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Intellectual Property: A Universal Human Right?

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I. Introduction

Given the ever-widening acceptance of a *right* to protection of intellectual property (IP), one might assume that there is at least implicitly an equally broad and agreed upon rationale or justification for this right. This, however, is not the case. Among those who write on the subject, there are two dominant, and not at all consistent, lines of reasoning. John Locke's labor theory of property, one of the foundations of traditional property rights in the modern world, is a logical starting point for attempts to justify intellectual property rights (IPR), that is, the protection of exclusive ownership in intangible objects that acquire their value mainly from creative efforts. ¹ The second justification for IPR is derived from a traditional doctrine of [End Page 156] utilitarian inference, whereby the right to property is granted based on maximizing the benefits society can obtain. ² Although there are zones of overlap between these two lines of reasoning, even if they are taken together and their zones of disagreement ignored, they do not constitute an adequate or coherent prescriptive theory for the recognition of IP rights. Without a logical foundation for justifying IPR, their consideration as a basic human right seems untenable. Thus, this article presents an alternative argument for the justification of IPR and its manifestation as a human right.

Although it is clear that the most frequently offered justifications for a right to IP are anchored in relatively modern theoretical arguments, there are substantially older historical precedents for this policy. Intellectual property issues date to the Chinese Zhou dynasty (1122 BC), when concern arose for commodity identification. ³ By AD 835, the Wenzong Emperor barred the unauthorized reproduction of documents, calendars, and other items related to prognostication. ⁴ In the Western world, IPR in the form of patents came into existence around 1500 in Venice and spread to most of the major European powers by 1550, ⁵ more than a century before John Locke's work on private property. Gradually,

governments recognized rights that owners had to their ideas. Subsequently, states adapted IPR to accommodate the increasingly expansive growth of technological innovations. In the modern era, the claim to IPR has evolved from a state-granted right to a universal human right without substantial scrutiny.

This article proposes an alternative view of IPR protection: that not all IPR should be justified. Because the state's responsibility to provide for people's physical welfare takes precedence over an individual's right to profit, the article makes two explicit arguments. The first is that there exists a hierarchy of intellectual objects based on a generally perceived notion of physical welfare. The second is that when discussing IPR, the emphasis must not be exclusively on the rights of producers; IPR must also be examined from the perspective of consumers and the national welfare. Both of these arguments focus on nations' attempts to fulfill their citizens' basic needs, which are largely grounded in technologies and processes that **[End Page 157]** sustain physical well-being. Consequently, if certain individuals have exclusive control of established technologies, other individuals may be deprived of basic products that could contribute to their betterment.

Before elaborating on the arguments outlined above, this article explores the differences between traditional property and IP, as well as the two traditional theories used to justify IP rights. The article also considers the role that IP plays in contributing to people's welfare, and concludes with an examination of the conflict that exists between developed countries that favor strong universal IPR protection, and the developing countries that favor greater access to technologies for all nations based on human rights considerations.

II. Property Rights and Intellectual Property Theory

Property, in one form or another, has been a concern in many of history's struggles for fundamental rights. The Magna Carta (1215), ⁶ the US Declaration of Independence (1776), ⁷ the French Declaration of the Rights of Man and Citizen (1789), ⁸ and the Universal Declaration of Human Rights (1948) ⁹ all recognize property rights in some form. Generally, this right to property refers to tangible items, such as land, business establishments, housing, and other resources. Yet there is another form of property, consisting of intangible items such as intellectual objects. ¹⁰ The theoretical justification for intangible property has been grounded in two traditional theories: Locke's labor theory of property, and utilitarianism. **[End Page 158]**

A. John Locke's Labor Theory of Property

John Locke justified property rights through labor. In his view, objects produced by an individual through the mixing of labor with resources are the property of that individual alone. ¹¹ Locke's theory of property also contains two limitations on the acquisition of property. The first is on the amount of property that can be

appropriated: "enough and as good left in common for others." ¹² In other words, so long as others are not made worse off by the acquisition, there is no limit on the amount that may be appropriated. The second limitation relates to the amount of an item that can be used: a person should not take more of an object than can be used before it spoils. ¹³

Locke's labor theory of property is problematic, however, when used to justify IP rights. In particular, the question of ownership in the cumulative inventive process poses a serious problem. For example, technology that is developed by one person is often employed in new products without ownership privileges being granted to its creator. Similarly, literary works often build on the fruits of other efforts. Because their labor is embodied in the new product, are the prior inventors and writers entitled to partial ownership of the object? If past inventors used their labor to create the object, does their right to property diminish if others utilize the product? ¹⁴ As these questions suggest, the cumulative process of inventions complicates the question of ownership if labor is used to justify IP rights. Therefore, an alternative view of Locke's labor theory is needed.

One of the most frequently cited analyses of Locke's labor theory of property is that of Robert Nozick. Nozick points out that while mixing one's labor with something could bring about ownership of the object, it could also result in a loss of one's labor. ¹⁵ That is, why should the act of mixing labor justify the ownership of previously unowned property? He uses the example of pouring juice into the sea and then asking whether now he owns the sea or has lost his juice. ¹⁶ Ultimately, Nozick rejects Locke's emphasis on labor in favor of a distribution of property based on Locke's first proviso. ¹⁷ **[End Page 159]**

Nozick interprets Locke's first proviso as meaning that others, no longer free to use the appropriated property, should not be made worse off than before the property was appropriated. ¹⁸ At the center of the "worse-off" argument is the question: worse off compared to what? Individuals are "worse-off," according to Nozick, if: (1) they lose the opportunity to improve their situation by a particular appropriation; or (2) they are no longer able to use freely what they could previously use. ¹⁹ Under a strict interpretation of the "worse-off" condition, when a person has nothing to counter the loss, then the person is "worse-off" under both premises. A weaker interpretation of being "worse-off" would ignore the second premise and be based exclusively on the first. It may be possible, according to Nozick, that although individuals could no longer appropriate an object, they would still be able to use it. ²⁰ Despite this, people would still be "worse-off" because of restrictions on access to the item. Furthermore, he contends that any theory of justice in the acquisition of property must include this second proviso. ²¹

Nozick further argues that a baseline for the comparison of "worse-off" must be established. For instance, he applies this critical notion of a baseline directly to intellectual objects, which are *ipso facto* private property in his scheme. ²² He

tells the story of a medical researcher who creates a new drug to treat a disease. ²³ The researcher refuses to sell the substance unless exclusive individual control over the product is guaranteed. According to Nozick, this situation does not violate the first Lockean proviso. The baseline in this example is the *absolute* condition of people before the discovery. If they do not have access to the substance, their situation is unchanged: "The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso." ²⁴ Nozick contends that the proviso focuses on a particular way that "appropriative actions affect others, and not on the structure of the situation that results." ²⁵ His concern is that people not be harmed, that their rights not be violated. But Nozick's conception of harm is narrow, focusing on harm that might be done to the property owner. Can harm be in a *relative* **[End Page 160]** sense? That is, can people be harmed when compared to others under the same circumstances? Can we expand the concept to include the situation that results? This seems like a fair analysis because the law and legal structures must consider the collective good and interest. Hence, it is the relative effects resulting from the appropriation with which we must concern ourselves. To understand this in IPR, some additional information is needed.

Suppose the researcher is able to dictate the terms for the sale of the substance because the government has granted a patent. The patent provides the researcher with an advantage, specifically a monopoly advantage, in selling the product. Nozick implies that people, if they possess the right compounds, are free to make the substance. However, the patent legally blocks others from freely producing the substance themselves. Having a monopoly, the researcher is able to charge the greatest price that the market can sustain. Consequently, some will be able to afford the substance while others will not. If we use Nozick's baseline of comparison, some individuals will be made better off. They will be able to purchase the elixir, to consume it, and to rid themselves of the malady. Others will see no change in their condition because they may not be able to obtain the substance. ²⁶

If the purpose of IPR is simply to protect an idea, then this has been achieved; however, nothing is said about the rights of other people to use this information except under the monopoly conditions dictated by the owner. If the purpose of the monopoly right is to make people's lives better, then one must look at the effects that this right has on all people. If the substance is available only to a segment of the population that needs it, then the remaining population is "worse-off" relative to those to whom the substance is available. So, in this sense, people in need of the substance who are unable to acquire it are "worse-off." ²⁷ Conceived of in this manner, IPR cannot be justified because people have been made "worse-off" in a relative sense.

Nozick's main concern is that resources not be monopolized. Yet herein lies the contradiction between Nozick's proviso and IPR because IP rights promote

monopolies and restrict access. Without IPR, if the researcher **[End Page 161]** releases the knowledge publicly, then a contribution to the general pool of knowledge has been made. Anybody then can use the formula to produce the substance that will benefit those who need it. By restricting access to the formula as IPR do, the researcher is guaranteed a monopoly on production. The other side of this debate is that without IPR protection, the researcher would not release the information and nobody would benefit. Such an argument leads to the question of inventors' rights.

Although an inventor's rights must be recognized in any IPR scheme, they must be juxtaposed with the rights of those who live with the consequences of IPR protection. In short, one must ask whether the institution of IPR is just when it provides benefits to a select few. While IPR are fair in that everybody is entitled to obtain IPR protection, the resulting product control produces distinctions among those who may need the product. This is shown clearly in Nozick's research example.

Access to advantages produced by IPR protection is thus based on financial resources, which one would expect in a competitive economy. This system is satisfactory when one is concerned about the distribution of nonessential items, that is, objects that do not affect people's physical well-being. However, IPR systems tend to treat all intellectual objects equally; they fail to recognize that not all intellectual objects are essential. For instance, people would be no worse off if they were monetarily restricted from buying a new music compact disc. But those who are monetarily restricted from buying a new drug that can save their lives are worse off than those who are not restricted. Some may contend that the social welfare net is intended to aid those who cannot afford such expenses. However, even if that is true, when an institution is expanded globally (as IP rights have been), the potential inequalities are more readily exposed. Where IPR systems exist in developing nations, for example, limited resources may hinder efforts to aid those in need of product access.

In summary, Locke's labor theory of property, and its libertarian interpretation, fail to present a compelling reason to justify the existence of IPR to protect all intellectual objects. This conclusion is based on conditions present in that theory that negate the justification for property rights. Locke's labor theory does not account for the cumulative inventive process that assigns sole ownership to those who utilize others' prior work. Nozick's interpretation of Locke, based on the first Lockean proviso, insufficiently justifies IPR because people potentially are made relatively worse off under IPR systems, particularly as a result of unequal access to resources and products both in the domestic and global markets. Thus, one must look elsewhere in the Western tradition if IP rights are to be justified under property theories. One possible approach is utilitarianism. **[End Page 162]**

B. Utilitarians and IPR

Canadian philosopher Will Kymlicka suggests that utilitarianism conforms to our

inner sense of social responsibility; that is, the idea that the well-being of humans matters, and moral rules must be subjected to tests for their consequences on human well-being. ²⁸ Kymlicka argues that the morally best acts are the ones that maximize human welfare. ²⁹ Along these same lines, political theorist John Rawls has noted that "the principle for society is to advance as far as possible the welfare of the group, to realize to the greatest extent the comprehensive system of desire arrived at from the desires of its members." ³⁰ In recent years, however, the utilitarian approach in general has come under attack from a number of scholars. The criticism is wide and varied, with the central theme being that utilitarianism does not take into account differences among individuals. ³¹ As Rawls points out, "utilitarianism is not individualistic . . . in that, by conflating all systems of desires, it applies to society the principle of choice to one man." ³² Utilitarianism subjects individual rights obtained through equality and fairness to social interests. A net utility calculus formulates utilitarian social policy, which is troubling, particularly if a policy is targeted at a population segment. As economist Amartya Sen argues, the elimination of society's ills is justified in utility theory only if there is a net utility through their removal. ³³ Of course, Sen's refutation has direct consequences for IP rights. The burden on utilitarians is to justify property rights based on an overall improvement in the general welfare.

The utilitarians' argument is that IP rights provide incentives to produce new intellectual objects. ³⁴ By assigning property rights to the creators, an incentive is in place for people to undertake the expense and time to invent new products or develop new ideas. If IPR are removed, the argument goes, then there will be no incentive to produce intellectual objects because people will be free to copy the object without compensating the creator. The utilitarian argument weighs the long-term development of the society against the short-term drawback of assigning exclusive production rights to a creator. Yet, it is not clear that the long-term benefits outweigh the short-term drawbacks associated with the monopoly right. These drawbacks **[End Page 163]** include problems with the diffusion of technology and the varying levels of dependence that intellectual objects have on IPR protection.

The diffusion of intellectual objects is slowed dramatically under a strict IPR protection system. Intellectual property laws are meant to provide creators a time period to recover their initial investment and make a modest profit in exchange for the knowledge. ³⁵ As such, Edwin Hettinger sees a paradox in the utilitarian argument: the diffusion of or access to the product or method is restricted so that the production, availability, and use of new intellectual objects are assured for the future. ³⁶ The result is that progress is hampered.

Progress may be stalled further by the abuse of property rights that results from the buying and selling of patents, copyrights, and trademarks so that competition in the production of a commodity is eliminated. Producers then have the exclusive right to produce their product at a price that the market can sustain without competing against other products. Without competition, producers can charge

artificially high monopoly prices for the product for the duration of the property right protection while being shielded from competitive pressures that force companies into product improvements.

The utilitarian justification also implies that all products and people are equally dependent upon IPR protection. Yet, this does not appear to be the case. For example, movies are more dependent on protection than academic writing, while small investors tend to rely on IPR more than large corporations. ³⁷ In essence, not all products or producers are equally dependent on formal IPR protection. This, however, begs the question: why do those less reliant on IPR protection keep producing? One possible answer is that the short-term profits generated by being first in the market with a product are incentive enough to engage in the productive process. As Hettinger notes, product market share is more important to large corporations than long-term IPR protection. ³⁸ Moreover, IP laws have been used more recently not as part of a social contract between creators and society, but as a tool for securing market share in an increasingly competitive global economy. ³⁹ This is especially true for producers whose intellectual objects are heavily dependent upon IPR protection. **[End Page 164]**

The market share issue draws one back to the utilitarian argument that IPR provide an incentive for invention and production, which ultimately promotes economic growth. Although the incentives argument should be viewed with some skepticism, it should not be totally dismissed. Indeed, IPR can induce creative activity and production of some intellectual objects, increasing the immediate availability of products, particularly in fields that require long training or have high research costs. But this does not necessarily imply a long-term benefit of economic progress. The utilitarian argument that strong IPR protection leads to economic progress is deeply rooted in the Western theoretical tradition that emphasizes private property and its importance to Western economic development. However, the focus on private property is misplaced and such attention should instead be directed to the free exchange of ideas and creative activity that has characterized much of the West's economic growth and development.

This issue is most important because it is at the core of the dispute between the industrialized countries of the North and the developing nations of the South. The North has argued that strong IPR protection will increase any country's economic progress. ⁴⁰ The South generally has resisted this argument, asserting that access is needed to specific technologies that aid the development process. ⁴¹ This claim has historical support. The United States explicitly prohibited the protection of foreign works for the first century of its existence. ⁴² Great Britain, too, has borrowed ideas and inventions from abroad. ⁴³ In contemporary times, China has produced impressive levels of economic growth initially with lax IPR laws and currently with moderately strong, but poorly enforced IPR laws. ⁴⁴ Thus, it would appear that some doubt is warranted regarding the importance of strong IPR for economic progress. In essence, the utilitarian claims that the long-term

benefits outweigh the short-term costs of IPR protection are weak. **[End Page 165]**

C. The Nature of Property and Intellectual Property

Thus far, this article has shown how the traditional justifications of property, namely labor and utilitarian, fare poorly when applied to IP. Some additional reasons for this can be seen in the distinction between traditional property and IP.

1. Possession

Traditional property theory holds that property is not associated exclusively with individual possession. Rather, property is a relationship between the owner and other individuals relative to some item. This relationship is a right against others that can be exercised to protect the owner's property. In the case of IP, the state must guarantee the exclusive ownership of the idea or work, artificially creating the relationship between IP owners and others. For instance, in a Lockean state of nature where the power of law remains in the hands of individuals, property and IP are different. Formal law is not needed to protect that which is claimed by people; people can protect their property from encroachment by others. Intellectual property differs from simple property in this sense because there is no way to protect it. If plans for a new invention are disclosed, there is no way to prevent a person from utilizing the idea. The only way to protect IP is to keep it secret. In this way, IP is nonexclusive because it cannot prevent others from using the property once it is disclosed.

2. Supply

Another distinction between property and IP is supply. Using the Lockean state of nature as an example again, no one can use land that has already been appropriated. Furthermore, the supply of land is finite. Contrast this with a formula for a pharmaceutical product. Individuals can use that formula repeatedly and its supply will remain unchanged. People can pass the formula by word of mouth or by printing it and giving it away; the idea's supply will never dwindle. Moreover, the cost of an additional user of an intellectual object is zero and, as Hettinger points out, modern technology can instantaneously make an intellectual object available with few limitations. ⁴⁵ Without civil law, therefore, IP differs fundamentally from simple property. Society establishes laws to protect people's property from others. These laws assign rights to exclude others from using one's property. **[End Page 166]** Similarly, IP rights give individuals the right to exclude others from using their ideas, works, and inventions.

3. Exclusive Control

In essence, what IPR laws do is give the creator the ability to alter the essential nature of many intellectual objects by eliminating the nonexclusive characteristic. To this end, IP rights grant to *individuals* exclusive control over some object

(whether it is literary, mechanical, or procedural). Intellectual property rights allow the possessor to exclude others, to control the output, and to establish a monopoly price within the limits that product demand will allow. ⁴⁶ People who would otherwise be free to implement another's idea must now, at minimum, receive permission from and possibly pay the owner to do so. The supply of the object has thus been artificially limited by the introduction of exclusive control over distribution. As Hettinger points out, it is the nonexcludable characteristic of intellectual objects that must be kept in mind when trying to justify IP rights. ⁴⁷ As such, the burden on those who support strong, unlimited IPR is to show that the elimination of the nonexclusive nature of intellectual objects is justified.

The granting of exclusive control over intellectual objects is an attempt to alter their inherent structure; intellectual objects, by their nature, are nonexclusive. Traditional theories of property reflect ideas on the distribution of diminishable, perishable, or scarce property--characteristics that do not apply to intellectual objects. These objects are only made scarce by artificially imposed means, namely IP rights.

In questioning the labor and utilitarian justifications for IPR, and in particular the latter account, an implicit argument is being made about the construct of IPR laws as a social policy. The focus in adopting these laws must be on the impact that an IPR system will have on individuals, not society. An alternative approach that emphasizes individual needs is one possibility. However, any approach must balance the rights of creators with the needs of others. It is to these ideas that this article now turns.

III. Intellectual Property Rights Reconsidered

The utilitarian conception of IPR is centered on the benefits that society can derive by protecting IP. ⁴⁸ However, as argued above, this approach neglects **[End Page 167]** the effects of these policies on individuals. The central focus of both the utilitarian arguments for society's betterment, and the refutation of the utilitarian approach based on IPR's effects on individuals, is on society's development. But these two approaches need not necessarily be exogenous. By reconceptualizing society's development at the individual level instead of at the national level, these two views can be reconciled.

A. Capability Theory and Economic Development

Traditionally, economic development has been explored as a country-specific phenomenon. But some have challenged this view. ⁴⁹ Development can be considered to be an expansion of people's capabilities. ⁵⁰ This conception of development concentrates on individuals rather than all of society, and is carefully constructed to incorporate three often-cited definitions of development: expansion of commodities, an increase in utility, and basic needs. ⁵¹ This "capabilities approach" to economic development is an attempt to integrate all of

these components while at the same time demonstrating the deficiencies of defining development solely within the context of one of these concepts.

Capability theorists define people's capabilities in terms of their functionings, which "vary from such elementary physical [needs] as being well-nourished, being adequately clothed and sheltered, avoiding preventable morbidity, and so forth, to more complex social achievements such as taking part in the life of a community, being able to appear in public without shame, and so on." [52](#) Complex social achievements are closely linked to societal norms and will not be addressed here. For purposes of this article, the concern is with physical functionings or physical well-being, both of which may be related to societal norms, but are also subject to a series of other conditions, such as entitlement systems. [53](#)

Sen has asserted that a person's capabilities depend, though not entirely, on access to commodities, which are their entitlement. [54](#) The **[End Page 168]** entitlement a person has reflects the rules of the entitlement system. In this sense, IPR are a subset of the rules of the entitlement system. Yet one important proviso must be made with regard to having access to commodities that affect one's physical well-being: the emphasis is not on the actual possession of the object itself, but rather on the accessibility of the commodity. For instance, one might consider the case of a doctor patenting a medical procedure and demanding royalties for every time the procedure is used. An individual might be able to afford the operation itself, compensation for the doctor, nursing staff, hospital stay, etc., but the procedure may be made unaffordable by the additional costs of the royalties. [55](#) The entitlement system in this instance makes the procedure inaccessible to the individual.

The importance of access to commodities is illustrated further by two examples: music and medicine. Copyright prohibits duplication in the case of music, while patents generally protect medicines and related compounds. The music producer sets a price for the compact disc and those who can afford the music purchase it. Nobody has the right to produce that music other than the artist and the production company. Similarly, medicines are produced by a manufacturer who establishes a price for the product. Those who need to use the medicines may purchase it at that price. People do not suffer a tremendous physical loss if solely one company produces the latest music compact discs; if people cannot afford the music, they may not buy it or, alternatively, they may seek a different type of music to purchase. The free market masterfully supports substitutability of products in this instance. The medicine example is more complex and deserves greater attention.

Without much argument, medicines can be classified as important to the improvement of people's physical well-being; they are important for individuals to survive and to live better than they could otherwise. Unlike compact discs, the restricted production of particular medicines has an impact on people. Often the demand for a particular medicine is inelastic--people cannot find alternatives and

they must purchase the product even if the cost escalates. If they cannot afford the manufacturer's price, they must do without the product, compromising their well-being.

The recent example of the human immunodeficiency virus (HIV) "cocktail" treatment explicitly illustrates this point. Several combinations of **[End Page 169]** drugs have shown limited promise of slowing the onslaught of HIV. ⁵⁶ The drugs appear to slow the viral attack, but the cost of the drug combination is estimated at \$10,000 per year. ⁵⁷ At this price, the discovery is virtually meaningless to the many people infected with HIV around the world, particularly those in developing countries. One could easily argue that this is not an issue of IPR, but rather an issue of social welfare policy; if people cannot afford health care, it is incumbent upon the government to help them. However, this burden cannot be imposed upon governments that do not even have the economic base to feed their own people. Moreover, what this amounts to is the state subsidizing industry profits. The state is put in the bizarre circumstance of providing financial assistance to people who cannot afford medicines because the state granted the firm a monopoly on the production of the medicine.

As the music and medicine examples show, it is difficult to assume that all intellectual objects are equal in their importance to people. The existence of a hierarchy of intellectual objects is evident, but its ordering is different for each person. We cannot even assume that all individuals value the same objects as important or necessary to their physical well-being. Nonetheless, the critical point is that whatever property is needed to maintain an individual's physical well-being must be accessible if all human beings are to be permitted to achieve their full potential.

B. Physical Well-Being and Intellectual Property Rights

With respect to the IPR issue, developed countries have more resources available to adopt any combination of policies that will satisfy both those claiming IPR in a particular object, and those who may need to use the object to maintain their physical well-being. The state, in this case, may adopt IPR protection while implementing a social welfare policy that aids those who cannot afford the product if it is needed for their physical well-being. While this may indirectly subsidize industry, it is one way for the state to balance competing interests. Developing countries, on the other hand, are restricted in the policies they can adopt because of financial constraints. If developing nations adopt IPR policies, it is possible that intellectual objects that people need will be priced outside of their ability to pay. With limited resources, the state can do little to alleviate the problem, thereby jeopardizing the physical well-being of its people. **[End Page 170]**

The developing country is faced with a number of competing interests that it must balance: the needs of its people and industries, and the claims brought by foreign governments and enterprises. Foreign governments and enterprises have an

interest in protecting their technological advances from duplication because every competitor producing a particular object shrinks the foreign market for the object, reducing potential profits *ceteris paribus*. ⁵⁸ People's needs have been addressed previously, leaving domestic industry and foreign entity interests for further evaluation. As argued above, inventive activity or even the process of creating some object rarely begins without reference to or building upon other work. Indigenous industrial research and technology that might help solve some of the more critical problems faced by developing nations is limited, so the least costly option is to import existing technology and to adapt it for domestic use.

While this seems to be an easy solution to the problem, the consequences of such an action are serious as this constitutes "theft." If one does not recognize intellectual objects as a form of property, then it is meaningless to discuss property rights in this regard. In such cases, the state is under no obligation to protect intellectual objects, and those with access to the product may freely copy it without fear of penalty. Those who create intellectual objects are then left without recourse against those who profit from their work. At the other extreme is the argument that *all* intellectual works are property that is in need of protection from "thieves." Neither of these interpretations is satisfying.

If no IP is to be protected, individuals often will be reluctant to release their works. More importantly, this position taps into a deeper sense of fairness. If somebody toils for months on an invention and then finds it mass-produced by somebody else without compensation, that person will feel cheated. Similarly, laws that protect all intellectual objects may produce situations such as that given in the music and medicine examples. What both extremes have in common is that they evoke a certain level of moral indignation. Society is faced with two competing values: protecting those who create objects from being exploited by profiteers seeking a quick dollar on the one hand, and alleviating personal suffering of people when the capability to do so exists on the other hand. The problem is one of *property rights* versus *subsistence rights*. The approach using the physical well-being criteria provides one possible solution. In practice, nations already recognize the existence of subsistence rights through a variety of means. For example, the Universal Declaration of Human Rights recognizes such **[End Page 171]** rights, while domestic social legislation in the developed countries has incorporated these basic tenets of survival. ⁵⁹

Nations may choose to adopt certain objects that are considered important to their development, but it may not be possible to justify the adoption of all intellectual objects, which leads back to the hierarchy of IP discussed above. The decision to import a particular intellectual object should be made with two goals in mind: (1) to provide for the physical well-being of the state's people, and (2) to integrate the technology into an indigenous research and development program that will contribute to solutions for some of the problems that the state faces in providing goods for the physical well-being of its people. The first of these principals, based on the hierarchy of IP, is fairly obvious in its objective. The second is intended to provide developing countries with the opportunity to break their dependency on

the developed world for technology. The second provision, though important, is an ancillary goal with the immediate objective being greater access to products that will enhance people's physical well-being. Even if the developing countries adhered to these provisions for importing technology, why should any developed country and its intellectual property creators acquiesce to such a scheme for the partial redistribution of technical knowledge? One could simply argue this position on the basis of benevolence--it helps people. But this approach neglects a glaring problem: how to balance the rights of the property creators (firms, inventors, etc.) in the developed countries with the needs of the people in developing countries.

C. The Duty to Bring Aid

While inventors and creators have a right not to give up their knowledge, that right may be outweighed by a duty to assist those in the developing countries. Nozick argues that rights to material things are determined by whether having the object violates the rights of another individual. ⁶⁰ Based on this argument, one might insist that the property owners in the developed countries have absolutely no obligation to provide their products to the developing countries without compensation. After all, if we consider intellectual objects to be property (as the developed countries do), they are the owners' to use as they please. Moreover, property owners in the developed countries did not create the terrible economic and social conditions that are pandemic in the developing countries; hence, IP owners **[End Page 172]** have no obligation to involve themselves in solving "their" problems. ⁶¹ If developing countries want to use intellectual property created by other countries, they must pay to do so. This position, however, is unconvincing.

Philosopher John Arthur insists that in situations where people have a right not to act, there may be compelling reasons that obligate them not to exercise that right: "If it is in our power to prevent death of an innocent without sacrificing anything of substantial significance, then we ought morally to do it." ⁶² In such cases, the duty to help others outweighs the rights of the giver if what is being provided is of substantial significance. The problem, of course, is in how "substantial significance" is defined. Arthur asserts two criteria for determining substantial significance. First is the question of importance to the recipient:

[W]e might specify the needs that people have, and grant that the duty to bring aid is not present unless these needs have already been met. Included among the needs which are of substantial significance would be those things without which a person cannot continue to function physically, for example, food, clothing, health care, housing, and sufficient training to provide these for oneself. ⁶³

The recipient must be in need of these particular goods. Most of the points covered in this criterion relate directly to physical well-being.

The second criterion is a psychological factor on the part of the donor: "if the lack of x would not affect the long-term happiness of a person, then x is of no substantial significance." ⁶⁴ Goods or products needed to sustain happiness need not be given or sold to benefit others if the lack of the item will decrease the amount of happiness the owner could have. In other words, items that could be transferred are those considered to be of substantial significance to the people in need and of no substantial significance to the donor.

The second criterion Arthur proposes is critical because it is an attempt to balance the rights of the donor against the rights of the recipient. When **[End Page 173]** applied to IPR, this principle becomes morally contentious. If one assumes that IP rights provide an incentive to invent (however dubious this might be), then one must focus on the incentive as the source of happiness to the creators. Of course, there are those who invent and create things for truly altruistic reasons, but inventions and products that require high costs often have the incentive of profit returns to entice investors who ultimately own the rights to the product. According to Arthur's second criterion, if profit is what makes people happy, and by allowing their product to be duplicated they receive less profit, the producers of the IP need not allow others to copy their product because it will decrease their happiness. In cases where there is no substitution for the product, the producer has a monopoly.

The situation that Arthur's second principle creates is one of profit versus physical well-being. It is morally difficult to justify boosting profits at the expense of peoples' physical well-being. While this issue is a problem, it need not beckon the extreme Marxist position that advocates the abolition of private property. Instead, what is needed is an amendment to Arthur's second criterion with what one might call the principle of priority.

The principle of priority would recognize the property owner's right, but order this against others' rights. This assumes, as argued above, that duties can outweigh certain rights. A state must arbitrate between competing rights. In some cases, the optimal solution is a simple compromise, but in others, some rights must take priority. The question is: how would the state decide this issue? The issue is whether a person's right to pursue profits takes priority over another individual's physical well-being. (At this juncture, it is important to note that one need not be concerned, as the utilitarians are, with whether society will maximize its benefits by this decision.) Put in these terms, it is clear how the state should decide. Clearly, the state would not be able to place the right to profits over a person's physical well-being. Profits could be achieved by other means; the producers can easily find other ways of generating profit. In contrast, physical well-being is relatively limited in how it can be fulfilled. In this framework, the duplication of IP by developing countries could be considered just, given the assumption that the state would place human physical well-being morally above the right to profit.

In practical terms, the industrialized countries have an interest in seeking to

improve the living conditions of the developing countries. If a goal of the developed countries is to expand their potential markets for intellectual goods, then they need viable, stable markets with healthy, educated people to purchase their technologically advanced products. It is thus in the interests of foreign entities, private and public, to assist those countries in developing sustainable economies. On the other hand, some industries see this as a potential threat because vibrant economies necessarily mean additional competition in an increasingly competitive global **[End Page 174]** economy. In this view, additional competition for shrinking markets may not be welcomed, as some industries see strict IP protection as an advantage in competitive climates. ⁶⁵ However, this does not dilute the importance of the arguments already made concerning the duties to aid other developing countries. In fact, what *is* called into question is the position that IP is a guaranteed universal human right, the topic of the next section.

IV. Intellectual Property and Human Rights Reconsidered

The Universal Declaration of Human Rights recognizes IP as a universal human right. ⁶⁶ However, the argument presented so far conflicts with the UN position. This article has argued that all IP is not equally significant to human well-being and that people's physical well-being must take priority in assigning IP rights. This section will contend that the UN declaration is flawed and that other issues that relate to physical well-being must take priority over the guarantee of IP as a universal human right.

A. The United Nations and Intellectual Property

Under Article 27 of the Universal Declaration of Human Rights, IP is designated as a universal human right: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author." ⁶⁷ The basis for such a claim without doubt lies in the Western conception of property rights. What this implies is that, similar to the ownership of property, people also have an exclusive right to their ideas, creations, and inventions. In practice, the United Nations is charged with the administration of various international agreements pertaining to IP. ⁶⁸ However, its position on IP and its duty to carry out agreements promoting universal IP protection are incompatible with other important goals, particularly the promotion of human physical well-being.

The declaration of IP as a universal human right is problematic within the framework of physical well-being established in this article because the **[End Page 175]** UN position does not recognize the hierarchy of IP that exists. Under the Universal Declaration, the registered trademark for a multinational corporation is accorded the same importance and protection as a patent for medicinal purposes. This position has been challenged emphatically by the developing nations with the issue again centered around the profits versus physical well-being argument. Prime Minister Indira Gandhi of India echoed these

concerns when she argued the following:

Affluent societies are spending vast sums of money understandably on the search for new products and processes to alleviate suffering and to prolong life. In the process, drug manufacture has become a powerful industry, subject to the same driving considerations of other big industries, that is, concentration on profit, fierce competition and recourse to hard-sell advertising. Medicines, which may be of the utmost value to poorer countries, can be bought by us only at exorbitant prices, since we are unable to have adequate independent bases of research and production. This apart, sometimes dangerous new drugs are tried out on populations of weaker countries although their use is prohibited within the countries of manufacture. It also happens publicity makes us victims of habits and practices which are economically wasteful or wholly contrary to good health. . . . My idea of a better ordered world is one in which medical discoveries would be free of patents and there would be no profiteering from life or death. [69](#)

Article 27 may also pose problems for other rights guaranteed by the Declaration. For instance, Article 25 proclaims the universal right of every person

to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. [70](#)

The conflict with Article 25 occurs when IP protection raises barriers to commodity access that would improve the physical well-being of people. By promoting IP as a guaranteed right, the Declaration gives IP producers significant latitude in abrogating any responsibility to promote national development, though producers often argue for greater access to foreign markets and the protection of IP in those markets. **[End Page 176]**

B. Trade, Aid, and Intellectual Property

In recent years, the West, led by the United States, has pushed for increased global protection of IP, which is in line with the UN position. [71](#) Based on the previous discussion of IP protection and its relationship to physical well-being, this position could be detrimental to the developing nations. By promoting stronger protection of all IP, the developing nations will be placed at a more severe disadvantage, both in developing policies to sustain economic growth and in the increasingly competitive global markets. The result of strengthening IPR protection for developing countries may be in foregoing products that could aid in sustaining economic development, as it has been defined in this article. But more importantly for the developed countries, strong IPR protection in many of these countries will only promote continued reliance on foreign aid from the developed

countries, which does little to promote economic self-sufficiency.

Intellectual property can be adapted to domestic economic conditions and utilized by the developing countries. Historically, this has been the case in a number of countries. The United States, Britain, Japan, Germany, and other developed nations have all adopted foreign inventions, creations, and ideas and adapted them to domestic use, promoting their continued growth and development. ⁷² However, the developing countries are now faced with the problem of these same countries imposing greater barriers to accessing technology that could help sustain development. Strong IPR protection advocated by the developed countries is also short-sighted in that the primary concern for the developing countries is to adapt technology that will help maintain the physical well-being of their people. By putting up barriers, the developed countries delay the creation of markets that could support entry of technologically advanced IP, thus cutting short the potential profits that could be obtained if the developing countries could sustain themselves. **[End Page 177]**

V. Conclusion

The above discussion illustrates how IP is playing an increasingly more important role in the economic development of nations. While the process of further technological advancement necessitates the protection of exclusive production rights that IPR grant, the maintenance and improvement of human physical well-being must be considered when allocating IP rights. The resulting decision has profound human rights implications, given that the Universal Declaration of Human Rights guarantees IP as a human right. In order to maximize both the benefits derived from IP and the physical well-being of its citizens, developing and developed countries must work to craft policies that strike a fine balance between these values. Part of this work must include allowing developing countries access to critical technologies that support the economic development of their people. The trade-off for developed countries is that weaker IP protection in developing countries may ultimately result in lower foreign aid requirements as the developing world acquires technologies that allow it to sustain itself.

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Notes

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[1.](#) The items protected by intellectual property rights (IPR) (usually by the granting of a copyright, patent, trademark, or by keeping a trade secret) are numerous. For simplicity, this article will use Hettinger's term "intellectual objects" to refer to matter that can be protected by IP rights. See Edwin C. Hettinger, *Justifying Intellectual Property*, 18 **Phil. & Pub. Aff.** 31, 34 (1989).

[2.](#) On the relationship between IPR and utilitarian theory, see Tom G. Palmer, *Intellectual Property Rights: Moral Philosophy and Ideal Objects* 46-48 (1993) (unpublished M.A. thesis, The Catholic University of America) (on file with author and available through Catholic University Library). See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 **Geo. L.J.** 287 (1988). On the relationship between traditional property rights and utilitarian theory, see **Stephen R. Munzer, A Theory of Property** (1992).

[3.](#) See **William P. Alford, To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization** 13 (1995).

[4.](#) See *id.*

[5.](#) See Frank D. Prager, *The Early Growth and Influence of Intellectual Property*, 34 **J. Pat. Off. Soc'y** 106, 107-10 (1952).

[6.](#) Magna Carta, ¶¶ 4, 22, 26, 37, 41, *reprinted in The Human Rights Reader* 102 (Walter Laqueur & Barry Rubin eds., 1989).

[7.](#) U.S. Declaration of Independence, *reprinted in The Human Rights Reader*, *supra* note 6, at 108.

[8.](#) Declaration of the Rights of Man and of Citizen, 26 Aug. 1789 (1789), *reprinted in English in George A. Berman, Henry P. de Vries & Nina M. Galston, French Law: Constitution and Selective Legislation* (1994) and *in The Human Rights Reader*, *supra* note 6, at 118.

[9.](#) Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., (Resolutions, part 1), at 71, arts. 17, 21, U.N. Doc. A/810 (1948), *reprinted in* 43 **Am. J. Int'l L. Supp.** 127 (1949).

[10.](#) Intellectual property has no universally recognized definition, so what is considered intellectual property may vary from one country to the next. However, as Robert Benko notes, there are some widely accepted terms in use. **Robert P.**

Benko, Protecting Intellectual Property: Issues and Controversies 1-3 (1987).

For example, intellectual property can be categorized as either industrial property, which includes inventions, trademarks, and industrial designs, or copyrights, which include literary, musical, artistic, photographic, and cinematographic works, maps, and technical drawings. Most software is also covered by copyrights. The protection afforded intellectual property in the law is found in patents, trademarks, trade secrets, and copyrights. These forms of protection are not the only ones covered under IPR, but they constitute the bulk of protection for intellectual property. See *id.*

[11.](#) **John Locke, Two Treatises on Government 288 (1821).**

[12.](#) *Id.*

[13.](#) *Id.* at 290. The interpretation of Locke's labor theory and the two provisos have been the subject of much literature in political theory. The author does not wish to enter the debate on the interpretation of these ideas, but has simply chosen interpretations that are common in the IPR literature.

[14.](#) Of course, one argument for granting IPR is so that prior inventors and writers *will* get compensation for their work. This issue will be addressed later in the article.

[15.](#) **Robert Nozick, Anarchy, State and Utopia 174-75 (1974).**

[16.](#) *Id.* at 175.

[17.](#) *Id.* at 174-82.

[18.](#) *Id.* at 175-76.

[19.](#) *Id.* at 176.

[20.](#) *Id.*

[21.](#) *Id.* at 178.

[22.](#) *Id.* at 181. Nozick does not address the nature of intellectual property as private property; however it is quite clear in his work that an individual who possesses the talents to produce an intellectual object is entitled to possession.

[23.](#) *Id.*

[24.](#) *Id.*

[25.](#) *Id.*

[26.](#) The reasons for not being able to obtain the substance are not only financial; factors such as geographic location, market sustainability, and access to health

care may also interfere with an individual's ability to obtain the product.

[27.](#) While on the surface this seems to be a moot point in that the profit motive should entice firms to make their products available to all people, some examples show that this is not necessarily the case. For instance, the elderly and the critically ill often find themselves unable to afford medicines needed to sustain their lives.

[28.](#) **Will Kymlicka, Contemporary Political Philosophy: An Introduction** 11 (1990).

[29.](#) *Id.*

[30.](#) **John Rawls, A Theory of Justice** 23-24 (1971).

[31.](#) See, e.g., **Kymlicka, supra** note 28, at 11. See also **Amartya Sen, Commodities and Capabilities** (1985); Amartya Sen, *Goods and People, in World Hunger and Morality* 186 (William Aiken & Hugh LaFollette eds., 2d ed. 1996).

[32.](#) **Rawls, supra** note 30, at 29.

[33.](#) Sen, *supra* note 31, at 189-90.

[34.](#) See, e.g., Hettinger, *supra* note 1, at 47; Palmer, *supra* note 2, at 46-47; Hughes, *supra* note 2, at 287.

[35.](#) See **Ulf Anderfeldt, International Patent Legislation and Developing Countries** 36-45 (1971).

[36.](#) See Hettinger, *supra* note 1, at 48.

[37.](#) See *id.* at 50. This is further illustrated in various studies. For example, Mansfield has noted that the pharmaceutical and chemical industries tend to rely on American patent protection the most. See generally Edwin Mansfield, *Intellectual Property, Technology, and Economic Growth, in Intellectual Property Rights in Science, Technology, and Economic Performance* 17 (Francis W. Rushing & Carole Ganz Brown eds., 1990).

[38.](#) See Hettinger, *supra* note 1, at 50.

[39.](#) See *id.*

[40.](#) See Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 **Wake Forest L. Rev.** 89 (1993); **Robert M. Sherwood, Intellectual Property and Economic Development** (1990); Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 **J. World Trade** 75 (1990).

- [41.](#) See Gutterman, *supra* note 40, at 89.
- [42.](#) See **Office of Technology Assessment, U.S. Cong., Intellectual Property Rights in an Age of Electronics and Information** 215 (1986).
- [43.](#) See **Assafa Endshaw, Intellectual Property Policy for Non-Industrial Countries** 64-67 (1996); see also J.R. Harris, *Industrial Espionage in the Eighteenth Century*, 7 **Indus. Archaeology Rev.** 127 (Spring 1985).
- [44.](#) See **U.S. Dep't St., Report on China, in Country Reports on Economic Policy and Trade Practices 1989-1997.**
- [45.](#) See Hettinger, *supra* note 1, at 34.
- [46.](#) See **Edith Tilton Penrose, The Economics of the International Patent System** 1-2 (1951).
- [47.](#) See Hettinger, *supra* note 1, at 34.
- [48.](#) See Palmer, *supra* note 2, at 46-47; Hettinger, *supra* note 1, at 47.
- [49.](#) See Sen, *supra* note 31, at 187.
- [50.](#) See Sen, *supra* note 31, at 187; see also **Sen, supra** note 31; **Amartya Sen, Resources, Values and Development** 510-11 (1984).
- [51.](#) See *generally* Sen, *supra* note 31 (for an analysis of these three individual components).
- [52.](#) Sen, *supra* note 31, at 192.
- [53.](#) The concept of physical well-being is similar to the "right to subsistence" and "right to survival" in that all are concerned with providing those minimal products that allow humans to live. However, physical well-being goes further by addressing specific social contexts of these items. See **Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy** (1980); Arthur K. Okun, *Rights and Dollars, in Property, Profits and Economic Justice* 221 (Virginia Held ed., 1980).
- [54.](#) See **Sen, supra** note 31.
- [55.](#) This scenario is not at all fantasy. Consider the case of Dr. Samuel Pallin, who applied for a patent and subsequently demanded royalties (although marginal) for an ophthalmological surgical procedure. See Sabra Chartrand, *Why Is This Surgeon Suing?: Doctors Split over Patenting of Their Techniques*, **N.Y. Times**, 8 June 1995, at D1.
- [56.](#) Among these drugs is AZT (Zidovudine, formerly known as AZT or

Azidothymidine). See Evan Ackiron, *Patents for Critical Pharmaceuticals: The AZT Case*, 17 **Am. J.L. & Med.** 145 (1991).

[57](#). See *id.* at 146.

[58](#). Implicitly, foreign governments and businesses also have an interest in being able to sell goods in foreign markets in order to increase product demand and ultimately profits.

[59](#). See Okun, *supra* note 53, at 227.

[60](#). **Nozick**, *supra* note 15, at 178.

[61](#). The author ignores, of course, the neo-Marxist arguments that directly attack developed countries and multinational corporations for their role in creating the impoverished conditions in much of the developing world. See, e.g., Johan Galtung, *A Structural Theory of Imperialism*, 8 **J. Peace Res.** 81 (1971); Theotonio Dos Santos, *The Structure of Dependence*, **Am. Econ. Rev.**, May 1970, at 231-36; Andre Gunder Frank, *The Development of Underdevelopment*, **Monthly Rev.**, Sept. 1966, at 17-31. See also **Robert Packenham, The Dependency Movement: Scholarship and Politics in Development Studies** (1992) (providing an outstanding critique of the Dependency school of thought).

[62](#). See John Arthur, *Rights and the Duty to Bring Aid, in World Hunger and Morality*, *supra* note 31, at 39.

[63](#). *Id.* at 49.

[64](#). *Id.*

[65](#). Of course, this assumes the distinction made between necessary products for physical well-being and products that are not necessary for this purpose, which relates directly to the hierarchy of IP that has been discussed previously.

[66](#). Universal Declaration of Human Rights, *supra* note 9, art. 27.

[67](#). *Id.*

[68](#). The World Intellectual Property Organization (WIPO), which is under the auspices of the United Nations, administers most major IP conventions.

[69](#). Address by Prime Minister Indira Ghandi, 34th World Health Assembly, *quoted in* S. Patel, *Editor's Introduction, Pharmaceuticals and Health in the Third World* 165, 165-66 (S. Patel ed., 1983).

[70](#). Universal Declaration of Human Rights, *supra* note 9, art. 25. This is controversial in that not all people or nations agree with the extent of the claims made in Article 25. However, the purpose here is not to debate the merits of Article 25 as a human right, but merely to point out its problems relative to the IP

position in this article.

[71.](#) The push by the West culminated in the addition of IPR protection to the agenda of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). See Gutterman, *supra* note 40, at 89; **Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System** (Jagdish Bhagwati & H.T. Patrick eds., 1990); B.M. Berliner, *Making Intellectual Property Pirates Walk the Plank: Using "Special 301" to Protect United States' Rights*, 12 **Loy. L.A. Int'l & Comp. L.J.** 725 (1990); Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 **Vand. J. Transnat'l L.** 689 (1989); **Chakravarthi Raghavan, Recolonialization: GATT, the Uruguay Round & the Third World** (1990).

[72.](#) See Hedrick Smith, *Rethinking America* (1995); B. Harrison & B. Bluestone, *The Great U-Turn: Corporate Restructuring and the Polarizing of America* (1988).

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