On Social Welfare and the Incentive to Share: Towards a Unified Understanding of Intellectual Property Law in Canada

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Introduction

One is generally well-advised to understand both the purpose and process of a thing before tinkering with it. This lesson is no less true for amending the provisions of a statute than it is for adjusting the gears of a bicycle, car engine or wristwatch. It is no doubt for this reason that scholars, judges and legislators continue to debate the appropriate means and ends of law. How we justify a given law defines the extent of the rights that it offers, which in turn greatly affects not only rights-holders but also the society that must respect those rights. Errors or misplaced consensus, which arise from genuine but conflicting philosophies as well as specious rhetoric, thus have significant consequences for the application and development of the law. In this essay, I intend to cut through such confusion with respect to intellectual property law and elucidate precisely why rights under its banner exist and how they operate in Canada.

Although I will examine their extensive common ground, it is noteworthy that the three branches of intellectual property law – copyright, patents and trade-marks – are most often discussed separately. They are indeed discrete entities and so, to some extent, such distinction is fitting. Copyright law protects creative expressions in their most personal form, such as literature or works of art. Patents defend inventions – inherently functional devices with some practical application, like a drug to treat an illness. Trade-mark law safeguards indicia such as logos or brand names that are used to distinguish owners' goods from those of others. These branches vary significantly from each other in terms of their practical contexts and schemes of protection. Nevertheless, I believe that excessive focus on the branches' differences belittles their parallels, consideration of which can bring each back from its isolated, romanticized extremes to a more objective assessment of why and how it truly functions.

Following this approach, my goal in this essay is to establish that Canadian intellectual property rights, in both design and practice, are focused on social welfare by encouraging the dissemination and consequent public engagement of creative works. In Part I, I will explain why the oft-cited, individualistic natural law justification of intellectual property rights is not only descriptively inaccurate but prescriptively undesirable. I suggest and refine a utilitarian alternative in Part II, first explicating precisely why it is a more reasonable explanation than natural law and then rationalizing how it is generally consistent with Canada's copyright, patent and trade-mark schemes. I build on these intermediate conclusions in Part III to suggest that intellectual property rights advance social welfare primarily by incentivizing the broad distribution, rather than creation, of creative works, which is achieved by granting to their owners rights that facilitate commercial exploitation.

Part I: The Shortcomings of Natural Law

Jurists have long sought to justify the conferral of intellectual property rights by reference to the principles of natural law.[1] In essence, this doctrine holds that certain rights are somehow innate and undeniable; they are merely given expression by human-crafted statute. Two related justifications are often applied to intellectual property law: the "labour theory" and the "personality theory". Admittedly, these theories seem to comport with the intuitive senses of entitlement and possessiveness that underlie human nature. Nevertheless, as I shall establish in this section, these accounts neither accurately describe nor desirably explain intellectual property law, both in principle and with respect to Canadian law. Although some of the following

[1] Interestingly, some scholars have used the natural law principle of personal autonomy to challenge the conferral of intellectual property rights: see Tom G Palmer, "Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects" (1990) 13 Harv JL & Pub Pol'y 817 at 821-827 [Palmer (Justified)].

criticisms have been discussed in greater detail elsewhere, they are worthwhile to review and reframe here as a basis for this essay's later arguments.

The Incompatibility of Natural Law and Modern Intellectual Property Law

Natural law theories are paradoxical when applied to intellectual property rights

The "labour theory" of property, famously proposed by English philosopher John Locke, has long been cited as a foundational justification for intellectual property law.[2] Locke's theory begins with the dual premises that every individual has inherent dominion over her own "person" and "labour"[3] whereas the world's natural resources are initially held in common by all of humanity.[4] Once a person has applied her labour to such a resource, however, she has made it useful and thereby appropriated it as her property.[5] Locke acknowledged that property rights under this view are justified only where two conditions are satisfied. First, per the "no-harm" proviso, a labourer must not worsen others' positions by her appropriation of a resource from the commons.[6] Second, following the "no-spoilage" proviso, no person should take from the commons more than she can use without incurring waste.[7]

Unfortunately for strict Lockeans, the intuitive appeal of the labour theory is frustrated by the fact that intellectual property rights do not generally satisfy the theory's conditions. The no-

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[2] John Locke, "Second Treatise of Civil Government" in Peter Laslett, ed, *Locke: Two Treatises of Government*, 3d ed (Cambridge, UK: Cambridge University Press, 1988) [Locke]. Although Locke is perhaps the most famous exponent of the labour theory of property generally, many other scholars have applied similar rationales to intellectual property law in particular (*e.g.* Lysander Spooner, Ayn Rand, Israel Kirzner): see Palmer (Justified), *supra* note 1, at 821-827.

[3] Locke, *supra* note 2 ("every man has a 'property' in his own 'person'" as well as "[t]he 'labour' of his body and the 'work' of his hands" at para 26).

[4] *Ibid* ("all the fruits [the earth] naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of Nature, and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state" at para 25).

[5] *Ibid* ("[w]hatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property" at para 26).

[6] *Ibid* ("no man but [the labourer] can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others*" at para 26 [emphasis added]).

[7] *Ibid* ("[a]s much as any one can make use of *to any advantage of life before it spoils, so much he may by his labour fix a property in*" at para 30 [emphasis added]).

harm proviso is breached because such exclusive rights inevitably deplete the commons to the detriment of others. As it relates to intellectual property, the commons is a finite collection of ideas – each with its own unique meaning and opportunities – rather than an infinite trove of roughly interchangeable ideas.[8] Application (and thus appropriation) of an idea thereby withdraws a unique element from the commons without necessarily compensating or expanding it in return.[9] Intellectual property rights further violate the no-spoilage proviso. In many fields, an idea's usefulness is directly related to its novelty. Reduction or elimination of such novelty by appropriation may not affect the inherent value of the idea *per se*, but it does deplete its social value and thus potential for later use.[10] It is interesting that although the Lockean theory at first seems to permit extensive intellectual property rights by setting only labour as the threshold for protection, the theory's rigid limitations preclude rights sufficiently broad to account for the bare minimum of intellectual property protection.

A related alternative to the Lockean view is a "personality theory", such as the one proposed by German philosopher Georg Wilhelm Friedrich Hegel.[11] Hegel began his hypothesis

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[8] See Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot, UK: Dartmouth Publishing, 1996) [Drahos] (the stock of "usable abstract objects" at any given point is limited by "the state of cultural and scientific knowledge which exists at that historical moment" and because "some ideas or knowledge may be necessary gateways to others" at 51); Carys Craig, *Copyright, Communication and Culture: Towards A Relational Theory of Copyright* (Cheltenham, UK: Edward Elgar Publishing, 2011) [Craig] ("[t]he difficulty in the case of 'ideas' is that, where an idea has a meaning or purpose of its own, it will simply not be true that any other idea can perform the same function" and thus "the removal of something *unique* from the common necessarily causes harm" at 78).

[9] *Ibid* ("[g]ranting a property right in X has precluded others from using X in whatever way they choose: responding to X, transforming it, critiquing it and building upon it to produce Y and Z" at 78). *Contra* Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Geo LJ 287 at 315-325 [Hughes] (discussing that there is at least an equilibrium between those ideas being removed from the commons and those such appropriation contributes back to the commons).

[10] See Craig, *supra* note 8, at 81-83; Drahos, *supra* note 8 ("[a]s abstract objects ideas cannot spoil, but the opportunities that they confer may" at 51); Hughes, *supra* note 9, at 139-140. *Contra* Mark A Lemley, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031 at 1050-1058 (arguing that information cannot be depleted and its consumption is non-rivalrous).

[11] Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, translated by Thomas Malcolm Knox (Oxford: The Clarendon Press, 1957) [Hegel]. Despite the Hegelian theory's natural law flavour, it has been pointed out that Hegel sought rather to justify his theory on purely functional grounds: see Jeanne L Schroeder, "Unnatural Rights: Hegel and Intellectual Property" (2006) 60 U Miami L Rev 453. Although Hegel is the chosen focus here, many other scholars have advocated similar personality-based justifications of property rights as well (*e.g.* Wilhelm von

with the premise that an individual's internal will is the core of her existence and constantly seeks expression and effectiveness in the external world through her personality.[12] The inherent human drive to act upon the world is thus an initial step in this ongoing struggle for self-actualization.[13] Clearly demarcated property rights prevent endless conflict between individuals, each trying to protect her self-actualization from that of others.[14] According to this view, property is therefore essentially a protected expression of one's will and personality. Hegel's justification seems to be an especially appealing explanation for intellectual property law given the highly personal connection that many creators have to their creations.

Like the labour-based justification of intellectual property rights, however, a personality-based theory is thwarted by its own dogma. Its most glaring problem is quite simply its equivalence of intellectual property works and their creators' personalities.[15] Surely most would not have difficulty in making such a connection for traditional works of art, such as paintings or novels, but few would so generously describe other, more strictly functional (but protectable) works like a pharmaceutical compound or a mousetrap. Nevertheless, strict application of a personality theory demands that all such works be treated as roughly equal expressions of their creators' personalities if they are to receive roughly equal legal protection. The alternative – to grant varying rights based on works' relative levels of personality – is not only an unworkable

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Humboldt, Immanuel Kant): see Palmer (Justified), *supra* note 1, at 835-843; Margaret Radin, "Property and Personhood" (1982) 34 Stan L Rev 957.

[12] See Hegel, *supra* note 11 ("[p]ersonality is the first, still wholly abstract, determination of the absolute and infinite will" at para 41); Hughes, *supra* note 9 (at "[f]or Hegel, the individual's will is the core of the individual's existence, constantly seeking actuality and effectiveness in the world" and personality is "the will's struggle to actualize itself" 331).

[13] See Hegel, *supra* note 11 ("[p]ersonality is that which struggles to lift itself above this restriction [of only being subjective] and to give itself reality, or in other words to claim that external world as its own" at para 39); Hughes, *supra* note 9 ("[a]cting upon things is an initial step in the ongoing struggle for self-actualization" at 333).

[14] See Hughes, *supra* note 9 (property rights have "the immediate purpose in preventing men from forever being embroiled in an internecine conflict of each individual trying to protect his first forays at self-actualization from the predation of others" at 333).

[15] See Palmer (Justified), *supra* note 1 ("[i]f, as Hegel insists, '[a] person must translate his freedom into an external sphere in order to exist as Idea,' this does not mean that this 'translation' is constitutive of the person himself, nor that the artifacts resulting from this translation become inextricably bound up with the person" at 843).

standard but contradicts at least the intuitive sense of entitlement to one's creations espoused by the labour theory in particular and natural law school more generally.[16]

Natural law is inconsistent with modern Canadian intellectual property rights

By a more practical view, it is significant that the expectations of such natural law-based theories are also contradicted by the state of modern intellectual property rights in Canada. Consider for example the law's general indifference towards the influence of past innovators in present creators' works. It is generally accepted that there are few, if any, truly original acts of creative expression. Rather, creators are unavoidably inspired – consciously or subconsciously – by the contributions of those who came before.[17] So although a new work may indeed represent the present creator's labour and/or personality, so too does it embody some quantum of the labour and/or personality of her forebears. Copyright and patent law allow for the possibility of joint authorship and inventorship, respectively, but such rights are limited to present contributors.[18] This is a reasonable limit, given the sure impossibility of identifying and

[16] See Hughes, *supra* note 9 ("[a] property system protecting personality will have difficulty finding reliable indicia for when people do and do not have a 'personality stake' in particular objects" and when personality "is manifested to varying degrees in different objects" at 339).

[17] See Craig, *supra* note 8 ("[o]nce it is recognised that every ideal object is necessarily the 'joint product of human intellectual history', the simple claim to a right over the fruits of one's labour is emptied of meaning: the fruit of intellectual labour has no definable boundary, and the results of an individual's 'added labour' become impossible to demarcate" at 83-84); Horatio M Spector, "An Outline of a Theory Justifying Intellectual and Industrial Property Rights" (1989) 8 Eur IP Rev 270 ("[i]f the labour employed by a person does not offer an explanation for the total value of a commodity – and only explains the added value – then Locke's theory does not justify ownership over the whole commodity" at 272); William M Landes & Richard A Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Harvard University Press, 2003) [Landes & Posner] ("since... intellectual creation is a cumulative process – each creator of 'new' intellectual property building on his predecessors – and since copyright and particularly patent law give a long-term property right to someone who may have won the race to come up with the new expressive work or new invention by just a day, it is unclear to what extent an intellectual property right can realistically be considered the exclusive fruit of its owner's labor" at 4).

[18] For copyright law, see *Copyright Act*, RSC 1985, c C-42, s 2 [*Copyright Act*] (definition of a "work of joint authorship"); *Neudorf v Nettwerk Productions Ltd* (1999), 94 ACWS (3d) 737 at paras 14-96, 3 CPR (4th) 129 (BSSC). For patent law, see *Patent Act*, RSC 1985, c P-4, ss 31, 53(1) [*Patent Act*]; *Apotex v Wellcome Foundation Ltd*, 2002 SCC 77 at paras 95-99, [2002] 4 SCR 153, citing *Gerrard Wire Tying Machines Co v Cary Manufacturing Co*, [1926] Ex CR 170, [1926] 3 DLR 374.

delineating such past and present contributions. Nevertheless, by a strict view of either natural rights theory discussed above, the line of ownership seems unfairly drawn.

The present creator is also unfairly disregarded under such a natural law-based view, as she is not entitled to intellectual property rights simply because her creation is an expression of her personality or the result of her labour.[19] For instance, a trade-mark deemed likely to be found confusing with another, previously used mark will be barred from use regardless of whatever effort went into creating the confusing mark.[20] Likewise, the inventor who files her application first will be the one to receive patent protection.[21] Another, who simultaneously or even previously develops the same invention independently but files later, receives nothing. In copyright, an author who makes a transformative use of another author's protected work, thereby going to some effort or adding some measure of personal flair, might receive only significantly limited rights or none at all.[22] Such inconsistencies – which go on[23] – ought to confirm that a natural law does not accurately describe modern Canadian intellectual property law.

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[19] See Palmer (Justified), *supra* note 1 ("[l]iberty and intellectual property seem to be at odds, for while property in tangible objects limits actions only with respect to particular goods, property in ideal objects restricts an entire range of actions unlimited by place or time, involving legitimately owned property... by all but those privileged to receive monopoly grants from the state" at 830).

[20] See *Trade-marks Act*, RSC 1985, c T-13, ss 7, 20 [*Trade-marks Act*].

[21] See *Patent Act*, *supra* note 18, s 28.2(1).

[22] See *e.g. Delrina Corp (Carolian Systems) v Triolet Systems* (2002), 58 OR (3d) 339 at paras 22-27, 17 CPR (4th) 289 (CA), aff'g *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, [1964] 1 WLR 273, [1964] 1 All ER 465 (HL (Eng)) ("[t]he reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected" at 481). Such uses in copyright might be protected by the principle fair dealing, but these provisions have been interpreted narrowly: see *e.g. Alberta (Minister of Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2010 FCA 198, [2011] 3 FCR 223 (the fair dealing provisions of the *Copyright Act* must be given "[a] large and liberal interpretation" but "should not be given a meaning it cannot ordinarily bear" at para 38). *Contra CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*] (the fair dealing provisions must "be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained" at para 51).

[23] For instance, natural rights theories do not jibe with limited terms of protection or rights of alienation: see *e.g.* Landes & Posner, *supra* note 17 ("a person's freedom is diminished rather than enlarged by limiting his right to sell his property in exchange for money that he can use to buy things he needs or wants more" at 4).

The Undesirability of Natural Law Theories as a Sole Justification

Beyond their descriptive inaccuracies, natural law-based justifications are undesirable for what I would characterize as at least two misapprehensions of the law's function in society. First, and perhaps most obviously, such theories inappropriately direct the law's attention towards individual entitlement rather than social welfare. In doing so, natural law theorists overlook the fact that law is fundamentally a social construct. Not only is law human rather than divine in origin but, whatever its rules, law is designed to govern how individuals act in relation to others and their property. This inescapable social context is the limiting force that guards society against the spectre of absolute rights.[24] Natural law does not generally abide such limitations. This lapse leads either to the over-protection of creators' rights at the significant expense of others' freedom and opportunities or to meaningless rights given the inevitable conflict between individuals' claims to their respective but overlapping creative expressions as discussed above.

The second and, in my view, more serious misapprehension of the natural law school lies in its approach to law as a means of advancing public policy interests in society. Here it must be noted that, where natural law-based theories do limit rights in relation to others, as done by Locke's provisos, such rights are only constrained with respect to the immediate rights of others and thereby without reference to any purpose of the legal system beyond maintaining order and justice. While these functions are certainly fundamental to any society's laws, it must be borne in mind that laws may also be legitimately used to advance other policy ends, such as increasing general utility or economic prosperity. Natural law devotees thus ignore that laws might be

[24] The law of every field recognizes that individuals do not enjoy unbridled freedom to do as they please. Even human rights, supposedly the most inviolable of our legal rights, are limited: *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1. Intellectual property rights are even more subject to limitation than human rights given their distinct natures; the former protects a positive right to do something whereas the latter are mostly negative rights not to have something done to the person protected.

judged for reasons other than immediate order and justice. If laws are judged by their success at advancing their intended policy goals, then this view constrains the principled modification of laws by removing from consideration an entire set of judging criteria.[25]

Part II: The Utilitarian Goals of Intellectual Property Law

The shortcomings of natural law-based justifications of intellectual property rights invite a theory more grounded in social welfare and consistent with the various Canadian schemes. Utilitarianism appears to be the clear answer to this call. By such a view, intellectual property law is intended to provide some social benefit greater than mere fulfillment of individuals' feelings of entitlement to the fruits of their creations. I will begin this section by explaining why such a view is prescriptively desirable and respond to several notable challenges. I will then introduce and briefly explain the economic analysis of law, which provides a useful framework for deriving the goals underlying the utilitarian paradigm. Finally, I will apply this framework to the three traditional branches of intellectual property – trade-marks, patents and copyright – and explain how the utilitarian view is descriptively accurate by aligning the law's ultimate economic goals with the judicially recognized purposes of each scheme.

A Case for Utilitarianism

Utilitarianism is desirable precisely for its freedom from and inherent opposition to the prospective faults besieging the natural law theories discussed in Part I. Consider for example the utilitarian focus on social welfare over individual entitlement. This emphasis provides the

[25] Others have expressed concern that the natural law school inherently constrains policy-making: see Craig, *supra* note 8 ("[t]he label of natural entitlement therefore constrains policy-making; if the author's right is private and pre-political as opposed to socially produced, then it is not amenable to pragmatic or principled alteration in the name of a broader public interest" at 86); Richard A Epstein, "The Utilitarian Foundations of Natural Law" (1989) 12 Harv JL & Pub Pol'y 713 [Epstein] (such theories "disavow the idea that the consequences of any legal rule could justify its adoption or rejection" at 713).

necessary foundation for limited, rather than excessive or absolute, rights that is generally absent from the natural law view. Utilitarianism's focus is also pleasingly simple. It eschews abstract, unverifiable explanations of human nature and behaviour as well as unyielding, if well-intentioned, rules such as the Lockean provisos. It thereby allows for rights to be flexibly granted and limited without any inevitable dogmatic inconsistencies. Utilitarianism also contemplates how social welfare might be advanced beyond the traditional considerations of order and justice. Accordingly, such a view permits additional bases of reasoned evaluation and modification of intellectual property rights that are more reactive to evolving social values.

Interestingly, the utilitarian view has been criticized by some for its shift in focus from the individual creator to society. Libertarian scholar Tom Palmer equates this shift with a departure from justice as the law's focus.[26] He argues that a utilitarian approach unfairly ignores the inevitable welfare losses suffered at the individual level by policies restraining personal liberty to engage in supposedly infringing activities.[27] Such arguments that highlight the counterintuitive but apparent amoral tendency of pure utilitarianism are compelling. I agree with Palmer that it is wise to guard against granting rights that would yield gross imbalances across society while raising net welfare. However, this concession is hardly fatal to the utilitarian approach. Utilitarianism, in fact, retains a significant moral element; it simply operates at a broader level than the more short-sighted natural law view. Renowned jurist Richard Posner explains: "[U]ncompromising insistence of individual liberty or autonomy regardless of the

[26] Tom G Palmer, "Intellectual Property Rights: A Non-Posnerian Law and Economics Approach" (1989) 12 Hamline L Rev 261 at 262-263 [Palmer (Non-Posnerian)]. It is noteworthy that Palmer goes further to suggest that intellectual property rights are "illegitimate state-granted monopol[ies]" and "unjustifiable interventions into voluntary market processes": *ibid* at 263 and 304.

[27] *Ibid* ("[t]he assumption [of utilitarianism] is that the principal or even sole criterion for evaluating intellectual property law is its contribution to aggregate utility, and that the legal regime governing ideal objects should aim explicitly at a utilitarian result, maximizing net utility by balancing off the welfare gain from innovations induced by intellectual property rights against the welfare losses resulting from the restrictions on the dissemination of such innovations" at 262).

consequences for the happiness or utility of the people of the society seems equally misplaced and unacceptable."[28] As such, Palmer's libertarian sensibilities may have taken him too far in casting off all of utilitarianism as a justification for law.

Another, more compelling, criticism of the utilitarian justification is that it does not inform an initial distribution of rights as the natural law approach does. It is significant that legal rights are fundamentally personal rights; that is, they are granted to persons and not society. Because utilitarianism focuses exclusively on social welfare, however, such a theory can only serve to *limit* such personal rights; it is inherently incapable of prescribing them. As such, the utilitarian approach does not resolve the initial distribution of legal rights. Professor Richard Epstein suggests that property rights be granted to those who would traditionally have been entitled to them under the natural law view and thereafter limited by utilitarian demands as necessary.[29] I agree: This solution guarantees full satisfaction of utilitarianism while providing a defensible inclusion of the intuitively appealing natural rights. Yet this approach must be framed carefully. The utilitarian view is capable of accommodating natural law to some extent, while the reverse is not true. I think it is thus appropriate to proceed with the framework of utilitarianism as the dynamic limiting force on a static, presumptive set of natural rights.[30]

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[28] Richard A Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981) at 65 [Posner].

[29] Epstein, *supra* note 25 ("[t]he basic rules of natural law operate as a first round of presumptions [in that] [t]hey capture much of what makes sense in a sound legal order [and yet] they do not exhaust all the possibilities for gain in the structuring of social institutions" at 750).

[30] It is noteworthy that Epstein and Posner seem to agree on the limited compatibility of utilitarianism and natural law: see Epstein, *supra* note 25 ("[t]he principle of autonomy is often consistent with economic welfare (though less so with redistribution of wealth), but it should in any normative discourse be regarded as an end in itself and not as a contingent means toward some other end" at 75); Posner, *supra* note 28 ("[i]f transaction costs are positive (though presumably low, for otherwise it would be inefficient to create an absolute right), the wealth-maximization principle requires the initial vesting of rights in those who are likely to value them most, so as to minimize transaction costs" at 71). *Contra* Robert P Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011) [Merges] ("while Locke's theory reflects a deep concern for incentives and consequences, it (1) points to an individual right to property and (2) completely avoids adherence to a calculus of preferences – and therefore is quite distinct from utilitarian justifications of IP" at 320). Although Craig seems dismissive of the attempt to salvage the natural law approach, her reservations seem more to do with the admittedly undesirable rhetoric than the base ideas: see Craig, *supra* note 8 ("[w]hat is not clear, however, is exactly why we should force ourselves to stumble through

The Law and Economics Framework of the Utilitarian Paradigm

The utilitarian paradigm is complemented by the study of law and economics, a method of analysis that has become increasingly popular across multiple areas of law in recent decades.[31] In essence, students of this school apply economists' tools to the study of human behaviour in a legal, rather than market, context.[32] Economics is founded on the assumption that humans are "rational maximizers of their satisfaction" or, simply, that people will respond rationally to exogenous constraints so as to maximize their welfare or some element thereof.[33] Building on this assumption, law and economics analyzes how people are incentivized by laws to do so. The study of law and economics is thus a powerful tool for deriving rational and testable hypotheses contributing to the understanding of laws' justifications.[34] I would emphasize here that the purpose of this essay is to explain how intellectual property rights conform to the generally accepted economic purposes of law rather than to suggest change on either front.

Within the utilitarian camp, there is ongoing debate over how the social welfare targeted by law ought to be defined. Phrased in the language of law and economics, the question is what

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the assumptions and unnecessary restrictions imposed by the invocation of natural law reasoning, rather than avoiding them and being honest about the end-point that is sought" at 93).

[31] This field of study was pioneered by economists Ronald Coase and Guido Calabresi in the 1960's and later expanded and brought to prominence by jurists Richard Posner and William Landes beginning in the 1980's: see Ronald H Coase, "The Problem of Social Cost" (1960) 3 J L & Econ 1; Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Yale LJ 499; Posner, *supra* note 28. Beyond intellectual property, the law and economics analysis has been applied to the laws governing, *inter alia*, corporations, tax, competition, tort, property and contract: see generally Francesco Parisi, "Positive, Normative and Functional Schools in Law and Economics" (2004) 18 Eur J L & Econ 259 at 259-261 [Parisi].

[32] See Posner, *supra* note 28 ("[i]f rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behaviour, then the conceptual apparatus constructed by generations of economists to explain market behaviour can be used to explain nonmarket behaviour as well" at 2).

[33] *Ibid* ("the economist's basic analytical tool for studying markets... is the assumption that people are rational maximizers of their satisfactions" at 1).

[34] This view facilitates critical appraisal of the law: see Landes & Posner, *supra* note 17 ("[b]y cutting away the dense underbrush of legal technicalities, economic analysis can also bring into sharp definition issues of policy that technicalities may conceal" at 10). Within the law and economics field, there is nevertheless a distinction between positive analysis, which seeks only to explain and evaluate the law, and normative analysis, which aims to recommend policy changes in light of such evaluation. For a helpful description and comparison of these schools, see Parisi, *supra* note 31, at 264-266.

element of social welfare ought to be maximized.[35] Two of the measures most often proposed are wealth and utility. In this context, wealth is the sum of all value held in the goods and services of society,[36] while utility refers to net personal happiness across society.[37] These maximands are at least intuitively beyond reproach; it seems exceedingly difficult to challenge prosperity and happiness as the ultimate incentives for any human activity. From a practical standpoint, maximization of wealth is clearly preferable to utility.[38] Wealth is objective and measurable while happiness is subjective and intangible. This difference is crucial to economic analysis, which relies on comparison of measurable outcomes among individuals to draw conclusions. Nevertheless, people are not merely rational wealth-maximizers.[39] For the purposes of this paper, it suffices to say that, in economic and practical terms, the dominant goal of law is the maximization of some combination of social wealth and utility.

Efficiency is another commonly proposed maximand in the law and economics analysis. With respect to property law, the proposition here is that rights ought to be allocated so as to minimize wasteful use of finite resources. The work of Richard Posner (later with economist William Landes) has focused extensively on such economic efficiency in the legal context[40] and

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[35] *Ibid* ("[t]here is an important methodological question that has openly engaged the attention of prominent law and economics scholars: What should the legal system try to maximize?" at 269).

[36] See Posner, *supra* note 28 ("[f]rom the concept of value derives the concept of the wealth of society as the sum of all goods and services in the society weighted by their value" at 60); Francesco Parisi & Jonathon Klick, "Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking" (2004) 79 Chicago-Kent L Rev 431 ("[u]nder wealth maximization principles, a transaction is desirable if it increases the sum of wealth for the relevant parties (where wealth is meant to include all tangible and intangible goods and services)" at 443).

[37] See *e.g.* Posner, *supra* note 28 (utility means "happiness – 'the surplus of pleasure over pain' – aggregated across all of the inhabitants... of 'society,' which might be a single nation or the whole world" at 49); Parisi, *supra* note 31 (defines utility as "human happiness and well-being" at 269).

[38] It has been argued that the goal of wealth maximization is more desirable than utility maximization from a moral standpoint as well: see Posner, *supra* note 28, at 65-69, 73-87. However, wealth maximization as the purpose of law has also been criticized as necessarily amoral: see Palmer (Non-Posnerian), *supra* note 26.

[39] Wealth and utility are not necessarily inconsistent concepts; increased wealth often increases utility: see Posner, *supra* note 28 ("[w]ealth is positively correlated, although imperfectly so, with utility" at 66). The reverse is not true, however, so the emphasis in law and economics is perhaps best left on wealth as the primary maximand.

[40] See e.g. Isaac Ehrlich & Richard A Posner, "An Economic Analysis of Legal Rulemaking" (1974), 3 J Legal Stud 257. For the William Landes and Richard Posner's collaborative work in the intellectual property law context, see *e.g.* William M Landes & Richard A Posner, "An Economic Analysis of Copyright" (1989) 18 J Legal Stud 325

is often characterized as advancing efficiency as the law's primary focus.[41] Although efficiency is certainly helpful in rationalizing property rights, it offers an incomplete justification. Like utilitarianism itself, efficiency cannot dictate a fair initial distribution of rights but can only serve to evaluate and streamline those rights once they are in place. Professor Robert Merges appropriately labels efficiency as an important but "midlevel principle".[42] Accordingly, I would suggest that efficiency be viewed as complementary, but secondary to the primary maximands of wealth and utility as the social purposes of the law.

The Utilitarian Purposes of Canadian Intellectual Property Laws

The maximization of social wealth and utility as the utilitarian goal of the law provides the necessary context for understanding and evaluating the more immediate purposes of the various intellectual property schemes in Canada. I will now conduct this analysis for each scheme in consideration of their respective histories and jurisprudence. This analysis confirms that a utilitarian justification of intellectual property law is descriptively accurate while the natural law view is not. In Part III, I will demonstrate how intellectual property rights themselves advance the purposes that I identify here.

Trade-marks are intended to directly stimulate modern commerce

The utilitarian purpose of intellectual property rights is most apparent in trade-mark law. Although rights-holders jealously defend the use and distinctiveness of their marks, their quarrels

("[a]s in most of our work, we are particularly interested in positive analysis, and specifically in the question to what extent copyright law can be explained as a means for promoting efficient allocation of resources" at 325); William M Landes & Richard A Posner, "Trademark Law: An Economic Perspective" (1987), 30 JL & Econ 265 (the purpose of trade-mark law is to "reduc[e] consumer search costs" at 269).

[41] See Parisi¸ *supra* note 31 ("[t]he primary hypothesis advanced by positive economic analysis of law [advanced by Posner and the Chicago school of economics] is thus the notion that efficiency is the predominant factor shaping the rules, procedures, and institutions of the common law" at 264). Given Posner's storied advocacy of wealth maximization as the economic aim of justice, it is perhaps unfair to characterize his later focus on efficiency as the suggesting it is "predominant factor" in the law and economics analysis: see Posner, *supra* note 28, ch 1.

[42] Merges, *supra* note 30, at 152-154.

are generally proxies for trade disputes and without reference to even the rhetoric of natural law. Indeed, trade-marks' rather uncontroversial role is to facilitate commerce. It is no coincidence that the use and legal protection of trade-marks expanded greatly during the Industrial Revolution in England amid the rapid development of business and consequent rise in the importance of advertising.[43] In modern-day Canada, the Supreme Court has recognized trade-marks' integral role in the national economy and has thus deemed the federal *Trade-marks Act* a valid exercise of Parliament's constitutional "general trade and commerce" power.[44] As such, there is little doubt that trade-marks are primarily instruments of economic activity.

It nearly goes without saying that trade-marks accomplish their commercial purpose by stimulating sales of the goods that they mark. Trade-marks are commonly held as doing so indirectly by indicating the source of the marked goods.[45] At an immediate level, they provide such distinction by purely sensory means. At a deeper level, the distinction is made by psychological association in the mind of the consumer between the mark and some abstract

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[43] See generally Sidney A Diamond, "The Historical Development of Trademarks" (1975) 65 Trademark Rep 265 at 266-288 [Diamond]; Brad Sherman & Lionel Bentley, *The Making of Modern Intellectual Property Law* (Cambridge, UK: Cambridge University Press, 1999) at 166-172; Christopher May & Susan K Sell, *Intellectual Property Rights: A Critical History* (Boulder, CO: Lynne Rienner Publishers, 2006) [May & Sell] ("[p]rior to the rise in advertising across the capitalist world, for instance, trademarks had little real economic significance, although during the nineteenth century their perceived asset value started to be more widely recognized" at 97).

[44] See *Kirkbi AG v Ritvik Holdings*, 2005 SCC 65 at paras 28-31, 43 CPR (4th) 385, citing *Asbjorn Horgard A/S v Gibbs/Nortac Industries Ltd*, [1987] 3 FC 544, [1987] FCJ No 245 (QL) (CA) and *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(2) [Kirkbi]. See also *Mattel USA v 3894207 Canada*, 2006 SCC 22, 49 CPR (4th) 321 [*Mattel*] ("[m]odern commerce is driven to a significant extent by famous brands" at para 59).

[45] See *Kirkbi*, *supra* note 44 ("[*t*]*rade-marks seek to indicate the source of a particular product, process or service* in a distinctive manner, so that, ideally, consumers know what they are buying and from whom" at para 39 [emphasis added]); *Mattel*, *supra* note 44 (trade-marks "serv[e] an important public interest in assuring consumers that they are buying from the source from whom they think they are buying" at para 21); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 SCR 824 ("the purpose of trade-marks is to function as a symbol of the source and quality of wares and services" at para 18); *Masterpiece v Alavida Lifestyles*, 2011 SCC 27, [2011] 2 SCR 387 (a trade-mark "allows consumers to know, when they are considering a purchase, who stands behind those goods or services" at para 1) [*Masterpiece*].

notion of the source's unique quality.[46] In the language of trade-mark law, this quality is the source's "goodwill"; it is the character responsible for attracting attention and custom.[47] Whether by sensory or cognitive means, the distinguishing power of a trade-mark rests wholly on its distinctiveness from other marks, which is thus a core principle in trade-mark law.[48]

In my view, the belief that trade-marks are intended to identify source must be reconciled with the fact that the actual sources of marked goods are so often unknown to consumers.[49] Rather, trade-marks indicate and guarantee the unique quality of the goods that consumers expect, thereby directly influencing their purchasing decisions for better or worse.[50] Phrased in the language of trade-mark law, that is to say that the trade-mark itself, not the source, is increasingly responsible for the creation and maintenance of goodwill. Accordingly, the true function of trade-marks is to identify a product as satisfactory and thus stimulate further

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[46] See Jacob Jacoby, "The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution" (2001) 91 Trademark Rep 1013 at 1015-1028 (discussing how a trade-mark's function is grounded in the understanding of the cognitive processes of the consumer).

[47] See *Inland Revenue Commissioners v Muller & Co's Margarine Ltd*, [1901] AC 217 (HL (Eng)) (goodwill is "the benefit and advantage of the good name, reputation, and connection of a business" and thus "the attractive force which brings in custom" at 223-224), cited in *Consumers Distributing Co v Seiko Time Canada Ltd*, [1984] 1 SCR 583, 1 CPR (3d) 1 [*Seiko*].

[48] See Harold G Fox, *The Canadian Law of Trade Marks and Unfair Competition*, 3d ed (Toronto: Carswell, 1972) ("[t]he advertising and sales value of a trade mark is in many cases dependent upon its uniqueness and dilution impairs the effectiveness of the trade mark as an advertising or selling medium" at 340). This protection of marks' distinctiveness by trade-mark law has led courts to regularly label trade-mark law as the arbiter of "fair competition" among traders: See *e.g.* Mattel, *supra* note 44 (trade-mark law "is sometimes said to hold the balance between free competition and fair competition" at para 21); *Consorzio del Prosciutto di Parma v Maple Leafs Meats*, [2001] 2 FC 536, 11 CPR (4th) 48 (TD) (protection of rightful owners of trade-marks from unfair competition "is part of the larger goal of ensuring stability in the marketplace, allowing the owners of registered trade-marks to invest in building up goodwill surrounding their valid and registered trade-marks" at para 21). This is more to do with rights among traders than benefits to society and so is not discussed at length in this essay.

[49] For instance, many prominent trade-mark owners (*e.g.* Procter & Gamble, Unilever, SC Johnson) choose to sell their goods anonymously and brand only the products being sold. Several scholars have written about the increasing social significance of trade-marks as products themselves and the concomitantly diminishing attention paid to the source itself: see *e.g.* Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (New York: Random Picador, 2000) at 27-36; Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum L Rev 809. Further, the assignment and licensing provisions of *Trade-marks Act* law distinguish the rights to use of a trade-mark from the source that the mark communicates to consumers: *Trade-marks Act*, *supra* note 20, ss 48, 50.

[50] See *Report of Trade Mark Law Revision Committee to the Secretary of State of Canada*, (Ottawa: Queen's Printer, 1953) ("modern commercial development has demonstrated that the public is not so much interested in source as in the maintenance of quality, kind and type" at 24), cited in *Eli Lilly & Co v Novopharm Ltd* (2000), [2001] 2 FC 502 at para 77, 10 CPR (4th) 10 (CA).

purchases by the consuming public.[51] The point of this tangent is that trade-marks perform a far more direct role in stimulating modern commerce than traditionally thought.

Trade-marks thus also serve a more significant role than might be thought in generating the social benefits that result from such commercial activity. Consider the immediate prosperity of a trader who successfully uses her mark to sell her goods. In the language of law and economics, she has increased her wealth and no doubt some measure of utility along with it. This economic activity also increases the government's taxation revenues, which are then (ideally) redistributed across society for the greater good, thereby increasing societal wealth and utility as well. A purchaser of the marked goods has likewise increased her utility because she has received the goods hoped for by relying on the trade-mark. The efficiency of this reliance has the additional benefit of saving time that the purchaser may spend on other wealth- and utility-maximizing activities. In light of these effects, it seems clear that the recognition of trade-mark rights fulfills an ultimately social purpose.

Patents are granted to advance innovation and the state economy

Courts and legislatures expounding upon patent law have consistently established perhaps the most explicit link between intellectual property rights and social welfare. Before either body had the jurisdiction to do so, however, patents began as monopolies liberally granted under the prerogative power of the English Crown in medieval times, as a convenient source of revenue beyond direct taxation and as a means to introduce new technologies to the national economy.[52] Although this practice was long criticized for its dubious legality and constraint of free trade, it

[51] As a corollary, the protection of distinctiveness is thus the protection of the incentives to buy that trade-marks provide consumers, which may thereby be diminished by their use upon either related or non-related goods: see Frank I Schechter, "The Rational Basis of Trademark Protection" (1927) 40 Harv L Rev 813 at 824-830.
[52] See generally Douglass North & Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (Cambridge, UK: Cambridge University Press, 1973) at 146-148; May & Sell, *supra* note 45, at 96; Drahos, *supra* note 8, at 29-31.

was not until 1601 that English courts were given the jurisdiction to address it. Shortly thereafter, in the famed *Case of Monopolies*, the Court of the Queen's Bench ruled that such state-granted monopolies were barred except in circumstances where they would provide social benefit.[53] This utilitarian emphasis was later codified in the *Statute of Monopolies* of 1623, which allowed patents only for new manufactures that contributed to the public good.[54] The Statute also made clear that patents belong to inventors by virtue of a privilege and not natural right.

Centuries later, Canadian courts have upheld this focus on social welfare as the ultimate justification for patent monopolies. This principle was affirmed by the Supreme Court of Canada in *Free World Trust v Électro Santé*.[55] In what remains the leading characterization of the Canadian patent system, Binnie J stated for the majority: "The patent system is designed to advance research and development and to encourage broader economic activity."[56] This utilitarian focus on driving innovation and the state economy has been widely affirmed in the subsequent caselaw.[57] Patents are thought to incentivize innovation by the enforceable rights and remedies promised to inventors that would allow them to maximally profit from their inventions during the temporary monopolies granted. By the same token, patents propel economic activity from the market entry and growth of enterprises possessing intangible assets by offering security to prospective investors and business partners.[58]

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[53] *Darcy v Allen* (1602), 11 Co Rep 84b, 77 Eng Rep 1260, 74 ER 1131 (QBD) (the Court accepted the defendant's argument that, where useful trades and inventions had been brought into the commonwealth by a person, "the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not" at 1139). For a detailed account of the case's proceedings and judgment, see Drahos, *supra* note 8, at 30-32.
[54] *English Statute of Monopolies of 1623*, 21 Jac 1, c 3, s 1.
[55] *Free World Trust v Électro Santé*, 2000 SCC 66, 9 CPR (4th) 168 [*Free World Trust*].
[56] *Ibid* at para 42.
[57] See *e.g. Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76 at para 185, 21 CPR (4th) 417 [*Harvard College*].
[58] See generally Teresa Cheung & Ruth M Corbin, "Is There a Method to the Madness? The Persisting Controversy of Patenting Business Methods" (2005) 19 IPJ 29 at 73; Clarisa Long, "Patent Signals" (2002) 69 U Chi L Rev 625; Bronwyn H Hall, "Business and Financial Method Patents, Innovation, and Policy" (2009) 56 Scot J Polit Econ 443 at 459 [Hall].

These two goals are closely aligned with utilitarianism. The social benefits flowing from patent-driven trade are largely the same as for trade-marks, while patents' additional purpose of stimulating innovation introduces another layer of benefits. Obviously, new inventions that are developed, refined and disseminated redouble patents' commercial impact and the social benefits thereof. As inherently functional works, however, the dissemination of patented inventions may directly contribute to individuals' welfare as well. Inventions like power tools or light bulbs allow individuals to make more efficient use of their time or resources, yielding more of the same to devote to other wealth- or utility-maximizing activities. Other inventions, such as pharmaceuticals or computers, may increase individuals' wealth or utility directly. In light of these benefits and the clear jurisprudential emphasis on social welfare, it is difficult to understand how one could seriously suggest that patent rights are grounded in anything but utilitarianism, let alone natural law.

Copyright is intended to expand social development and opportunities

Although copyright is associated with natural law far more often than trade-marks or patents are, the relevant authorities have consistently explained it in primarily utilitarian terms. Anglo-Canadian copyright began on an altogether different note, however, when Queen Mary I of England granted a monopoly over the book trade to a select group of publishers by royal charter in 1557.[59] The tacit benefit to the Crown in doing so was to limit the spread of seditious and heretical information while, in return, the publishers received the right to ply their trade unencumbered by competition. All that changed in 1709 with the passage of the *Statute of Anne*, which limited the duration of copyright and explicitly stated that its purpose was the

[59] See generally Drahos, *supra* note 8, at 23; Palmer (Non-Posnerian), *supra* note 26, at 264-268.

"Encouragement of Learning".[60] From copyright's evolution from a political to social entity in feudal England, it is noteworthy that a natural law justification was never cited as more than a means to a broader policy end.[61]

This tradition has continued in Canadian copyright law. In the seminal decision *Théberge v Galerie d'Art du Petit Champlain*, Binnie J of the Supreme Court held: "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator".[62] Despite this supposed balance, the Court accorded greater weight to the public interest.[63] Binnie J warned that "[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization".[64] This focus has been upheld in the Court's subsequent copyright decisions.[65] Given this past and present focus on the public interest, it seems that those who advocate authorial entitlement by a natural law view have engaged in some degree of *ex post* romantic idealism of copyright that is not reflected in its history or jurisprudence.

From its origin in feudal England to modern-day Canada, the primary purpose of copyright has thus evolved from restricting public knowledge to expanding it. The exceptional

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[60] *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned* (1710), 8 Anne, c 19. For more detailed discussion of the significant public interest dimension of the Statute, see generally Drahos, *supra* note 8, at 30-32; Mark Rose, "The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship" (1988) 23 Representations 51.
[61] See generally Drahos, *supra* note 8, at 22-28 (explaining that the English courts interpreted the instrumentalist purpose of the *Statute of Anne* in natural law terms to give authors some reward for their labours and others to be allowed to pursue their natural right to freedom of trade). See also *Donaldson v Becket* (1774) 4 Burr 2409, 98 ER 257 (HL (Eng)) (copyright is a statutory right, a limited in duration), overturning *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201 (QBD) (affirming a common-law right of literary property and the principle of perpetual copyright).
[62] *Théberge v Galerie d'Art du Petit Champlain*, 2002 SCC 34 at para 30, [2002] 2 SCR 336 [*Théberge*].
[63] *Ibid* ("[t]he proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature" at para 31).
[64] *Ibid* at para 32.
[65] See *e.g. CCH*, *supra* note 22, at para 10.

breadth of copyrightable subject matter lends itself well to this utilitarian purpose. Copyright includes "literary, dramatic, musical and artistic work[s]" and all the many examples therein.[66] Accordingly, copyrighted works light a crucial path for members of the public to broaden their knowledge or perspective, whether by works' direct use or implied lessons. From an economic perspective, members of the public who engage such works can apply their newfound knowledge into useful purposes in their own lives that enable them to pursue opportunities that will increase their wealth and/or utility. No doubt even the experience of engaging some works, without further application, will increase social utility. As for the owners themselves, they may sell their works and thereby reap the same personal benefits and contribute to the more indirect social benefits noted above for the commercial functions of trade-mark and patent law.

Unlike in trade-mark or patent law, however, copyright's clear utilitarian focus must be reconciled with the *Copyright Act*'s concomitant provisions for authors' moral rights. In essence, these rights entitle an author to the integrity of her work and to be associated with it.[67] Unlike the Act's otherwise economic rights, moral rights are inalienable; they can be waived but not assigned. Their inclusion in the copyright scheme hearkens to the *droit d'auteur* principle of the civil law tradition present in Canada in addition to its more dominant English common law roots.[68] Put simply, this principle values the authorial interest over that of the public. Despite this apparent fusion of traditions, the Supreme Court made clear in *Théberge* that the tension between

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[66] *Copyright Act*, *supra* note 18, s 5(1).

[67] *Ibid*, ss 14.1, 28.1, 28.2. Elsewhere in the world, moral rights also include the author's rights to refuse disclosure of her work before she feels it is satisfactory and to retract or withdraw her work even after it has left her hands: see generally Henry Hansmann & Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26 J Legal Stud 95 at 95-96; Michael B Gunlicks, "A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy" (2001) 11 Fordham IP Media & Ent LJ 600.

[68] See generally Michael Rushton, "The Moral Rights of Artists: *Droit Moral ou Droit Pécuniaire*?" (1998) 22 J Cultural Econ 15 at 16-21 (discussing of the history of the *droit d'auteur* in France and the principle's importation into Canadian copyright law); Margaret Ann Wilkinson & Natasha Gerolami, "The Author as Agent of Information Policy: The Relationship Between Economic and Moral Rights in Copyright" (2009) 26 Government Information Quarterly 321 at 323-324, 325-327 [Wilkinson & Gerolami]. See also *Théberge*, *supra* note 62, at para 15.

economic and moral rights is typically resolved in favour of the former.[69] Although this emphasis supports the utilitarian view of copyright law, it nonetheless sits uneasily with the author-centric values protected by moral rights.

Despite this apparent disparity, perhaps moral rights are consistent with or even advance the utilitarian purposes of Canadian copyright law. For instance, akin to the function of trade-marks, perhaps the author's exercise of her rights to attribution and integrity broaden the use and enjoyment of her work by indicating and guaranteeing to the public the authenticity of the work's source and quality.[70] By another view, perhaps the protection of moral rights encourages authors to share their works with the public by guaranteeing them some minimal, irrefutable rights. This promise might be particularly motivating to authors – rather than either trade-mark designers or inventors – given their works' exceptionally personal character and relative ease in acquiring legal protection, two factors that render such works less likely to be shared. In any event, these hypotheses are mostly speculative. Until they are substantiated, perhaps any attempt to reconcile moral rights with the utilitarian, economic understanding of copyright is a futile exercise in the face of decidedly mixed legal traditions.

Part III: Intellectual Property Rights as Incentives

Following Parts I and II, it ought to be clear that the ultimate basis for a state's intellectual property system is to benefit its society in a broader sense than merely fulfilling creators' expectations of rights to their works. Each scheme meets this end by slightly different means than the others. Common to each, however, is how creators are incentivized to participate

[69] *Ibid* ("[g]enerally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights" at para 12).

[70] Although it might be argued that the public has no guarantee of the author's exercise of her moral rights and thus is not protected from fraud, the same criticism could be mounted against trade-mark law. For further discussion of how moral rights might serve the information needs of the public, see generally Wilkinson & Gerolami, *supra* note 70, at 327-330; David Vaver, "Moral Rights: Yesterday, Today and Tomorrow" (1999) 7 Int'l JL & IT 270 at 276.

in it and thereby serve the ultimate purpose of the system: the bestowal of rights facilitating the commercial exploitation of creative works. That is, intellectual property rights are structured to encourage creators to share their works broadly with society in exchange for exclusive, if temporary, rights to the commercial gain from that sharing. In this section, I will defend such a view. First I will clarify that intellectual property rights are primarily structured to incentivize the sharing and dissemination of creative works rather than promoting their actual production. I will then explain the inherently commercial nature of intellectual property rights with reference to several of the fundamental rights common to each scheme.

The Behaviour Incentivized by Intellectual Property Rights

Intellectual property rights do not primarily motivate creative activity

The course of action induced by intellectual property law has traditionally been characterized as at least beginning with the initial creation of a work. Proponents of such an *ex ante* view suggest that, without the promise of a legal monopoly over use of a profit from her creation for at least an extended period of time, the potential creator would lack the adequate motivation to create in the first place.[71] This explanation makes intuitive sense and, indeed, it has been strongly emphasized in leading decisions and scholarship regarding copyright and patent law.[72] It is telling that this rationale is rarely, if ever, invoked to explain the mechanism of trade-

[71] An *ex ante* justification, by which "the goal of intellectual property is to influence behaviour that occurs before the right comes into being", is distinct from an *ex post* justification, which "defend[s] intellectual property rights... on the basis of the incentives the right gives its owner to manage works that have already been created": Mark A Lemley, "*Ex Ante* Versus *Ex Post* Justifications for Intellectual Property" (2004) 71 U Chicago L Rev 129 at 130 [Lemley].

[72] For copyright law, see *e.g. Compagnie Générale des Établissements Michelin v National Automobile, Aerospace, Transportation and General Workers Union of Canada* (1996), [1997] 2 FC 306, 71 CPR (3d) 348 (TD) ("[c]opyright promotes the third value by protecting and providing an incentive for authors to create works of expression because their works will be protected under the aegis of the Copyright Act from unauthorized reproduction" at para 104); *CCH, supra* note 22 ("[i]n order to realize these benefits [of the copyright system], however, creators must be protected from the unauthorized exploitation of their works to guarantee sufficient incentives to produce new and original works" at para 23); Allen Rosen, "Reconsidering the Idea/Expression Dichotomy" (1992) 26 UBC L Rev 263 (discussing that the purpose of the idea/expression dichotomy in copyright

mark rights. At least this inconsistency invites consideration of the extent to which trade-marks are an exception or to what extent this traditional focus is off-base.

There are indeed at least two reasons to be critical of such a focus on creativity as the primary target of intellectual property rights' incentives. First, it is well-documented for each scheme that acts of creativity will not cease or even be significantly diminished but for the promise of legally protected monopoly rights. Archaeological and historical evidence indicates that merchants used trade-marks to distinguish their goods for thousands of years before any form of legal protection emerged.[73] Likewise, an extensive empirical survey on the effects of patent law concluded that there is no broad evidence that it encourages innovation "always and everywhere".[74] Rather, its impact on innovation varies widely across inventive areas, including among subject matters already deemed patentable.[75] With respect to copyrightable works, researchers in psychology and behavioural economics posit that expressions of human creativity are primarily driven by an intrinsic desire to release powerful personal feelings more than out of any desire to exploit or profit from it.[76] I would suggest that, for each scheme, where extrinsic motivation is significant, its source is most often necessity in the face of overcoming external challenges rather than self-centric hopes of recognition or profit as ends of creation itself.

A second reason to doubt that intellectual property rights primarily incentivize creative activity is the fact that they are, in many ways, effectively structured to stifle it. In terms of incentives, works that are protectable can be fairly described as encouraged while works that

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is to incentivize "additional creativity" at 265-266). For patent law, see *e.g. Harvard College*, *supra* note 57 (Parliament's intention in the *Patent Act* was "to encourage new and useful inventions" at para 11); Norman Siebrasse, "The Structure of the Law of Patentable Subject Matter" (2011) 23 IPJ 169 ("[i]t is well accepted that the purpose of the patent system is to spur innovation for the social good" at 178).

[73] See generally Diamond, *supra* note 43, at 266-288 (providing a detailed accounting of the history of trade-marks from antiquity to medieval times to the industrial revolution to present).

[74] See Hall, *supra* note 58, at 467.

[75] *Ibid* at 457-459.

[76] See generally Diane L Zimmerman, "Copyrights as Incentives: Did We Just Imagine That?" (2011) 12 Theoretical Inquiries in Law 29 at 42-44 [Zimmerman].

would be infringing are discouraged. Yet infringing activity, while discouraged by the legal remedies available to rights-holders, is often creative. For instance, creativity is apparent in the design of a trade-mark nevertheless deemed likely to be found confusing with another, pre-existing mark; in the development of an invention anticipated by the claims of a pre-existing patent; and in the transformative use of a copyrighted work deemed substantially similar to the original notwithstanding the "infringer's" added labour.[77] None of these examples is protectable under its respective scheme and is punishable if exercised. It might be clarified that intellectual property rights are intended to incentivize the creation of newly protectable works.[78] Yet recall from Part I that intellectual property rights likely reduce the net volume of freely accessible ideas from the commons and thereby also decrease the avenues of creativity available to potential creators.[79] Thus even this clarification does not remedy the inconsistency.

Admittedly, it would be an over-simplification to argue for a wholesale rejection of creativity as a target of intellectual property laws' incentives. No doubt there are endeavours that are begun with the promise of later legal protection firmly in mind. For instance, it is highly unlikely that so many would so intently pursue the research and development of life-changing pharmaceuticals or medical devices if not for the hope of seizing the monetary benefits flowing from patent protection. It is perhaps equally unlikely that makers of Hollywood blockbuster films would pursue their craft in such numbers if bootleggers would be able to freely pirate them upon release. Moreover, even creators of works traditionally motivated by intrinsic factors may be inspired to create in the hope of the recognition and profit flowing from exclusive rights, no

[77] See Part I, above, for further discussion.
[78] I would suggest that this distinction is likely lost on potential creators, who are thus nevertheless deterred, if only by the general litigiousness of intellectual property-holders.
[79] See Part I, above, for further discussion. See also Craig, *supra* note 8, at 77-81 (explaining this proposition by reference to the dialogic nature of culture, by which social development is advanced by second-generation creators building upon the products of first-generation creators).

matter how unlikely.[80] These exceptions are sufficiently prominent that they cannot be dismissed entirely. Nevertheless, in light of my two serious criticisms above, I would argue that creative activity cannot be the dominant incentivizing goal of intellectual property rights.

Intellectual property rights are structured to incentivize the dissemination of creative works

If creative activity is not generally inspired by intellectual property laws, then, to be effective, they must incentivize some handling of creative works once they have been produced. Though it is perhaps self-evident by this point, I suggest that the action incentivized is the sharing and dissemination of such otherwise private works. As initial support for this view, it is noteworthy that the respective benefits of the various schemes discussed in Part II presuppose such sharing.[81] Even more significantly, this view aligns closely with the fundamental right of exclusion common to each: owners of registered trade-marks receive "the exclusive right to the use throughout Canada of the trade-mark" with its associated wares or services;[82] patentees are granted "the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used";[83] and copyright-holders obtain "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever".[84] As I shall demonstrate, in some form, each of these rights incentivizes sharing over creation.

The heightened effect of the exclusionary rights in trade-mark and copyright law following dissemination offers a prime example. With respect to trade-marks, it is noteworthy

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[80] See generally F M Scherer, "The Innovation Lottery" in Rochelle Dreyfuss, Diane L Zimmerman & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (New York: Oxford University Press, 2001) (suggesting that some artists might labor long and hard for scant returns by a "lottery theory", which nevertheless explains only a modest part of creative behaviour). *Contra* Zimmerman, *supra* note 76, at 41-42 (rejecting the idea of incentives in a classical microeconomic sense that considers people rational profit-maximizers because of the good chance of nothing happening).
[81] The indisputable fact that creation the *sine qua non* of intellectual property does not necessarily mean that intellectual property rights are designed to encourage such activity, as the previous subsection explained.
[82] *Trade-marks Act*, *supra* note 20, s 19.
[83] *Patent Act*, *supra* note 18, s 42.
[84] *Copyright Act*, *supra* note 18, s 3.

that the statutory language indicates that the right is limited to owners of registered marks.[85] Registration of a trade-mark presupposes at least the intention to circulate it, both intuitively and by the provisions governing entitlement and priority to registration.[86] Enforcing the exclusivity to an unregistered trade-mark by a passing off action relies even more actively upon dissemination. A key element investigated in a passing off proceeding is the goodwill and reputation that the unregistered mark symbolizes;[87] however, these elements cannot develop without public use of the mark. With respect to copyright, to establish infringement there must be some evidence of access to the copyrighted work by the author of an infringing work in order to disprove the possibility of coincidence and establish the necessary causal connection between the two works.[88] As with passing off, if the protected work has not been publicized then it becomes exceedingly difficult to establish an essential element of the wrong in order to make good on the exclusionary right granted. In all cases, therefore, the more broadly shared the work, the more powerful the right of exclusion becomes.[89]

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[85] *Trade-marks Act*, *supra* note 18, s 19.

[86] *Trade-marks Act*, *supra* note 18, ss 4, 5, 16. See also *Masterpiece*, *supra* note 45 ("[w]hile the *Trade-marks Act* provides additional rights to a registered trade-mark holder than were available at common law, registration is only available once the right to the trade-mark has been established by use" at para 35). It is also noteworthy that registration comes with many additional benefits: see generally James Kokonis, "The Scheme of the Canadian *Trade-Marks Act*" in Gordon F Henderson, ed, *Trade-Marks Law of Canada* (Toronto: Carswell, 1993) at 84 (discussing the additional legal rights that registration imparts); David Vaver, *Intellectual Property Law: Copyrights, Patents, Trade-marks* (Toronto: Irwin Law, 2011) at 434 (discussing the added economic value of registered trade-marks).

[87] See *Oxford Pendaflex Canada Ltd v Korr Marketing Ltd*, [1982] 1 SCR 494, 64 CPR (2d) 1 ("[t]he fundamental requirement for success, however, must always be (whatever else may be required in each instance) something akin to the imitation of a 'unique or distinctive dress' which is recognized by the buying public" at 504). See also *Trade-marks Act*, *supra* note 18, s 7.

[88] See *Francis Day & Hunter, Ltd v Bron*, [1963] 2 All ER 16, [1963] Ch 587 (CA) Diplock LJ ("to constitute infringement of copyright in any literary, dramatic or musical work... the copyright work must be the source from which the infringing work is derived" at 27), cited in *Gondos v Toth* (1982), 38 OR (2d) 555 at paras 32-34, 64 CPR (2d) 145 (H Ct J).

[89] It is also noteworthy that this emphasis on dissemination narrows the conceptual distinction of trade-marks that emerges under an *ex ante* view, as discussed above.

Conversely, the effect of the right of exclusion in patent law is more or less independent from the dissemination of the invention protected.[90] The act of sharing the work *per se*, however, serves a much more foundational role than in trade-mark or copyright law. To receive a patent, an applicant must file a detailed, publicly accessible account of its construction and operation that, without more, would enable an appropriately skilled person to build it.[91] The patentee receives a 20-year monopoly for her invention, which thereafter becomes freely available to the public.[92] In this sense, dissemination is an inevitable consequence of the system. The invention of a creator who refuses to share can receive only limited protection as a trade secret. Copyright does not require such public disclosure for protection; it inheres naturally to eligible works. Trade-mark registration does require disclosure, but the application itself lacks the intrinsic value of patents because they are meaningless outside of a market context. Accordingly, patent rights incentivize sharing most of all; it is a *sine qua non* on par with creation of the work itself.

Notwithstanding the clear structure of intellectual property rights as incentives to share, it is essential to further consider whether these rights are necessary or effective as such incentives. Only if these requirements are satisfied are intellectual property rights truly justified.[93] Professor

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[90] In patent infringement proceedings, courts consider only whether the allegedly infringing invention encroaches upon the valid patent's claims, which delimit the scope and nature of the exclusive property rights granted to the patent-holder: see *e.g. Free World Trust*, *supra* note 55 ("[p]atent claims are frequently analogized to 'fences' and 'boundaries', giving the 'fields' of the monopoly a comfortable pretence of bright line demarcation" at para 14). Patent infringement is judged by claims construction alone; it is irrelevant whether the alleged infringer had been exposed to the valid patent or not.

[91] See *Patent Act*, *supra* note 18, s 27 (provisions governing the application for patents).

[92] *Ibid*, s 44.

[93] Fittingly, the necessity and effectiveness of these rights as incentives is a common subject of scholarly debate, though mostly in consideration of intellectual property rights as incentives of creative activity. This focus is not altogether surprising given the dominant focus on intellectual property rights as incentives of creative activity reflected in the jurisprudence. See Hughes, *supra* note 9 ("[t]he wide acceptance of the instrumental argument suggests wide acceptance of the premise that idea-making is a sufficiently unpleasant activity to count as labor that requires the inducement of reward" at 304); Jane C Ginsburg, "Creation and Commercial Value: Copyright Protection Works of Information" (1990) 90 Colum L Rev 1865 ("[t]he incentive rationale assumes that copyright is needed to prompt authors to undertake creative labors" at 1907); Zimmerman, *supra* note 76 ("the widely accepted argument is that intellectual property law not merely supports market formation, but that it is a significant – even necessary – precondition for creative activity to occur" at 30-31).

Mark Lemley is one of the few scholars to have focused this debate on the *ex post* goals of intellectual property law, which he generally frames as the efficient distribution of creative works.[94] Relying on economic principles, Lemley is quite critical of proprietary rights as necessary or effective means to this end. He suggests that freely competitive markets are more effective at efficiently allocating scarce resources than private ordering via individual exclusionary rights.[95] He likewise dismisses the argument that intellectual property rights serve to prevent overuse of creative works in such a way as to reduce their social value, per a "tragedy of the commons" scenario.[96] Information, he argues, cannot be depleted; in economic terms, its consumption is nonrivalrous. Accordingly, whatever loss of value of the creative work is incurred by the creator is not shared by society.

Lemley's arguments are appealing for at least their implicit reference to social welfare but, to my mind, are too dismissive of the role that proprietary rights play in the distribution of creative works. I would counter that, in the absence of intellectual property rights, public demand for (and thus dissemination of) protected works is reduced. Here, it is significant that intellectual property rights generally prevent non-owners from making derivative uses of protected works. Consumers value this uniformity flowing from proprietary rights because it guarantees authenticity of what they are set to purchase or otherwise engage.[97]

Lemley anticipates this concern about reduced public demand but, in my respectful view, offers rather unconvincing rebuttals. First, he argues that such concerns apply only to extremely well-known works and thus doubts that it is a "widespread enough phenomenon" to justify

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[94] Lemley, *supra* note 71.
[95] *Ibid* ("[i]t is competition, not the skill or incentives of any given firm, that drives the market to efficiency" at 135).
[96] The tragedy of the commons is a dilemma arising from the situation in which multiple individuals, acting independently and rationally consulting their own self-interest, will ultimately deplete a shared limited resource, even when it is clear that it is not in anyone's long-term interest for this to happen: see generally Garrett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243.
[97] Landes and Posner have made a similar argument with respect to copyright in particular: William M Landes and Richard A Posner, "Indefinitely Renewable Copyright" (2003) 70 U Chi L Rev 471 at 486-488.

intellectual property rights.[98] I seriously doubt, however, that public expectations crystallize around only a limited number of creative works as Lemley suggests. Second, he points to the public demand for transformative uses of pre-existing creative works not otherwise possible under schemes of proprietary rights.[99] I would agree, but I think the proper target of reform to address this concern is better left to expanded fair dealing provisions than the outright elimination of intellectual property rights. Third, Lemley argues that the demand problem is self-limiting because consumers can decide whether to choose the original or the derivative.[100] However, this view requires the untenable assumptions that individuals are always able to distinguish the original from the derivative and that confusion is not harmful. I would argue that, for many goods, if individuals are uncertain as to whether they would be engaging the original or a derivative, they would likely choose to abstain from both. Given these apparent shortcomings in Lemley's argument, I think it is fair to suggest that intellectual property rights are necessary and effective in generating public demand of creative works – leading to their broad dissemination – that cannot be substituted or surpassed by market forces entirely.

Intellectual Property Rights as Commercial Rights

The final link in this essay's chain of reasoning is how intellectual property rights actually induce owners to share their fruits and thus advance the utilitarian goals of the system. To this end, I contend that owners are granted what are essentially commercial rights structured to facilitate the profitable exploitation of intellectual property.[101] Such exploitation entails the

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[98] Lemley, *supra* note 71 ("[t]he demand-reducing effects argument... would seem to apply only to the subset of works that are so extremely well known that they have become cultural icons around which public expectations have crystallized" at 145).
[99] *Ibid* ("there is substantial social value to allowing people to criticize and subvert cultural icons" at 146).
[100] *Ibid* ("the problem seems self-limiting" at 146).
[101] Although few seem to have suggested that intellectual property rights themselves are commercial in nature, many have acknowledged that commercial nature of intellectual property more generally: see *e.g.* Landes & Posner, *supra* note 17 ("bodies of law that regulate primarily commercial relations... is a generally apt description of the laws

production and distribution of multiple copies of the original, whether performed directly or authorized by its owner, thereby fulfilling the incentive structure discussed above. The owner's profits are monetary, although it is at her discretion whether to demand such compensation for her sharing. Her choice is unimportant; the fact remains that the rights she is granted are primarily suited to the treatment of intellectual property for that purpose. Beyond the obvious commercial implications of the rights to exclusivity, at least two other sets of foundational intellectual property rights in Canada affirm this commerce-tinted view.

The Distinction of Creator and Owner and the Alienability of Intellectual Property Rights

Several major ways for intellectual property to be employed as articles of commerce are premised on the legal distinction of the creator of the work and the owner of its associated rights. This distinction is made or implied in each scheme. In patent law, the "inventor or the inventor's legal representative" named in a correctly filed application is presumed to be the owner of the patent rights.[102] There are several exceptions to this inventor-as-owner presumption, however, such as where those rights have been relinquished in advance to an employer.[103] The *Copyright Act* likewise deems the author of a protectable work to be first owner of the copyright therein, subject to statutory exceptions including certain commissioned works and employment scenarios.[104] In trade-mark law, the distinction of creator and owner is implicit; registration is granted to "[a]ny applicant" of a correctly filed application.[105] These schemes alone provide a

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pertaining to intellectual property" at 4); May & Sell, *supra* note 43 ("[t]he modern period of our history of intellectual property sees ideas about owning knowledge and information, which had been developing for many centuries, galvanized and transformed by the new industrial society (most obviously in Britain and France, the most economically developed countries of the time), where property was more than mere possession but rather the basis upon which to build economic relations" at 105).

[102] *Patent Act*, *supra* note 18, s 27(1).

[103] See *e.g. Devoe-Holbein v Yam* (1984), 3 CPR (3d) 52, 2 CIPR 229 (FCTD).

[104] *Copyright Act*, *supra* note 18, ss 12 (where the Crown is deemed owner), 13(2) (where the commissioning party of an engraving, photograph or portrait is deemed owner), 13(3) (where an employer is deemed owner).

[105] *Trade-marks Act*, *supra* note 20, ss 16, 40(4).

useful method for creators to levy their talents in return for compensation. Indeed, it is difficult to understand the value of this creator-owner distinction if not for at least such a purpose.

Other sections of each Act build upon this distinction by rendering intellectual property rights alienable by assignment or licence. Under the *Trade-marks Act*, rights can be assigned and licensed "either in connection with or separately from the goodwill of the business and in respect of either all or some of the wares or services in association with which it has been used".[106] The *Patent Act* permits transfer of rights "either as to the whole interest or as to any part thereof".[107] The *Copyright Act* allows rights to be transferred "either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof".[108] These phrasings are noteworthy because they not only turn intellectual property into articles of commerce that can be bought or sold, but highlight how many possible arrangements are available to that end. As a result, these provisions expand owners' opportunities for profit while also encouraging the broader dissemination of creative works.

Retrospective Remedies for Infringement

The various remedies available to owners for infringement of their intellectual property rights further supports the argument that they are commercial in nature. For all losses already suffered, each scheme allows for compensatory remedies by way of statutory damages or an accounting of profits through equity.[109] A statutory damages awarded to the plaintiff rights-holder are the lost profits on the sales that she would have made but for the defendant's

[106] *Ibid*, s 48(1). See also s 50.
[107] *Patent Act*, *supra* note 18, s 50(1).
[108] *Copyright Act*, *supra* note 18, s 13(4). See also ss 2.7, 13(5)-13(7).
[109] *Ibid*, s 34(1); *Trade-marks Act*, *supra* note 20, s 53.2; *Patent Act*, *supra* note 18, s 55(1). The plaintiff owner might also seek an injunction to bar further infringement or delivery up and destruction of the infringing goods, but these are prospective remedies that do not resolve past injuries. See also Ronald E Dimock, *Intellectual Property Disputes: Resolutions and Remedies* (Toronto: Carswell, 2012).

infringement, while an accounting of profits hands over to the plaintiff the defendant's profits that arose as a result of the infringement.[110] To have effect, these remedies require at least one of the parties to have used the work for financial gain. If the owner used it for personal benefit and was somehow deprived thereof by the defendant's unprofitable infringement, then, without more, the owner would be entitled to no compensation under these remedial provisions. The plaintiff might make a claim for exemplary or punitive damages, but such a remedy poses a heavy burden to prove improper conduct and motives on the part of the infringer.[111] Significantly, moral indignation and loss of utility or opportunities on the part of the rights-holder are generally insufficient grounds for compensation. Accordingly, the various schemes clearly treat intellectual property works as articles of commerce to be spoken of in the language of money.

Conclusions

Intellectual property law, in both design and practice, is focused on advancing social welfare rather than acknowledging individual creators' rights to their efforts. Despite its intuitive appeal, the opposite, natural law-based view is descriptively inaccurate not least because of its dogmatic inconsistencies when applied to intellectual property rights, such as their net diminution of the public commons or the difficulty in identifying and demarcating a creator's personality in her work. Such theories are also contradicted by the fact that intellectual property rights in Canada are denied altogether from many creators despite their influence in later creative works or because the products of their efforts overlap with those of previous creators. Beyond

[110] *Ibid*.
[111] See *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 ("[p]unitive damages are awarded against a defendant in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency' at para 117), aff'g *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196, [1995] SCJ No 64 (QL). This principle has been upheld in the intellectual property context: see *e.g. The Queen v James Lorimer & Co Ltd*, [1984] 1 FC 1065, 77 CPR (2d) 262 (CA) (notwithstanding the defendant's "unquestionably deliberate" and "blatant" infringement, exemplary damages were refused).

these doctrinal discrepancies, natural law-based justifications are undesirable *ab initio* for their shared failure to conceptualize law as a social construct that advances policy goals beyond mere justice and order in their traditional senses.

Utilitarianism, which is intrinsically focused upon social welfare, avoids these pitfalls and thus offers a superior justification for intellectual property rights. The study of law and economics provides a convenient structure for this paradigm by setting as its specific goals the maximization of social wealth and happiness. Review of the decisions by courts and legislatures from feudal England to modern-day Canada affirms this view for each of the primary branches of intellectual property law: copyright, patents and trade-marks. Rights under each branch accomplish their social purpose by encouraging owners to share and disseminate their works among society, which, in turn, facilitates their broad engagement and results in net welfare gains. Owners are incentivized to distribute their works by the very rights granted, which are designed to facilitate the commercial exploitation of creative works at least by virtue of the right of exclusion, right to alienation and retrospective remedies of each scheme.

The framework discussed here has significant consequences for the application and development of intellectual property law in Canada. As I suggested at the beginning of this essay, the purpose we ascribe to a law determines the extent of the rights that it offers. Having now established that the goal of our intellectual property laws is to increase social welfare by encouraging the broad engagement of creative works, we can now accurately judge the success of such laws' current rights structures in advancing that purpose and modify them accordingly. For instance, while the clear role of commercial exploitation in the dissemination of creative works may weigh towards more extensive ownership rights, we must also consider their inevitable limits on the public engagement of such works. A solution may be to reduce the

duration of certain rights such that, upon a certain level of public awareness of a creative work, proprietary rights to it might be curtailed to allow for broader use. The laws' purpose might also suggest broader fair dealing provisions for copyright or the introduction of analogous user rights in patent and trade-mark law. The possible steps from here are manifold. None should be taken, however, without the framework discussed here firmly in mind.

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