JUSTIFICATIONS FOR COPYRIGHT: THE MORAL JUSTIFICATIONS*

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1. INTRODUCTION

It appears that intellectual property is valued and despised in equal measure in our current society. For many of the best-known firms their most valuable asset is the intellectual property they own, and this is a trend which is unlikely to change, given the nature of modern commerce. In the case of copyright, works primarily protected by copyright, such as computer programs, music and literary works have become an indispensable part of our lives, whether in our working environments or leisure pursuits. Intellectual property rights are legally, economically and socially significant; they are said to be the 'most spectacular' form of limited privilege granted to private individuals by governments.[1] While this article (and the second part thereof) will focus on the justification for copyright protection, references may be made more generally to intellectual property for two reasons: some of the comments or issues relating to copyright protection may be relevant to intellectual property protection generally, and vice versa; and, it is intended that the contribution relating to the justification of the copyright protection should form part of a larger discourse on the justification of other forms of intellectual property. This is, of course, done with complete appreciation that there are substantive legal differences between the various forms of intellectual property. Accordingly, unless otherwise stated, the points made specifically in relation to copyright should not to be construed as also being applicable to other types of intellectual property.

Although copyright as a form of intellectual property,[2] like other forms of property, exists by virtue of its recognition by the state, specifically through legislation, '[l]aw needs some form of social justification if it is

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1 RM Hurt & RM Schuchman 'The economic rationale of copyright' (1966) 56 *The American Economic Review* 421.

2 'Intellectual property' is the generic term used to refer to the different legal regimes concerning copyright, patents, trade marks, designs, and confidential information, 'which began their existence independently of each other and at different times in different places'. P Drahos *A Philosophy of Intellectual Property* (1996) 14. No definitive judicial definition of 'intellectual property' has been provided by our courts. References to 'intellectual property' are, invariably, illustrative. The Intellectual Property Rights from Publicly Financed Re-search and Development Act 51 of 2008 defines 'intellectual property' even more broadly as 'any creation of the mind that is capable of being protected by law from use by any other person'.

to be successfully legitimised'.[3] We no longer merely accept laws or social institutions (or consider such laws or institutions to be justified) simply because they emanate from an established authority such as the legislature.[4] We condemn 'blind mandates of power' and seek reasons for the existence of laws; we require that laws are based on sound philosophical or economic justifications.[5] Power and authority are subject to greater scrutiny than at any point in human history. Intellectual-property scholarship in South Africa has, arguably, focused on the immediate issues concerning black-letter law, with very little analysis of the conceptual foundations of intellectual property as a legal institution.[6]

Copyright, because of its social and economic significance, should be grounded on a sound theoretical basis, particularly if protection is periodically expanded to new types of work, as was the case, for example, with cinematograph films and computer programs. The South African Copyright Act[7] has not been substantively amended, despite unimaginable technological advancements, since 1997,[8] and the appropriateness of the scope of protection needs to be reassesed as a matter of priority. Every aspect of copyright protection is now, argubly, more critically assessed than may have previously been the case. For example, the United Kingdom's Intellectual Property Office are considering the World Intellectual Property Organisation's (WIPO) proposed copyright limitations and exceptions for visually impaired people and for people with print disabilities, which can serve to faciliate their access to information.[9] Given the challenges we face in South Africa, such as ensuring adequate education opportunities, we should be particular vigilant about the impact of copyright protection on access to information.

What we seek to establish when considering the justifications for intellectual property protection, such as copyright, is why it exists and what purpose it serves.[10] There are two principal reasons for seeking to establish a sound justification for copyright protection. The first reason for seeking a justification for copyright protection is as part of a more general discourse on the continued relevance of intellectual property law. There is a perception among laypeople, particularly the youth, that intellectual property rights unjustifiably fetter their freedom to use 'their' property as

3 C May *A Global Political Economy of Intellectual Property Right: The New Enclosures?* (2000) 17.

4 HM Spector 'An outline of a theory justifying intellectual and industrial property rights' (1989) 11 *E.I.P.R.* 270; and J Hughes 'The philosophy of intellectual property' (1988) 77 *Geo. L. J.* 287 288.

5 Spector (n 4) 270.

6 The same is true of English copyright law, which formed the foundation of South African and continues to be influenced by it.

7 Act 98 of 1978.

8 Intellectual Property Laws Amendment Act 38 of 1997. Although the Act was amended in 2002 (Copyright Amendment Act 9 of 2002), these amendments were largely of a technical nature relating to royalties.

9 http://www.ipo.gov.uk/pro-policy/policy-information/policy-notices/policy-notices-copyrightworks.htm.

10 R Deazley *Rethinking Copyright: History, Theory, Language* (2006) 137.

they see fit.[11] Why should they not be able to use their computers to download a computer program or music? From their perspective, there is no physical – and, therefore, wrongful – interference with another person's liberty or property.[12] These attitudes towards intellectual property appear to be wholly at odds with how the law seeks to regulate intellectual property, and there is a general ignorance, or misperception, concerning the purpose of intellectual property protection. This misperception is so prevalent that we have seen the emergence of political parties in various countries – the Pirate Parties – with anti-intellectual property political manifestos. There is probably only one other area of law that has involved such issue-based political campaigning in recent years: environmental law.

It has, therefore, become increasingly important to be able to justify the existence of intellectual property protection. If the justifications are not cogent and coherent, a good case can be made for a claim that, from the perspective of most members in society (or according to the *mores* of the next generation), intellectual property protection simply amounts to an unnecessary restriction on human activity. Accordingly, a sound justification is necessary to ensure the continued relevance of the various forms of protection and the types of works protected. Any bad apples in the intellectual-property basket should be removed, if the justification for their continued protection is found to be wanting; their continued protection, arguably, weakens the case of those works which require legal protection because it undermines the case for intellectual property law, generally. If copyright, and other forms of intellectual property, are to remain relevant, they have to stand up to scrutiny, and be able to deal with technological challenges, which can only be the case if they are placed on sound theoretical foundations.[13]

The second reason for seeking a sound theoretical justification for copyright is its importance to the determination of the appropriate scope (and the term) of copyright protection. If copyright law lacks a sound theoretical foundation against which the substantive provisions of copyright law can be assessed and analysed, there is a distinct danger that the law will be arbitrary. Not only should a justification for copyright protection provide an account for the grant of property rights, it should also provide a sound basis for copyrirussellght doctrine like the idea-expression dichotomy and the fair-dealing exceptions. In addition, analysing vexing issues concerning the development of copyright in the face of emerging technologies is best done if there is clarity on the purpose of copyright law, otherwise the development of copyright law will, arguably, be *ad hoc* and unpredictable.

11 L Bently & B Sherman *Intellectual Property Law* 3ed (2009) 34-5; and TG Palmer 'Are patents and copyrights morally justified? The philosophy of property rights and ideal objects' (1990) 13 *Harv J L & Pub Pol'y* 817 ('Palmer') 855.

12 WJ Gordon 'An inquiry into the merits of copyright: the challenges of consistency, consent, and encouragement theory' (1989) 41 *Stan L Rev* 1343 1345-6; and RA Posner 'Intellectual property: the law and economics approach' (2005) 19 *Journal of Economic Perspectives* 57 64.

13 Spector (n 4) 270.

Thus, a sound rationale for copyright protection should not merely serve to provide a basis for such protection, but should also be able to provide a basis for determining the scope (and the term) of copyright protection. However, as will become apparent from the discussion which follows, a coherent justification protection of intellectual property, such as copyright, is a 'formidable task,'[14] and 'not so obviously or easily justified as many people think'.[15] Despite the daunting prospect of the task, it is submitted that a sound justification for copyright protection exists, and that it is primarily an economic justification. The economic justification for copyright protection will be detailed in the second part of this two-part article on the justifications for copyright law.[16]

In the first part of this article, we will consider the moral justifications for copyright protection, and why they prove to be unconvincing justifications.

2. Moral Justifications

When moral or ethical justifications for copyright are proffered, they almost invariably fall into three categories: (1) those based on the natural rights of an author to the product of his creation (natural rights theory), or that the property right is an author's 'just desert' for his labour (reward theory); (2) those which require the extension of a property right to an author in respect of his creation because it serves to protect his personality (personality theory); and, (3) those which consider copyright as producing socially beneficial effects (utilitarian theory). The first of these justifications – the natural rights theory and the reward theory – will collectively be referred to as the 'labour-based' justifications, for reasons that will soon become clear.

While the the labour-based justifications are essentially based on Lockean notions of occupancy and labour as the foundation for a property system, the personality theory is based on Hegelian and Kantian notions of personality, which were favoured in civil-law jurisdictions. In contrast, the utilitarian theory (as is the case with economic justification) is distinctly more instrumentalist as copyright is principally viewed as the means by which a desired social goal is realised.[17]

Coherent moral justifications for protecting intellectual property, and copyright in particular, are not so easy to formulate. It is submitted that these moral arguments, which, for example, seek to base copyright protection on labour-based arguments (by appeals to the natural rights theory or the reward theory), or to justify protection on the basis that the works protected are an extension of their author's personality, while intuitively appealing, are largely unconvincing.[18]

14 EC Hettinger 'Justifying intellectual property' (1989) 18 *Philosophy and Public Affairs* 31 51.

15 SE Trosow 'The illusive search for justificatory theories: copyright, commodification and capital' (2003) 16 *Can J L & Juris* 217 245, quoting Hettinger (n 14) 39-40.

16 The second part of this article will also consider the utilitarian justification for copyright protection, and why it forms an inadequate basis for such protection.

17 Deazley (n 10) 138; May 7.

18 S Breyer 'Copyright: A Rejoinder' (1972) 20 *UCLA L. Rev* 75 75.

2.1 Natural rights theory

It is important to note at the outset that, despite the common employment of John Locke's philosophy in the context of justifying intellectual property, he made no specific reference to any aspect of intellectual property.[19] At the time Locke wrote, the issue of copyright for authors was not yet a topical matter. It was only later that his works were applied to the subject of intellectual property.[20]

Locke's conception of property was based on the ownership of land.[21] Through the application of labour an individual is able to appropriate that which was formerly in the common pool of resources, and exclude the rights of others to those resources.[22] Thus, the key factor which must be established when determining if someone is entitled to claim ownership is whether they have expended labour on the land claimed to the extent that the land can be said to be transformed as a consequence of the labour expended.[23] The notion that through expending labour one is entitled to claim ownership of the fruits of one's labour becomes a general principle: 'everyman has private property in the produce of his own labour – or, at least, should have'.[24]

The right to property is more significant: there are some rights, like the right to own property, which are natural rights and precede the existence of a government or law.[25] However, the natural rights which we enjoy, such as the right to propery, are often exercised in a way which infringes the rights of others. This results in conflicts, and prevents humans from enjoying their natural rights. It is because of this that humans chose to enter into a social contract to form a government, in order to enjoy their natural rights.[26] In fact, the purpose of government, as constituted by the social contract, is to protect life, liberty and property; it should seek to maximise the well-being of its citizens, and not act to propagate any particular form of ideology.[27] Property, thus, plays the central role in justifying the existence of government, and a government's actions in relation to property determines whether it (and its laws) remains faithful to the social contract by which it was created.[28] A government's principal role, and the function of law, is to protect property.[29]

19 Hurt & Schuchman (n 1) 422.
20 Palmer (n 11) 818.
21 Palmer (n 11) 832.
22 J Locke *The Second Treatise of Government and A Letter Concerning Toleration* (2002) ('Locke') 13; SE Sterk 'Rhetoric and Reality in Copyright Law' (1996) 94 *Mich. L. Rev.* 1197 1234; and Trosow (n 15) 224.
23 Palmer (n 11) 833-4.
24 B Russell *History of Western Philosophy* (2005) 577.
25 Locke (n 22) 12; I Ward *Introduction to Critical Legal Theory* 2ed (2004) 101.
26 Locke (n 22) 21; P Strathern *The Essential Locke* (2003) 29; Russell (n 24) 568-70 and 584; and Ward (n 24) 84.
27 Strathern (n 26) 30; and Ward (n 25) 82-3, 101.
28 Russell (n 24) 571; and Ward (n 25) 101.
29 Ward (n 25) 101. The state's purpose of protecting the property of its citizens is arguably given disproportionate importance; someone may be incarcerated and physically punished, but it is not permissible for the state to deprive him of his property. When it comes to taxation, he justifies it on the basis of it being authorised by the majority (Russell (n 24) 575).

At a more fundamental level, Locke's conception of property was concerned with individual liberty, and the role of property ownership served to increase individual liberty.[30] According to Locke, the law of nature accords each person freedom, and that is why the right to life and the right to liberty are natural rights.[31] The Lockean theory of property rights is premised on an individual's alleged natural right to personal liberty; the contention is that a person owns his labour, which is an aspect of personal liberty, and to deny a person the product of his labour (which it is claimed becomes an integral part of the individual)[32] amounts to a denial of his labour, and, consequently, his personal liberty.[33] It is not just the increase in value through the labour expended that justifies the claim to ownership, it is because the object becomes an inseparable part of our person that entitles us to claim ownership.[34] His argument for private property is neatly paraphrased as follows by Hettinger:[35]

> A person owns her body and hence she owns what it does, namely, its labor. A person's labor and its product are inseparable, and so ownership of one can be secured only by owning the other. Hence, if a person is to own her body and thus its labor, she must also own what she joins her labor with – namely, the product of her labor.

From the above, an impression may be created that Locke advocated, or condoned, the avaricious appropriation of resources. However, other than the requirement that sufficient labour must be mixed with a common resource for ownership to vest, Locke required that two further conditions, or provisos, needed to be satisfied before ownership could be acquired: first, the appropriation of ownership must not result in a loss to others as there should still be sufficient resources available for others to use (the 'enough-and-as-good,' or the 'no-loss-to-others,' requirement);[36] and, second, that which is appropriated must be no more than that which is necessary (the 'no-waste' requirement).[37] The standard for determining whether a loss is suffered by others according to the enough-and-as-good requirement is human happiness or well-being, which 'is the sole standard of intrinsic value.'[38] This requirement is substantially similar to the economic measurement of Pareto improvements, used to determine efficiency.[39] If these provisos are satisfied, there can be no objection to the appropriation of ownership based on labour. The existence of these provisos has meant that Locke's political philosophy is employed to

30 Palmer (n 11) 835-6.
31 Russell (n 24) 569.
32 Palmer (n 11) 833.
33 Locke (n 22) 12-3; Hettinger (n 14) 37.
34 Palmer (n 11) 833.
35 Hettinger (n 14) 36-7.
36 Locke (n 22) 13; Hettinger (n 14) 44; AD Moore 'A Lockean theory of intellectual property' (1997) 21 *Hamline L. Rev.* 65 78; Palmer (n 11) 831; Trosow (n 15) 224.
37 Locke (n 22) 17; Hettinger (n 14) 44; Hughes (n 4) 298; Russell (n 24) 577; and Trosow (n 15) 224.
38 Moore (n 36) 79-80.
39 If resources can be allocated so as to make at least one person better off and no one else worse off, then such a change is Pareto superior. Accordingly, if any change from a given allocation would make at least one person worse off, that allocation is Pareto optimal. See JL Harrison *Law and Economics in a Nutshell* (1995) 32.

justify actions by both those who are on the left and right of the political spectrum. A selective extract of Locke's views on property can be used to justify individual avarice and capitalism, but it can also be used to adopt a more socialistic outlook.[40]

Despite the fact that Locke made no specific reference to claims relating to intellectual property, it is not hard to see why his arguments have found a receptive audience among the advocates of intellectual property.[41] Intellectual property, such as copyright, can be more intuitively, and, arguably, plausibly justified in accordance with his political philosophy than claims to land.[42] Unlike the appropriation of land, intellectual property, and copyright, in particular, does not deprive others of anything as the product of the creative endeavour would not exist but for the labour expended by its author. If it is the case that nothing could so clearly be one's own property as one's labour, then nothing can more clearly be the product of one's labour than that which he has exclusively created.[43] Hettinger expresses this proposition as follows:[44]

> What a person produces with her own intelligence, effort, and perseverance ought to belong to her and to no one else. "Why is it mine? Well, it's mine because I made it, that's why. It wouldn't have existed but for me.

As copyright does not protect the facts or ideas on which a copyright work is based, it also seems to satisfy Locke's provisos, as nothing can be said to be removed from the common pool of resources – 'the common of ideas seems inexhaustible.'[45] Others can freely create as there is no loss in resources, so no one is worse off. In fact, a copyright work may actually contribute ideas, which others are again free to use. After all, ideas are created by individuals, not society.[46]

Simply stated, the natural rights theory of copyright is based on the moral notion that an author is entitled to copyright protection because it protects the 'fruits of his labours': something which he has a natural, or inherent, right to. An author's creation is his property, and copyright simply vindicates the author's natural rights and prevents the unauthorised exploitation of the author's work.[47] The rights which copyright afford the author are, thus, not a privilege or some type of reward. Economic considerations, such as providing authors with incentives to create works, are, at best, secondary considerations.[48]

40 Russell (n 24) 576.
41 Sterk (n 22) 1235.
42 Hughes (n 4) 365.
43 Hurt & Schuchman (n 1) 422; and Gordon (n 12) 1388-9.
44 Hettinger (n 14) 36.
45 Hughes (n 4) 300 and 365; and Moore (n 36) 82.
46 Palmer (n 24) 823-4.
47 HB Abrams 'The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright' (1983) 29 *Wayne L. Rev.* 1119 1122; and BW Tyerman 'The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer' (1974) 21 *Copyright L. Symp.* 1 1.
48 Abrams (n 47) 1122.

Criticism of the natural rights theory

The claim that an author should have a property right over his creation has been stated as being 'an intuitive, and unanalyzed feeling'.[49] Critics of the application of the Lockean conception of property to intellectual property would argue that, although it appears to provide a seemingly more convincing justification than that for the ownership of land, it does not necessarily justify the grant of such rights. If anything, Locke's theory was a distinctly instrumentalist argument: common ownership is always the preferred model, unless – because of the scarcity of a resource, like land – it does not result in the optimal use of resources.[50] When it comes to intangible, intellectual property, where we do not have concerns about scarce, exhaustible resources, and, the prospect of conflict is, thus, not significant – the analogy to land ownership is inappropriate – and that the default position should be common ownership.[51]

Besides the issues raised by a system which seeks to base ownership on labour, which will be addressed shortly, the very idea that a person is entitled to the product of his labour may be regarded as morally questionable. Because of differing abilities between human beings, the same amount of effort expended does not necessarily result in equivalent levels of output. If labour is the basis of ownership, we then by implication also accept that there will be disparities of wealth on the basis of talent or ability. Critics, like John Rawls, argue that 'the distribution of talents is arbitrary from a moral point of view and should not furnish a basis for the distribution of social resources'.[52] Rawls does not deny that talents should be rewarded. Talents should be rewarded provided they are used optimally to benefit society. Talented individuals will, thus, be rewarded if they enhance their abilities through education, and so direct their talents to vocations to which society attaches a premium (and which society signals through the market in the form of higher remuneration levels in such vocations) to reflect the need for such activities. Thus, people should not being rewarded for merely having had the good fortune of being talented but because they are using their talents to best serve society. This is therefore a distinctly instrumentalist approach to property and remuneration.[53]

The idea that labour should form the basis of ownership raises a number of issues that are not easily resolved. First, how does one determine whether an appropriate level of effort has been expended to justify the grant of ownership? When can it be said that the amount of labour expended is so trifling that no property right had arisen? If a person is particularly incompetent and expends an extraordinary amount of labour doing a relatively menial task, does that justify him having property rights in the product? How should different

49 S Breyer 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 *Harv. L. Rev.* 281 288.

50 Trosow (n 15) 225-6.

51 Breyer (n 49) 288-9; and Sterk (n 22) 1235.

52 Sterk (n 22) 1237.

53 Sterk (n 22) 1236-7.

contributions be measured? Can lesser, or constituent, contributions simply be appropriated by the owner of the larger work? Second, Locke's suggestion that most of the value of a commodity could be ascribed to the labour which was expended on it is not tenable in respect of most natural resources, which was the main focus of his work.[54] The problem is no less thorny in the case of intellectual creations; they are the result of an incremental process which builds on what has preceded it.[55] It is not possible to establish an accurate baseline for the contribution of the last author claiming ownership.[56] It cannot, therefore, be equitable, or justified, to allow the person who may have merely put the finishing touches to an intellectual creation, or who simply pulled the various conceptual strands together, to appropriate the full benefit of such creation by claiming property rights therein.[57]

Arguments that the producer of the final product may have been the person that created something with significant value – and, therefore, something of greater value than its constituent parts – also does not lead to the necessary conclusion that he should be entitled to appropriate its market value. The market value of a product is not simply a consequence of the labour expended by its creator, and, therefore, labour cannot be the sole basis for allowing the creator of a product to appropriate such value.[58] The market value of a product depends on a range of social factors such as the behaviour of other producers, demand, the disposable income of consumers, and the legal environment. In any event, the market price of a product serves as a signal to influence future behaviour of other potential producers rather than being based on the value attributable to efforts of its producer.[59]

Of course, the retort at this point will probably be that the law has to deal with such distinctions of materiality and value in a range of subjects, so these are not issues which should serve to undermine the Lockean basis of property. The problem is that to argue in such a manner misses the essence of Locke's theory. According to Locke, property rights, which, for present purposes will be assumed to include copyright, is not a privilege or some type of reward by the state (or its institutions). As indicated above, there are some rights, like the right to own property, which are natural (or divine) rights and precede the existence of a government or law. It is, therfore, not for the law to determine

54 Hettinger (n 14) 37.

55 E Harison *Intellectual Property Rights, Innovation and Software Technologies: The Economics of Monopoly Rights and Knowledge Disclosure* 1ed (2008) 22; Posner (n 12) 60.

56 Trosow (n 15) 225.

57 Hettinger (n 14) 38-9; GS Lunney 'Re-examining copyright's incentive-access paradigm' (1996) 49 *Vand. L. Rev.* 483 572-3 and 631-2.

58 It is, of course, the case that South African copyright law simply requires that an author should have expended sufficient – more than trivial – skill, judgment or labour in creating a work before it will be considered as original, and, therefore, eligible for protection (*Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) 473). As already indicated, the purpose of the article is not to examine the current black-letter law concerning copyright protection, but rather to determine the conceptual foundations for such protection. It is hoped that in future, the suggested conceptual foundation of copyright will be used in the analysis of the substantive law relating to copyright protection.

59 Hettinger (n 14) 39; and Lunney (n 57) 572-5.

when we own property, or to define the extent of our ownership. Economic or practical considerations, such as providing authors with incentives to create works, are, at best, secondary considerations.[60] They are not the basis on which property can be, or should be, recognised. Moreover, because of the centrality of property to Locke's constitutional order, property (which formed the basis for a qualified franchise)[61] was not viewed as something meant to be considered in economic terms – as having a market value. In fact, because property ownership determined a person's political rights, '[i]t was inconceivable to Locke that anyone should want to alienate property, unless forced to do so by adverse economic conditions.'[62] However, today, property, such as copyright, is almost exclusively considered in economic terms and is the cornerstone of the market economy. Accordingly, the Lockean conception of property cannot serve as the basis for modern copyright protection.

More fundamentally, there is no general principle in law that the expending of labour creates a property right in that which has been created, or that such labour should be rewarded.[63] While we can readily accept that each person should own their own body, there is no clear case for asserting that a person should similarly be given ownership in things they have created.[64] There are numerous instances of intangible, and valuable, creations not protected in a manner similar to intellectual property. For example, the discovery of a new mathematical technique, or the establishment of a large business (guaranteed to draw a large number of consumers to an area), may provide material benefits for others, but we do not permit the discoverer of the mathematical technique or the owner of the business to extract any form of compensation from others who benefit from their efforts. There is no principled basis on which these intangible benefits from which others benefit – also called positive externalities in economic literature – can be distinguished from those which the law does protect, like the specified works under copyright law.[65] It is not simply a matter of the ease with which others can be charged for these benefits, but whether any rights to charge for such benefits should be recognised.[66]

In addition, the Lockean property theory also fails to adequately account for the basis of ownership in a post-industrial revolution society in which production became organised and owned by corporations, and where products which enjoy copyright protection, like software, often involve numerous impersonal contributions.[67]

60 Abrams (n 47) 1122.
61 Russell (n 24) 573. Besides the poor, women were also excluded.
62 Ward (25) 102-3.
63 Breyer (n 49) 288-9; Hurt & Schuchman (n 1) 423.
64 Gordon (n 12) 1388-9.
65 The concept of 'externalities' will be considered in the second part of this article.
66 Hurt & Schuchman (n 1) 423.
67 Russell (n 24) 578 and 581-2.

2.2 Reward theory

As mentioned above, the other labour-based theory of property is the reward theory, which is based on the normative proposition (rather than on an instrumentalist basis) that a property right ought to be granted to an author as the 'just desert' for his labour.[68] The reward theory tends to adopt a rather sentimental view of the author of a work. Labour, by its nature, is considered as something which is unpleasant and best avoided, not something that a person will ordinarily do in preference to enjoying leisure time. An author is regarded as a self-sacrificing genius, more concerned with creating a work, which contributes to society, rather than being concerned with receiving commensurate compensation for such contribution.[69] Thus, an author who expends labour to create something socially beneficial, is morally entitled to own it, not because it would serve as an incentive to engage in creative activity but as a form of compensation for their efforts.[70] The reward theory, therefore, encapsulates an element of distributive justice: there is the idea that the creator should be able to recoup some of the benefit of his contribution to society, which is what the award of property rights seeks to achieve.[71]

The notion that authors deserve to be rewarded also serves an ancillary political purpose. Prosperous and powerful members of society (who also, invariably, shape the legal institutions in society) seek to distinguish themselves from those less fortunate by ascribing their higher levels of remuneration to market rewards for the costly investment – sums spent and the opportunity costs – they have made. To perpetuate the notion of that they deserve their good fortune, and to be consistent, authors (who, generally, have similar educational and 'intelligence' levels to those of their prosperous and powerful counterparts) are also considered to be deserving of protection. Thus, these prosperous and powerful individuals are essentially protecting their own interests by promoting the interests of authors.[72]

Criticism of the reward theory

Some of the above criticisms relating to the natural rights theory are equally applicable to the reward theory, which asserts that, from a normative or moral perspective (rather than on an instrumentalist basis), the grant of property rights is the just desert of an author for the labour he has expended in the creation of a work, and by which society benefits. The reward theory, once again, raises problems of how to measure the effort expended and the contribution made, because the reward should presumably have to be commensurate with the effort and the contribution. What level of reward is just in the case of inefficient, but honest, effort? Should effort be exalted at the expense of its social contribution? There is, at present, no objective way of

68 Hughes (n 4) 288 and 296-7; and Sterk (n 22) 1197.
69 Sterk (n 22) 1197.
70 WR Cornish *Intellectual Property* 3ed (1996) 325; Hughes (n 4) 302-5; and Sterk (n 22) 1197.
71 Sterk (n 22) 1234.
72 Sterk (n 22) 1247-8.

measuring, and comparing, the efforts of two people which can be used as a basis for the reward theory.[73]

The reward theory can only consider voluntary past action as the basis for reward, as justifications in terms of the incentive theory are necessarily consequentialist in nature.[74] Suggestions that the reward must be based on the market value of the object produced, are subject to the same criticisms as those discussed above, namely, that the market value of a product is a socially-created phenomenon which depends on numerous factors, which has very little to do with the labour expended on its production. Once again, the submission is not that talent should not be rewarded but simply that what should be rewarded is not the talent *per se* but the socially beneficial, optimal use of such talents.[75]

More fundamentally, if reward is the proper basis of ownership, it is rather callous and dismissive for the law to simply leave authors exposed to the vagaries of the market for their reward.[76] The market does not assess the intrinsic value or contribution of a work to society: it simply gives signals about the demand for a work at a given price.[77] There may be other, more effective, ways to compensate authors for their efforts such as prizes, tax reliefs or financial support.[78] The reward theory is, to some extent, also anachronistic in relation to the production methods of new types of copyright work, as well as the commercial reality, as it still conjures up images of the beneficiaries of copyright protection being stoic authors, struggling to make ends meet. However, in many cases the beneficiaries of copyright protection 'are not struggling authors but faceless corporate assignees well-versed in the ways of the business world'.[79]

2.3 Conclusion on the labour-based theories

The fact that copyright doctrine refuses protection for ideas is incongruous with the notion that the justification for copyright protection is based on an author's natural rights or reward for creation. It is indeed paradoxical that the more socially valuable scientific or functional works, despite the effort which may have been expended in their creation, are denied any significant form of protection or provide any great reward for their creators by way of copyright protection. For example, the inventor of a new search algorithm, which allows for more efficient website searches, would not be able to prevent others from using the idea contained within it, once it has been disclosed. All the creator would be entitled to is – extremely thin – copyright protection for his particular description of the algorithm, but not the particular method

73 Palmer (n 11) 834; PG Spivak 'Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software' (1988) 35 *UCLA L. Rev.* 723 760.
74 Hettinger (n 14) 42.
75 Sterk (n 22) 1236-7.
76 Sterk (n 22) 1237-8.
77 Sterk (n 22) 1247-9.
78 Hettinger (n 14) 41; Hurt & Schuchman (n 1) 424; Sterk (n 22) 1237-8.
79 Sterk (n 22) 1198.

or other explanations of the algorithm. On the other hand, the author of a fictitious work, arguably, receives greater protection.

2.4 Personality theory

Unlike Locke, the German Idealists like Kant and Hegel, made specific reference to the idea of property rights in intangible objects in their writings. Hegel, for example, saw no need to justify intellectual property by analogy to tangible property. Intellectual property, once it has been expressed, is as real as any tangible property. Property *per se* is important in Hegel's system.[80] The personality theory, attributed most notably to Hegel, considers the extension of intellectual property rights to an author in his intellectual creations as the means by which the author's personal identity can be protected. Property rights, thus, serve to realise and augment the development of individual personality and liberty,[81] and they are not important because of their economic value, although the economic value is acknowledged.[82] Kant similarly defended copyright on the basis that an author's work is an extension of his personality, and not simply something of economic value.[83]

For Hegel, personal identity is established only when it is recognised by others, and for this to happen one's personality needs to manifest itself externally.[84] The protection of property establishes the environment in which persons can establish their personal identities through external manifestations, without fear of appropriation by others.[85] If other members in society accept an individual's claim to property, they are recognising the individual as a person.[86] Because property is essential to the development of the human spirit, it needs to be protected by the state.[87] Unlike Locke, Hegel did not view the state – or, more likely, the Prussian monarchy – as an institution which fetters individual freedom. The restrictions imposed by the state made citizens feel more secure, and these restrictions are the way in which individual freedom would be realised.[88] There is no natural right to property; property is simply a social construct.[89] For Hegel, individual freedom is the ultimate goal, and society and the state have to facilitate the achievement of that goal.[90]

The notion that property fosters personal development does have intuitive appeal, particularly in the case of intellectual property. After all, what could seemingly say more about our personalities than the creations produced by our mental faculties?[91] Our creations may be considered to be the most revealing

80 Drahos (n 2) 81; and Hughes (n 4) 337-8.
81 Hughes (n 4) 330; and Palmer (n 11) 837.
82 Palmer (n 11) 841.
83 Hurt & Schuchman (n 1) 423.
84 Hughes (n 4) 331.
85 Hughes (n 4) 333.
86 Hughes (n 4) 333-4 and 343.
87 Drahos (n 2) 89.
88 Drahos (n 2) 83.
89 May (n 3) 26.
90 Drahos (n 2) 78.
91 Hughes (n 4) 330.

way of showing our personalities to others, and can serve to distinguish us as individuals. In this sense, they can be said to embody the personality of the creator.[92] Because of the importance of intellectual property to personal development and identity, intellectual property, such as copyright, unlike other property, cannot be alienated in the same manner as other property.[93] It would be incorrect to simply regard the intellectual creations as *products*; for some people their works are the very embodiment of their personalities.[94]

Under the Hegelian conception of property, ownership over something is acquired through a combination of a subjective relationship (occupation), and recognition by others. Because property starts as a subjective act of the will, provided it is recognised by others, there is no limitation as to what can be regarded as property, tangible or intangible property.[95]

As the subjective act of the will depends on the recognition by others, property is seen as an aspect of personality. Property is as much a part of a person as any other aspect of his personality; it is the embodiment of personality.[96] Physical acts like possession, labour or use are merely indicative that the requirement of occupation has been satisfied; occupation actually arises from the subjective will to occupy the object.[97]

The idea that intellectual creations are the expression of their author's individuality, has, of course, greatly influenced the recognition of authors' moral rights – such as the paternity (or attribution) right and the integrity right – in modern copyright law, as consequence of its strong influence on the historical development of copyright in European legal systems, which emphasised the non-economic, moral interests of authors.[98] In order to preserve the author's non-economic interests, Hegel drew a distinction between intellectual property, such as copyright, and other property. Intellectual property cannot be alienated in the same manner as other property.[99] He considered intellectual property as a 'universal' aspect of an individual, alienation of which would be tantamount to slavery or suicide. Intellectual objects are considered to be continuing expressions of their creator.[100]

French law recognises two additional moral rights: the right of disclosure and the right of retraction. The disclosure right allows an author to publish their works in any form desired, and the retraction right allows an author to withdraw any previously planned publication.[101] These rights are said to help prevent the misrepresentation, or unauthorised dissemination, of an author's work. Kant regarded the communication of the written work to be the

92 SM McJohn 'The paradoxes of free software' (2000) 9 *Geo. Mason L Rev* 25 45-6.
93 Hughes (n 4) 350; and Sterk (n 22) 1242.
94 Sterk (n 22) 1239.
95 Drahos (n 2) 78-9.
96 Drahos (n 2) 79.
97 Hughes (n 4) 334-5; and May (n 3) 27.
98 Hurt & Schuchman (n 1) 423; and Palmer (n 11) 820.
99 Hughes (n 4) 350; and Sterk (n 22) 1242.
100 Hughes (n 4) 348.
101 Hurt & Schuchman (n 1) 424; Moore (n 36) 89; Palmer (n 11) 841.

prerogative of the author, and any deprivation of such rights was an unjustified constraint on the author's liberty.[102]

An author's moral rights assist the author to assert the necessary rights to ensure that he gets the necessary recognition and that his work is accurately represented. As a result of attempts to harmonise copyright law internationally, countries following the Anglo-American tradition in copyright law have been compelled to recognise authors' moral rights, or aspects thereof.[103] The significant point about moral rights is that they remain vested in the author irrespective of whether copyright in the work has been assigned.[104]

Criticism of the personality theory

As with the labour-based theories, the sufficiency of an act before it can qualify as an expression of individuality (if it is to be recognised by others), and, therefore, entitled to copyright protection, is not clear. It is also not clear whether any type of effort (such as the aggregation of rather mundane information like compilations, which are currently protected by copyright) should qualify as protectable expressions of personality.[105] Rather unhelpfully, Hegel considered the substantive content of property ownership to be unimportant; all that mattered was that property law should facilitate relations between people.[106]

In fact, Hegel did not seek to justify property in any sense other that being an instrument for individual development,[107] and his theory cannot sensibly be extended to cover modern production methods for the creation of intellectual property. The personality theory cannot serve as justification for works created by corporate entities using employees to perform menial or formulaic tasks. It fails to account for the protection of works which cannot be said to embody personal expression.[108] The law of intellectual property does not distinguish between various categories of works on the basis that some represent greater expressions of personality, and, thus, being more deserving of protection.[109] Also, if Hegel's characterisation of property is accepted, there is no basis for the current practice of restricting the categories of protected work; presumably, any types of work should be protected, provided that it

102 Breyer (n 49) 290.

103 This does not mean that the moral rights are accorded the same importance in countries following the Anglo-American tradition, as there is still a noticeable difference of treatment; the historical distinctions still appear to inform the substantive positions in the Civilian and Anglo-American jurisdictions. For example, in the UK, the moral rights, such as the paternity right, have been qualified and excluded to such an extent that critics have claimed its implementation of its obligations has been 'cynical, or at least half-hearted'. See Bently & Sherman (n 11) 242.

104 While these rights can be negated under South African and English law by obtaining a waiver of these rights from the author, a number of European countries, including France do not permit such waivers (Hurt & Schuchman (n 1) 424).

105 Sterk (n 22) 1239-41.

106 Sterk (n 22) 1239-41.

107 Drahos (n 2) 80.

108 Hughes (n 4) 365.

109 Drahos (n 2) 79-80; Hughes (n 4) 365.

expresses the personality of the individual.[110] Why does currently unprotected matter such as mathematical techniques or a new commercial concept not embody the personalities of their authors?

The fact that the personality theory considers intellectual property, like copyright, as being an aspect of the author's personality raises difficulties when it comes its alienability as property.[111] If such rights cannot be alienated, it, 'in an Anglo-American legal sense, [is] not property at all'.[112] The personality-based justifications become even more problematic to accept after the death of the author: if creations are an aspect of the author's personality, they cannot be considered to be property after the author's death. It is not universally accepted that the moral rights of an author extend beyond the life of the author, so why should the property rights, which is also said to be based on personality, be any different?[113] For example, in South Africa, as moral rights are regarded as being akin to common-law personality rights protecting honour or reputation, they can only be enforced by the author, and will, thus, terminate on the death or termination of the author.[114] Thus, the personality theory fails to provide adequate justification for modern intellectual property, as is the case with copyright, which continues to exist after the death of the author.[115] The conception of a work as the inalienable expression of the individual author is also not capable of accounting for the basis of ownership by employers in works created by their employees during the course of their employment, which is common in copyright legislation.[116]

More fundamentally, does the personality theory conform with the ontological nature – namely, the nature or existence – of intellectual creations, and is it true that an individual's work reflects his individuality? If anything, something that has been produced by an individual can only provide the briefest insight to the individual's personality. Is creation not simply a by-product of our environment, and is it not the case that what has been created takes on an independent existence, and how such work is perceived says more about the person perceiving the work, rather than its creator?[117]

As will be indicated in the second part of this article, moral rights could also more plausibly be justified on a utilitarian, or economic, basis. Furthermore, from the author's perspective, the types of interests which moral rights protect could, in any event, been protected under the common law, using contract or delict. There was no need to introduce copyright to protect these interests.[118]

110 Sterk (n 22) 1244.

111 Hughes (n 4) 365.

112 M Kretschmer & F Kawohl *The History and Philosophy of Copyright* 2ed (2004) Edinburgh University Press 33.

113 Sterk (n 22) 1241-2.

114 OH Dean *Handbook on South African Copyright Law* 14ed (2012) 1-111 and 1-112. The position is different in the United Kingdom, where the term of the moral rights is, with one exception, the same as that of the copyright (s 86(1) Copyright, Designs and Patents Act, 1988).

115 Sterk (n 22) 1241-2.

116 For example, s 21*(d)* of the Copyright Act 98 of 1978.

117 Palmer (n 11) 843.

118 Breyer (n 49) 291; and Hurt & Schuchman (n 1) 424.

3. Conclusion about the Moral Justifications

What both the natural rights theorists and personality theorists had in common was their desire to increase individual liberty. Whereas Locke emphasised the importance of property for an individual's physical needs and safety, the personality theorists focused on the importance of property to the development of intellectual potential. In this sense, their conceptions of property rights were, thus, arguably, instrumental in that it served to further that goal.[119]

In general, the notion of the individual, creative author, which is the basis for much of the moral justifications, is increasingly looking more tenuous. The types of work which copyright now protects, such as sound recordings, broadcasts, program-carrying signals, and published editions, serve to protect the financial invest in such works, rather than individual creativity.[120] In fact, the history of the development of copyright law in England[121] also shows that it did not evolve from any sort of moral or philosophical basis concerning an author's natural rights, labour, or personality rights, but that it was was 'distinctly instrumental';[122] it served the interests of the publishing firms.

Of course, the mere fact that the initial development of copyright was instrumental should not be the basis for dismissing it as an institution, as there may be a sound rationale for its existence. It also does not mean that a theoretical foundation is unimportant. On the contrary, if we are periodically required to extend copyright protection to new types of works, and need to adapt it to deal with the challenges posed by new technologies, we should be clear about why we consider it to be appropriate, and what purpose it serves. Only by understanding 'the fundamental philosophic perception of the nature of copyright and its underlying purpose' will we be able to respond to new technological developments on a principled and consistent basis.[123] An inherent problem with moral justifications for legal principles is that they tend to be a rather blunt tool when seeking to address novel or specific issues. Moral arguments, by their nature, tend to involve incommensurable points of view, and arriving at a consensus where there are conflicting moral considerations is difficult, and possibly arbitrary. While it is not suggested that the law does not promote, or is not informed by, moral notions, because of the aforementioned difficulty, it is preferable if there is a more sophisticated justification for a legal institution, such as copyright.

As the moral arguments fail to provide an adequate justification for modern copyright law, a consideration of the utilitarian and economic justifications for copyright protection is necessary, which form the basis of the second part of this article.

119 Palmer (n 11) 835-6.

120 J Davis *Intellectual Property Law* 3ed (2008) 3.

121 As will become clear below, the reason for specific reference to the development of English copyright law is the fact that England, with the passing of the Statute of Anne (1710), was the first country with a 'modern' copyright law in that it granted general copyright protection to authors, and because our copyright law is almost wholly derived from English law.

122 Drahos (n 2) 14.

123 Abrams (n 47) 1186-7.