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Innovation and Litigation

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Abstract: *Provides an overview of intellectual property perspectives in literature, and contributes a focused discussion of the landmark Apple vs. Samsung patent trial of 2011. A discussion of the U.S. Patent system is also provided and gaps in this system are addressed as well as recommended solutions, which allow for continued innovation while curbing litigation.*

The laws that govern intellectual property are intended to provide legal protection to the author or creator of an invention, intangible idea, or tangible creative work. The intent is to prevent others from reproducing, copying and distributing similar work and gaining a profit from the originality of others. In a fast paced society where every day equals time spent to deliver a bottom line, people cannot afford to work hard towards a product or idea without financial benefits. We no longer live in a time where creativity and innovation can exist merely for the purpose of personal satisfaction or joy. Even if that is the intended purpose of the work, as soon as it begins to turn a profit, the law begins to unravel itself to protect the creator and everyone wants a piece of the profit. "The stated objective of most intellectual property law is to promote progress. If some intellectual property is desirable because it encourages innovation, they reason, more is better. The thinking is that creators will not have sufficient incentive to invent unless they are legally entitled to capture the full social value of their inventions."[1] So when does the protection of the law in one's journey to creativity turn into the limitation of creativity? And why then, if intellectual property comes with such great risks, do people continue to create and innovate? To understand this, we will examine perspectives in literature and see if it is supported in history with a real world case.

The first groups of individuals are personality theorists who claim that individuals have moral claims to their own feelings, talents, and experiences.[2] They believe that intellectual property is an extension of one's own personality because by expanding beyond our own minds and mixing this with tangible and intangible items, we define ourselves and are able to take control over our goals and projects. If personality theorists are accurate then in their claims, then it means that any creative work or innovation made is tied to the personality and reputation of the creator. Intellectual property rights are then not only justified to cover the damages of economic loss that could be incurred if the work is damaged or stolen, but it is also protecting the reputation of the individual who created it, since it is merely a tangible

[1] Lemley, Mark A. "Property, Intellectual Property, and Free Riding." Stanford Law School. 6 Aug. 2006.
[2] Moore, Adam. "Intellectual Property." *Stanford Encyclopedia of Philosophy*. 8 Mar. 2011. Accessed Feb. 2014 <www.plato.stanford.edu>.

extension of that person. That certainly feels to be a justifiable rationale for protection, and this can be seen in many forms of today's society through branding or trademarking. There is a reputation behind certain brands and faces, such as in the music industry, technology industry, and many others. There is also an argument against personality theorists, stating that there are times when there is no evidence of a creator's personality in intellectual innovations.[3] While this may be true, in today's society most authors, creators, and innovators want to stand by their reputation and brand, and want it to be a constant symbol of whom they are and what the consumer is to expect when seeing it. This is very different from a single person's personality attribute behind that brand, but in some cases, even large corporations strive to stand by their original founding member's values.

Another group of individuals makes the case for justifying intellectual property rights as incentive based and utilitarian. The theories behind utilitarian arguments for intellectual property are by granting limited rights of ownership; authors and creators can promote more intellectual works based on this incentive. Without it, they may not create any intellectual property, which will inevitably slow social progress.[2] If this were an entirely accurate argument, then copyleft movements and free, open source software sharing would not fall under this domain. Many software programmers believe that developing computer programs based on open source code will not be done for the pure joy of coding, and without the restrictions of intellectual property laws, they will not create or innovate new technological ideas based on this open source code. On the other hand, this is the premise for the majority of ideas, innovations, and creative works used in commerce today. Without a financial backing, both companies and individuals would not be able to function and generate goods and services. Most companies go to extreme lengths to protect their own intellectual property and can become the foundation for its very own existence. An example of this would be at The Boeing Company, where employees take quarterly training and sign annual Code of Conduct to ensure that privacy and security measures are in place day in and day out so that intellectual property of the company is not lost or stolen. Locks are placed on laptops and all engineering drawings and email is securely located on servers that cannot be accessed outside of the company firewall. Without these extreme measures, even large companies can falter in the face of intellectual property loss.

This then takes us to the Lockean justification of intellectual property, based on the theories of philosopher John Locke. Locke believed that individuals are entitled to the fruits of their labor, and since we each own our bodies and the labor that it produces, it is translated to the goods that are produced from ourselves. To counter this argument, since the skills, tools and inventions that are used in conducting this labor are social products, then there is no justification for the individual to make intellectual property claims on their ideas.[4] Locke's theories still generally hold true today in some forms, such as creative writing and entertainment industries. Books, movies, and music that are created are the labor that generates enormous fruits, and it should be the sole property of the artist.

[3] Hughes, Justin. "The Philosophy of Intellectual Property." *Georgetown Law Journal*. Dec. 1988. Accessed Feb. 2014 <www.justinhughes.net>.
[4] Moore, Adam.

Taking a step away for a moment from the perspectives of the holders of intellectual property rights, we now examine how this affects those consumers and individuals who benefit on a daily basis from the innovations and creations of these laborers. How do the copyright law, patent law, and other governances influence the average citizens who with or without knowledge infringe on these rights more often than they know? For simplicity reasons, we look to the U.S. Copyright Act, which was created in 1976, at a time when the Internet barely existed and computers primarily existed in businesses for industrial and corporate purposes, or were a luxury of the rich. Media during this time was only available to the consumer in hard format, and books, magazines, and newspapers were only available in print form. Fast forward to 2014, the digital age has allowed nearly every person who has access to the Internet, to be more likely to become a copyright owner of some type of work. The simplicity of the U.S. Copyright Act becomes ever so complex in the digital revolution. Similarly, U.S. Patent Law (Title 35 U.S. Code, Section 101) states: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." Patents protect inventions by giving the inventor a monopoly for a specified period of time. Patents differ from copyrights in that they protect the invention, not just a particular expression or implementation of it.[5] With the digital revolution then, does the U.S. Patent Law still hold true then, or is it in need of updating just as the U.S. Copyright Act is? To understand this, we will examine closely a case scenario that highlights whether intellectual property laws are supporting or hindering innovation.

In the spring of 2011, Apple Inc. (herein referred to as 'Apple') began filing patent lawsuits against their industry rival and business collaborate, Samsung Electronics Co., Ltd. (herein referred to as 'Samsung'). Following the release of Apple's iconic iPhone as well as their many other laptop and tablet products, Samsung released similar smartphones and tablets that utilized many of the innovative features of the Apple products. Apple subsequently filed over 50 lawsuits against Samsung over a span of ten countries, with over a billion dollars in litigation claims between them. Samsung then counter-sued Apple in four countries, alleging that Apple infringed Samsung's patents for mobile communications technologies. The lawsuits that Apple filed against Samsung are claims of breaches of seven of their patents as well as other trade dress violations. Many of the Apple patents were undoubtedly infringed upon and were considered epic in terms of smartphone touchscreen capabilities, such as several touchscreen interactions, tap-to-zoom and navigation features. There were also many trade-dress and ornamental design patents that indicate what the Apple products generally looks like from a distance, and if a consumer would be confused seeing the Apple and Samsung products side-by-side based on general visual appearance. This claim about the ornamental design of the phone was held by an Apple patent and was at the heart of the dispute; it was depicted in court by various figures showing a thin rectangle with rounded corners. Ultimately, the jury returned a verdict largely favorable to Apple based on patent infringement on Apple's design and dilution of Apple's trade dresses relative to the iPhone, and awarded Apple more than $1 billion in damages.[6]

[5] Baase, Sara. *A Gift of Fire*. Aug. 2012.
[6] Lowensohn, Josh. "Jury Awards Apple More than $1B, Finds Samsung Infringed." *CNET*. 24 Aug. 2012. Accessed Feb. 2014 <www.cnet.com>.

While the outcome of this landmark patent case will conceivably raise questions, it highlights a new era of intellectual property rights and the ethical validity of them. How far is too far when not only infringing on patents, but granting them in the first place? Should Apple have gone to such extreme lengths to patent so wide and deep into their products, and then when there was no tangible product or innovative feature left to patent, they claimed patents on overall look and feel. A similarly criticized system of patenting is using patent trolls, which are companies that make all of their money by licensing patents and collecting fees for them, and then suing other companies for patent infringement. Patent trolls set up shell companies to hide their activities. Those who are facing litigation then do not know the full extent of the patent that is being held by their adversary. This in turn prevents innovators from being able to find each other, and undermines companies' understanding of the competition.[7] Critics of this type of patent system observe that when companies collect patents for the sole purpose of bringing lawsuits for infringement, the law does not serve the goal of encouraging innovation.[8] Following the jury verdict in the Apple/Samsung trial, Samsung made the following public statement which remained consistent with the critics perceptions of the patent system: "Today's verdict is a loss for the American consumer. It will lead to fewer choices, less innovation, and potentially higher prices. It is unfortunate that patent law can be manipulated to give one company a monopoly over rectangles with rounded corners, or technology that is being improved every day."[9]

Since there is a great dichotomy in the opinions for and against the verdict of this trial, we will take a deeper look to see if the intellectual property rights that were awarded to Apple stay true to the moral justification of these rights as held by the Personality, Utilitarian and Lockean theorists. Per the personality theorists, since they believe that the intellectual property is an extension of the creator and is tied to their physical selves in the form of a tangible product, they would likely agree with the verdict largely favorable to Apple. In the case of Apple's overwhelming comeback in the computing industry based on the iconic iPhone, this success is largely attributed to the visions and innovation of its creator, Steve Jobs. Steve Jobs was then CEO of Apple, and it is agreed upon by industry professionals that he was the reason for the success of the products, and therefore the products would be very closely tied to his reputation and the reputation of the Apple brand. It can then be inferred that there is evidence of the creator's personality in the product, and therefore per personality theorists, property rights were justified in the verdict to cover the damages of economic loss that were incurred with the work being reproduced by Samsung, as well as to protect the reputation of Steve Jobs and Apple.

If the utilitarian theorists were to weigh in on this trial, they would believe that intellectual property rights are granted so that authors and creators can continue to promote more intellectual works based on gaining an economic incentive. Therefore, if Apple were not granted all of the property rights that they had, they would not continue to create more innovative products. The utilitarians may not agree with the verdict in this case, because gaining profit from the $1 billion in infringement damages was going to

[7] "Executive Actions: Answering the President's Call to Strengthen Our Patent System and Foster Innovation." Office of the Press Secretary, The White House. 20 Feb. 2014. Accessed Feb. 2014 <www.whitehouse.gov>.
[8] Baase, Sara.
[9] June, Laura. "Apple vs. Samsung: The Verdict." *The Verge.* 24 Aug. 2012. Accessed Feb. 2014 <www.theverge.com>.

neither motivate nor hinder the future of the Apple Company and their evolving product line. It was merely a lawsuit that was intended to slow the progress of the rival companies, but in reality most consumers are well aware of the Apple products and know what they are purchasing whether they purchase Apple or Samsung. The Apple Company will continue to develop products and to innovate, and utilitarians would largely agree.

The last group of individuals are the Lockean theorists, and they would likely agree with the verdict of the trial. They believe in creators benefiting from the fruits of their labor, and thus they would agree that Apple should be the only company turning a profit based on the innovations that they created and implemented into their products. Locke would argue that it is unjust for people to misuse another's ideas. In the case of the trial, it would be a fair assumption that Samsung was out to profit from the success of Apple.

If there is a divide in opinions of the theorists of intellectual property moral justifications, then how as a society can we better understand and change the policies of intellectual property in the future to support both innovation and minimize unwarranted lawsuits? The premise should be to reward innovators for their creative work, and if the rights to this work are liberally protected, it offers others visions and encouragement to build upon their work without stealing it. If there are facets of the creator's work that must be used, then royalties must be paid and requested in a legal platform. There is the innovation that is epic and landmark, and then there is innovation that builds upon that and continuously improves. From the first ever automobiles, to flat screen televisions, until someone develops a new way of doing something, there will never be this evolution of products without reproduction and distribution to some level. The holder of the 1895 patent on an automobile sued Henry Ford;[10] does that mean then that Henry Ford never should have revolutionized the automobile industry by developing the first automobile that middle class Americans could afford? He did not invent the automobile nor the assembly line, but he was able to revolutionize transportation forever by developing a system to lower costs through mass production. When Apple first released its iPhone, it was at a selling price that most consumers could not afford, and it was contracted to only one service provider. This made the phone a very exclusive commodity, and created even more reasons for competitors to want to make a similar device at a more affordable rate. Without other companies doing this, just as Henry Ford did, it would make the consumer market very shallow and create a monopoly for the leading company. While the iPhone is not required for one's livelihood the way an automobile is, it can change the world and that type of power to a single company furthers into blanket patents, which then translate into unwarranted lawsuits, and billions of dollars at stake. "Regardless of the outcome of the trial, we might want to step back and consider whether society should be granting such powerful rights so easily. Are the [iPhone] features at issue really deserving of so much protection? On the whole, the trial is one more indication of a patent system that has lost its bearings, with litigation rather than innovation leading the way."[11]

[10] Baase, Sara.
[11] Feldman, Robin. "Tech Giants Gear Up for Patent Battle." *Science Friday*. 3 Aug. 2012. Accessed Feb. 2014 <www.sciencefriday.com>.

The policies surrounding the patent system (in the United States) are governed by federal laws, and are executed by the U.S. Patent and Trademark Office. While patent attorneys do their best to identify what is and is not patentable, there are just not enough resources to dig deep to ensure that patents are innovative, not used in the past, and are non-conflicting. The Patent Office has a backlog of more than 600,000 patents and issues approximately 40,000 patents a year.[12] Decisions about granting patents are generally complex, and these decisions require knowledge of history of that related technology. In the fast-developing industries such as software, the Web, and smartphone technologies, this becomes even more complex and mistakes are inevitable. In an effort to improve patent reform, in 2013, President Obama and his administration began to pass landmark legislation through a series of initiatives designed to combat patent trolls, further innovation and strengthen the patent system.[13] The basic premise of the executive actions are first, to use crowdsourcing techniques to find relevant prior art for the patent that is being requested. The public, applicants, and patent holders and examiners will have access to the information and more data can be collected to identify whether an invention is truly novel. Second, there will be more robust technical training to help patent examiners keep up with fast-changing technologies. Third, the administration will appoint Pro Bono legal representation to inventors who are not able to maintain their own representation. The presidential administration will also be working with Congress to pass further laws to combat patent trolls and curtail abusive patent litigation by improving transparency in the patent system. Lastly, the administration will continue to work to strengthen the current patent system through making patents clearer, and making educational tools, resources and academic scholars to volunteer their time to make available more robust technical training to patent examiners. With these executive actions in play, it will help to level the playing field for inventors and litigators alike, ideally fostering innovation. Ultimately, it will be up to the individuals who create their art to strike a fine balance in protecting what is rightfully theirs, but sharing it so that the world can continually build upon it in the years to come.

[12] Baase, Sara.
[13] "Executive Actions"