

**INTELLECTUAL PROPERTY
LAW (LAWS5150)
EXAM NOTES**

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IP LAW THEORY

What is 'IP'?

- Creations of the mind – intangible property
- Protected by different regimes (e.g. patents, copyrights)
- Agreement on Trade-Related Aspects of IP Rights (TRIPS)
 - Article 1 – categories:
 - i. Copyright and Related Rights (incl moral rights)
 - ii. Trademarks
 - iii. Geographical Indications
 - iv. Industrial Designs
 - v. Patents
 - vi. Layout-Designs (Topographies) of Integrated Circuits
 - vii. Protection of Undisclosed Information

FOUR MAJOR THEORIES OF IP LAW

- Natural rights theory (John Locke)
- Utilitarian theory (Mill, Bentham)
- "Personhood" theory (Hegel, Kant)
- 'Distributive justice' or 'social planning' theory

1. NATURAL RIGHTS THEORY (JOHN LOCKE)

Key Concepts

- **Locke's Theory of Appropriation:**
 - Nature is a **common** resource.
 - Individuals own their body, and their **labor**.
 - **Mixing labor with a resource creates valid property claim.**
- **Property arises from labor:**
 - "Whatsoever he removes out of the state that Nature hath provided and left it in... he hath mixed his labor with it and joined to it something that is his own."
 - Nyssa has taken from the common (language) to create lecture slides (labor) - > entitled to own it

Application in IP Law

- Example: ***D'Arcy v Myriad Genetics (2015, HCA)***
 - **Patent** for the isolation of a gene
 - **A gene's isolation** does not constitute an "invention."

- IP protection applies to **human-made** innovations, not discoveries.
- I.e. **not enough labor applied to it** (invention)

Protects Distributive Justice:

- Fairness -> creation must be rewarded
- **Free-riding is unfair**

Criticism

- **Disparity in labour but commonality in rights**
 - Every IP right is the same (i.e. same protection offered)
 - Does not account for different extent in labor (**same protection for someone who spent 70,000 hours vs 7 hours**)
- **Type/degree of labour**
 - What kind of labor should be rewarded?
 - Physical yes. What about **intellectual labor**?
- **Does it comport to a theory of *intellectual* property? Physical and intellectual 'commons'**
 - Locke's theory -> God commanded mankind to subdue the Earth and to improve it
 - What about IP where **humans appropriate same intangible resources?** Information, facts (**no one is worse off** than others by reason of that multiple use)
- **What is 'the commons'?**
 - Cf soil and land
 - What is commons in IP? **Facts? Cultural heritage?**
- **Should labour necessarily convert to a reward of *property* rights?**
 - How do we ensure laborer is not under/over rewarded?
 - **Money/tax incentive could more closely accord** with the extent of their labor
- **How to accommodate *prior* labourers?**
 - In real world, things get created through **collaborative labor**

2. UTILITARIAN THEORY

Key Concepts

- Most broadly adopted theory by courts and legislators
- Aims to **maximize social welfare** by encouraging innovation.
- The **State grants monopolies** to incentivize creation.
 - Inventions would not otherwise be created without that monopoly reward
 - Without laws preventing copying, **consumers would copy inventions/works rather than purchasing them**

- Balances = **Innovation benefits vs Social costs of monopoly pricing.**

Legal Framework

- **TRIPS Article 7:**
 - IP protection should:
 - Promote **technological innovation.**
 - Encourage **knowledge dissemination.**
 - Balance **creator and public interests.**

Old origins

- Venetian Patent Law of 1474

Criticism

- Fails to explain:
 - **Non-incentivized creativity.** People have always **created with no desire for a reward** (e.g. Michelangelo)
 - **Increasing IP rewards.** Extending copyright extension to author's life + 70 yrs after death indicates that there is no incentive for the author (**protection lasts after they have died**).
 - **IP that remains undistributed.** Could paint art that is **never published/disseminated.**
- **Hard to measure the balance of social welfare.** whether IP **stimulates more innovation** than it restricts.
- How coherently does theory explain:
 - **Breadth of IP rights.** E.g. right to create derivative works – movie based on a novel. Fails to justify **why these broad IP rights are necessary for innovation** (does author of novel really need to control all of these rights in order to be incentivised to write novel?)
 - **Duration of IP rights.** Why do they last so long? **Once a creator makes reasonable return, continued exclusivity** creates no additional benefit
- Fails to acknowledge individual's labor

3. PERSONALITY THEORY (HEGEL)

Key Concepts

- **Property is an extension of self** (**creation becomes part of your identity**)
 - People need to "project" their will onto external objects.
 - Intellectual property represents a **personal expression.**
- **Control**
 - Allows creators to see their intentions and personality reflected in their work
 - Protection is crucial as **creators can be sure that their autonomy** is respected
- **Labour vs. Will**
 - Labour is a **conscious effort.**

- Will is an **integral part of identity** – needs to be expressed, e.g. via property claims

Application

- Supports **moral rights** in copyright (e.g., preventing misattribution/mutilation).
- IP protection is stronger for **expressive works (e.g., novels)** than for **technical innovations**.

Criticism

- How do we balance **competing "personhood" claims**?
 - People defined 'personhood' differently – what if two people have **put personality into the same creation** (e.g. singer vs producer)
- What **specific needs/interests** should be protected/promoted?
 - Ability to **profit** from work? **Recognition** of being attributed?
- Why do those interests **justify property rights in particular forms**?
 - Doesn't dictate how these IP rights should be structured
- **Social costs**?
 - Primarily to serve individual
 - What if they conflict with public good? **Pharma company patenting life-saving drug** for public?

4. DISTRIBUTIVE JUSTICE / SOCIAL PLANNING THEORY

Key Concepts

- IP viewed as a 'good' that should contribute to **fair and attractive culture**.
- Focuses on:
 - **Fairness and accessibility.**
 - **Balancing creator and public (/user) interests.**

Application

- Used to justify **exceptions and limitations** in copyright law (e.g., fair use).
- Addresses issues of **equitable access to knowledge**

Concluding Thoughts

Key Takeaways

- Theories **overlap** in real-world applications.
- Courts and policymakers use **multiple frameworks** to justify IP laws.
- **Examples:**
 - **US Supreme Court:** IP secures a fair return for labor but also serves public interest.
 - **Canadian Supreme Court:** Balances **creator rewards** with public **access**.