INTELLECTUAL PROPERTY OR LEGAL INTELLECTUAL MONOPOLY: JUSTIFICATIONS FOR THE SO-CALLED LEGAL INTELLECTUAL MONOPOLY

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ABSTRACT

The article covers the monopolistic nature of the Intellectual Property Rights but emphasizes on the justification that has been put forth by the Legal Academics. With regards to the justifications, the article will discuss the theories of Hegel, Locke and the Servan in greater detail along with further discussions of the smaller theoretical branches of the Lockean models i.e the First Occupancy theory and the No harm theory. Later, the script explores the utilitarian idea put forth by Jermy Bentham and Stuart Mill about the benefits and utility of granting the Exclusive Monopolistic Intellectual Property Rights. The article also places a great importance to the contemporary moral justification of the rights of intellectual property along with a emphasis on the judicial activism in this regards as it also tends to provide very briefly; short but comprehensive discussion of the limitation on such monopolies thus making them almost legal monopoly. To support this particular point, brief comments of some authors on the issue of overlap of Anti-Trust laws with the Intellectual property rights will be included with respect to the monopoly by Intellectual Property Rights.

INTRODUCTION

The Intellectual Property Rights are odd; they are said to be monopolistic in nature by various academics. For example in the case of patent; it is the patentee only who is exclusively allowed to use the product, offers it for sale, dispose it off or keep it to him therefore giving rise to legal monopoly[1]. One may bring the attention towards the case of *Darcy v Allin*[2] that all monopolies are considered as contrary to the public policy and interests. The author *David Bainbridge*, in his book[3] calls the use of intellectual property, a manipulation to the market, as the abuse of intellectual property rights for the purposes that are responsible for monopoly. This may lead to the disadvantage of competitors and consumers. He also raised a suspicion that an owner of an intellectual property may also contribute towards the unfair advantage to the patent holder, thus may commit any action contrary to the terms of fair competition. History states the same; it created monopoly, however, Bainbridge commented that it was observed in historical times as a method of generating revenue. Hence, ignoring the concept of monopoly at all.

Today a student cannot in any way study this subject without considering the economic arguments involved in the debate as opined by *William Cornish* in his text[4]. The authors further explain the

[1] Helen Norman, Jonathan Griffiths, *Intellectual Property* (University of London 2018).
[2] [1602] 11 Co Rep 84b.
[3] David Bainbridge, *Intellectual Property* (9th ed., Pearson 2012).
[4] William Cornish, David, Tanya, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (8th ed., Sweet and Maxwell 2013).

monopolistic behavior of the intellectual property rights; by claiming that the owner can in some way restrict the supply of the commodity, he has a property right on, through the mechanism of intellectual property; doing so shall create a monopoly contrary to the public policy.[5]

The given example by Cornish in his writing is a situation created by the actions where supply can be reduced and prices can be raised by the intellectual property right owner, and then there is no one else who has the right to produce the same product at a more competitive price resulting in creation of monopoly.

As mentioned above, such rights are advantageous when construed as encouragement for the invention of creativity and ideas, but on the other hand the monopolistic nature of these rights may disregard a fair competition and be in a position to disregard public policy and economic structure, that may be disadvantageous. This is a matter of a long-on-going debate in the history for the justification of intellectual property rights by various scholars, jurists and the contemporary commentators. We shall in turn explore these justifications that are put forth in favor of the IP rights providing us with a basic concept to call the monopoly created by grant of Intellectual Property Rights as a legal monopoly.

[5] Ibid.

JUSTIFICATION BY HEGEL (HEGELIAN THEORY)

It is stated by *Hegel* that for the purposes of justification, the Intellectual property rights shall not be viewed in conjunction with Physical property rights. Hegel viewed property as extension of personality. Extended by modern commentator's views, personality defined by Hegel is equally protected as the human rights such as privacy. Moreover it was said that like all other property rights the intellectual property rights shall be justified by the benefits they bring to the society[6], as they are means for production of social wealth. Thus the property rights are equally capable of protecting the personality interest of the community or society.

The theory of invention by Hegel idealizes that such rights are capable of being property rights by the virtue of their benefits and maximization of the wealth. The theory of Hegel seems to suggest that the inventor has made the product by his or her own personality and makes it justified to be tied to that person, meaning thereby giving the person rights of the use. Moreover, this theory also lays protection in some ways to use or abuse the intellectual property. By way of personification; a person is allowed to protect his or her own creativity from disclosure so that the work remains in the creators own domain and this is the desires of a personality[7].

[6] Kanu Priya, 'Intellectual Property and Hegelian Justification' (2008) 2 NUJS Law Review 359.
[7] Ibid.

In conclusion of the above stated points it is stated that the Hegel justifies the intellectual property rights on the basis of the benefits they bring in to the society for the human flourishment.

It is argued through *Daniel Stengel* writings[8], according to Hegel this is process of creation and creation thus embodies the will of a person in the object, thus furthermore there is no restriction on the fact that what can be a property, so anything can be a property, interalia, intellectual property. As Daniel concludes it by saying that the broad theory of Hegel personification of the property will make any mental product to be afforded by the legal protection.

Finally, it can be inferred that under the Hegel theory of the intellectual property rights, the free will of the person is divested in the creation and the product itself thus giving the ownership to the person itself.

JUSTIFICATION BY JOHN LOCKE (LOCKEAN THEORY)

To claim ownership of the property; labor must be invested[9]. The theory by *Locke* is considered as one of the most persuasive[10]. It was argued by the *William Dibble* in his article (cited at footnote no.9), that the *Lockean theory* is based on two perspectives. Firstly, the person owns the fruits of his or her own labor and secondly, labor

[8] Daniel Stengel, 'Intellectual property in philosophy' (2004) 90 Archives for Philosophy of Law and Social Philosophy 20-50.
[9] Ibid.
[10] William Dibble, 'Justifying Intellectual Property' [1994] UCL Jurisprudence Rev. 74.

allows him to appropriate the fruit of the labor. One can clearly see and claim this theory as fairly straightforward. According to *Locke*, labor is required to put some value to the product because without the product value there will be no appropriation; this is duly because value may be defined as useful to the human life.

According to the *Daniel Stengel* Locke's theory builds the foundation of today's intellectual property laws. Various criticisms were raised by the *William Dibble* as mentioned earlier. The theory was almost never meant to apply to the intellectual property. It may be said that Locke only attempted to amend the feudal land ownership system but not the creation of the new rights as by the labor fruits. Moreover, Locke used the word common in *Second Treatise of Civil Government,* that the initial discussion very readily suggests that these words were used to refer towards the tangible and real products that are already in existence, because the products of ideas or intangible that are still not in existence cannot be in any way said to be common.

Lastly, an another argument advanced is that Locke suggested; a person shall appropriate the part on which he/she worked, it can be argued that it may only apply to a very small portion of something or some product therefore Locke failed to clarify such division in the Intellectual property.

There is another theory provided by Locke titled as '*The No-Harm theory',* he argues and tends to justify the labor theory by highlighting the fact; that the part where I have labored if appropriated by someone else will harm me, and that there is a moral claim to not harm another,

meaning thereby that you should not harm me in any way. It may provide justification through avoiding interference in the products created by me because the interference in my labor may harm me, resulting in protection of the patents and copyrights. The criticisms were nevertheless advanced which included the questions as to what actually harm is or what exactly may constitute harm to the property.

Another theory advanced in lieu of the theory above by Locke was the '*Just Deserts theory'*, where the basic point is that a person or the creator of the object has a moral right to control and exploit the object. This is a preventive theory to maintain the fair use of the property by the creator only.

Lastly an essentially moralistic idea brought forth as justification is the *First Occupancy Theory* where it was said that the object created belongs to the its creator who first created. The criticisms advanced against this were based on the production by two or more individuals which will lead to the question that who in-turn will have the first occupancy and what exactly will determine the first occupancy.

It can be concluded that the *Lockean theory* of justification at first; proves to be very effective and attractive to the sentiments that it gives regards to the hard work, putting in on one's energy and spending one's time on an invention but on the other hand the real practical application of this theory renders it incomplete and faulty due to the ambiguity in the theory as noted above. Moreover, the further branches that originated from the *Lockean* Model are somehow

attractive but merely considered as arguments instead of proper theoretical justification and they tend to be more moral rather than being practical. The first occupancy theory is rather first come first serve basis argument can be called to be very new concept. Hence the theories are a great work of intellect in understanding and forming a perspective about the intellectual property rights.

JUSTIFICATION ON THE BASIS OF UTILITARIANISM

According to the *Peter Menell*,[11] *Bentham* and *Stuart* started to argue the justifications on the basis of *'Utilitarianism'*, emphasizing on the use and the benefits of the intellectual property rights. Jermy Bentham approached it in way that the inventor shall be protected, because if the rival without any effort or the hard-work and talent, that the inventor has put in, gets his hands on the inventor or the product then that rival may be able to deprive the inventor from the fruits of the invention by, for example, selling it at the low cost. While on the other hand the Jurist John Stuart Mill justified the monopoly created by the patent or the intellectual property rights regime on the basis that they are temporary and the award to the creator was proportional to the usefulness of the product to the consumer. Moreover *Clark* at the same point argued that if the rights of the inventor are not protected it will lead to the rivalry between the public and the

[11] Peter S. Menell, *Intellectual property: general theories* (Berkeley Centre of Law and Technology 1999).

inventor[12]. This particular point ignited discussion in relation to the security and peace of the society.

Moving forward we have seen that the Bentham and the Stuart tend to regard the benefits to the society and inventor for justifying the monopoly created by the intellectual property rights.

In addition to this, *Clark* clarifies the framework by the perspective of the chaos in the society resulting from the appropriation of the product/invention by the rivals without the consent of the inventor which will disregard the efforts and the labor of the inventor, also approving the Lockean Labor Model.

Here it is important to note the comment made by the *Scherer*[13] where he said that the protection and the advantage of monopoly shall only be given to those inventions which without protection could not have been invented/formed.

JUSTIFICATIONS BY THE MICHEL DE SERVAN AND JOHN RAWLS

According to the *Daniel Stengel*'s explanation, the theory advanced by *Servan* contains a major attractive element, which was obviously the fact that he explained the ownership between two or more than two creators (the First Occupancy Theory, mentioned

[12] John Bates Clark, *Essential of Economic Theory* (Macmillan NY 1927).
[13] Frederick Scherer, *Industrial Market Structure and Economic Performance* (2nd edn. Chicago, Rand McNally & Co. 1980) p.632.

above). The works were unfortunately limited to the literature for example; he describes the letters as correspondence between sender and receiver, contending that these two parties influence the material produced in the letter so consequently these two are allowed the ownership rights of the letter or the work thus produced of an intellectual nature. It can also be extended to the factor that if two people participated in a dialogue to create a design or a product then these both will be argued to be the owners of the products due to the influence of the parties.

I am of the opinion that the theory by Servan is not a new theory but the application of the past theories to clear the ambiguity in them. The Lockean model was criticized for having no provision or discussion on the co-ownership rights in the intellectual property thus the model by Servan tends to solve only that particular dimension of the lacks in the Lockean Model.

John Rawls attempted to justify IP Rights by using the theory of '*Distributive Justice.' Shlomit Yanisky-Ravid*[14] argued that this theory is based on the allocation or re-allocation of the resources among the people; he also argued that the term distributive justice by Rawl is a broad term and may cover the widest desires of fairness. Furthering the argument, wider term includes within itself the economic theories, for the allocation[15]. The theory basically approaches the intellectual

[14] Shlomit Yanisky-Ravid, 'The Hidden though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National versus International Approaches' (2017) 21 Lewis & Clark L. Rev. 1.
[15] Michael F. Reber, 'Distributive justice and Free Market Economics: A Eudemonistic Perspective' (2010) 2 Libertarian Papers 1, 7.

property on basis of fairness and equality. So the distribution of the money and good will is very much justified in itself.

Thus, if this theory is applied to the IP debate, easy justification may be made on the common fair and equal grounds. The theory also discusses the equality or inequality between the inventors and creators. That the Intellectual property there shall be distribution of good according to the principle of justice which may suggest that the inventor shall only have the right to the ownership and he thus can exclude others fairly.

The courts of equity, in my opinion, are well equipped to go with this kind of practice and thus the theory by Rawl is just another reinstatement of the traditional equitable principles and the purposes of the justice.

MORAL JUSTIFICATIONS IN THE CONTEMPORARY ERA

So far we have discussed intellectual property as a source of monopoly in light of the views by various academic jurists and modern commentators. In turn, we must look upon some of the justifications that are considered as moral justifications. An attempt by *Amir Khoury*,[16] explains some of the moral arguments used to justify the intellectual property rights and the monopoly created by them.

[16] Amir H. Khoury, "Essentials of Intellectual Property United States Patent and Trademark Office, Alexandria 2007).

Here, the very first argument regards the *Reward Theory*, that the person or the inventor is rewarded for his/her/others invention that the labor of the creator/inventor does not go unrewarded. Thus rewards can be given in the shape of the granting the ownership rights to the concerned creator or inventor. *Just as he who has plowed and sowed should reap, so too, he who spent countless days and nights in thought, study, and research should reap the fruits of his intellectual creations*[17] [Emphasis added].

In the continuation of the above, I must highlight that the IP rights transfer the benefits to the monopolist which is against the distributive justice theory thus producing some undesirable consequences against the welfare state[18]. Whereas the reward theory mandates that he is actually not the monopolist for the fact that he is just enjoying and is rewarded for the fruits of his invention.

The second moral argument; revolves around the *prevention principles* that the person who is the creator or inventor shall only be entitled to the fruits of the creation until unless the concerned owner consents to exploitation by someone else. Thus giving the intellectual property rights exclusively in the hand of the owner will then uphold this principle.

[17] Ibid at p.33
[18]Roger D. Blair, Thomas F. Cotter, *Intellectual Property: Economic and Legal Dimensions of Rights and Remedies* (Cambridge University Press 2005)

Thirdly, another moral argument may be raised on the basis of the liberal comment of *Ronald Dworkin*[19] *that some sovereignty over the range of personal possession is necessary to maintain the dignity of the person*. However, the very fact of autonomy of the people is an essential value of the society[20]. Argued at this point about sovereignty being an essential for the society and nation, there shall be such intellectual property rights given to the persons.

The fourth point of argument is carries considerable weight and is regarded to be based on the *Incentive Theory* and *utilitarian grounds*. The utilitarian principles favor the promotion of science and technology, enhanced through intellectual property rights. Despite the fact that those rights create monopoly, this shall be nevertheless justified for their utilitarian purposes. It is also argued, that if no exclusive or ownership rights are granted, the creator/inventor will be prone to the copy/duplication or dissemination of the products by the people who has never took part of pushed any effort in the production. The incentives or rewards shall be attributed to the creators/inventors.

David BainBridge argues that the inventors and investors are rewarded for their time by grant of the limited monopoly[21]. Here the author has used the word limited monopoly by means of creating monopolies by the intellectual property rights being somehow not

[19] Stuart Hampshire (ed), Public *and Private Morality* (Ronald Dworkin Liberalism, Cambridge University Press 1978).
[20] Edwin C. Hettinger, Justifying Intellectual Property, Philosophy & Public Affairs, Vol. 18, No. 1 (Winter, 1989), pp. 31-52.
[21] David Bainbridge, *Intellectual Property* (9th ed., Pearson 2012).

strictly exclusive. One may argue several restrictions on the use of the intellectual property rights.

The limitations shall be then the mandatory renewal of the patents, if there is no use then the information may be made available for the public use moreover the recent Anti-Trust laws has severely restricted and prescribe the way of the use of the intellectual property rights. An injunction can be granted against the unfair regulation of the property or getting unfair economic privilege, the grant of such injunction may put the monopoly to limits and can be said to be justified and in the kennel.

Lastly a case, worth mentioning, is the case of *Chiron Corporation v Organon Tekrika Ltd (no.10)*[22] *Aldous J* put forth a justification by saying that the intellectual property rights are justified on the basis of monopoly creating enhancements of the technical progress in several ways. Firstly, that it encourages the research and invention and also pushes the inventor to disclose the discovery instead of keeping it a secret and lastly that it offers reward for the inventor to be globally recognized of the invention.

We can also regard the judicial activism as said in the case above, that the monopoly created by granting intellectual property rights is the legal monopoly and thus capable of benefit rather than the unfair benefit.

[22] [1995] ESR 325.

JUSTIFICATION FOR AN OVERLAP WITH ANTI-TRUST LAWS

The objective of the Anti-Trust Laws also known as the Competition Laws[23] is to promote free competition in all spheres of the economic activity and to protect the potential buyers against the price discrimination through monopolistic practices.

The Intellectual property rights permits the monopoly albeit in limited sense, whereas the anti-trust laws and competition laws tend to minimize and invalidate any type of monopoly created. It has been argued that the Intellectual property rights are considered as the exception from the anti-trust law. Below we will visit some commentators for their comments on the above situation re overlap of the two bodies of law.

Peter S. Menell[24] stated that there are policies existing to carry out the promotion of the innovation with the anti-trust law regime which promotes competition by restricting the monopoly. Menell has argued the balance here while there are some critics that argue intellectual property rights wholly as exception.

A major contribution was made in the debate by the *William F. Baxter* in his writing [25], where the author established the intellectual

[23] Competition Act 2010.
[24] Peter S. Menell, *Intellectual property: general theories* (Berkeley Centre of Law and Technology 1999).
[25] William F. Baxter, 'Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis' (1966) 76 Yale L.J. 267.

property rights as exclusive rights that are deceptive in meaning and capable of creating monopoly. Baxter also argues that the intellectual property rights are afforded a little exception from the antitrust laws but in reality the intellectual property rights are misused.

It is pertinent to emphasize here that the Intellectual Property Laws and the Competition Laws are two different regimes but historically they are found to be overlapping and interplaying with each-other. For example, the said two systems have one common idea to encourage the innovation and protect the same against the abuse. Another example is when the IP right owner refuses to grant permission/license to use the protected property[26]; it inhibits the competition and amounts to anti-competitive practice which is leading cause of monopoly and abuse of the dominant position hence prohibited under The Competition Act, 2010 of Pakistan.

The use of the IP rights restrictively in the merger agreements, which includes limiting the scope of use of the protected property by adding certain clauses into the same merger. If that merger then seems to abuse the competition, the Competition Act, 2010 comes into play. The dilemma we are concerned here is the application of the laws, we can see here an inherent conflict between the two regimes.

Hence it can be safely said that the neither of the Laws are clear enough to provide for the solution of the inherent conflict thus discussed. One may need to go further and ask himself the questions

[26] Aravind Prasanna, 'Intellectual Property Rights and Competition Law: A Satisfactory Compromise in India', (2018), 5 Indian JL & Pub Pol'y 45.

of immunity and governmental regulation, whereas the governments are not readily ready to pronounce on the discussed points above.

JUSTIFICATION BY THE GORDON'S THEORY OF UNJUST ENRICHMENT

According to the *Gordon*[27], it is stated to be in the favor of intellectual property rights without any doubt by considering the laws of restitution. Gordon was of the idea that if the intellectual property rights are not given exclusively and protected, it may lead to unjust enrichment for a person who does not deserve. The theory was basically based on the fact to compensate the creators rather than those who follow-up[28].

Another related aspect to the foregoing is the 'overuse or over-distribution of the information'[29] which falls in the category of the unjust enrichment. In the modern era, we are found to be very sensitive about the use of information. It is argued that the Intellectual property is justified even if it creates monopoly for the fact that it prevents the overuse of the information. The owners are likely to gain from the value of the information and where there is a value the same information needs to be protected against the abuse of the benefits.

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[27] Gordon, Wendy J., 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia Law Review 149-281.
[28] Gordon, Wendy J., 'Of Harms and Benefits: Torts, Restitution and Intellectual Property' (1992) 21 Journal of Legal Studies 449-482.
[29] Mark A Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property, (2004), 71 U Chi L Rev 129.

The issues arise in today's world where no one is actually able to show empirical evidence in support of the contention that the concerned valuable information is over-distributed and in turn is abused to the disadvantage of the owner.

It can be said that the contemporary principle, of unjust enrichment and over-use/distribution of information, successfully provides the justification of the Intellectual property rights but nevertheless it is not in itself sufficient to make the intellectual property rights an exception to the rule against monopoly and antitrust laws.

IN THE HONOURABLE COURTS OF PAKISTAN

There can be found very little discussion by the Courts of Pakistan on the monopolistic and jurisprudential nature of Intellectual Property Rights. However, before the enactment of the Trade Mark Ordinance, 2001, the legislature recognized the Intellectual Property Rights as being a personal property of a person through the s. 54 of the Specific Relief Act, 1877. It was supplemented by the case of Atiqa Odho v. R. Lintas[30] wherein the High Court of Sindh dilated upon the point of law that the above mentioned s. 54 allows for injunction where the breach is related to intellectual property rights. Therefore it can be safely asserted that the Courts of Pakistan recognized such rights before the advent of proper intellectual property legislation. The

[30] PLD (1997) Karachi 57.

Court also called it a property therefore, in light of the discussion above, saying such rights the property makes one think that even it is capable of creating a monopoly still it can be justified as legal monopoly allowed by the Courts of Law.

Interestingly, In the case of Riffat Saraj v. Eye Television Network[31], the Court of Law, ignoring any discussion on the issue of monopoly, discussed the nature of the moral rights that are attached to the intellectual property. The author of the novel in which a drama was based, approached the Court for an injunction to get his name as the writer of the drama for lifetime. The Courts thereafter held in the favor of the author by stating that all propriety rights can be assigned but the moral rights can-not be transferred – meaning thereby that the authors name as a writer shall be mentioned even if the whole other property rights are assigned to someone else. This is somehow related to the reward theory which means that ownership of the intellectual work is actually a reward for the author's (etc.) hard-work and intellect therefore the Court, ignoring the creation of monopoly, decided in favor of the author that his name as writer of the novel shall stay with him for his lifetime as a moral right.

Very recently, in 2017, in the matter of Hilton Pharma v. UCB, SA[32], the High Court of Sindh, in clear words and explicitly, recognized the monopolistic nature of the intellectual property rights and stated that the *"concept of patent revolves around the*

[31] CLD (2009) Lahore 1133.
[32] 2017 CLD (2017) Karachi 557.

fundamental principle that inventor be granted monopoly upon his disclosure of the patent to public"[33] . It is therefore very clear that the monopoly is being justified by the Highest Court of Law instead of promotion of free competition in the market.

CONCLUSION

As we first explained that the nature of the Intellectual Property Rights is monopolistic and is widely characterized as the Legal Monopoly. The article providing with detailed justifications including the Labor Theory of Locke and Hegel's personification of property rights. These theories provided the basis for the further development in this regards because further there were more theories of the First Occupancy and No harm were advance to justify the Intellectual Property rights around each single detail. Meanwhile there were arguments put forth by Bentham and Stuart who clearly emphasized on the utilitarianism of the Intellectual property rights. In order to devise a justification theory where Clark extended the idea put forth in same theory, giving us an attractive theory both legally and morally. Looking at the Moral justification we concluded that these moral justifications cannot be said to be historical rather they seem more contemporary. The writers of the various books and the commentators have provided us with the Reward, Incentive and Development theory. While the judicial activism promoted the concerned development through monopoly by validating it. Lastly the

[33] Ibid at para 10.

overlap between the Anti-trust laws and the Intellectual Property, a very comprehensive debate but not essentially conclusive as the position is very complex but from the justification it can be inferred that the monopoly restriction by the Anti-trust laws does not apply to the Intellectual property rights in its strict sense.

Hence, in the light of the justifications discussed above it is inferred that the Intellectual Property Rights regime being beneficial, in national interest and being of great advantages will outweigh the argument of it being of disadvantage because of manifest monopoly. Ending this at a note fairly that monopoly can be said to be legal monopoly created under the intellectual property rights.

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