keen shine and was sufficiently industrious that I accumulated vast supplies of polished apples. My ownership of the apples would be unjustified, argues Locke, if said ownership would be to the extent that I owned more apples than were necessary for sustaining my life. In this case my ownership is unjustified because those items which are owned (apples) will spoil before I can ever get around to eating them. If they were to spoil they would be rendered useless, and, as a result, my owning them in this case would lead directly to a contradiction of God's intentions. Locke makes his reasoning explicit by stating:

*God has given us all things richly...But how far has he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy”.*⁶

5 Locke, John, and C B. Macpherson. *Second Treatise of Government*. Indianapolis, Ind: Hackett Pub. Co, 1980. Page 19.

6 Ibid. Pages 20 – 21.

The inference that Locke is leading us through can be summed up as follows: God granted the earth to humans for its use in sustaining their lives; therefore, an individual is justified in appropriating pieces of the earth to the extent that it (a given bit of earth) is needed to sustain his/her life. However, one's appropriation of that which God has granted is unjustified if more is taken than what one can utilize.⁷ This is the first limitation on Locke's theory of property appropriation: the spoilage proviso.

Locke's comments on the second proviso are much more brief. Upon stating his theory of property appropriation which I have outlined above, Locke adds that no one can claim a right to that which someone else has fixed their labour while adding "...at least where there is enough, and as good, left in common for others".⁸ So the portion of the proviso which speaks to leaving enough for others could be re-stated to say that I may appropriate some piece of land, or object upon the land, so long as my doing so does not leave others with substantially less resources. Here an appropriation is deemed 'substantial' just in case it is such that others could not make a similar appropriation. Secondly, the 'as good' portion of this proviso, as I understand it, demands that a given appropriation can leave others with substantially worse resources in common. So, if the 'enough' portion of this proviso were to be understood as regarding the *quantity* of things left in common for others, the second portion would be best understood as being in regards to the *quality* of things left in the common for others. Therefore, when paired together, the two elements of the second proviso demand that when I appropriate something from the commons I do not take all of the best of a given type of thing. For

7 Locke, John, and C B. Macpherson. *Second Treatise of Government*. Indianapolis, Ind: Hackett Pub. Co, 1980. Pages 20 – 21.

8 Ibid. Page 19.

example, this proviso would exclude my taking all the fertile land from the commons simply because my doing so precludes others from fulfilling God's intentions (i.e. the equal well-being of His subjects).

The above has been offered a brief outline of what I take to be the standard reading of Locke's natural rights theory of property. On this view, humans can have justifiable claims (read: rights) to property in a state of nature through an investing of their labour into things upon the land (trees, non-human animals, rivers, etc.) and the land itself up to a point. That point is determined by the 'enough and as good' and 'spoilage' provisos sketched out above. With this reading of Locke in place I will use the following section to provide an exegesis of how various authors have argued that Locke's natural rights theory of property can or cannot (depending on the author) support a natural rights view of *intellectual/literary* property. The first author I will look to is Seana Shiffrin.

2.3 Shiffrin's Natural Right View of Intellectual Property

In her essay “Lockean Arguments for Private Intellectual Property” Seana Shiffrin lays out an argument purporting that Locke's account natural property rights cannot support the claim that, unlike physical property, intellectual property can be appropriated by individuals. The main line of her argument stems from what she calls the 'common ownership thesis'.⁹ While she admits that her interpretation of Locke's work differs from the standard account of Lockean appropriation (the account which I have just given) in that it places more emphasis on the common ownership thesis, I have no reason to think that from her increased emphasis any inconsistency with Locke's view is born. In other

9 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 143.

words, her placing the common ownership thesis (or God's grant) at the forefront of her work does not conflict with what I have presented so far. With that said, I would like now to present Shiffrin's argumentation.

Under Locke's view, private appropriation is necessary in order to make good use of God's grant, or as Shiffrin states it, "...private appropriation facilitates the development and the full use of a resource".¹⁰ Such a facilitation is necessary because it maintains the well-being of human beings. Furthermore, in order for an appropriation to be genuinely useful, it is sometimes the case that an appropriation *excludes* others from the resource. To be clear, in the above Shiffrin and I are speaking strictly in terms of real, or physical, property. However, when this form of argument is applied to intellectual property it loses much of its intuitive appeal. Its conflict with our intuitions comes about, argues Shiffrin, for primarily three reasons. First, the full use of some possible bit of intellectual property does not call for a sole exclusive owner over a prolonged period of time.¹¹ Secondly, one person's use or possession of an intellectual bit is completely compatible with someone else possessing the very same intellectual bit.¹² Finally, Shiffrin states that much of the time intellectual products need to be freely exchanged and contemplated by groups of individuals in order to see their utility maximized.¹³ Combined, these postulates point out that my possessing some heretofore unheard of idea for, say, the spoon, is not ruined or spoiled by someone else having the same idea; also, my bettering the spoon does not demand that I have sole right to spoon making. Quite the opposite, Shiffrin, by way of the

10 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 155.

11 Ibid. Page 156.

12 Ibid. Page 156.

13 Ibid. Page 156

third postulate, states that sharing my idea with large groups of people is more likely to produce a better spoon than I could on my own.

These three postulates justify two conclusions. The first is that, in Shiffrin's words, "Attempts to control, suppress, manipulate, or monopolize ideas and information run counter to the intellectual spirit of open public discussions that promote learning and appreciation for the truth".¹⁴ The second conclusion is made explicit by Shiffrin through the following statement: "For the bulk of intellectual products, then, the basic Lockean justification for parcelling them out to specific individuals for exclusive control is missing".¹⁵

2.3.1 Regarding the Common Ownership Thesis

On Shiffrin's view of Locke's work a great deal of emphasis is given to the common property presumption. That is, up to this point Shiffrin has taken for granted that the common ownership thesis applies to cases of intellectual property as it does in cases of physical property. She raises an objection to this suggesting that she is mistaken in thinking that intellectual property is in fact similar to physical property. The common ownership thesis is applicable for physical property because, for Locke, God created the earth and placed humans upon it. The earth is not empty and, therefore, there was something actually held in common by all individuals. However, if we take the initial intellectual commons as being empty, a claim that may seem more intuitive in this case, Shiffrin thinks that her argument against private appropriation of intellectual products may not work. The reason for this is that if my coming up with an idea does not involve

14 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 156.

15 Ibid. Page 157.

my use of commonly held/owned items, then no one but myself can lay a justified claim to it.

To face this concern Shiffrin aims to argue that regardless of the state of the initial intellectual commons, there is a good moral reason to think that intellectual property is commonly owned. Her argument is aided by three characterizations of the initial commons. The first takes all intellectual products to be within the intellectual commons. When we come up with ideas, we are essentially miners bringing intellectual ore to the surface. Under this view, we do not create intellectual products. The second view takes the intellectual atoms (facts, ideas, concepts, etc.) to be in the commons. Therefore, when we come up with 'new' intellectual products we are simply discovering and establishing new interconnections between the atoms (generating new molecules, if you will). These intellectual molecules are made public through their expression. The final characterization takes the initial intellectual commons as empty. New ideas are the *ex nihilo* creations of their authors and, therefore, such creation does not rely on any use of common resources.¹⁶

2.3.1.1 The First Characterization

On this view, Shiffrin argues, the Lockean argument against the private ownership of intellectual products would arise from the lack of any need to exclusively hold a given product to see its full effective use. In other words, if all intellectual products are commonly held and we simply *discover* them no one person can lay claim to their discovery because that which they have discovered has always been owned by all. For

16 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Pages 158 – 159.

this reason Shiffrin states that on this characterization “the argument for a natural, strong right to appropriate would be a nonstarter”.¹⁷

An objection to Shiffrin's line of thinking in this case may purport that in appropriating parts of the intellectual common new parts might be found, thereby putting the common to better use. A bright bit of insight by one individual may open the way for avenues of thought which were, prior to the insight, inaccessible parts of the common. Shiffrin is quick to note that this objection fails to see an important distinction between a person's appropriation of an intellectual product and his use of said product. It is not the former which expands the common. It is, instead, the use of the product. In using the intellectual product, through communicating it to others, for example, that the product opens up the common in new and interesting ways. As argued above, there is no need to grant an individual exclusive rights to the use of the product to see an opening of the commons. In fact, it is the making the use of the product inclusive that yields greater utility. Therefore, Shiffrin concludes, on this characterization of the initial commons strong intellectual property rights can not be justified.¹⁸

2.3.1.2 The Second Characterization

The second characterization of the initial common presents a distinction that most closely resembles Western copyright laws in that it differentiates between ideas and expressions. The former are similar to raw physical resources in that they are commonly held, while the latter comes to be from an act of intellectual labour. Like what occurs when one tends to the common in order to produce crops, we, as intellectual labours,

17 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 159.

18 *Ibid.* Page 160.

invest our time into the cultivation of expressions. For this reason Shiffrin states that this characterization of the common “may seem especially amenable to a Lockean form of intellectual property rights”.¹⁹ There is an important incongruity that this characterization faces. Unlike real property, the commons of intellectual property does not require exclusive use or control in order to maximize the common's potential. This position might be objected to in the following way: Suppose that you and I independently put forth two expressions which stem from the same idea. There is nothing in this view, so the objection goes, which demands non-ownership of our resulting expressions. Since the idea which forms the basis of our expressions are held in common, and continue to be so held, your or my claiming ownership of our given expression does not prevent the access of others to the stock of raw ideas. Therefore, it would seem that this characterization of the initial common *strengthens* any argument for an individual's right to own expressions.²⁰

What this objection fails to note, argues Shiffrin, is that it does not provide reasons *for* private ownership of intellectual products. Instead, it simply notes that there no argument against such ownership. Or so it would seem. Implicit in Locke's egalitarian common property presumption is the idea that in cases of physical property effective use of the commons demands exclusive use. If there is no impetus which demands that a given piece of property must be exclusively used in order to facilitate effective use, the egalitarian presumption of common ownership trumps. Therefore, in cases where items within the common need not be exclusively used to be used effectively, there is no

19 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 161.

20 Ibid. Page 161.

justification for private ownership. This is the case in instances of ideas and expressions. As she has argued in what I have outlined above, Shiffirin believes that exclusive use of ideas, and even expressions, are unnecessary. From this she concludes that Locke's view does indeed provide reasons against the private ownership of ideas and expressions and, therefore, that many people can use ideas and expressions at the same time “lends even stronger support to the Lockean argument against a natural right to intellectual property”.

21

The final objection/worry that Shiffirin entertains with respects to the second characterization of the initial common argues that unlike raw resources (be they physical or intellectual) in which every person stands on equal footing in relation to said resources, there is no such equal footing when it comes to intellectual *products*. In other words, the worry is that the common property presumption is inappropriately presumed in cases dealing with products of intellect.²² In such cases, the worry suggests, my creation of a intellectual product puts me in a special relation to my product and no other person shares this relation with me. Recall Diderot's view as it was sketched out at the start of this chapter. It is plain to see that he was certainly a proponent of this view. The response to this that Shiffirin formulates hinges on a conceptualization of the common property presumption which obtains its force from an appeal to our moral intuitions. Shiffirin's presumption is that taking all intellectual property to be held in common better reflects and expresses our beliefs that all moral agents are equal in states. She has this to say on the matter:

21 Shiffirin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 162.

22 Ibid. Page 163.

On this alternative explanation, it should matter less whether intellectual products were in a preexisting initial common or whether they were partly or wholly human creations. Creations could become part of the common – available equally to all – when their nature did not require exclusive use, to symbolize the equal moral status of individuals.²³

Since the nature of intellectual creations do not require exclusive use (as Shiffrin has repeatedly stated they do not), Locke's implicit egalitarianism demands that, upon creation, intellectual products should be incorporated into the common.

In summation, under the characterization of the initial common in which ideas are held in common while expressions are not, Shiffrin offers two strong reasons to incorporate expressions into the common upon their creation. First, intellectual expressions are compatible with joint use. Therefore there will be no conflict of wills or interests if two people use the same expression for different purposes at the same time. Second, the incorporation of intellectual expressions into the common fits nicely with Locke's account of property that, in Shiffrin's words, that “things should be shared, equally, unless there is a strong reason to do otherwise”.²⁴

2.3.1.3 The Third Characterization

As alluded to above, the final characterization of the initial common takes the common to be empty, void of both expressions and the idea from which they are formed. Since it is empty, there is nothing to take from the common when new ideas and expressions are formed by authors. The formation are new intellectual products are strictly *ex nihilo* creations of authors. Shiffrin argues that even in cases of *ex nihilo*

23 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Page 164.

24 Ibid. Page 164.

creation (which she takes imply a view of authorship that is a tad extreme) the argument for the incorporation of intellectual products offered in the above section would still apply. In other words, simply because I create a new expression or idea *out of nothing* does not mean that I must have exclusive rights to it in order for it to be effectively used.

25

2.3.2 A Final Worry

In an effort to be as diligent as possible, Shiffrin contemplates one final objection. On the view of such an objector the expressions of an author can be seen as extensions of the self. Since they invest their time and energies into their work (as Diderot stressed they did), to claim to own a work is not justified by way of appropriation; instead, it is made legitimate because the work is an aspect/extension of the author themselves. While this may seem to fit nicely with cases in which the author is currently investing labour in their project (i.e. their work is a work-in-progress) it is, according to Shiffrin, “not clear that the values animating the right of self-ownership can sensibly be extended to protect individuals' ability to disperse aspects of themselves into the public domain while simultaneously retaining complete control over them”.²⁶

2.3.3 Some Concluding Remarks

As I noted in the introduction to this chapter, there are two main views of property ownership within Lockean scholarship. The first referred to as the 'labour-mixing model', with Shiffrin's work being an extension of some of the model's major themes. This model, which emphasizes the common ownership thesis and the condition of full and

25 Shiffrin, Seana Valentine. "Lockean Arguments for Private Intellectual Property." *New Essays in the Legal and Political Theory of Property*. Ed.. Stephen R Munzer. Cambridge, UK; New York: Cambridge University Press, 2007. Pages 164 – 165.

26 Ibid. Page 165

effective use to justify the appropriation of portion of the common by an individual, suggests that there can be no justification for the private appropriation of intellectual/literary products. However, this model is not without its critics. I will devote the following section to an exegesis of both an alternative model as well as its application to the issue of intellectual property.

2.4 A Response to Shiffrin's Account and The Maker's Right Doctrine

“Lockean Property and Literary Works” by Jonathan Peterson contains two central claims.²⁷ First, Peterson argues that Shiffrin fails to maintain an important Lockean tenet which Peterson calls the 'workmanship model' which rests upon the 'doctrine of maker's rights'. The second claim is that once Shiffrin's oversights have been accounted for, a programme of 'strong' authors rights will flow directly out of a Lockean account of intellectual property. What each of these terms entail will be explained shortly, and with no further ado I begin my examination of Peterson's work.

2.4.1 Two Objections to Shiffrin's Account

Peterson provides two objections to Shiffrin's work. Both respond to her treatment of the initial commons, with the first specifically speaking to her examination what she referred to as the third characterization. In this characterization, the initial common is entirely void of both ideas and expressions, and claims to private intellectual property ownership are unjustified because, as Shiffrin sees it, exclusivity is unnecessary for full and effective use. Additionally, there is a *moral* reason to incorporate ideas and expressions into the common which is born out of egalitarian (and utilitarian) intuitions.

27 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008).

Peterson is not persuaded by this argument. The first reason for his dissatisfaction stems from his thinking that Shiffrin has inappropriately reordered the process of justified appropriation. In other words, it is not the case that the condition of effective use can be applied to cases in which the commons are empty simply because consideration of effective use is a means of justifying appropriation from the common. Such an appropriation is *impossible* when the common is empty; therefore, the condition of effective use does not apply.

The second objection that Peterson raises is far more substantial than the first and it provides the launching point for Peterson's own positive program. Therefore, I will devote the following section to it.

2.4.1.1 Peterson's Second Objection

Shiffrin's view of intellectual property rights, argues Peterson, depends heavily upon the presumption of common ownership; furthermore, this presumption is an interpretation of the moral implications of the initial common. Also, Shiffrin takes her interpretation to be the most defensible reconstruction of Locke's argument for private appropriation. This last point is precisely what Peterson takes issue with and he therefore concludes that Shiffrin's position can be undermined if an alternative reconstruction can do better justice to Locke's egalitarianism.

To these ends, Peterson considers William Enfield's work on the subject matter at hand. On Enfield's view, God's grant of the initial common ought not to be seen as a grant of common ownership, as Shiffrin takes it to be. Instead, it ought to be regarded as God's granting all humans with the common ability of property acquisition. Enfield explains his position by of an analogy in the following:

The original state of mankind with respect to the goods of nature resembles that of children, sitting down to the table of their common parent, who has set before them an abundance of provision, and given them a general power to partake of it, without assigning to each his particular portion; every one takes what he pleases, and what he takes is his own though before he had no property in it, and though there was no prior agreement among them what part each should take.²⁸

From this Peterson establishes the distinction between being granted the ability to share in a common means of self-preservation and being granted a common ownership of all the means of self-preservation. The latter is the view expressed by Shiffrin while the former is what Peterson is presenting as an alternative. It is important to note that both views maintain egalitarian themes in that both depict something being granted to all individuals equally. The difference, however, is twofold. The first difference resides in the nature of that which is granted. The first view argues that God has bestowed humankind with both the ability to obtain property and access to potential property. The second, on the other hand, argues that we have been bestowed with access to property which is already ours. There is, in other words, no ability, nor need of one, to obtain property granted by God. The second difference places emphasis on alternative egalitarian aspects of Locke's theory. The latter point is of extreme importance to Peterson's project since Shiffrin is critical of both Lockean arguments which emphasize labour and self-ownership for giving too little attention to Locke's egalitarian overtones. The alternative which Peterson presents via Enfield preserves the aforementioned overtones with Locke's body of work and therefore is not prone to similar criticisms.

28 Enfield, William as quoted in: Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008): Page 267.

That both interpretations are on fairly equal footing is noteworthy indeed for Peterson writes that “Shiffrin's defence of her view appears to depend on a claim that her interpretation is the only one that allows us to take the idea of an original [initial] common seriously”.²⁹ Therefore, if *both* Peterson's and Shiffrin's interpretations can take the initial common seriously, and if Peterson does not place a constraint on appropriation (and he thinks they do not), then “more argument is needed to show why we should accept Shiffrin's presumption of common ownership as an account of the implications of the original common”.³⁰

Peterson does not think Shiffrin's problems end there for, even if we were to accept the egalitarian principle as a motivating moral principle as she does, her argument is subject to yet another objection. Shiffrin clearly places human benefit at the center of justifying appropriation from the common. This ignores two things of import. First, there is an alternative interpretation of Locke which justifies appropriation which does not require an analysis of a given object's role in human self-preservation (this is the doctrine of maker's right, the subject of the next section). Second, the doctrine of maker's right is compatible with seeing the value of the initial common and its egalitarian role in Locke's account.³¹ I will offer Peterson's arguments for these two points in the following section.

2.4.2 The Workmanship Model

The first thing Peterson does upon introducing the reader to the maker's right doctrine is argue that the model which it is a key tenet of, which he calls the workmanship model, is not subject to the same objections as the more traditional

29 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008): Page 268.

30 Ibid. Page 269.

31 Ibid. Page 269.

interpretation of Locke's theory of property appropriation (most commonly referred to as the labour-mixing model). It has been argued, most notably by Robert Nozick, that the latter model of appropriation fails to state why it is that an individual *gains* that which they mix their labour into rather than *lose* their labour upon mixing it with the item in question. Nozick's example depicts someone who dumps a bottle of tomato juice (which they own) into the ocean (which they don't own). Our intuitions in such a case lead us to conclude that the person loses their juice rather than their gaining the ocean. It may be that any use of the labour-mixing model as applied to any attempt to justify the appropriation of intellectual property would be vulnerable to a similar objection. For this reason Peterson avoids the issue altogether by favouring the workmanship model. If Peterson is correct, this alternative model of property appropriation supports the ownership of both ideas and expressions.

2.4.2.1 The Maker's Right Doctrine

While Gopal Sreenivasan provides the first explicit use of the term 'maker's right doctrine', and while James Tully was the first to argue for the alternative interpretation of Locke's work, Peterson himself offers a extremely apt characterization of the view both Tully and Sreenivasan argued in favour of. Therefore, I employ Peterson's account.

The workmanship model, in its entirety, can be roughly sketched in the following.

1. The doctrine of maker's right: a maker has a right in that which he has made. Since (for Locke) a right is equivalent to a property, it can be said that a maker has a property in what he has made.
2. God has a property in Man. This property is explained by the doctrine of maker's right. That is, God's property in human beings obtains in virtue of the fact that God made them.
3. Making is an intellectual activity that involves bringing about the "material realization of some idea." It is governed by the

idea or essence of the thing made and involves knowing that idea.

4. By virtue of the fact that making is an intellectual activity, God's making and human making are analogous. Both God and humans engage in making the sense required by the doctrine of maker's right.
5. The doctrine of maker's right applies to human making by virtue of the analogy. If God's property in humans is explained by the fact that they are his workmanship, then human property in things that humans make is explained by their workmanship.
6. A human being has a property in her labor. The important premise here is that humans have a property in their action. Since labor is equivalent to action, for Locke, and since humans may properly be said to make their actions, humans have a property in their labor.
7. A human being has a property in the things that she makes from the common material provided by God. (This is only a necessary not a sufficient condition, since property rights must also satisfy the proviso.)³²³³

The final two statements can be seen as the results of applying the doctrine of maker's right (the first point) to human activity; therefore, it becomes obvious that this view, in its entirety, hinges on the plausibility of the doctrine of maker's right. Before attempting to extend this doctrine to the area of intellectual property, Peterson defends it from two objections.

2.4.2.2 Objections to the Maker's Right Doctrine

The first objection flatly denies that Locke ever argued for anything along the lines of the maker's right doctrine within the *Second Treatise* or anywhere else. On this view the maker's right doctrine might be seen as bending Lockean texts to the point of breaking only to avoid strong objections to the 'correct' reading of Locke (namely the labour-mixing model). Peterson offers two responses to this objection. The first response

32 'The proviso' here refers to the 'enough and as good' proviso outlined in section two of this chapter.

33 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Pages 270 – 271.

states that the maker's right doctrine need not be a *Lockean* account of property rights in order to succeed.³⁴ However, such a claim is unnecessary, argues Peterson, simply because Locke did in fact endorse the maker's right doctrine. In support of this argument Peterson points the reader to Section 6 of the *Second Treatise* in which Locke writes:

...for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure.³⁵

This quote, claims Peterson, sufficiently shows Locke's endorsement of the maker's right doctrine. I do not desire to delve into a debate on whether or not Locke endorsed this view simply because its connection to Locke does not bare a sizable enough impact on the issue at hand, i.e. whether or not natural rights *per se* can provide sufficient justification for intellectual property rights. I therefore move on to the second objection to the maker's right doctrine; an objection to which I, and Peterson, devote more credence and attention.

The focus of the second objection falls upon the analogy between the makings of God and those of humankind. God, the objection goes, creates things from nothing, or *creatio ex nihilo*, while humans do not. Their creation is vastly inferior to God's since it relies on the drawing upon/fusing together of/rearranging of preexisting materials. Perhaps the maker's right doctrine, concludes the objector, only applies to acts of *creatio ex nihilo*.

34 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 271.

35 Locke, John, and C B. Macpherson. *Second Treatise of Government*. Indianapolis, Ind: Hackett Pub. Co, 1980. Page 9.

To defend against this view Peterson borrows a distinction from Sreenivasan. According to the latter author, *creatio ex nihilo* and the form of activities humans engage in when they craft tools, poems, arguments etc. are different in the way in which the objection notes; however, they are also similar in that they are both subsets of a broader type of activity: making. Peterson describes 'making' as “causality of a specific kind in which one knows an idea and brings about a material realization of that idea”.³⁶ This characterization of making does not diverge from Sreenivasan's work where he can be found stating:

On the workmanship interpretation, man's capacity for property is to be explained in terms of the similarity between man and God as makers in the broad sense. This similarity is itself due to the similarity between making and creating, of which man and God are respectively capable. In each case, on this interpretation, a right arises in the product newly brought into being, namely, a maker's right. Thus, even though he cannot create, man as maker can still bring new things into being and is therefore entitled to a property in them.³⁷

With these two objections found wanting, Peterson takes the workmanship model and applies it to the subject of intellectual property rights. I examine his account in the following section.

2.4.2.3 The Workmanship Model and Intellectual Property

In Section Three of this chapter, I noted that Shiffrin thought that applying Lockean justifications of property ownership to the realm of *intellectual* property was a troublesome philosophical move. Intellectual property, she argued, was different from physical property in important respects. These differences resulted in a lack of Lockean

36 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 271.

37 Sreenivasan, Gopal. *The Limits of Lockean Rights in Property*. New York: Oxford University Press, 1995. Page 75.

justifications for the ownership of intellectual property. We should not be surprised to see that Peterson has taken up a contrary position. This position, in fact, is almost an inverting of Shiffrin's because he does not take the differences held between physical and intellectual property to strain the use of Locke's justification of owning of intellectual property; quite the opposite, he notes that "in the production of literary works, human beings do something that they are not capable of doing in the material world, namely, they create them [literary works] *ex nihilo*".³⁸ In other words, rather than *weakening* upon application to the area of intellectual property (as Shiffrin argues it does), Peterson takes Lockean justifications to *strengthen* upon such an application.

Furthermore, on this view of human making Shiffrin's common ownership thesis fails to apply. As *ex nihilo* creations, the products of a person's intellectual endeavours do not remove anything from the common. Even if we find the possibility of a human creating something *ex nihilo* counter-intuitive (as Shiffrin did) Peterson argues that the doctrine of maker's right has traction still. To see this he asks us to suppose that human making is an act of synthesis in which the bits which we combine are preexisting (as is the case with ideas or propositions) or as created in part by others. On this view, argues Peterson, even though there may be some justification for taking ideas as being similar to the common in cases of physical property ownership, it does not follow that there is no justification for author's rights. To put it another way, if we were to posit ideas as being the intellectual common from which we take in order to produce intellectual goods, there is nothing that flows from the assumption which excludes securing rights enabling an author's control over their products. The reason for this is that just as making a material

38 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 273.

thing establishes a relation between the maker and that which is made, a relation is established between the author and their intellectual works. Peterson concludes that “this relation [between the maker and that which is made] has to be taken into account in considering whether or not the author should have the right to exclude”.³⁹

A denial of an author's rights presupposes two things, according to Peterson: first, that viewing productions of human making as *ex nihilo* creations is false; and second, that Shiffrin's common ownership thesis applies. The latter presupposition is dismissed by Peterson because he has taken himself to have provided sufficient argumentation to warrant its dismissal in what has preceded. The former presumption is similarly dismissed for it does not appear to Peterson that “by itself the idea that literary making is not *ex nihilo* does not seem to determine the answer to the question in the direction of common ownership”.⁴⁰ To deny an author's right to their work would assume that the only worthwhile consideration in any attempt to determine property rights is that of human benefit, and, effective and exhaustive use of their work. However, the maker's right doctrine, argues Peterson, establishes that these are not the only considerations in such a determination. Central to this doctrine is the connection formed between the author and their work which arises from the act of making. This connection grounds a moral property claim to the work in question, and, to exclude this connection for the aforementioned determination would be, on Peterson's view, unfair to the author since it would exploit their efforts in an unjustifiable manner.⁴¹

39 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 274.

40 Ibid. Pages 274 – 275.

41 Ibid. Page 275.

From this Peterson takes the maker's right doctrine to establish a programme of 'strong' property rights for literary works. The programme is deemed 'strong' because it grounds rights to an extensive form of exclusive control of an object (here the object being a literary work). While we might want to suggest that this conditions of this programme can be satisfied by compensating or acknowledging the author of a work, Peterson objects to this stating that the argument I outlined in the above paragraph shows that the maker's right doctrine demands more of us. On his view we must not only compensate and acknowledge authors but also “recognize that it would be unfair to refuse authors a special control over what they have made”.⁴²

Now, Peterson goes on to argue that while, in general, an author's excluding others from her work is not objectionable, there are some forms of exclusion which are objectionable from a Lockean perspective. I will not offer a treatment of this section of his text because it simply draws out entailments from the view he has, up to this point, been arguing for. For my purposes within this work, an analysis of these entailments would lead the reader too far from the intended direction of this chapter. Therefore, I move on.

2.5 The Rejection of Natural Intellectual Property Rights

In what follows I will argue that Peterson's thought has one central failure which, most simply put, involves using examples of material makings to serve as a motivating analogy for his strong maker's rights in literary works. I argue that no such justification is available because the nature of material and immaterial makings are sufficiently different so as to not allow for such a analogy to provide justification. However, I will argue that,

42 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 276.

upon recognizing this failure and correcting for the mistakes it caused, the maker's right for which Peterson argued so strongly is not removed from considerations regarding natural rights in literary works. The entailments of such revisions will be explained at length in the following two sections.

The nature of the maker's right is not the only element of Peterson's work which demands revision as a result of correcting for his mistaken analogy. The principle of equity that serves as the ethical grounding for his 'strong' maker's right is changed as well. Just as with the changes to the maker's right, the necessary changes to this principle of equity will be explicated shortly.

The structure of my argument will be as follows: I will first explain the analogy that Peterson attempts to make between material makings and their immaterial kin. Secondly, I will explicate my reasons for thinking that such an analogy is unsatisfactory; and, finally, I will explain the changes to the maker's right doctrine and the principle of equity which are demanded.

2.5.1 Physical Makings and Authorial Makings

Peterson attempts to argue that there is an analogy between material makings and authorial makings. So much is clear when he writes:

Suppose we view literary works as fixed combinations constructed from a preexisting material (ideas, propositions, etc.) or as constructions in a social context from materials partially created by others. On these conceptions of what it is to make a literary work [i.e. to make it *ex materia*], there is some justification for thinking of ideas as a common on which authors labor as others labor on the earth. But it does not follow from this alone that authors cannot claim rights in the products of their laboring activity. Authorial making in this case seems to be analogous in the relevant way to bringing forth produce by cultivating a field. If we are persuaded

that material cultivation could give rise to property, then it seems that authorial making ought to do so as well.⁴³

His line of thought may become more obvious through an example. Suppose I go out into the commons and cut down some trees and from them make a table. As the maker of the table I have a property in it. This property is, according to the maker's right doctrine, characterized as a distinct relation between myself and that which I have made (in this case, the table). This relation entails an author being able to exclude others from use of their work. If this were not the case a consequence would be the denial of "a special and morally significant connection between [maker] and work."⁴⁴

There is, however, another reason for an author having special control over their work. According to Peterson, the additional justification for these controls comes in the form of an ethical principle which states that for others to use my table without my permission would be to treat me in an unfair fashion.⁴⁵ What determines this unfairness is not entirely explicit within Peterson's thought. He does say that "The problem with allowing others to reap where they have not sown is that...[that which is made]...becomes available as a resource for others to draw upon whenever and in whatever way they like. This may plausibly be thought to be contrary to equity."⁴⁶ But, it is unclear exactly how such treatment is unfair, contrary to the maker's right, or inequitable if we take Peterson's claims at face value. A contradiction of the reap-sow principle cannot be thought of being inequitable by definition, for if every individual was given access to any given product of a maker's effort then it could truthfully be said that every individual is given the same

43 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 274.

44 Ibid. Page 275.

45 Ibid. Page 276.

46 Ibid. Page 276.

treatment as any other; therefore, the process would meet the requirement to be seen as being equitable.

However, this treatment can, I think, be demonstrated as contrary to the maker's right doctrine if we take the unfairness of such treatment as stemming from its overriding the relation held between maker and their product. Recall that on Peterson's view a relation between the maker and their product emerges as a result of the making process. If we understand this relation as a tie of sorts which bonds maker and work, a bond which therefore guarantees/demands that a maker has access to their work, then someone else making use of the work in a fashion contrary to the desires of the maker dissolves this relation because implicit in such use is the *interruption* of a maker's ability to access. Take the case I outlined above involving my making a table. Suppose you wished to make use of the table in a manner that excluded my using it as I saw fit, say you wanted to burn it for heat while I wished to place my meals upon it. Your burning of the table in this case interrupts my access to that which I have made and would, to use Peterson's words, "fail to respect the significance of [my] creative activity".⁴⁷

In the large quote at the beginning of this section Peterson establishes a conditional which claims that, if we are persuaded by the reasoning behind the exclusive maker's controls over physical works, we ought to be similarly persuaded to accept controls in the case of authorial makings. If this conditional has a grip on our intuitions it would follow that just as I had strong control over the use of the table I made in the example above, I would also have strong controls over the use of any authorial works I might happen to produce. In the following section I will argue that this conditional fails

47 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 276.

because authorial makings are of a different *kind* than physical makings in important and relevant respects.

2.5.2 The Differences Between Such Makings and Consequences Thereof

When we speak of the object of production in cases of non-authorial making, it is fairly obvious what we are referring to. In my example, that which is made is a particular table. The relation that I share is with a specific material object. The fruit of my labour (i.e. that which I have made) and the physical product are one and the same. Such is not the case when we think of authorial makings for the 'object' in question is not material. If we did in fact mean 'object' in this way in the case of authorial makings “Moby Dick” would not refer to a story about the adventures of a wandering sailor name Ishmael and his voyage on the 'Pequod'; it would instead refer to a particular physical manuscript in which Herman Melville tells the aforementioned tale. This is extremely counter-intuitive and I think those individuals who wish to justify stronger author's rights would not accept such an understanding of authorial objects simply because there is little to stop my copying Melville's work so long as my copying did not interfere with his access (suppose that he permitted me to read the manuscript and afterwards I rewrote the story from memory).

Another understanding of the nature of authorial products might posit that the author has a right to all physical objects which bear the expression of their labour. But this too is unacceptable because it would suggest that in quoting an author (as I have frequently done within this work) one hands over their work to the author quoted. Both of these conceptualizations of intellectual product fail to capture our common intuitions that, in the case of authorial makings, that which is produced cannot be isolated to any

particular physical object. The product is intangible; intellectual property is always respecting an *abstract* object. Therefore, the more acceptable understanding of authorial 'objects' is that an idea (or set of ideas) is expressed by way of an arrangement of words/shapes/notes etc. Consequently, there are two 'objects' in any given authorial making: the implicit ideas, and the expression which explicates those ideas. Such an understanding of authorial objects is, I think, much more in keeping with the canon of thought on intellectual property.

Now, these two authorial 'objects' are vastly different from their physical counterparts. There are at least two key differences that bear on the subject matter at hand. Firstly, they, unlike material objects, do not require exclusive control to be used or possessed. This line of thought is evident in both Shiffrin's work as well as in Deborah Johnson's "Computer Ethics". Secondly, as a result of the first difference, the nature of the 'object(s)' in cases of authorial makings changes the nature of the relationship held between author and work such that a greatly different conceptualization of the maker's right becomes apparent. This new conceptualization will be the focus of the remainder of this chapter.

2.5.3 Non-tangible 'Objects' and Their Use/Possession

During the exegesis of her work, I noted that Shiffrin held there to be important differences between physical objects and intangible 'objects'. One of those differences is that one person's use or possession of intangible 'object' is completely compatible with someone else possessing the very same 'object'. Take, for example, the largely different uses Shiffrin and Peterson have made of the writings of Locke. This would be impossible were it not for the nature of the 'objects' in question. Johnson holds this to be true as well.

While her analysis focuses specifically on the concept of 'confiscation' it can be applied to the instances of what one might call 'plural use' and 'plural possession'. Her line of thought is explicated in the following:

...when someone comes along and takes the laborer's crops, the laborer loses products of his labor. However, when it comes to intellectual products such as ideas, musical tunes, and mental steps, the laborer does not lose access to the products of the labor. If I labor in creating a song...and someone hears the song (or even memorizes it)...I don't lose the song...I can continue to have and use the intellectual results of my labor while others have and use them. Thus, there is no confiscation.⁴⁸

It is important to note here that Johnson states that not only can authors continue to *use* the products of their intellectual labour despite others using them, but they can also continue to *have* them. The products are, in other words, within the possession of all those who use them. Furthermore, plural possession and use interferes with no single individual's possession or use of the work. From this fact alone the error in Peterson's thought can be seen. In the case of a maker's relation with their physical product the relationship can be harmed by the confiscation or misuse of the product. A injustice arises as a result. A similar injustice cannot arise if I were to use or possess an author's work simply in light of the non-physical nature of the work.

This would seem to undermine the doctrine of maker's rights, and, therefore, there may be more than one tack that might be followed in response to the realization that intellect products allow for plural use and plural possession. First, we might reject the doctrine of maker's right entirely due to its being unable to account for the nature of intellectual products. This, I think, would be unsatisfactory because this doctrine captures

48 Johnson, Deborah G. *Computer Ethics*. Upper Saddle River, NJ: Prentice Hall, 2001. Page 126.

some important intuitions regarding the special emotional/intellectual investments an author makes while pursuing their intellectual endeavours. Therefore, I shall opt for a second tack which demands a re-conceptualization of the relationship held between author and work, or, perhaps more exactly, a re-conceptualization of the rights guaranteed by the doctrine of maker's rights.

It may seem difficult to understand how the maker's right doctrine can be salvaged. My suggestion is as follows: Peterson wrongly believes that the relation held between author and work is analogous to the relation held between the maker of a physical object and said object. As I showed above a disanalogy holds between these two different forms of 'making'. However, key tenets of the doctrine of maker's rights remain intact because there is one feature of authorial works that can be confiscated: the status of *author*. In other words, while you and I can both use and possess an idea or expression of that idea which I authored, only one of us can be the genuine author of the work. If you were to present yourself as being the author of the idea or expression that I originated it would make sense to speak of your having *confiscated* what was/is mine. In other words, if I were to pass myself off as the author of some work that you have in fact authored, I would be in effect interfering with an intangible relation that you shared with the product of your work. It is *this* kind of interference that 'fails to respect the significance of an author's creative activity', not the mere possession or use of the author's ideas/expressions (the obvious exception to this would be my using your work to pass myself off as an author of the work). There is an intuitive similarity between this kind of interference and to my taking credit for someone's good deed, or my shifting blame for a bad deed I have committed onto someone else.

Therefore, this new insight into the nature of authorial works can be seen as to suggest an alternative account of the doctrine of maker's rights. On this view confiscation of the status of author, or *plagiarizing*, is an action which interrupts the relation between author and work while merely possessing/using the work does not. Finally, the rejection of Peterson's strong authors' rights stems not from a rejection of the moral principles with which he builds his account; instead, it finds its roots in a category mistake made by Peterson. It corrects his mistake and, in doing so, allows us to adopt the same moral principles which informed his account of authors' rights. The result was a re-conceptualization of these rights that is sensitive to the fundamental difference between physical and intangible products of human labour. At this point I think it may be prudent to face some objections which may remain.

2.5.4 Objections

The new doctrine that I have outlined above may not be enough to soothe proponents of natural rights in literary works. They might be inclined to argue that without something similar to Peterson's strong maker's rights there is little motivation to produce literary works. In other words, if there is no method through which the interests of authors are protected it may very well be the case that authorial productivity is curtailed. I have two possible responses to this objection, which one applies to the situation is determined by what is meant by the term 'motivation'. If we take it to mean that there will be little *financial* motivation for producing literary works I would wholeheartedly reject this objection on the basis of its clearly misunderstanding the character of natural rights. Natural rights sit conceptually prior to such things as *economic* rights (say, the right to try to make a living by exercising the abilities with

which we have been blessed), and to swap the priority would be, in some sense, to take a perverse view of morality.

In the interest of due diligence, however, I will play devil's advocate. Suppose that someone wished to form an argument beginning with financial considerations and concluding with author's having exclusive control over their literary works. The proponent of this argument would have an uphill struggle to make these ends meet. Interestingly enough, Peterson himself suggests why this is so through stating the following:

...considerations such as these [principles of equity that can be broadly lumped together under the heading of 'economic'] do not appear to support exclusive property rights. It may be, for example, that those who labor and produce literary works are fairly owed a return from their labor, but this in itself does not entail that they should have exclusive property rights in what they have created.⁴⁹

We might imagine a society whose economic practices satisfy the demands made by these financial considerations by, for example, paying the author for his or her work. However, as Peterson notes this does not require an author's having exclusive rights control over their product; and, as a result, the move from such considerations to exclusive rights is an exceptionally strained one.

There may be an alternative way to understand the term 'motivate' in the objection presented above. According to this alternative an author would have little motivation to contribute to the development of their social group if they lacked the right to exclude others from freely accessing their work. Therefore, in efforts to encourage cultural development there ought to be an author's right to control their intellectual products. My

49 Peterson, Jonathan. "Lockean Property and Literary Works *." *Legal Theory*. 14.4 (2008). Page 276.

response to this concern comes in the form of a promissory note. I cannot, at this point in time, provide argument that there ought to be, or ought not be, rights of any sort for an author to exclude others from using their work. This is simply due to the limited scope of this chapter, for as I have taken great pains to show, there is no basis for such exclusion in *natural rights*. However, it will later become evident that this objection gains traction on our intuitions when the discussion turns to *positive rights*. For the time being though, this type of exclusion is baseless.

A second objection argues that the new doctrine fails to truly capture the unique relation between author and work. On this view, it is not the status of 'author' that an author takes great pains over, but instead the arrangement of words, images, sounds etc. In short, it is the expression and the ideas behind the expression that an author is in relation to that is in need of protection. Therefore, it is wrongheaded to protect an accidental feature of authoring and not the intended ends of such an endeavour. While the 'new' doctrine accounts for some aspects of the appropriate maker's rights, this objection holds, it fails to account for the author's relationship with their expression and the ideas implicit in the expression regardless of the non-physical nature of the ideas and expression.

I see no such failure within my work. On my view, the status of 'author' simply *is* a relation between an individual and a work. To say that Herman Melville is the author of *Moby Dick* is just to say that Melville stands in relation to set of ideas and expressions which we refer to as 'Moby Dick'. Therefore, as per the extended argument above regarding the differences between physical objects and intangible 'objects', since there can be no sensible justification of an author having the right to exclude others from using

their ideas or expressions, the only way to protect this unique relationship is via protection of their status of 'author'.

2.6 Concluding Remarks

As I noted in the introduction of this chapter, natural rights can be treated as the foundation upon which a set of positive laws can be built. Assuming that these positive laws do not conflict or contradict their natural counterparts this seems to be a very plausible method of developing a system of just laws. However, given that, as shown above, there is only a very minimal set of rights regarding intellectual/literary works (the right to works-in-progress, and, the right not to be plagiarized) a puzzle remains which asks: if there can be no justification for a thing/action within natural rights, will including that thing/action within positive law create an injustice? To apply this concern to the topic at hand the question can be rephrased to ask: Will positive laws giving strong control over the content of authorial products to authors, or anyone else for that matter, generate injustices?

I think not. The reason being in that I have argued that natural rights, with a few exceptions, are *silent* on the matter of exclusive control of intellectual/literary works. Within this limited scope there is no justification to be had. However, this does not entail that injustices will arise if we find alternative (read: those which do not speak to natural rights) justifications for codifying these controls into law (read: positive law). In other words, we can expand the scope of inquiry to include other models of justification and this expansion will not necessarily lead to injustices. Therefore, as per the comments made at the outset of this thesis, I will move to offer extended analysis of an alternative

justification for such controls: utilitarianism. The first step in this analysis to to outline the most ideal form of said moral theory, upon which the justification will be built.

Chapter Three: An Alternative Justification for 'Intellectual Property'⁵⁰

3.1 Introduction

As most academic philosophers are aware, there are numerous forms of utilitarianism; so the claim I made at the close of the preceding chapter (that I would be applying this theory to the issue at hand) is likely to breed an undesirable amount of uncertainty if not expanded upon. The initial concern in need of attention is, therefore, in regard to which form of utilitarianism is best suited for the task at hand. I will begin with hedonistic utilitarianism. I offer two reasons for adopting this as my starting point. First, it is the most familiar formalization of utilitarianism. While a theory's being well-known obviously does not provide good philosophical grounds for its adoption, beginning with such a theory will immediately quell any concerns that I have intentionally overlooked the standard account in order to secure the conclusions I desire. Secondly, this moral theory has well-known detractors and objections that are awkwardly out of place if not set into context. In short, I have good reasons to ultimately make adjustments and additions to hedonistic utilitarianism; however, acceptance of these reasons hinges on a strong grasp of the position itself. The moral theory I will come to adopt is presented by Peter Railton in his essay "Alienation, Consequentialism, and Morality", namely *pluralistic sophisticated consequentialism*. Since Railton's view expands upon hedonistic utilitarianism, it retains some elements of hedonism. It is not, however, simply hedonistic, nor does it place hedonistic commitments above all others. The structure of

⁵⁰ At this point I will begin to refer to the subject-matter at hand as "intellectual property" rather than "intellectual property". I utilize this shift in notation to reflect my rejection of natural rights justifications and to keep the distinct commitments entailed by each view separate in the eyes of the reader.

this chapter, therefore, is to present hedonistic utilitarianism, provide an analysis of its defects, and alter it in order to provide the strongest form of utilitarianism available.

3.2 Bentham's Hedonistic Utilitarianism

The dichotomy upon which all actions are evaluated to be good or bad is, according to Bentham, pain and pleasure. It is, he writes, “for them alone to point out what we ought to do”.⁵¹ All actions can be taken to ultimately be evaluated as either good or bad through his oft cited 'principle of utility'. This principle evaluates an action to be either good or bad depending on the consequences it yields; or, in other words, evaluates an action by “the tendency which it [an action] appears to have to augment or diminish the happiness of the party whose interest is in question”.⁵² The party in question may be a sole individual or a community. If it is the latter, as is the case for this work, the utility of an action (the tendency of that action to produce happiness) is determined through summing all happiness generated by the action at the individualistic level, for, on Bentham's view, a community is merely “a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*”.⁵³ The morality of an action, in cases which concern the community at large, then, depends on its tendency to promote more happiness than unhappiness. This holds for actions of individuals, but it also applies to those of governments. Of this Bentham notes:

A measure of government...may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it.⁵⁴

51 Bentham, Jeremy, J H. Burns, and H L. A. Hart. *An Introduction to the Principles of Morals and Legislation*. London: Athlone P, 1970. Page 11.

52 Ibid. Page 12.

53 Ibid. Page 12. Author's emphasis.

54 Ibid. Page 13.

From these brief comments the basic structure of Utilitarianism is bared. Therefore, the moral status of any act of government, including those under scrutiny in this work, must be evaluated by the amount of happiness which arises as a consequence. Now, it would be good to clarify what counts as happiness.

For Bentham, there are four genera of pleasures/pains: physical, political, moral, and religious.⁵⁵ All sanctions, or bindings of individual persons to a rule or law, are formulated in light of these four kinds of pleasure/pain. While the precise intricacies of his comments are, for the most part, irrelevant to the ends of this work, there is one important feature that needs to be drawn out if the future objections I will be handling are to be properly understood. On Bentham's view all of these kinds of pleasures/pains are reducible to physical pleasure/pain. Of this Bentham states:

Of these four sanctions the physical is altogether...the groundwork of [the other three]. It is included in each of those other three. This may operate in any case, ...independently of *them*: none of *them* can operate but by means of this.⁵⁶

Any law, therefore, which seeks to maximize, for example, a particular political pleasure, must do so through physical sanctions (where a sanction is simply a means of providing a motive for action).⁵⁷ An action's having a painful sanction is therefore interpreted as a legislature's disincentive for said action. A pleasurable sanction, on the other hand, an incentive for a given action. This latter point bears particular relevance to the larger discussion of this chapter, as will be shown later on.

55 Bentham, Jeremy, J H. Burns, and H L. A. Hart. *An Introduction to the Principles of Morals and Legislation*. London: Athlone P, 1970. Page 34.

56 Ibid. Page 37. Author's emphasis.

57 Ibid. Page 34. Footnote 'a'.

The aforementioned genera of pleasure and pain are further distinguished into what I will call the species of pleasure/pain. Bentham outlines fourteen simple pleasures and twelve simple pains. For the sake of brevity I will not offer an exposition of these pleasures and pains. What is of import, though, is that these simple pleasures and pains can be, and often are, perceived synthetically, which is to say that one may experience a complex pleasure which is comprised of two or more simple pleasures. A carpenter, for example, may look happily upon a cabinet she has made many years ago. In such a case she experiences, in Bentham's terms, both the pleasures of skill and the pleasures of memory concurrently. This is not to say that she experiences *more* happiness than when she experiences a simple pleasure; for, with these two different classifications of pleasures and pain, Bentham has outlined the qualia, the basic *types* or *kinds* of sensations, as they are relevant to Utilitarianism. These form the basic units of Utilitarian ethics, and they comprise both the ends sought after or avoided, as well as the means used to obtain a legislature's desired ends.

The question remains: with the basic units in place, how does one go about determining which means bring about the most happiness; or, how does one measure a given action's effect? The answer is dependent on a number of factors. First of all, one must consider the value of a pain or pleasure in isolation, both from other pleasures/pains *and* from other agents. A given bit of pleasure experienced by a particular agent will be greater or less according to four dimensions of value: its intensity, its duration, its (un)certainty, and its propinquity or remoteness.⁵⁸ Two further dimensions must be taken into account when the value of a pleasure or pain is evaluated in association to an action.

58 Bentham, Jeremy, J H. Burns, and H L. A. Hart. *An Introduction to the Principles of Morals and Legislation*. London: Athlone P, 1970. Page 38.

The first, the action's fecundity, refers to “the chance it has of being followed by sensations of the *same* kind”.⁵⁹ The second, an action's purity, speaks to the likelihood of a given pleasure/pain *not* being followed by sensations of the *opposite*.⁶⁰ The final dimension of evaluation is an action's extent, or, “the number of persons to whom it *extends*; or...who are affected by it.”⁶¹ The method of determining a moral action, then, rests in the balance of what has been called 'Hedonistic Calculus'. On Bentham's view one must measure the effect of an action on all affected individuals; this measurement consists of analyzing all individuals under the above rubric. If the action, acts of legislatures included, yields a positive value, which is to say that there is more pleasure than pain as a result of the act, then it is of *good tendency*. On the other hand, actions which yield net pain have a *evil tendency*.⁶² Thus, we have Hedonistic Consequentialism.

This view is not without its detractors, however. I will raise three serious concerns: one by J.S. Mill, a second by Robert Nozick, and finally a third by Henry Sidgwick. Each focuses on a separate aspect of Bentham's thought, or, at least, an aspect of Hedonistic Consequentialism of which I have taken Bentham to be emblematic. Mill's comments, found in his essay “Utilitarianism”, reflect a dissatisfaction with the Bentham's contention that all kinds of pleasures are equal in worth. He (Mill) therefore suggests that pleasures are arranged in a structured hierarchy, with a particular *kind* of pleasure outranking, or outweighing, other kinds. Robert Nozick, in his book “Anarchy, State, and Utopia” offers what I will take to be a critique of Bentham's placing subjective

59 Bentham, Jeremy, J H. Burns, and H L. A. Hart. *An Introduction to the Principles of Morals and Legislation*. London: Athlone P, 1970. Page 39. Author's emphasis.

60 Ibid. Page 39.

61 Ibid. Page 39. Author's emphasis.

62 Ibid. Page 40.

state-of-affairs at the center of moral considerations rather than objective state-of-affairs (the difference between the two state-of-affairs will be explained at that time as well).

Finally, I will provide a brief account of Henry Sidgwick's Paradox of Hedonism as it is found in his book "The Method of Ethics".

While one might utilize such concerns as a motivation to reject any brand of ethics which is comprised of, at least in part, some amount of hedonistic considerations, my intentions are more nuanced. I intend to analyze these three critics and use the faults they point out as an impetus to seek out a form of consequentialism which does not suffer from the illuminated shortcomings. I will turn to Peter Railton's "Alienation, Consequentialism, and the Demands of Morality" in order to fill this void. With this consequentialism in place, I will begin to put forth justifications for intellectual property which are based on, or have been based on, consequentialist considerations.

3.2.1 Mill's Concerns with Hedonistic Consequentialism

The central claim that Mill defends is that Utilitarianism is compatible with there being some pleasures which are more valuable than others. This stands in stark contrast to Bentham's line of thought which contends that all *types*, or *qualities*, of pleasures are, *ceterus paribus*, equal. If, for example, a given pleasure of skill had a set value (with respect to its intensity, its duration, etc.) and a pleasure of memory had the identical value, these two pleasures would give way to two consequences which are equally morally praiseworthy. On Bentham's view, the type of pleasure bears no impact on its moral worth beyond the fact that it is indeed a pleasure. It is on this point that Mill distances himself from Bentham, stating that "[i]t would be absurd that while, in estimating all other things...the estimation of pleasures should be supposed to depend on

quantity alone.”⁶³ Mill's reason for holding this position is simple enough. He argues that there are some pleasures which are, in and of themselves, more pleasurable than others. The feature that determines which pleasures are more desirable is, quite simply, pleasure itself. Mill puts the point succinctly in the following:

Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be attended with a greater amount of discontent, and would not resign it for any quantity of other pleasure which their nature is capable of, we are justified in ascribing to the preferred enjoyment a superiority in quality, so far outweighing quantity as to render it, in comparison, of small account.⁶⁴ (Mill, 279-280)

The very nature of some pleasures, it seems, make them preferable to others. In other words, Mill is claiming that only a minority of beings who are capable of intelligence or moral sensibility would give up these higher capabilities to live the life of beings who were incapable of these things, even if these incapable beings had all their desires fully realized. It is better, on Mill's view, to be “a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”⁶⁵ Furthermore, if we encounter a pig or fool who argues otherwise, their argument can be dismissed for it is born out of an ignorance stemming from their having not experienced both *kinds* of pleasures. They are, by definition, incapable of obtaining firm ground upon which they may rest their argument.

63 Mill, John S, Jeremy Bentham, and Alan Ryan. *Utilitarianism and Other Essays*. Harmondsworth, Middlesex, England: Penguin Books, 1987. Page 279.

64 Ibid. Pages 279 – 280.

65 Ibid. Page 281.

At this point Mill handles two objections. The first argues that those individuals who are capable of 'higher' pleasures often act in manners contradictory to the hierarchical structure of pleasures for which Mill is arguing. Mill's objector suggests that evidence of individuals often ignoring the 'higher' pleasures in favour of the 'lower' justifies the conclusion that there are no intrinsically superior pleasures. Mill disagrees. On his view, such instances often reveal no more than a person's imprudence. A smoker, for example, pursues the pleasures which are part and parcel of his addiction; all the while accepting, and believing, that their health is the greater good. This does not mean his choices indicate that his health and his smoking are of equal good. Instead, Mill holds that electing for the lesser, yet nearer, good is indicative of an infirmity of character and nothing more.⁶⁶

The second objection argues that many individuals who, in their youth, strive for the 'higher' good often, over the course of their lives, slide into morally questionable practices. Again, this objection adheres to a similar form as the one examined above. If over time, the objection claims, people often slide into the practice of choosing the 'lesser' goods over the 'higher' goods, it is difficult to hold Mill's position regarding the nature of the good.

Mill contends that very few people voluntarily choose 'lower' goods over 'higher' goods. On his view the people who are found to have devoted themselves to the former of the two have already become incapable of the latter. His view is explicit in the following:

Capacity for the nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance; and in the majority of young persons it speedily dies

⁶⁶ Mill, John S, Jeremy Bentham, and Alan Ryan. *Utilitarianism and Other Essays*. Harmondsworth, Middlesex, England: Penguin Books, 1987. Page 281.

away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, as not favourable to keeping that higher capacity in exercise.⁶⁷

In short, lower preferences are formed due to a lack of alternative or, in other words, a lack of *access* to the 'higher' goods. Therefore, any conclusion similar to the one arrived at by this objection will have, on Mill's view, confused a genuine choice (a choice in which an agent can decide between two or more options, some being good and some being bad) with one which sees an agent choosing the lesser of two evils.

Now, Mill's thought does not, generally speaking, stand in strong tension with Bentham's. It would be more correct, therefore, to state that Mill's project is one of supplementation. In adding the dimension of quality to Utilitarianism, Mill has established a hierarchy of values with those of greater quality being of more importance than those lesser quality. The test of quality is, to reiterate, the result of a comparison of two undertaken by those who have experienced both. This objection is not the only one that Bentham's Hedonistic Consequentialism faces. As noted above, Robert Nozick offers his own concerns; these will be the subject of the following section.

3.2.2 Nozick and The Experience Machine

In "Anarchy, State, and Utopia", Nozick utilizes a thought experiment in order to probe into our moral intuitions regarding Hedonism. He writes:

Suppose there were an experience machine that would give you any experience you desired. Superduper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain.⁶⁸

67 Mill, John S, Jeremy Bentham, and Alan Ryan. *Utilitarianism and Other Essays*. Harmondsworth, Middlesex, England: Penguin Books, 1987. Page 281.

68 Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974. Page 42.

If our intuitions balk at the use of such a machine, Nozick contends, there must something we take to be of greater import than *mere* sensations, or there would be little justification for such intuitions. In search of this justification he prompts us with the following question: “*What else can matter to us, other than how our lives feel from the inside?*”⁶⁹ (Nozick, 43. Author's emphasis) The answer is twofold. First, Nozick states that what might matter to us, beyond pleasurable *sensations* of doing things, is the *actual* doing of things. Therefore, on this view, what motivates an action, say providing first aid to a badly injured stranger, is not the sensation of satisfaction one feels upon saving the stranger from their injuries. Instead, what is important to us is the knowledge that first aid was provided to this stranger – that efforts were made to secure the stranger's physical well-being. Note that this is entirely consistent with the death of the stranger. If all we were concerned with was pleasurable sensations born out of the saving of the stranger then we would ultimately view any first aid treatment as a waste of time (assuming the death was cause by their injuries despite the attempt to prevent it). On Nozick's view, even if the stranger were to succumb to their injuries, we would not view the attempt to save them as being without moral value. Fruitless perhaps, but certainly not a waste of time.

The second response to the above suggests that we want to be a particular type of person, and this desire is confounded by being, as Nozick calls it, “an indeterminate blob” floating in a tank.⁷⁰ Much like in the first case, what matters to people is being

69 Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974. Page 43. Author's emphasis

70 Ibid. Page 43.

kind, well thought of, funny, etc.; and individuals in an experience machine are, simply in light of their situation, incapable of being these things.

What is important to draw from these considerations is not that utilitarianism is incorrect on the whole. Instead, I take Nozick to point out an important shortcoming of particular features of hedonistic utilitarianism. Like with those illuminated by Mill, these limitations can be accounted for, and ultimately temper the utilitarianism with which I will conclude. I do not engage in the process of tempering here and now since there is one more deficiency which is in need of explanation.

3.2.3 Henry Sidgwick and The Paradox of Hedonism

In “The Method of Ethics” Henry Sidgwick, among other things, raises a series of objections to Hedonism. The most poignant is what he refers to as the “Fundamental Paradox of Egoistic Hedonism”.⁷¹ Sidgwick begins to outline the paradox by arguing that criticisms such as the one Mill makes in the above discussion do not refute Hedonism. So much is made evident via two points. The first:

...I do not doubt that an important element of happiness, for all or most men, is derived from the consciousness of possessing 'relatively permanent' sources of pleasure – whether external, as wealth, social position, family, friends; or internal, as knowledge, culture, strong and lively interest in the wellbeing of fairly prosperous persons or institutions.⁷²

In other words, the permanence of particular forms of pleasure is wholly consistent with a Hedonistic program. In what seems to be an echoing of Mill, James Sully, via Sidgwick, offers the second point:

...as soon as intelligence discovers that there are fixed objects, permanent sources of pleasure, and large groups of enduring

71 Sidgwick, Henry. *The Methods of Ethics*. Chicago: University of Chicago Press, 1962. Page 136.

72 Ibid. Page 135.

interests which yield a variety of recurring enjoyments, the rational will, preferring the greater to the less, will unfailingly devote its energies to the pursuit of these.⁷³

On this view, there are sources of pleasure which may be said to be more 'permanent' than others and are sought solely as the means to one end, namely pleasure itself.

Furthermore, once a person has identified the more permanent source of pleasure, she will undoubtedly prefer it over less permanent sources of pleasure. As a result, having a hierarchy of pleasure (as Mill argues we ought to) does not refute Benthamian utilitarianism. It does, however, present another problem for Sidgwick concludes that this form of rationality (the pursuit of all things solely as means to pleasure itself) is “practically self-limiting”. Sidgwick outlines this tension in the following:

...while on one hand individuals may and do sacrifice their greatest apparent happiness to the gratification of some imperious particular desire, so, on the other hand, self-love is liable to engross the mind to a degree incompatible with a healthy and vigorous outflow of those 'disinterested' impulses towards particular objects, the pre-existence of which is necessary to the attainment, in any high degree, of the happiness at which self-love aims.⁷⁴

Hedonistic utilitarianism, in other words, often requires that an agent make some other end (other than pleasure itself) the ends of their action since failing to do so frequently precludes the possibility of obtaining pleasure. It is this consideration that Sidgwick refers to as the “Fundamental Paradox of Egoistic Hedonisms”.⁷⁵ The problem this poses for this thesis is clear – if my aim is to adopt and use a moral theory to arrive at normative conclusions regarding a particular issue (which it is) then I would do well to

73 Sully as quoted in: Sidgwick, Henry. *The Methods of Ethics*. Chicago: University of Chicago Press, 1962. Pages 135 – 136.

74 Sidgwick, Henry. *The Methods of Ethics*. Chicago: University of Chicago Press, 1962. Page 136.

75 Ibid. Page 136.

avoid framing my conclusions within a form of rationality whose application is self-limiting.

With these three concerns in place – Mill's call for a hierarchy of pleasure, Nozick's intuitions regarding the use of sensations as the sole basis of moral deliberations, and Sidgwick's insights into the self-limitations that hedonistic utilitarianism faces – I will endeavour to adopt a form of utilitarianism which overcomes, or accounts for, these obstacles. Once overcome, it is my contention that the resulting moral theory will be more tenable and, therefore, the resulting application of said theory to the discussion of intellectual property rights will be stronger as well.

3.3 Railton's Consequentialism

In his “Alienation, Consequentialism, and Morality”, Peter Railton offers an account of utilitarianism that overcomes the challenges raised above concerning the strength of hedonistic utilitarianism. I will outline his view and, upon the completion of this task, offer some additional reasons of my own for utilizing his theory. For now, though, I begin, as Railton does, with a response to the 'paradox of hedonism'.

3.3.1 Of Hedonisms

Railton suggests that distinguishing two forms of hedonism may go a long way towards softening the blow imposed by the 'paradox of hedonism'. The first, which he refers to as *subjective hedonism*, claims that an agent, or group of agents, should whenever possible “attempt to determine which act seems most likely to contribute optimally to one's happiness, and behave accordingly.”⁷⁶ Any given act which is

⁷⁶ Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 143.

undertaken from a hedonistic point of view is, in Railton's terms, *subjectively hedonistic*.⁷⁷ In other words, if I were to entertain a host of possible candidates for action at a particular time and I chose that action which I took, at the same time, to promote my happiness to the highest degree, my subsequent action would be one made from a subjectively hedonistic point of view. Railton contrasts this view with *objective hedonism*, which he defines as “the view that one should follow that course of action which would in fact most contribute to one's happiness, even when this would involve *not* adopting the hedonistic point of view in action.”⁷⁸ Accordingly, Railton differentiates acts stemming from the former view from those born out of the latter by defining *objectively hedonistic* actions as those which *in fact* most contribute to an agent's happiness. Finally, *sophisticated hedonism* is made distinct. Such an agent is an individual who adopts an objectively hedonistic life as her ends (i.e. the life which contains the greatest amount of happiness possible, given the context(s) she finds herself in) and, at the same time, undertakes no commitment to the subjective variant of hedonism.⁷⁹ On this view an agent “...is prepared to eschew the hedonistic point of view whenever taking this point of view [the hedonistic] conflicts with following an objectively hedonistic course of action.”⁸⁰ The result of being a sophisticated hedonist is striking, for it reduces the 'paradox of hedonism' to no more than the 'problem of hedonism' which presents itself as an issue of “how to act in order to achieve maximum possible happiness if this is at times – or even often – *not* a matter of carrying out

77 Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 143.

78 Ibid. Page 143. Author's emphasis.

79 Ibid. Page 143.

80 Ibid. Page 143.

hedonistic deliberations.”⁸¹ In other words, through creating a form of hedonism which does not demand that all an agent's deliberations be hedonistic in nature, Railton has provided sufficient elbow room for us to wedge ourselves past the 'paradox of hedonism'. This does not remove all struggle from our lives though. As Railton notes, the proper course of action given a particular state-of-affairs will be both complex, contextual, and not necessarily stemming from a single method of decision making.⁸² Due to the flexibility of the sophisticated hedonist's decision making structure one might think that there are no more conditions on him/her aside from those mentioned above. This is not so, for Railton outlines an additional *counterfactual condition*. It is:

...he [an agent] need not always act for the sake of happiness, since he may do various things for their own sake or for the sake of others, but he would not act as he does if it were not compatible with his leading an objectively hedonistic life.⁸³

This condition is not unreasonably rigid; that is, it does not ask moral agents to overcome epistemic impossibilities. A sophisticated hedonist can only guarantee that an attempt will be made to meet this counterfactual condition as fully as possible.⁸⁴ This leaves a remaining concern – whether it is possible to maximize happiness while, at the same time, remaining committed to other ends. Railton believes so and offers the following analogy as a case in point:

Ned needs to make a living. More than that, he needs to make as much money as he can – he has expensive tastes, a second marriage, and children reaching college age, and he does not have extensive means. He sets out to invest his money and his labor in ways he thinks will maximize return. Yet it does not follow that he acts as he

81 Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 143. Author's emphasis.

82 Ibid. Page 143.

83 Ibid. Page 145.

84 Ibid. Page 145.

does solely for the sake of earning as much as possible. Although it is obviously true that he does what he does because he believes that it will maximize return, this does not preclude his doing it for other reasons well, for example, for the sake of living well or taking care of his children. This may continue to be the case even if Ned comes to want money for its own sake, that is, if he comes to see the accumulation of wealth as intrinsically as well as extrinsically attractive.⁸⁵

From this two things can be seen. First, the sophisticated hedonistic view provides a great deal more practical guidance and, secondly, it has noteworthy limitations. Particularly, it seems that any hedonistic view cannot provide guidance to those who have aligned themselves with ends other than those compatible with hedonism, namely, happiness. Any concern which is born out of this limitation may appear to be trivial. However, remembering the intuitions that were brought to the surface as a result of Nozick's Experience Machine, the opposite could not be any more true. Railton evokes Nozick's thought experiment when he writes that “[i]t still seems possible that the happiest sorts of lives ordinarily attainable are those led by people who would reject even sophisticated hedonism.”⁸⁶ In other words, given our intuitions to avoid entering Nozick's machine, a sophisticated hedonist would seem to outright reject *any* form of hedonism, *qua* criterion which one's acts ought to meet. This is not the case, however, for it is objective hedonism which serves as such a criterion; or, as Railton notes, “it would be precisely in order to meet this [objectively hedonistic] criterion that the sophisticated hedonist would change his beliefs.”⁸⁷ The criterion instead serves as the impetus for Railton to shift to a

85 Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 145.

86 Ibid. Pages 145 – 146.

87 Ibid. Page 146.

consequentialism which has multiple possible ends rather than the purely hedonistic. This issue is the subject of the following section.

3.3.2 Pluralistic Consequentialism

Classical utilitarianism, or the consequentialism found in the work of Bentham, is guilty of two failures. The first is to evaluate all moral circumstances, dilemmas, and issues purely in terms of subjective states since, on the view of classical utilitarianism, only subjective states (rather than objective states) can have intrinsic value. The essential harm in this failure is that it cuts subjects off from, as Railton terms it, “their objective counterparts”.⁸⁸ This severing divorces, or alienates, us from the world around us. At this point Railton utilizes Nozick's experience machine, citing our intuitions regarding the use of such a device as evidence of our desire to, or our belief that we, share a bond with the world in a fashion not captured by hedonistic utilitarianism (subjectivism). Our desire to not use the experience machine, in Railton's words, “suggests where subjectivism has gone astray.”⁸⁹ On Railton's view, our intuitions regarding the use of the experience machine not only warrants but also demands that we reflect upon intuitions and grant the plausibility of an account of consequentialism which does not alienate us from the objective world which plays host to our lives.

Secondly, classical utilitarianism errs in reducing all intrinsic values to happiness alone.⁹⁰ On this view, all goals are instrumental means to the ends of happiness or pleasure. This alienates us in a manner slightly different from the aforementioned method of alienation. Railton contends that the insistence that there is some underlying and all-

88 Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 148.

89 Ibid. Page 149.

90 Ibid. Page 148.

encompassing goal functioning as the impetus for seeking our ends illuminates “an alienation from these particular ends...”⁹¹ In other words, he is unwilling to accept a moral theory which holds our ends, say friendship, knowledge, and the like, as being simple means to one 'true' end – pleasure/happiness. While he does not provide an extended argument against the classical utilitarian position on this matter, he does write the following:

...the best-developed method for justifying claims about intrinsic value involves thought-experiments of a familiar sort, in which, for example, we imagine two lives, or two worlds, alike in all but one respect, and then attempt to determine whether rational, well-informed, widely-experienced individuals would (when vividly aware of both alternatives) be indifferent between the two or have a settled preference for one over the other. Since no one is ideally rational, fully informed, or infinitely experienced, the best we can do is take more seriously the judgements of those who come nearer to approximating these conditions.⁹²

From this Railton draws the conclusion that we, as moral subjects, ought to open to values which are themselves non-instrumental among them happiness, knowledge, autonomy, and beauty.⁹³ It is for this reason that Railton dubs his form of consequentialism *pluralistic consequentialism*. However, Railton has not finished qualifying the form of consequentialism which he endorses. The remaining qualifications will be outlined in the following section.

3.3.3 Of Consequentialisms

Just as there are two forms of hedonism, so too are there two forms of consequentialism: *subjective* and *objective*.⁹⁴ The former is the view that “whenever one

91 Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 149.

92 Ibid. Page 149 in footnote 21.

93 Ibid. Page 149.

94 Ibid. Page 152.

faces a choice of actions, one should attempt to determine which act of those available would most promote the good, should try to act accordingly.”⁹⁵ A person lives a *subjectively consequential life* just in case they use a consequentialist method of decision making (i.e. intentionally seeking out the overall good doing one's best to make decisions based upon good information). *Objective consequentialism* is, on the other hand, the view that “the criterion of the rightness of an act...is whether it in fact would promote the good of those acts available to the agent.”⁹⁶ This view focuses primarily on actual consequences, or states-of-affairs which actually come about and therefore is solely concerned with questions of deliberations “in terms of the tendencies of certain forms of decision making to promote appropriate outcomes.”⁹⁷ Accordingly, an *objectively consequential act* is one which in fact brings about the best outcomes.

Finally, Railton outlines the *sophisticated consequentialist* – the person who commits herself to leading an objectively consequentialist life but does not also commit herself to consequentialist modes of decision making and, therefore, does not necessarily aim at leading the life of a subjective consequentialist. With Railton's terminology in place, I can lay out the form of consequentialism that I plan to utilize in the forthcoming discussion of intellectual property.

3.3.4 Choosing the Optimal Consequentialism

Given the serious errors facing the classical utilitarian's position, I contend that it is, qua moral theory, untenable. As such, it demands that we look elsewhere for a moral theory through which an attempt to justify intellectual property rights. Railton has

95 Railton, Peter. "Alienation, Consequentialism, and the Demands of Morality." *Philosophy & Public Affairs*. 13.2 (1984): 134-171. Page 152.

96 Ibid. Page 152.

97 Ibid. Page 152.

provided a plethora of consequentialisms to choose from and the now the issue becomes a matter of answering the question: which form of consequentialism is best suited for the intended ends of this thesis? I am content with Railton's move towards pluralistic considerations when discussing which intrinsic values enter our consequentialist calculus for two reasons. First, it in part originates from a forthcoming discussion of Mill's arguments against censorship. Central to his thought is a sense of humility, be it epistemic, moral, or aesthetic. In short, it argues that no reasonable person, or group of people, claims to have an monopoly on truth, the good, or the beautiful. We may have arguments for our views and implore others to adopt them, but the strength of our arguments in no way permits our dictating our views to others and forcing them to adopt our views by way of positive law. Reasonable people may disagree, but it is the more reasonable person who agrees to disagree. The second reason is born out of falling into the problem of hedonism yet again. If the sophisticated route is taken, then our practical application of the theory need not fear the presence of this problem.

3.4 Concluding Remarks

I therefore adopt *pluralistic sophisticated consequentialism*. This does not mean that the considerations that follow will necessarily be non-consequential, though. Recall that the sophisticated consequentialist only seeks out the objective consequentialist life and only abandons it in cases where a consequentialist decision-making process precludes the possibility of their obtaining an objectively consequentialist life. Therefore, barring the unforeseen, I presume the following to be an analysis of positive laws establishing intellectual property which is *in principle* sophisticated consequentialist, yet will most likely take an objectively consequentialist form *in practice*.

With this moral theory in hand, I will apply it to the moral issue of whether laws establishing intellectual property ought to be enacted. However, before I do this I will briefly return to Bentham, this time devoting my energies to illuminating his thoughts on the structure of laws, rights, and property.

Chapter Four: Bentham and the Structure of Laws, Rights, and Property

4.1 Introduction

Just as he is one of the prominent early Utilitarians, so too is Bentham an important figure within another field of philosophy – western jurisprudence. His rejection of natural law and subsequent establishment of Legal Positivism grew, at least in part, from his commitment to Utilitarian ethics. While I have critiqued and modified these principles in the preceding chapter, his conclusions as a jurist are sufficiently independent from his Utilitarianism that there is no harm in being engaged with the former while being committed to an alternative ethic. However, Bentham's hedonistic language does prove to be inconsistent with my pluralistic commitments. It is my intention to modify his thought so as to dissolve said inconsistencies while retaining his jurisprudential insights.

With that said, I take this chapter to use his Positivist thought in order to present the key tenets of my position before ultimately applying it to the subject matter at hand. The tenets are, first, a law's moral status is contingent on the moral status of its intended and eventual ends; secondly, that the default legal position on any subject matter is one of personal liberty and, finally, that all property created/enforced by way of a law must be properly understood as being strictly physical in nature (an interesting dilemma arises as a result of this which will demand placing an additional condition upon later work).

4.2 The First Tenet

Bentham initiates the discussion of the ends of a given law in “Of Laws in General” by asserting that what is meant by 'end' is not what he refers to as the 'eventual end', or those state-of-affairs which the law gives rise to in actuality. Rather, the end is intentional in nature and accordingly a discussion of the ends of a law bring about

questions of design (i.e. what is the given law supposed to do?)⁹⁸ This, however, does not preclude our evaluating the eventual ends of a law; instead, it demands that we keep two types of discussion separate: those of whether a law's ends are worthy of pursuit and those of whether a law is efficient at said pursuit. There is good reason for such a separation, for conflation of these two issues may lead to the error of confusing the status of a law's moral justification with the status of a law's implementation.

The second comment Bentham offers upon the ends of a law make up the first tenet of the position I wish to profess: for a law to be moral its ends must be prescribed by the principle of utility (i.e. the promotion of public happiness).⁹⁹ This need not fly in the face of the conclusions reached at the end of the prior chapter for as I amended hedonistic consequentialism with pluralistic sophisticated consequentialism, so too do I amend this aspect of Bentham's jurisprudence. Here I adapt his comments to argue that the moral status of a law's means are contingent on the moral status of its ends. The upshot of this adaptation is simply that my view permits alternative moral justifications for a law's establishment; in short, I allow those types of ends which are consistent with the view that I argued for in the prior chapter. Now, since a moral law's intentional ends are identical to the ends of the moral reasoning which justifies its establishment, I save further analysis on the matter for a subsequent chapter. Also, since discussion of a law's eventual ends depends entirely knowing the nature of its intentional ends, just as a meterstick must be at hand to evaluate a physical space in terms of 'meters', I will time my

98 Bentham, Jeremy, H L. A. Hart, and Jeremy Bentham. *Of Laws in General*. London: University of London, Athlone Press, 1970. Page 31.

99 Ibid. Page 32.

discussion of eventual ends to coincide with the analysis of the subject-matter's intentional ends.

4.3 The Second Tenet

The means by which a law achieves its intended ends partly involves affecting every member of society in one of three ways.¹⁰⁰¹⁰¹ I rest my attention upon the first two.

The first form of being affected by a law is by one's being bound or coerced by it. As Bentham notes:

A law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases which come to the same thing would be so many contradictions in terms.¹⁰²

Secondly, and as result of the above, there must be some party who is exposed to suffer by the law. In other words, the mere being bound or coerced via law is, on Bentham's view, a form of suffering. This does not permit the conclusion that enacting a law is immoral, though. Bentham aptly sums up the reason for this when he writes:

It follows that a law, whatever good it may do at the long run, is sure in the first instance to produce mischief. The good it does may compensate the mischief it does a million of times over: but still it begins with doing harm. No law can ever be made but what trenches upon liberty: if it stops there, it is so much *pure* evil: if it is good upon the whole, it must be in virtue of something that comes after. It may be a necessary evil: but still at any rate it is an evil. To make a law is to do evil that good may come.¹⁰³

In other words, a law necessarily causes suffering; this suffering, however, can be mitigated on the condition that the law produces more good than the harm caused. From

100By 'party' Bentham means either an individual person, a subordinate class, or the community itself. OLIG, 58

101Bentham, Jeremy, H L. A. Hart, and Jeremy Bentham. *Of Laws in General*. London: University of London, Athlone Press, 1970. Page 53.

102 Ibid. Page 54.

103 Ibid. Page 54.

this I argue that the default status is one of liberty and because laws necessarily harm individuals in the manner outlined by Bentham, the establishment of a law must not be arbitrary. In other words, its establishment must come with good intentions backed by sound moral reasoning . Some cases, of course, will require very little argument in favour of trenching upon liberty for the cost-benefit analysis offers *prima facie* reasons to accept a reduction in one's liberty (take, for example, a law which prohibits the killing of a fellow human being). The justifications for other laws, however, will not be so intuitive and in such cases the burden of proof is on those who wish to see the law enacted.

Additionally, because the default is liberty there need be no argument made for redacting a law should its eventual ends be morally questionable. This is by mere nature of liberty's default status. Where a law's eventual ends are immoral, or even where we are unsure as to the moral status of its eventual ends, we must either present reasons for maintaining the law which justify the harm the law does to our liberty or return to our default position. To do otherwise would be to, in Bentham's words, tolerate 'pure evil'.

4.4 The Third Tenet

There may be some confusion as a result of my use of 'rights' within this chapter, especially considering the prior chapter in which I was engaged in discussing natural rights. What must be made clear to the reader is that these terms are not interchangeable and from this point on my use of 'rights' is referring to positive rights. What follows is my explanation of what that term denotes with a particular emphasis placed upon property rights. From this explanation I will derive my third tenet: property is necessarily physical. The consequences this tenet holds for any attempt to create a law establishing intellectual property will be shown as well.

Of rights in general Bentham writes that “they are either rights of dominion, or mere liberties, rights of exemption from dominion.”¹⁰⁴ The former is rightly understood as the permission to exercise a particular power over something or someone, the latter the prohibition of anyone else exercising a power over you. While Bentham lists numerous forms of what he means by 'power', an analysis of them will be eschewed for the sake of avoiding irrelevant detours. What is of relevance, though, is the powers that are involved in the establishing rights to things. Bentham contends that property rights are different because the power they invest in the right-holder is not absolute power over the thing in question. He elaborates upon his contention when he writes:

It [a right to a thing] does not permit you to exercise any act on it [the thing in question] in the first instance: it however shews itself resolved that upon the performance of a certain act on the part of some other person, it will thereupon immediately give you such permission: and in the meantime it commands that person to perform that act.¹⁰⁵

Suppose, for example, that I owe you a cord of wood for some earlier services rendered. You would have a right to that cord of wood; however, your holding said right does not permit you to forcibly take it from my possession via burning it. On Bentham's view, your right commands that I perform the act of paying you, at which point you have the power to, say, burn the wood.¹⁰⁶ Therefore a right to a thing does not mean that one has absolute dominion over the thing in question and understanding why this is so hinges on making a distinction between physical possession and legal possession.

104 Bentham, Jeremy, H L. A. Hart, and Jeremy Bentham. *Of Laws in General*. London: University of London, Athlone Press, 1970. Page 139, footnote 'h'.

105 Ibid. Page 265.

106 Here I borrow heavily from an example Bentham uses on page 266 at footnote 'f'.

Physical possession can be divided up into two types: physical possession as against physical obstacles and physical possession as against human obstacles. In each case the common theme is that your physical possession of some thing is only the case if you are able to make use of it. A fish in a lake is not in my physical possession if it resides four fathoms below the surface, nor is my car in my physical possession if what stands between me and my use of it is a man wielding a knife.

Legal possession, though, takes on a different form. You are in legal possession of a thing just in case “the law has issued such mandates as have the effect of prohibiting other persons from disturbing you in the physical possession [of that thing].”¹⁰⁷ Legal possession of some thing, therefore, is a right to the physical possession of said thing. Now, given this definition, there is a *prima facie* concern that any attempt to establish the legal possession of 'intellectual property' (which if you recall from an earlier chapter is *intangible*) will be fraught with internal inconsistencies. Luckily Bentham engages in an analysis of object ownership and argues:

This [the object of property], according to the distinction which is commonly made, may either be a corporeal object or an incorporeal one. But the only objects which have any real existence are those which are corporeal. It follows that those which are styled incorporeal objects of property can be nothing by so many fictitious entities. Now to possess a fictitious entity, where the matter to rest there, would be to possess nothing. Property therefore must either amount to nothing at all or it must relate somehow or other to some corporeal object...To have a clear idea of what is meant by any of the names applied to an incorporeal object of property we must look further: we must push till we come to the corporeal object or objects which are its sources...That which is styled an incorporeal object is either one or several corporeal considered in some particular point of view.¹⁰⁸

¹⁰⁷ Bentham, Jeremy, H L. A. Hart, and Jeremy Bentham. *Of Laws in General*. London: University of London, Athlone Press, 1970. Pages 273 – 274.

Now, some might not be willing to take on Bentham's metaphysical commitments regarding the existential status of incorporeal objects; such debate, however, can be circumvented because what is at stake is the practical implications of the philosophical positions and not their epistemic merit. In other words, even if we accept the existence of incorporeal objects in the strongest sense of the term we would not be able to enforce legal possession of the object since, as per the definition above, it requires the ability to be in physical possession of it. Altering the definition to include legal ownership as having the right to non-physical possession is at odds with the principle of 'ought implies can' for enforcing a right to a thing consists of, at least in part, returning objects to their rightful owner, proofs of unlawful possession, avoiding offence, or other feats which are impossible to do with incorporeal entities such as beliefs and ideas. The only way to maintain such a form of incorporeal property would be to keep the property to one's self in the most literal way possible: being silent. Therefore, if the legal possession of an incorporeal thing must, as per Bentham's contentions above, amount to the legal possession of at least one corporeal thing; stipulating otherwise is to place impossible demands on both a legal system and its subjects.

An interesting result of these deliberations is that the idea/expression distinction which usually divides an analysis of copyrights from an analysis of patents becomes an inept distinction within the theory of law regardless of what status it holds within the practice of law. In other words, neither ideas nor expressions can be understood within the framework of legal possession in physical terms. As a result it is clear that both are, at their hearts, sufficiently similar to warrant my concurrent treatment of them.

108 Bentham, Jeremy, H L. A. Hart, and Jeremy Bentham. *Of Laws in General*. London: University of London, Athlone Press, 1970. Page 284.

Despite the advantage of being able to engage patents and copyrights in one breath, Bentham's reduction of non-physical property to physical property presents another quandary.

Suppose that there exists the ability to legally possess intellectual property and I hold the patent to a particular type of water-pump. Suppose further that someone takes their own physical property (in this case some amount of steel) and crafts it into a water-pump which is of the same type mentioned above. Who then is the owner of the pump? What is being referred to when we speak of 'the pump'? There are two possible answers to this dilemma, and entertaining the second is only necessary upon the rejection of the first. As outlined above, the legal institution of intellectual property supervenes on the legal institution of physical property and not vice versa. For this reason one can not argue for the existence of intellectual property and against the existence of physical property (i.e. the dilemma is not a false one). There is, then, a solution which rejects the existence of 'intellectual property' on the grounds that it is a superfluous law that, as shown above, only leads to confusion. I take this to be the safer of the two solutions, and therefore posit it as the default that will be returned to on the off chance the second alternative turns out to be unpalatable.

The second solution consists of elevating some types of physical property to a position of power over other types of physical property. To understand what is meant by this let us return to the example utilized above. Imagine there are no water-pumps and I obtain intellectual property over all things which fit under the heading 'water-pump'. In reality what has occurred is that I have gained legal possession over all physical things which take the form of my water-pump. If I have truly invented the water-pump the set

of things which previously fit the mold must be zero. Therefore, upon your taking something which is yours (say, an amount of steel) and manipulating it to take the form of my water-pump you have at the very worst turned that which is yours into that which is mine and, at the very best, committed a lesser offence. One might wonder why it is that you forfeit your steel to me and not I who forfeits my 'water-pump' to you. The answer may be that the sequence of events points to your action being the cause of the trouble for it was through your manipulation of the steel that led to the dilemma. An argument against this response could claim that it is the presence of intellectual property and not your manipulation of your property that lead to the problem.

The objector might also point out that as the legal possessor of some physical bit of property (of the 'non-intellectual' kind) we must have the legal ability to use our property in whichever manner we want given a particular range of possible physical uses; or, to present the point from a different angle, it might be suggested that this objection is in keeping with the second tenet presented above if we characterize the tenet as showcasing an implicit commitment to liberty having the trump status. This is unsatisfactory. The range of permitted uses is often deep within the boundaries of what is physically possible. Take, for example, having a wood-stove within one's house. Special types of products must be used around the wood-stove as a means of fire prevention, and there is good reason for limiting the range of permitted uses (concern for the occupant's safety, for any nearby buildings to which a fire may leap, for the taxpayers which pay the local fire brigade's salary, etc).

4.5 Conclusions

In short, the proper characterization of my view joins both the first and second tenet together to state that liberty is the *tabula rasa* upon which we codify a system of law which is justified in light of good moral ends they attempt to achieve and held in check by the moral status of the ends they actually achieve. Accordingly, the question which needs an answer is: Do we have good reason, as we do in the case of fire prevention, to limit the range of permitted uses of one's own physical property by establishing a stronger form of physical property (i.e. so-called 'intellectual property')? I believe that we do and I will next few chapters to present my argument.

Chapter Five: The Ideal Intended Ends of 'Intellectual Property' Law

5.1 Introduction

As noted above, the question at hand is whether there is good reason to establish an extension to physical property as depicted in the preceding chapter. In providing my response to this question I must raise, and answer, a subsequent question: what is to be gained by granting this stronger form of physical property to certain individuals? I devote the first portion of this chapter to offering my answer. In short, I argue that those things which are protected by intellectual property have the unique ability to improve the quality of life for individuals within a given society. In support of this argument I will draw heavily from J.S. Mill's thought in "On Utilitarianism". Secondly, I will present a standard of societal harm, also via Mill (although in this case from his work in "On Liberty"), for censorship. Admittedly the issue at stake is not censorship proper; therefore, some time will be devoted to explaining the relation shared between censorship proper and the establishment of intellectual property. With this standard of harm in hand, I will evaluate the benefits and drawbacks, both in the short-term and long-term, to taking two different approaches to the outlined ends. I will argue that the first approach, which seeks to maximize a particular quality (or those authorial works of a certain type), is not as justifiable as the second (which adopts the maximization of all types of authorial works). The justification of this argument depends largely on a willingness of present individuals to sacrifice some of the liberty for the benefit of future generations.

This line of argumentation demands in turn that certain limitations be placed on the strength of intellectual property: first, that the power granted to those holding intellectual property be non-permanent; secondly, that the power is not automatically

granted but instead must be applied for; and lastly, that derivative works must not be prohibited. With the intended ends and these conditions in place I will move on to the next chapter which offers an analysis of the means of obtaining the ends presented within this chapter.

5.2 The Intended Ends of 'Intellectual Property' Laws

I do not wish to distance myself from the history of intellectual property by arguing that there is one particular end which is the sole justifiable end to focus upon when establishing a programme of intellectual property. Instead, it is my contention that there is a commonality shared between the majority of these legal traditions, and it is this commonality which I will take as my point of focus. On my view, there are two ends which are separable although not entirely dissimilar: the promotion of physical well-being and mental well-being. The former has largely been represented within the history of intellectual property in Western jurisprudence as being an end which seeks to provide educational materials to society's members. For example, the first copyright law within the United Kingdom had the title of “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned”.¹⁰⁹ In his essay “On Utilitarianism”, Mill explains the important role that individual education and social knowledge play in the well-being of society. He writes that “[n]ext to selfishness, the principal cause which makes life unsatisfactory, is want of mental cultivation.”¹¹⁰ He warns against interpreting mental cultivation as an elitist position whereby only members of the academy can obtain this

109 Hesse, Carla. "The Rise of Intellectual Property, 700 B.c.-A.d. 2000: an Idea in the Balance." *Daedalus*. 131.2 (2002): 26-45. Page 37.

110 Mill, John S, Jeremy Bentham, and Alan Ryan. *Utilitarianism and Other Essays*. Harmondsworth, Middlesex, England: Penguin Books, 1987. Page 285.

form of well-being; instead, he refers to a person's having the opportunity to access knowledge of whatever subject matter, evaluate it, and exercise said knowledge within the surrounding environment.^{111 112} This form of cultivation can be analyzed in two ways, with each playing a role in the other over time. On an individualistic level, increasing one's knowledge of, for example, health, will likely lead to living more healthily, while at the societal level, general inquiry into human biology and nutrition will increase the degree to which one may live healthily. The result is a co-operative effort between individual and collective. The individual inherits a particular set of knowledge from the collective and, throughout their lifetime does their best to contribute to the advancement of knowledge. The collective, then, is best understood as a group of people whose existence endures well beyond the life of one of its members and sees the stock of its knowledge increase as a result of the efforts of its members. The individual is then capable of drawing upon the collective's knowledge – bettering themselves in the process. Accordingly, the attempt to promote an increase in this collective stock of knowledge will see a benefit conferred onto the members of that society even if those that contributed to raising the stock of knowledge do not necessarily obtain these benefits.

This begets the question: what is to be gained by those individuals who invest their time and energies into the collective's stock of knowledge yet do not live to benefit from it? This problem is one commonly found within environmental ethics discourse and, because it will come up again towards the end of this chapter (albeit in a slightly different

111 Mill, John S, Jeremy Bentham, and Alan Ryan. *Utilitarianism and Other Essays*. Harmondsworth, Middlesex, England: Penguin Books, 1987. Page 285.

112 It would be a mistake to interpret my use of “knowledge” as being strictly the 'knowing that' form of propositional knowledge explored within analytical epistemology; instead, I include all forms of knowledge (knowing how, knowing why, knowing that, etc.)

form) I will spend some time here providing a response. Mill's response to this concern can be seen, at least implicitly, in the following:

...every mind sufficiently intelligent and generous to bear a part [in overcoming the sources of human suffering], however small and unobtrusive, in the endeavour, will draw a noble enjoyment from the contest itself, which he would not for any bribe in the form of selfish indulgence consent to be without.¹¹³

For Mill merely knowing that one has participated in the attempt of improving social well-being is its own reward. An additional method of arriving at this conclusion stems from the moral theory outlined earlier. If we utilize a moral theory which gives weight to the capacity to suffer and being dissatisfied with having a poor lot in life, as I have partly done, then future generations must enter into our moral considerations for as humans they would seem to have this capacity and desire. Therefore, any hardship we can endure at present that would generate an enduring benefit to all future generations has a *prima facie* and potent goodness in its undertaking (providing that the hardship to us does not outweigh the benefit to them).

What then is the relation shared between the more powerful form of physical property under analysis and the ends outlined above? The answer is twofold. First, use of physical property in certain ways is the means of sharing this knowledge with others. With the exception of oral communication we distribute this education through physical media. Therefore, this education is contingent on access to, and proliferation of, this media.¹¹⁴ Secondly, social well-being is itself indirectly tied to education in two ways; first, the products of an individual's making use of that education gives rise to tangible

113 Mill, John S, Jeremy Bentham, and Alan Ryan. *Utilitarianism and Other Essays*. Harmondsworth, Middlesex, England: Penguin Books, 1987. Page 287.

114 It is, of course, also reliant upon oral communication. But any attempt to include this type of communication into a programme of physical property would be seriously strained.

evidence of social progress; additionally, the products of the educated's labour has the ability to rise the standard of all the society member's quality of life. In other words, these products have the direct ability to make life better for the collective, be it through making laborious tasks easier, teaching morals, offering enjoyable experiences from which feelings of joy emerge, etc. There is yet another sense in which this form of physical property and these ends are related. It is, however, an issue of utilization. To put it another way, I have endeavoured to present moral ends and the logical relation shared between them and intellectual property while the subsequent chapter presents an argument as to how establishing this form of property obtains those ends. Analysis of this additional relation will therefore be left for that time.

5.3 Unintended Ends

Up this point I have been concerned intended ends and now I shift my focus to the unintended ends, or incidental consequences, which necessarily occur (to various degrees) when a system of intellectual property is codified into law. For the individual it has already been shown that there is one such harm: their being prohibited from using their physical property as they see fit. This harm is compounded when the conclusions of the preceding section are recalled for not only can I not utilize my property as I wish, but those uses which are prohibited are those which may be the most beneficial. These two harms are not easily overlooked, and I will quell concerns of this nature momentarily but first I would like to present harms which I have not dedicated time to as of yet.

5.4 Mill and Societal Harms

Conducive to the analysis of the aforementioned social harms is the taking up of a standard of harm. This standard is met, loosely speaking, when the means become self-

defeating of the ends. That is, if intellectual property itself in anyway excludes the ends I provided above, then there is a harm bestowed upon society. For the purpose of the analysis herein, I adopt an adaptation of Mill's arguments against censorship.

There is, however, some salient differences between censorship proper and the form of exclusion involved in a state's establishing intellectual property that are best explained in advance of delineating the standard of harm. Censorship is best understood as an the promotion of one subject-matter through the direct removal and suppression all contrary accounts. The intended end of censorship is to reduce the existence of, and access to, ideas/expressions to zero. Intellectual property creates an artificial scarcity of ideas/expressions by reducing the existence of ideas/expressions and conditions of access depend upon the permission of the property holder. So while I, qua holder of intellectual property, am not censored, all those subjected to my right to that property are conditionally censored. The difference in harms imposed by these two types of laws is slight and admits to degrees. Censorship prohibits the proliferation of an idea/expression entirely and therefore represents the greatest harm possible in this regard (for reasons that will be given shortly). Intellectual property, though, has a range of possible harms since it conditions the proliferation of ideas/expressions upon the will of the property owner. One individual may be so parsimonious with their property that the result is nearly as harmful as censorship itself, and others may be more giving with their property which results in a decrease in harm done to the community. Therefore, in the following considerations censorship will be taken to be the standard of harm, and with it other similar actions can be measured for harmful effect.

The central thesis of Mill's work is, in part, that eliminating access and proliferation of ideas/expressions is, in effect, to be:

...robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.¹¹⁵

In other words, regardless of the objective merit of a view, there is harm in excluding it from widespread discussion and proliferation. The first conditional in the above quote (regarding the eventuality of an excluded view's being actually true, good, beautiful) is the subject of Mill's first argument, the topic of following section. The second conditional, in which the antecedent supposes the falsity of the censored opinion, will be discussed shortly. After these arguments have been given, two additional arguments will be outlined which present two further harms which arise from excluding speech.

5.4.1 Mill's First Argument

The first conditional (which prompts Mill's first argument against excluding expression) presupposes that the suppressed opinion is, in fact, veracious. In such cases the state's lack of epistemic humility leads to self-defeating commitments. Mill argues that when a definition of truth, the good, or beauty is adopted by a group of persons its veracity is not guaranteed. Humans are, after all, fallible, and the adoption of a particular version of 'the truth' and so on represents a betrayal of this fallibility. It is, as Mill writes, to “assume that *their* certainty [the state's] is the same thing as *absolute* certainty.”¹¹⁶ One might wonder what the harm is in making such an assumption. In this case the harm is

¹¹⁵ Mill, John S. *Three Essays*. London: Oxford University Press, 1975. Page 24.

¹¹⁶ Ibid. Page 24. Author's emphasis.

obvious given Mill's stipulating the veracity of the excluded opinion. Since the excluded opinion is stipulated as being true, then the state's bias towards *a* truth has undermined their obtaining *the* truth. Now, if we were to suppose that the state's view was stipulated to be the truth, then it might seem that the exclusion is justifiable. This, however, is not the case, as we will see in the following section.

5.4.2 Mill's Second Argument

The second argument offered by Mill revolves around the lively discussion of opinions and its impact on the status of true beliefs. That is, Mill asks us to suppose that some set of opinions are true and, in his words, “examine into the worth of the manner in which they are likely to be held, when their truth is not freely and openly canvassed.”¹¹⁷ In such a situation, Mill argues, the holders of the the true opinion do themselves a disservice because their opinions are never tested by contrary (albeit false) opinions, and therefore become stagnant and lifeless. In other words, if a true opinion is not “fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.”¹¹⁸ One might dismiss such a concern, citing that truth, even if it be adhered to dogmatically, is the sole end of rational discourse; since the truth is known there is little harm is adhering to it so.

There is a harm though. Mill argues that when an opinion or type of opinion is censored, it interferes with our ability to refute the excluded opinion based on reason. In short, when opinions are held as dogma, their epistemic justifications become atrophied and, despite their truth, they become indistinguishable from all other dogma – true or false. Arguments leading to false conclusions become all the more persuasive, gripping

¹¹⁷ Mill, John S. *Three Essays*. London: Oxford University Press, 1975. Page 44.

¹¹⁸ *Ibid.* Page 44.

our intuitions and leading us from the truth. Mill's sums up the point well in the following:

...assuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument – this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.¹¹⁹

This is not the sole harm of excluding false opinions though; another is identified in the following section.

5.4.3 Mill's Third Argument

The prior argument against censorship supposed the falsity of the suppressed opinion, as does this argument. This argument, however, illuminates a separate, yet similar, conclusion as that reached in the preceding section. It claims that when dissent against a true opinion is suppressed, the meaning of the *true* opinion is forgotten. The point is summarized when Mill writes:

The words which convey it [the true opinion], cease to suggest ideas, or suggest only a small portion of those they were originally employed to communicate. Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote; or, if any part, the shell and husk only of the meaning is retained, the finer essence being lost.¹²⁰

So, if the second argument given by Mill is to be understood as citing issues with the justificatory status of unchallenged true opinion, this argument can be seen as positing that such opinions will lead to an individual's lacking a robust understanding of their own beliefs. The distinction is nuanced, and it may be worthwhile to utilize an example to explicate it further. Suppose that we have a set of rules of conduct (something akin to

119 Mill, John S. *Three Essays*. London: Oxford University Press, 1975. Page 45.

120 Ibid. Pages 49 – 50.

the Ten Commandments, but without all the religious fervour). I can trace the justification for my beliefs regarding the justification of these rules with ease (I might tell some story about how they are valid via the way they were past by a representative government etc.). However, a separate issue is my ability to apply those rules to novel situations. Suppose one such axiom is that it is wrong to use a vehicle in a public park. On one hand, the justification of the rule is apparent to me, I know that it came about as a result of my municipal government's deliberations. However, I am at a loss when I see someone moving through the park by way of a motorized wheelchair. I stand dumbfounded, unsure as to whether this person's actions are contrary to the law. What I lack in this case is understanding. Such people as myself in this case have, on Mill's view, “an habitual respect for the sound of them [the axioms they adhere to], but no feeling which spreads from words to the things signified, and forces the mind to take *them* in, and make them conform to the formula.”¹²¹ Through open discussion of opinions such issues are averted, for implicit in the act of discussion is the relaying of information by those who understand it. The presence of this information out in the open allows for others to obtain an understanding of it and this is precluded by the censorship of opinions.

5.4.4 Mill's Fourth Argument

The three preceding arguments rested upon the implicit assumption that opinions, and sets of opinions, are either entirely true or entirely false. In making his fourth argument against censorship Mill states that it is more common for the truth to occupy some position in between two accounts of the true, the good, and the beautiful. In other

121 Mill, John S. *Three Essays*. London: Oxford University Press, 1975. Page 53. Author's emphasis.

words, what is actually 'true', 'good', or 'beautiful' is often comprised of portions of individual accounts of truth, goodness, and beauty.

The issue is that accounts of the truth often lack the humility discussed above for popular opinions. Those beliefs which are widely-held are often true, but not always so. Of such opinions Mill states that “[t]hey are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjoined from the truths by which they ought to be accompanied and limited.”¹²² These opinions are contrasted with what Mill calls 'heretical' opinions, or those beliefs which are suppressed and neglected. Heretical opinions are no more humble than their popular kin for they are “...either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth.”¹²³ On Mill's view, *both sets* of opinions are necessary in order to keep their counterpart reasonable, or in Mill's words, “within the limits of reason and sanity”.¹²⁴ Without both versions of truth, in other words, the truth itself, which history has so often taught us resides within the shared ground of two doctrines, is likely to never be obtained. Mill most aptly puts the point when he writes:

Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners¹²⁵.

122 Mill, John S. *Three Essays*. London: Oxford University Press, 1975. Page 57.

123 Ibid. Page 57.

124 Ibid. Page 59.

125 Ibid. Page 59.

Furthermore, the heretical opinions are not to be tolerated; rather, they must be encouraged for it is only through the vocalization of all versions of the truth that we, as a collective group, can have access to claim of 'fair play'. In other words, if we suppose that we hold a true opinion, it is only through hearing a dissenting account that we can take ourselves to have championed the truth to the utmost degree possible because “it is always probable that dissenters have something worth hearing to say for themselves, and that truth would lose something by their silence.”¹²⁶

5.5 Troubles and Conditions

With this standard of social harm and the individual harms laid out, I would like to now respond to challenges to the conceptual (rather than practical) union of proliferating the means and ends of education and 'intellectual property'. The first challenge charges that attempting to disperse the means and ends of education while at the same time granting individuals exclusive control over those physical objects in which the means and ends consist is necessarily self-defeating. There are, unfortunately, multiple reasons for thinking that this is so. First, individuals are not free to make derivative works largely due to their limited access to, and use of, 'intellectual property'. Additionally, because both use of and access to 'intellectual property' is contingent to the property holder's willingness to permit such use and access, it is possible that malevolent property holders will outright forbid any use or access. The second challenge states that if we establish this form of property as a legal default (i.e. such rights are necessarily granted upon the creation of some bit of 'intellectual property') we would create harm even if the property holder was turned out to be benevolent. The reason for this is that

¹²⁶ Mill, John S. *Three Essays*. London: Oxford University Press, 1975. Page 60.

any property right, via the analysis of Bentham's jurisprudential insights in the prior chapter, necessarily binds the liberty of everyone subjected to the rights of the property right holder. Suppose that I wish to make use of some piece of 'intellectual property' which is owned by a benevolent person who would happily permit my use if I were to ask. This particular harm stems from my being required to seek permission and, even in cases where such permission will undoubtedly come, our volition is bound to the volition of another and we are therefore harmed in the process.

I do not think that these concerns warrant a dismissal of 'intellectual property' qua a means of social progress and education if certain conditions are placed on the scope of power granted to 'intellectual property' holders. I argue that there are three such conditions. They are: first, that the creation of some derivative works must not be included within those uses under the control of the property holder; secondly, the right to legal possession must not have a permanent duration; and finally, the right to the property must be not be default. The justification for each is presented in the following.

The need for allowing derivative works emanates from the insights illuminated in both this and the previous chapter. Recall that in the previous chapter I argued that 'intellectual property' was, in fact, a set of physical tokens which shared membership within a particular abstract type. A derivative work, correctly understood, is one of two things. First, it may simply be a physical thing which shares all of the attributes of the abstract type and whose existence is contingent upon the existence of the abstract type. Rote copies, then, can be said to be derivative works in this respect. The alternative conceptualization of 'derivative works' refers to those things who owe aspects of their existence to the prior abstract type but do not possess all of the attributes assigned to the

abstract type. This kind of derivative work, in effect, is a hybrid of new and old abstracts. Any law establishing a right to 'intellectual property' must decide whether it treats this kind of derivative work as a token of a preexisting type or a type unto itself because it (the law) cannot, for practical reasons, treat the work as a genuine hybrid. This practical limitation arises from legal possession of a physical object being an all-or-nothing game – one either owns an object, or one does not. Suppose that I create a work which is a blend of new and old. If the law attempts to mirror the boundary conditions of the physical with those of the abstract the end result is the loss of the new abstract hybrid (since its identity is, by definition, both new and old). Conversely, if the law places the legal possession of the new abstract 'object' in hands of the derivative's author, the strength of the right granted to the author of the original is diminished. There must be a decision as to whom the law favours. I argue that derivative's author must be favoured because the ends outlined above are, in part, the generation new types of ideas/expressions. Treating this kind of derivative work as though it is a token of a preexisting type would retard our attempts at progress since doing so would involve seeking new works and at the same time prohibiting new works. If we are sincere in our attempt to promote social progress, therefore, we would do well to treat derivative works as being new types, and not new tokens.

The same solution can not be made in the case of making rote derivatives. The rationale behind this is that excluding such works does not self-defeat the adopted ends in the same way as excluding hybrids nor does it meet Mill's standard of harm. In the case of the latter no harm results from the exclusion because the idea/expression has already been voiced. Since the harms distinguished by Mill hang on the censorship's removing

the idea/expression from the public's ears and eyes, no social harm can be argued for if the public already has access to the idea/expression. There remains, however, a individual harm done to those who would wish to make rote derivatives out of their own physical property. Put another way, excluding the making of rote copies diminishes one's ability to legally access 'intellectual property' and, therefore frustrates the attempt to realize the ends explored above. This leads me to the second condition which mandates that the right to the possession of a piece of 'intellectual property' must have a point of termination. If this condition is absent from a programme of 'intellectual property' there are two harms which will follow. First, we will have sacrificed our liberty for naught for not only will our default liberty to copy be lost, but so too will our freedom to determine how our we use our own physical property. Second, as per the above discussion, giving 'intellectual property' holders temporally indefinite control of their works strains our reaching half of our intended goal – the proliferation of ideas/expressions. If, however, a time limit is placed upon these rights there are substantial gains to be had, if not for the present generation then for posterity. Therefore, the moral status of sacrificing our liberty depends up the benefit(s) conferred on future generations As I argued earlier, I maintain that there is a intuitive morality in sacrificing at present if posterity is profited in the doing. A natural question which follows from this condition asks: how long does this time limit need to be? The answering of this question is a large part of the pursuant chapter. I move on to the final condition of this chapter.

Due to the moral goodness of the ends presented and the inherent twofold harm in granting 'intellectual property', I argue that the right to such 'property' should not be automatically granted upon the creation of new ideas/expressions. It should, rather, be

rights which are applied upon an individual's meeting of some standard, or applied non-automatically. In this sense, such rights would be similar to, for example, a right to vote for just as the right to vote requires an individual to undertake some application process (most often the rather mundane process of registering within a particular riding) so too would the right to 'intellectual property' involve some process of application. The details of a particular application process is outside the scope of this work; however, it is worthwhile to note that making such rights non-automatic would achieve three moral ends. First, it would aid in avoiding confusion among right-holders by formally maintaining a divide which isolates those rights we take to be fundamental to human survival from those rights which we grant in order to promote human flourishing. Secondly, it would preserve adherence to the default of individual liberty wherever possible (the second tenet from the prior chapter). In this case, the liberty which presents itself as default is not a radical freedom, or, the absolute lack of subjugation. Liberty is instead preserved by making the default the institution of physical property and all the rights and powers that go with it. Lastly, making the rights non-automatic would formally recognize the moral goodness in an individual's participating in the progress of their society for its own sake. In other words, giving members of the collective the opportunity to sync their actions with those of the highest moral order, while also allowing the societal moral ends to be met by individuals who cannot, or do not wish to, make their actions sync in the same fashion, is the better means of achieving the adopted moral ends. The reason for this is that it makes harm (understood as the constraint placed upon the collective's liberty) possible, but unnecessary.

5.6 Concluding Statements

The main question answered within this chapter was “What, if any, moral reason is there for establishing a program of 'intellectual property'?” and I have taken strides to present arguments as to the moral implications which arise as a result of an answer in the affirmative. I take these implications, in the form of the conditions outlined above, to be a necessary condition placed upon any law establishing 'intellectual property's moral status. The question which remains, though, is “What is the practical relation shared between rights to 'intellectual property' and the production of authorial works?” I take the following chapter to provide an answer to that question and offer analysis of the moral ramifications which emanate from that answer.

Chapter Six: The Means of 'Intellectual Property' Laws

6.1 Introduction

The most common justification of 'intellectual property' argues that in granting authors this stronger form of physical property we (society in general) incentivize them to invest their time and energy into the production of the works we desire, thereby achieving the ends outlined above. The devil, however, is in the details for the face-value intuitiveness of the above argument only goes so far. Similarly to what I argued in the chapter above, I here argue that there are limitations upon the type of incentive that can be offered which, when broken, negatively effects the law's moral status. Particularly, I argue that morality demands that the incentives be tailored to specific kinds of authorial works, that the incentive's extensiveness (in terms of duration of control awarded to authors) be no greater than that which is required to achieve our desired ends, and finally that the basis for the analysis of conclusions reached during the above two discussions be based upon fact and not mere speculation.

6.2 Why Incentives?

In providing an economic advantage for the authors of intellectual products to have these rights, according to jurist Sir Hugh Laddie, we “make up for a defect in the competitive market.”¹²⁷ Such rights are, on his view, “the carrot to competition's stick” whose purpose is not to undermine competition but instead “to modify [competition], to create sufficient economic incentive to justify the labour and investment in new products or art.”¹²⁸ Despite the intuitive nature of how a set of legal incentives can achieve the

127 Laddie, as quoted in: Patry, William F. *Moral Panics and the Copyright Wars*. New York: Oxford University Press, 2009. Page 63.

128 Laddie, as quoted in: *ibid.* Page 63.

moral ends adopted within this work, whether incentives are at all necessary to such achievement is an issue that demands attention. This is due, at least in part, to the three tenets adopted and used in the chapters above. If incentives are unnecessary to the achievement of these ends, then the moral status of 'intellectual property' must be called into question and, via the arguments offered in the chapters above, ultimately a return to liberty is mandatory.

Making a law, qua establishing a standard of behaviour, necessarily presupposes that individuals have the capacity to both meet, and fail to meet, said standardized behaviour. Additionally, making a law presumes that society's behaving morally is contingent upon their being goaded into doing so through appealing to their instrumental rationality. Therefore, it must be determined whether members of a society will do what is moral (here this means produce and freely distribute authorial works). If they will, then 'intellectual property' is unwarranted. If they will not, then some form of incentive is warranted. So, what argument could be given in support of the claim that incentives are necessary to secure the ends I have outlined? My answer, once again, borrows from J. S. Mill. In 'Principles of Political Economy', he writes:

It is a common error of Socialists to overlook the natural indolence of mankind; their tendency to be passive, to be the slaves of habit, to persist indefinitely in a course once chosen. Let them once attain any state of existence which they consider tolerable, and the danger to be apprehended is that they will thenceforth stagnate; will not exert themselves to improve, and by letting their faculties rust, will lose even the energy required to preserve them from deterioration.¹²⁹

While Mill's comments are meant to address a shortcoming in Socialist theory, I use them to support the view that absent some form of incentive, our ends are not likely to be met.

¹²⁹ Mill, John S, and John M. Robson. *Principles of Political Economy: With Some of Their Applications to Social Philosophy*. Toronto: University of Toronto Press, 1965. Page 795.

There are number of reasons to think that this is so. First, historically speaking, the means of production (the printing press, the education required to properly engineer physical devices and objects, the film camera, etc.) have been expensive to obtain and maintain. Secondly, the means of distribution have also been prohibitively expensive. Finally, the time and physical effort involved in securing the above two means has required the investing of resources which, absent some method to obtain a return on said investment, generally results in a net loss. These factors do not make an incentive system morally necessary; instead, they point to a relation shared between the ease of production and distribution, and the likelihood of individuals undertaking the act of authoring. In cases where production and distribution are nearly effortless, human indolence ceases to figure so prominently into our reasoning and, therefore, the plausibility of having a moral need for incentives becomes strained. Furthermore, there is good reason to believe that as a society progresses, production and distribution become much simpler endeavours. For example, the advent the Internet, the inexpensive personal computer, and free-to-use software like Open Office has made it possible to both produce and distribute the written word at a minimal cost to the author (when compared to prior generations which needed such works to be printed one at a time and then distributed manually). From this stems the following point: the advantage needed to incentivize authors will proportionally decrease as a society develops a strong infrastructure of information exchange. It is also, therefore, implausible to argue for the exact appropriate amount of incentive in the abstract; and, accordingly, each state will have to determine for itself, based upon the effort needed to produce authorial works, how much incentive is warranted.

There are, however, two additional moral commitments to derive from both the need to incentivize authors and the moral conditions and tenets outlined in the chapters above. The first is the need to tailor the incentive provided to types of particular authorial works, while the second speaks to the strength of a morally permissible author's right.

6.3 Medium-Dependent Incentives and the Extent of Justifiable Incentives

Since the moral limit of justifiable power granted to authors in the form of 'intellectual property' is inherently tied to the amount of resources required to produce and distribute works, establishing one standard of power for all types of works is a difficult act to justify. The reason for this is simple enough: some types of works are more difficult to produce and distribute than others. Recall the above example involving the production of the written word, the costs are a great deal lower than, for instance, the production and distribution of pharmaceuticals. If we apply the standard of the written word to pharmaceuticals, there will likely be insufficient incentive to produce the latter. Alternatively, if the standard of the latter is applied to the former, we, as a society, will have sacrificed more of our liberty than was necessary to see the former produced. Adhering to a compromise between the two standards is likewise undesirable for it is likely to offer authors of pharmaceuticals too little and authors of the written word an avoidable windfall. Therefore, in order to make an efficient use of public resources (here understood as public liberty) it is in our best interest to establish many standards – ideally one for each type of work. How we classify what constitutes a 'type' (i.e. 'film' as a concrete type; or 'drama', 'documentary', 'comedy', etc., as concrete types) will depend upon two factors: first, how tight-fisted we are with the expenditure of our liberty; and second, the practical limitations on maintaining an over-precise system of incentives.

Additionally, a moral incentive can be understood as being comprised of a temporally-minded feature: the duration of such a right. It may appear at first glance that so long as the right meets the conditions argued for in the prior chapter (i.e. that is not present upon the creation of a work and it must terminate at some point in time) such law is morally justified. On my view this is not the case and the reason for this is twofold. First, the same motivations which compel us to divide incentives amongst types of works similarly compel us to offer as little incentive as needed. In other words, if we can obtain authorial works of a specific type by offering a right which lasts ten years, it would be an unnecessary sacrifice of public liberty to offer a more lengthy duration. Secondly, these rights, in effect, establish an artificial scarcity. The benefit of this type of scarcity is that the market of ideas/expressions functions similarly to the market of objects which are naturally scarce, which is what allows authors to profit from their work and thereby creates incentive to produce and distribute. Also, this artificial market can be evaluated in terms of economics because it shares these commonalities with the natural market. As a result, we can evaluate the correct investment of our liberty by economic standards and thereby determine the appropriate amount of power to grant authors. If the powers granted conflict with such standards we will be able to determine whether we have invested too little, or too much, of our liberty; which is to say, the moral status of a given 'intellectual property' right's strength (in both temporal senses, assuming a programme of 'intellectual property' is also contingent upon the economic health of the market we establish in doing so.

6.3.1 Incentives and Economic Analysis

The standard measure and end of an economic market is efficiency. Here efficiency, *qua* economic end, is defined as a state-of-affairs in which no more can be produced, given a set number of resources (time or money, for example), without also increasing the amount of resources used. An efficient producer, therefore, is one who requires less resources to produce the same output than another producer. Now, with these definitions I can begin to outline the reason as to why many economists do not accept extensive monopolies.

The general premise which underlines these deliberations is that, *ceterus paribus*, the economic end of efficiency is achieved through a competitive market. If you and I were to both be producers of widgets and I utilized more resources to produce one widget that you did, I would not be able to obtain a return without matching the price for which you sell one of your widgets, for, in this case, there would be very little reason to purchase my widget for more (assuming our widgets are of equal quality). The result is that in order for me to survive, *qua* producer of widgets, I would be compelled to alter some aspect of my production. In general, monopolies therefore are contrary to the ends of a vital economic market because there is, when a monopoly is present, no need for a producer to maximize efficiency simply due to lack of competition.

So it would seem that economists would outright reject the economic value of intellectual property rights. But this is surprisingly not the case. In providing an economic advantage for the authors of intellectual products to have these rights, according to jurist Sir Hugh Laddie, we “make up for a defect in the competitive market.”¹³⁰ Such rights are, on his view, “the carrot to competition's stick” whose purpose is not to undermine

130 Patry, William F. *Moral Panics and the Copyright Wars*. New York: Oxford University Press, 2009. Page 63.

competition but instead “to modify [competition], to create sufficient economic incentive to justify the labour and investment in new products or art.”¹³¹

So now it appears to be the case that economists would wholly accept intellectual property rights, but this too is not the case. The truth is a more nuanced and contingent matter, and Laddie sums up the thought well when he writes:

We should be trying to hone the system so that the greatest rewards and encouragement go to those industries which need and deserve them the most. Where IP [intellectual property] rights perform their function of advancing the science or arts, they should be encouraged to do so. Where or to the extent that they do not, they have no justification and the normal discipline of competition should apply. The gluttony which has resulted in the growth of completely unnecessary or excessively long IP rights undermines the system itself. As Shakespeare wrote in *Richard II*, - 'With eager feeding food doth choke the feeder.'¹³²

In other words, when 'intellectual property' rights are established those 'things' which are naturally abundant become, in law, artificially scarce for all but those holding the right. As a consequence it creates a near-perfect market for producers/distributors. For example, suppose I am a manufacturer of chairs. The resources required to make two chairs (raw timbre and my time, for example) is roughly twice that which it takes to make one chair. Those resources are reflected in the price I sell my chairs for and if a competitor of mine can be more efficient than I can (perhaps she is more skilled at chair-making and thus it takes her less time to make one) she can sell her chairs for less and make equal profit. The result is that my place within the marketplace is threatened. This threat, then, is the motivation that drives me to refine my production and distribution methods. However, suppose that I have a right to the idea of 'chair'. My competitor is

131 Patry, William F. *Moral Panics and the Copyright Wars*. New York: Oxford University Press, 2009.

Page 63.

132 Ibid. Page 64.

prohibited by law from selling chairs, therefore I have no motivation to become more efficient, and as a result the public will not see the chair's price lower for I will have no reason for doing so.

Where, then, is the social harm which originates with this monopoly beyond that of higher prices? Laddie's concern, one which I share, is that giving a producer/distributor this right for an excessive amount of time generates a state-of-affairs in which producers/distributors become entrenched within a state's economy. In the example above my chair-producing business (assuming the public's desire for chairs) blooms, I begin to expand by hiring new labourers to produce chairs more rapidly, perhaps building a line of stores which carry my products, design new furniture to which I also obtain the rights etc. All these employees, as well as those firms from whom I purchase raw resources (the amount of which increases as well as my business grows) and their employees, have their economic well-being tied to my being a furniture-producer. This creates a serious problem: if we offer long-lasting 'intellectual property' rights to authors, there is the likelihood that we will become economically dependent upon their continued existence and, as per the conclusions reached earlier in this chapter, as a culture progresses the moral justification for such rights will become weaker. Put another way, in granting overly strong 'intellectual property' rights we run the serious risk of placing ourselves on a path which leads far from the ends permitted by morality.

Avoiding this tension by not offering overly-long rights to 'intellectual property' will be an obvious component of the contemplation which goes into making the law; however knowing the correct amount of time cannot, I think, be found through a priori reasoning. We must become empiricists on the issue and take the time to engage in the

process of trial-and-error to determine the property amount of protection we are willing to grant authorial works. Richard Stallman sums this point up well:

By seeing if and when measurable diminution in publication occur, we will learn how much copyright power is really necessary to achieve the public's purposes. We must judge this by actual observation...¹³³

The very nature of this trial-and-error process allows for at least two concrete conclusions. First, stating that the justifiable amount of protection is that which is minimally sufficient to incentivize authors gives rise to the natural question “What is that amount of time?” This question, like the question “How far can I run?” can only be answered by some degree of failure. Just as the second question requires running and getting tired, the first requires passing the point at which authors are no longer enticed by our incentives. Without this step we can never escape speculative reasoning and the erroneous conclusions it often supports. Therefore, if there is no law on the books, it is best to start low and gradually increase the amount of protection offered. If, however, there is a law which offers excessively long 'intellectual property' rights, the gradual process of lowering the duration of these rights is necessary (much more on this issue will be explored in the following chapter). The trail-and-error process also leads to the conclusion that whatever starting point we adopt will be unlikely the one we will desire to keep for all time. This means, in other words, that there needs to be an expiry date on the *law itself* for as the cost to produce and distribute authorial works changes the amount of incentive will also need to change. In making laws establishing 'intellectual property' rights terminal we will be motivated to engage in a number of important behaviours.

133 Stallman, Richard. *Free Software, Free Society: Selected Essays of Richard M. Stallman*. Boston, MA: Free Software Foundation, 2002. Page 86.

First, it will require our keeping an eye on market trends in order to know whether the amount of publications is on the slide¹³⁴. Second, when the law is soon to expire, discussions as to what modifications are needed, if any, will be prompted. Finally, it will allow us to adapt the law to the changing technological environment. No one can reasonably deny the vast influence technology plays in the distribution and production of authorial works, and a fixed expiry date to the law will allow it to change with the times and remain a sound piece of legislation.

6.4 Lingering Hedonism/The Disutility of Change

There is, of course, a substantial divide between the act of making a moral law and the act of making a law moral. Recall the above example of my being a furniture-producer. Suppose that we lived in a society that allowed this type of harm to propagate unchecked so that an incredibly large portion of the society's economic well-being was tied to producers such as myself. Cases such as this present a serious concern for those holding a consequentialist view of morality (such as myself. The reason being that negative consequences may accrue as a result of changing the law so that it aligns with morality, and that these consequences absolve us from initiating the changes. With regards to 'intellectual property', an argument to this effect might take the following form:

There are many industries that currently depend, and have depended, on intellectual property to make money. Over time they have become exceedingly wealthy, with some estimating that the media and entertainment industries' worth in 2006 was approximately \$1.4 trillion (USD).¹³⁵ This same group estimates that

134 This will also be aided by making the rights be something authors need to apply for (as per one of the conclusions of the prior chapter). If this condition is met we will be able to weigh the amount of authors who seek the right (thereby implicitly stating their need for an incentive) against those who do not. The general need for this incentive will therefore become an empirical matter upon which arguments for and against the increase in duration of 'intellectual property' rights can be based.

this figure will have grown to \$1.4 trillion (USD) by 2010.¹³⁶ Take, for example, the music industry. This industry has been, as of 2006, estimated to be worth \$130 billion (USD) while only one third of this figure speaks to the actual money made via the selling of recorded music. In short, the industries are worth a great deal and the majority of this wealth is peripheral to, and dependant upon, authorial works. There are many people whose jobs depend on this established industry, none of whom could be rightly called authors. Therefore, any change that does not promote this well-being of these industries brings a harm to countless people who depend upon these industries for their financial security. That is we ought not change our current laws because doing so will cause widespread disutility.

Even those individuals who reject the conclusion derived above are likely to feel the grip of this argument. However, it suffers from two weaknesses. Firstly, I argue that this argument is either imprudent, irrational, or both. Recall Bentham's view on the nature of a law being an evil so that good may come. A law against theft constricts the liberty of all, but the end result (security in property) is better than the alternative despite that alternative's preserving liberty. This objection inverts Bentham's maxim and, in effect, suggests that we endorse a good (the maintenance of over-privileged industries, economic well-being) with no concern about what evil may come (the indefinite binding of liberty). Barring the impossible, the degree of difficulty of doing the morally good thing has no bearing on its ethical status. If doing the right thing was always easy I doubt there would be a need of 'intellectual property' law let alone laws themselves; furthermore, doing what is right *despite* its being difficult makes the action all the more righteous and not the opposite. Therefore, we must revise any intellectual property law which does not adhere to the above standard regardless of the short-term pains which spring up from doing so.

135 "The Broader Music Industry." *www.ifpi.com*. The International Federation of the Phonographic Industry, 01 Jan 2011. Web. 25 Apr 2011. <<http://www.ifpi.org/content/library/the-broader-music-industry.pdf>>.

136 Ibid.

I imagine that some might not be convinced by the above argument, so consider another tack. It is plain to see that the objector is about to wander into the paradox of hedonism. If we maintain an immoral 'intellectual property' law for fear of the disutility of change, we only continue to make our economy more dependent upon the producers and distributors of authorial works. In short, immoral 'intellectual property' law is such that the hold it has on our economic well-being necessarily gets stronger if the situation is not rectified. To avoid change would not consist in sliding down a slippery slope, it would rather consist in wilfully walking down the slope. This problem is not insurmountable though. In fact, my adoption of Railton's moral theory was, in part, in anticipation of it. There is, therefore, the solution to this problem built into the moral grounding of my analysis and justification of 'intellectual property'. Recall that the pluralistic sophisticated consequentialism adopted, which also encompasses sophisticated hedonism, allows us, qua moral agents, "...to eschew the hedonistic point of view whenever taking this point of view [the hedonistic] conflicts with following an objectively hedonistic course of action." (Railton, 143) Since not attempting to change an immoral 'intellectual property' law conflicts in just this way, we are best served by ignoring the concern altogether. In this case we may choose to leave happiness as our indirect end or adopt new ends, thereby abandoning happiness as an end altogether. However, detractors of this view must note that since it was through adopting societal well-being as my ends that I was able to put forth a plausible moral justification of 'intellectual property' rights, changing the ends to some other measure of morality is likely to exclude key features which motivate one to accept such rights (the social-centric aspect of moral deliberations, for example).

I am not, however, blind to the impact of the difficulty implicit in this course of action. As I mentioned at the outset of this chapter, the distance between the standard I have adopted and the moral status of any given 'intellectual property' law does play a role in how quickly we can return to a moral state-of-affairs. Additionally, this distance is multidimensional. If, for example, derivative works are prohibited under law (contrary to my conclusions), permitting the distribution of such works may bear a greater influence on a state's economy than, say, changing the duration of the right from a hundred years to fifty years. The reason for this is that the former change alters potential earnings of authors with less immediacy than those changes implicit in the latter. The differentiating feature of these two types of change is the former's belonging to the binary matter of what constitutes the right (the right either implies a particular power or it does not) while the former belongs to a class of features which admit of degrees. It may be wise, therefore, to structure the return to moral law in such a way that leads with less noticeable changes and then follows with the more dramatic change. It may also be prudent to incrementally change the powers implicit in a 'intellectual property' right gradually. Both of these methods of 'softening the blow' would allow authors and distributors to both prepare for, and adapt to, the changes that morality demands we make to immoral 'intellectual property' law. So there is, at a collective level, good moral reason to make an immoral 'intellectual property' law moral despite difficulties in doing so.

Individuals of strong moral fibre, though, are unlikely to be happy with placing all responsibility for change upon the collective. Many of our moral heroes refuse to be complacent in this regard and ask both themselves and others what can be done to change a societal state-of-affairs for the better? I propose an answer which prescribes the

empowerment of moral authors. In the remaining portion of this chapter I will explain this term, apply it to the case at hand, and provide an example.

6.5 Empowerment

One of the many lessons learned as a result of feminist movements is that activism becomes less arduous than it otherwise might have been if strong relational bonds with those in similar political situations are fostered and nurtured. Iris Marion Young, author of “Punishment, Treatment, Empowerment: Three Approaches to Policy for Pregnant Addicts”, defines empowerment as:

..a process in which individual, relatively powerless persons engage in dialogue with each other and thereby come to understand the social sources of their powerlessness and see the possibility of acting collectively to change their social environment.¹³⁷

Empowerment, on Young's view, consists of two elements: consciousness-raising and organization. The former involves multilateral discussions in which participants “construct an understanding of their personal lives as socially conditioned, constrained in ways similar to that of others by institutional structures, power relations, cultural assumptions, or economic forces.”¹³⁸ Consciousness-raising is a form of empowerment due to its ability to develop one's reflective and critical skills which enables one to rationally depart from institutional norms and determine that such norms are malleable and, if I am correct, in need of change.

The process of empowerment does not only enjoin those who accept the standard of morality argued for within this work to band together, it also enjoins us to establish directives for that group.

137 Young, Iris M. "Punishment, Treatment, Empowerment: Three Approaches to Policy for Pregnant Addicts." *Feminist Studies*. 20.1 (1994): 32-57. Page 50.

138 Ibid. Page 50.

This brings me to the second element of empowerment: organization. Young defines this as:

..the establishment or joining of democratic collectives that foster bonds of solidarity and bring the actions of many individuals together toward some end of social transformation.¹³⁹

Empowerment, then, involves the forming a collective of individuals whose aim is to upset immoral status-quos through adopting standards of practice which diverge from the norm. I would like to highlight an example of this type of empowerment as it relates to the subject-matter of this thesis: the support of 'moral authors'.

Moral authors give as freely as they take rather than rely upon economic incentives to motivate their participation in cultural progress. There are two such authors to whom I would like to draw attention. The first is Benjamin Franklin, who, upon being offered a patent for a highly efficient wood-stove, declined the right, later writing:

[...] *That as we enjoy great Advantages from the Inventions of others, we should be glad of an Opportunity to serve others by any Invention of ours, and this we should do freely and generously.*¹⁴⁰

Here Franklin makes the standard for the qualifying for the title 'moral author' explicit: benefiting others with the fruit of our authorial works as we have likewise been benefited by authors past. An additional moral author worthy of note is computer programmer Richard Stallman who, when the programming community of which he was a part of fell apart in the early 1980s (in part due to proprietary-software becoming the norm), faced what he calls a “stark moral choice”.¹⁴¹ One one hand he could join the proprietary-

139 Young, Iris M. "Punishment, Treatment, Empowerment: Three Approaches to Policy for Pregnant Addicts." *Feminist Studies*. 20.1 (1994): 32-57. Pages 50 – 51.

140 Franklin, Benjamin, and Leonard W. Labaree. *The Autobiography of Benjamin Franklin*. New Haven: Yale University Press, 1964. Pages 191 – 192. Author's emphasis.

141 Stallman, Richard. *Free Software, Free Society: Selected Essays of Richard M. Stallman*. Boston, MA: Free Software Foundation, 2002. Page 19.

software developers; on the other he could leave programming altogether. The former choice would consist of his working in an industry that was antithetical to his moral views, the latter would consist of his leaving the field of programming – a field that he was passionate about. Stallman ultimately realized that this was a false dilemma. There was a third option, namely, his developing software whose use would not require one's "conspiring to deprive his or her friends."¹⁴² In both cases the men in question saw that those actions most profitable to them were at odds with what they took to be the ideal moral ends. In the case of Franklin, he refused the right offered to him; in the case of Stallman, he opted for the third option which ultimately led to his founding of the GNU project. The GNU project largely involved (and continues to involve) the production of an operating system for personal computers. Central to the production of this software were four freedoms:

1. ...the freedom to run the program, for any purpose.
2. ...the freedom to modify the program to suit your needs.
3. ...the freedom to redistribute copies, either gratis or for a fee.
4. ...the freedom to distribute modified versions of the program, so that the community can benefit from your improvements.¹⁴³

However, to ensure that the program remained free, some restrictions were applied. Stallman and his peers employed what they called 'copyleft'. This process inverts the structure of *copyright* (as it is currently found) by preventing others from deriving copyrighted/protected products from this software. Stallman sums up the method in the following:

...we first state that it is copyrighted; then we add distribution terms, which are a legal instrument that gives everyone the rights to use,

142 Stallman, Richard. *Free Software, Free Society: Selected Essays of Richard M. Stallman*. Boston, MA: Free Software Foundation, 2002. Page 19.

143 Ibid. Page 20.

modify, and redistribute the program's code or any program derived from it but only if the distribution terms are unchanged.¹⁴⁴

In short, under this system individuals could obtain and alter the program while being prohibited from adding restrictions of their own, thus ensuring that the free access is maintained.

Through the actions of these two moral authors we can derive the standard of individual moral action as it pertains to our lives as authors. However, empowerment entreats us to not only be moral authors. It also requires that moral authors band together so that the actions of one author can be bolstered by others thereby satisfying the need for organization outlined above. I foresee two possible methods of such organization. The first can be obtained simply by drawing the public's attention to such authors or lending them our vocal support. The second, interestingly enough, arises out of a challenge which faces almost all moral authors. In cases such as Stallman's, authors may have difficulties in, absent the ability to profit from their work via 'intellectual property' rights, raising the funds necessary to produce their works? In other words, if Stallman does not stand to economically gain from producing the GNU operating system, the probability of its being produced are greatly diminished. How then can we support these authors when they preclude our paying for the product of their labour?

The answer to this question is found in what is popularly called 'crowd funding'. This method of financing, found on such web sites as www.indiegogo.com and www.kickstarter.com, allows authors to directly approach the general public and propose works to be funded. There are incentives at play. In this case, however, it is the authors

¹⁴⁴ Stallman, Richard. *Free Software, Free Society: Selected Essays of Richard M. Stallman*. Boston, MA: Free Software Foundation, 2002. Page 91.

who incentivize the general public to invest money into their (the author's) project. In exchange for donating money, authors offer 'perks'¹⁴⁵. Additionally, these perks are allocated into tiers whereby greater donations warrant greater reward. An author's offering financial gain in the form of a percentage of revenue earned as a result of the work is rare¹⁴⁶; therefore, this entire process is best viewed as a democratic patronage system which does require the voluntary curtailing of liberty in order to bring about the production and distribution of authorial works.¹⁴⁷ It must be noted, though, that releasing one's work under copyleft terms is not necessitated by web sites offering crowd funding opportunities. Therefore, the process of empowerment is made up of two jointly necessary and singly insufficient features: being a moral author and supporting them in manners similar to that of crowd funding. Absent the former, we run the risk of entrenching (or failing to remove) immoral authors from our economic systems. Absent the latter, we run the risk of failing to facilitate such authors retaining their positive moral status.

Since the process of empowerment explained herein can, and should, occur independently of a particular legal state-of-affairs, there is good reason to believe that empowering moral authors can further benefit society in cases similar to those outlined in the earlier sections of this chapter. It does so establishing a new method of producing authorial works. If it is practised on a large enough scale, this method of production,

145 These perks are often some sort of memorabilia associated with the work.

146 This type of exchange is, in some states, illegal unless the author seeking financial aid registers with an appropriate securities regulatory authority.

147 These systems, though, do exist along side 'intellectual property' rights. In a manner of speaking authors who utilize crowd funding may 'double dip', or, invest nothing but their time and energy into something they only stand to gain from. While there are social benefits to be had from crowd funding, I only offer it here as a moral means to support moral authors.

through minimizing the need for granting economic incentives at the societal level, slowly uproots those methods of production which are both morally undesirable and firmly entrenched within our economic systems.

6.6 Conclusions

I have offered an extensive analysis of both the ends and means which comprise a justifiable social policy which establishes 'intellectual property' rights rights. The moral status of such a program hinges upon both its meeting the conditions outlined in the prior chapter and the economical functionality of a system of incentives. I have argued that such a system is justifiable just in case the right granted is that which is minimally needed to sufficiently motivate potential authors to become realized authors and that this in turn requires arguments based on empirical data rather than those born out of mere speculation.

There is, of course, a significant difference between making a moral law and making a law moral. The first does not carry with it the same practical limitations that the second does. Recall the above discussion regarding the manner in which an overly strong system of 'intellectual property' can become economically entrenched within our lives. If we find ourselves in this situation, the difficulties involved in returning to a moral law (making an immoral law moral) are much greater than if the task at hand is making a law from scratch, and the reason for this is simply due to the entrenchment itself. Therefore, I have prescribed a process of changing the norm of behaviour from within a legal system rather than solely rely on overt changes to the system itself. This internal change depends, at least in part, upon a programme of empowerment which in turn involves becoming a

moral author and the supporting of those moral authors who align with the moral ends adopted within the fifth chapter of this thesis.

Chapter Seven: Conclusion

Within this thesis I have endeavoured to achieve three primary ends: first, to provide good reasons for thinking that the justification of 'intellectual property' rights via natural rights which has become pervasive within the moral reasoning of the general public are by and large untenable; second, to argue for a morally justifiable account of 'intellectual property' which in turns places firm limits upon the strength of any moral law which establishes the right to legal possession of ideas and/or expressions; and third, to argue for non-societal means of achieving the same ends as those sought by the aforementioned system of rights.

It is my hope that this work can serve to be a moral compass for those both familiar and unfamiliar with the literature on 'intellectual property' whether the question is 'what should *we* do?' or 'what should *I* do?'

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<<http://www.ifpi.org/content/library/the-broader-music-industry.pdf>>.