Chapter I

Introduction

In the course of the past two decades, Intellectual Property Rights (IPRs) have grown in visibility and acceptability and playing a major role in the development of the global economy. Many countries strengthened their laws and regulations in this area on their own volition during the 1990s. And when the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was successfully concluded at the World Trade Organization (WTO), the protection and enforcement of IPRs gained the status of international commitments. Over the past decades, copyrights, patents, trademarks and industrial designs, among others, have received increasing recognition. With the emergence of newer scientific and technological innovations, newer forms of such protection continue to emerge. This has significantly widened the scope of Intellectual Property (IP).

Intellectual Property can be defined as the creations effected by the human mind. Inventions, works of literature and other arts, symbols, and designs used in trade and industry fall under this definition. (Putnam: 1988). Intellectual Property is divided into two subjects: (i) industrial property, and (ii) copyright. The former includes inventions and Geographic Indications (GI) of source. Inventions further include patents, industrial designs and trademarks. Compared to inventions, Copyright has wider scope and it includes works of literature (such as novels, poems, plays, films,
and musical works) and art (drawings, paintings, photographs, sculptures, and architectural designs, among others (Ostergard: 1999). Rights that fall under the ambit of copyrights include those enjoyed by performing artists vis-à-vis their performances, phonogram producers vis-à-vis their recordings, and those of broadcasters vis-à-vis their radio and television programs. These rights are called Related/Neighboring Rights. Intellectual Property Rights (IPR) safeguards the interests of the creators of the works by according them rights over the property of their works.

There is one pertinent difference between Intellectual Property and other forms of property - Intellectual Property is intangible. As a result, it does not possess any physical parameters that can define or identify it. So, it must be expressed in some discernible manner in order to be extended protection. Generally, Intellectual Property encompasses four distinct areas, namely - patents, trademarks, copyrights, and trade secrets. However, the scope and definition of Intellectual Property is constantly evolving as newer forms of protection evolve. In recent times, Geographical Indications, protection for plant varieties, semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of Intellectual Property.

1.1 Concept of Intellectual Property

The concept of Intellectual Property has a long history attached to it. In fact, it is as old as the renaissance of northern Italy.
Venetian law of 1474 AD is believed to have made the first attempt to provide protection to inventions via a type of patents that granted certain exclusive rights to the inventor. Later, circa 1450 AD, Johannes Gutenberg invented the first movable type and printing press. This invention went a long way in the development of the world’s first copyright system (Peter Drahos: 1999). The end of the 19th century saw the emergence of novel methods of manufacture, which gave rise to industrialisation on a massive scale. This paved the way to rapid growth of cities, expansion of railroads, investment of capital and a surge in ocean-bound global trade. Novel ideals of industrial growth, strong centralised regimes, and rising feelings of patriotism saw many countries setting up their own versions of Intellectual Property laws.

Around this point in time, the international Intellectual Property system began to take shape with the setting up of the ‘Paris Convention for the Protection of Industrial Property’ in the year 1883 and the ‘Berne Convention for the Protection of Literary and Artistic Works’ in the year 1886. Intellectual Property followed a basic premise that as inventors are accorded greater recognition and are rewarded in good measure, inventive and creative activities receive a boost, which further gives rise to all-round growth of the nation’s economy. And in the contemporary corporate paradigm, ‘ideas’ and ‘knowledge’ have turning out to be vital parts of trade and commerce. A good part of the value of high-technology products as well as novel medicines (drugs) arises from the quantum of inventions, innovations, as well as Research and Development (R&D) that went into it. Movies, recordings of music, books and software are traded
for the creativity they contain and the information they provide, and not for the plastics, metals or paper used to manufacture them. A number of which were traded as low-technology goods once upon a time, now come with higher percentage of invention and design in their value. Therefore, creators are “given the right to prevent others from using their inventions, designs and other creations”.

The Convention establishing the World Intellectual Property Organization\(^1\) (WIPO) in 1967 provides the following list of subject-matters protected by Intellectual Property Rights; (i) literary, artistic and scientific works; (ii) performances of performing artists, phonograms, and broadcasts; (iii) inventions in all fields of human endeavor; (iv) scientific discoveries; (v) industrial designs; (vi) trademarks, service marks, commercial names and designations; (vii) protection against unfair competition; and all other rights resulting from intellectual activity in industrial, scientific, literary or artistic fields(Shulman: 2002). With the establishment of the World Trade Organization (WTO), the importance and role of Intellectual Property protection was crystallized though the Trade-Related Intellectual Property Systems (TRIPS) Agreement. This agreement was settled at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994. The TRIPS Agreement encompasses, in principle, all forms of Intellectual Property and aims at harmonising

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\(^1\) The World Intellectual Property Organization (WIPO) is a UN agency, responsible for the promotion of intellectual property worldwide. It acts as the secretariat for the negotiation of treaties that establish new norms in the field of intellectual property, and administers several treaties. It also conducts extensive programmes for training and technical assistance for developing countries.
and strengthening the standards of protection and effective enforcement at both national and international levels. It addresses the applicability of the general principles of GATT as well as the provisions in international agreements on IP (TRIPS Part I). It establishes standards for availability, scope, use, enforcement, acquisition and maintenance of IPR. Furthermore, it addresses related dispute prevention, settlement mechanisms and institutional arrangements.

The TRIPS accord came into existence on 1st January, 1995. It is the most all-inclusive and wide-ranging multilateral pact on IPR (WTO Agreement on TRIPs 1995). The areas of IPR that it covers are:

(i) Patents, including protection of new varieties of plants;
(ii) Copyrights and related rights (rights enjoyed by performers, producers of sound recordings and broadcast organisations);
(iii) Trademarks, including service marks;
(iv) Geographical Indication (GI), including appellations of origin;
(v) Industrial designs;
(vi) Integrated circuits; and
(vii) Undisclosed information/trade secrets.

1.1.1 Patents

Patent is also defined as “a monopoly granted by the State to an inventor for a limited period of time, in return for the disclosure of
the invention, in order to enable others to have the benefit of the invention (Sec.5, TRIPS: 1994). Patent right bestows the owner with the legal standing to prevent others from exploiting his/her invention (Ostergard: 1999).

According to law, to be qualified for protection under patent laws, an invention must meet certain conditions. These include, (a) the invention must be new or novel; (b) it must be non-obvious; and (c) it must be useful or industrially applicable. As in the case of a patent, plant variety protection is granted by a State to the breeder of a new variety (Epstein: 2008). The breeder is conferred with an exclusive right to produce, reproduce and sell the material.

Inventors apply for Patents to protect their creative work. For receiving such Patent, they make an application to a government office. In this application, the inventor sets out a description of the invention. The inventor then makes out a legal situation where the patented invention would need the patent-owner’s nod for use by another party. Such use could include manufacture or sale of the patented product.

1.1.2 Copyright

Copyright, also known as author’s rights, deals with the rights enjoyed by the creators of intellectual property. Copyright protection is given to original works of literature, scientific works, and creations in the field of arts. Copyright endows authors and other creators of

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2 In technical terms, the question is whether or not the invention ‘would have been obvious to a person having ordinary skill in the art’.
artistic works of the mind (literature, music, art and broadcasting organisations) the right to authorise or forbid, for a fixed, limited period of time, utilisation of the creations. As a result of this exercise, copyright awards “limited monopolies to the creators so as to control the right to make copies of a given work”. Generally, copyright is said to “protect the expression of the author’s ideas in tangible forms rather than the ideas themselves” (WIPO: 2000). Proponents of copyright say it is justified as it lends great encouragement to authors and artists to generate original works, which goes a long way in enhancing a nation’s economic standing.

1.1.3 Trademark

Trademark is a distinctive sign or name that individualises the products of any organisation with a view to recognise the source and thus, differentiate the item from the products of competing companies. Similar to a patent, a trademark can also be registered with the competent government authority, which in most countries is the same as the authority that processes patent applications.

1.1.4 Geographical Indication

Geographical Indication (GI) lends identity to a product as having originated in a specific region of a country, wherein “a given quality, reputation or characteristic of the product is essentially attributable to its geographical origin” (Kailasm&Vedaraman: 2003). By virtue of their universal reputation for quality, these indications have acquired enviable commercial value over the past years. Sarees produced in Kanchivaram, Tamil Nadu or Basmati rice grown in
northern India are two products that have gained immensely from being accorded GI identification.

1.1.5 Industrial design

Industrial design is defined as the “creative activity which results in the ornamental or formal appearance of a product and design right refers to a novel or original design that is accorded to the proprietor of a validly registered design.” Under TRIPS, industrial designs are accorded certain minimum standards of protection. The purpose of design law it to promote and protect the design element of industrial production.

1.1.6 Integrated Circuits (ICs)

These are miniaturised electronic systems within which “a number of active and passive circuit elements are located on or within a continuous body of material to perform the function of a complete circuit” (Kailasm&Vedaraman: 2003). Importing or distributing for commercial purposes a protected layout/industrial design without authorisation of the right holders is treated as design piracy.

1.1.7 Undisclosed Information

The information protected under ‘Undisclosed Information’ may be of a personal, commercial, industrial or administrative nature, and disclosed to a third party under a contract not to disclose it without the informant’s proper consent. Four main categories of information are said to be “confidential”. These are ‘trade secrets’,
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1.2 History and evolution of IPR

Man has made efforts for long to lend protection to the original creations of the mind (or, intellectual property). Research shows that such efforts have been taking place since the time of the Greek philosopher Aristotle (4th century BC). Some put it at the 9th century in China (Tansey: 1999). Researchers have traced laws dealing with Intellectual Property to royal privileges handed out by Kings and Emperors in medieval Europe. The Venetians are definitely said to have put in place the first fully developed patent laws in the year 1474. Over the next 100 years, this model spread over to many European states. Today’s copyright law has its origins in England when the 1709 Statute of Anne came into existence (Peter Drahos: 1999). In the United States too copyright law came into existence when its Constitution lent the Congress with powers “to promote the progress of science and useful arts, by securing for limited period of time to authors and inventors the exclusive right to their respectful writings and discoveries” (Constitution of the US adopted 1787, Art.1).

During the centuries, various countries put in place legislation to protect IPR for various motives. According to WIPO, IPR systems provide “statutory expression to the moral and economic rights of creators in their creations and define the rights of the public to access such creations”.
That’s not all. Another major intention is to provide strong incentives and fulsome rewards to inventors/creators and thereby help stimulate economic and social development of countries (WIPO: 1995). Beyond these traditional justifications, Governments use IP laws to help improve the nation’s competitive edge. This motive is increasingly gaining currency in today’s international economy. Often these policies favour major economic interests, particularly big MNCs, sometimes hampering the interests of developing countries. Public access and benefits in the home country and promotion development in countries in the South get affected. (Shulman: 2002).

Various countries developed IP laws in accordance with their national requirements and demands. Naturally, this meant that the law had differing levels of stringency in different countries. And then as global trade began expanding during the 19th century, counties began exploring various forms of international collaboration for trade and commerce. Initially, countries entered into bilateral pacts. But this did not have the desired effect of helping expand trade in a big way and providing IPR protection. Therefore, two major agreements with international standards came into existence. These were the ‘Paris Convention of 1883 for Industrial Property (Patents and Trademarks)’ and the ‘Berne Convention of 1886 for the Protection of Literary and Artistic Works (Copyright)’. In the years that followed, both the Conventions saw changes being incorporated in them. Not all countries, though, adhered to the provisions set out in these Conventions. Those that fell out with these pacts, felt the adverse pressures over time (Peter Drahos: 1999).
Over the years, Intellectual Property regimes have not only become globalised, but their scope of subject-matter too, have widened. Initially, restrictions and limitations which earlier barred certain types of subject-matters from being provided patents were removed. The patenting of biological entities constitutes one example. Prior to 1980, some 200 years of legal doctrine that conceptualised life-forms as ‘products of nature’ rather than as human invention, was therefore, unable to meet the three criteria of patents: novelty, utility and non-obviousness. These were overturned by a landmark decision of the US Supreme Court in *Diamond v. Chakrabarty* (Peter Drahos: 1999), where the court ruled that a Genetically Modified (GM) strain of bacteria that could degrade components of crude oil could be patented as a new and useful manufacture or composition of matter (*Diamond v Chakrabarty* 477 US 303:1980). Subsequently, the US Patent and Trademark Office, followed by the European and Japanese patent offices, began granting biotechnology patents on new plant varieties, non-naturally occurring non-human multi-cellular living organisms, including animals, and discoveries of naturally occurring human gene sequences (Chapman: 1999).

1.3 **IPR Regime: Developing Country Perspective**

Despite there being little domestic gain from IP protection, it is seen that most developing countries are members of institutions where IP issues are negotiated. However developing countries largely been unable to bring about changes in the international system which could be of benefit to them specifically. Various
studies have been conducted which has tried to provide satisfactory answer to these queries. And the findings are interesting. For one, developing countries have weak economic power, which does not help in their voice being heard at these forums. Moreover, developed countries get together in large Specifically, State behaviour in the global economic system is fundamentally connected to the internal domestic processes that define the State’s negotiating and bargaining power (Keohane: 1982). Thus, to explain the interaction between developing countries and the international Intellectual Property system, it is necessary to consider the international system more generally, and to examine the State’s behaviour more strategically.

The effects of globalisation as the primary rationalisation of the demands of market actors pursuing maximum returns for innovative products in the global market has forcibly intruded into a discipline that has been categorised by more or less precise distinctions of national and international Intellectual Property law. As with other disciplines, Intellectual Property is the subject of re-inventive efforts with international obligations supplying much of the justification for expanding rights. From rights management systems to copyright term extension, domestic Intellectual Property policy is now customarily justified by international obligations.

1.3.1 Regimes defined

Regimes are defined generally as implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. They
may or may not involve a formal agreement or treaty (Krasner: 1982). Regimes are systematic; they contemplate long-term commitments and typically represent bargain linkages among a number of issues. Thus, regimes differ from mere international agreements, which tend to be ad-hoc and may revolve around narrower interests. However, regimes can be reflected or established through international agreements.

International regimes reduce transaction costs, thus making it more likely for States to act in cooperation rather than in conflict. A regime, which is a form of Institutionalism, provides thrust to international cooperation, whereby States realise that there are substantial gains to be derived from acting in concert. Put this way, Institutionalism helps explain the importance of domestic governments and why states need (demand) and create (supply) international regimes that constrain their exercise of power (Hopkins: 1982).

Liberalism deviates from Realism and Institutionalism most significantly by viewing non-State personalities as the primary actors in both domestic and international communities. In this view, ‘State behaviour’ is determined not by the international balance of power, whether or not mediated by institutions, but by the relationship between these social actors and the Governments representing their interests in varying degrees of completeness. Further, there is a nuanced distinction between liberal international law and liberal international relations. Broadly, the liberal project in international law
is normative, prescribing the role of the State viz-a-viz individual rights, virtues of democracy, and to a more limited extent, socio-economic rights. Liberalism in international relations assumes the existence of these rights and is, generally speaking, descriptive. Both converge in emphasising on the role of non-State actors in determining norms, rules and institutions of the international domain.

Realism, in simple terms, would suggest that an international organisation defers strongly to a State’s asserted prerogative, but would not require a State to account for the exercise of that prerogative as that would implicitly undermine its sphere of authority.

Liberal international law would most surely pierce the veil of sovereignty and evaluate the domestic environment for unjustified bias against its citizens, or conduct that violates international norms. It might, for instance, suggest that the WTO grant a standing to private parties to bring complaints, or, at least, accord a weightier role to submissions of private actors. Further, it would contemplate that WTO agreements be directly applicable in domestic settings.

Institutionalism, would represent a median level of deference to the extent that rules, norms and procedures can produce order between States. Its goal, then, is not to evaluate the distributive efficiency of the regime but to operate in a way that produces and reflects the cooperative arrangement. The emphasis on order among sovereign States in international law and international relations focuses attention on benefits flowing to participating countries from
agreements, notwithstanding the domestic welfare consequences of such participation (Mutua: 1996).

Leading regime theorists stress that understanding the relationship between the domestic and international spheres requires that decision-makers be simultaneously concerned with domestic and international considerations. In the international arena, an “adequate account of domestic determinants of foreign policy and international relations must stress politics: parties, social classes, interest groups, legislators, and even public opinion and elections, not simply executive officials and institutional arrangements”. (Putnam: 1998). This could result in troublesome, manipulative use of international law. Assertions of sovereign prerogative in the face of international obligations, or reliance on international obligation to excuse domestic Government failures, both undermine the institutions and processes designed to facilitate the rule of law in both the domestic and international arenas. It invokes Realist views of States as completely focused on their own power in relation to the power of other States (Waltz: 1979). In this view, rules of international behaviour and the institutions responsible for developing and enforcing them are but convenient agents for demonstrations of State power. Actions really taken for reasons of power may be rationalised by international law. Similarly, domestic policy may be used to rationalise actions that are inconsistent with international law (Krasner: 1982).

Thus, it is entirely plausible that even with regime-shifting,
developing countries are actually losing normative ground with respect to the second element. If this is the case, regime-shifting may ultimately be more about where lines are drawn in Intellectual Property regulation, and not whether they are drawn at all. A more disturbing issue is that to the extent regime shifting upsets coalitional dynamics between developing countries, the loss on the development side is actually doubled. Not only is there a dilution of a normative proposition however subtle, but there is also political loss resulting from splinters between developing countries whose membership in various regimes may be different, or whose position on issues within the regimes may differ.

1.4 IP norms setting and Developing countries

International Intellectual Property standards setting have largely been dominated by Western States and Intellectual Property owners. Since World War II, the dominant mechanism of standard-setting has become economic coercion, of which TRIPS is the most potent multilateral expression. Prior to TRIPS, developing countries were able to base some of their development strategies on free riding, either because they were not members of international conventions or because there was no effective mechanism of compliance in the conventions that they had joined. But with the coming of TRIPS, the pursuit of free-riding strategies has become more difficult. Continued bilateralism by the United States, especially with regard to Intellectual Property Rights, further limited the possibility of such strategies. For developing countries, the reality of standard-setting is that they
operate within an Intellectual Property paradigm dominated by the US and the EU. TRIPS set minimum standards. Bilaterally, the bar on Intellectual Property standards continues to be raised. The major complaint at different multilateral forums against the TRIPS plus path followed by developed nations through bilateral diplomatic arm twisting.

The developing South, continues to share a set of common challenges over issues related to Intellectual Property (IP). If these countries join together, they could forge political cohesiveness at the international level on Intellectual Property-related issues. But seldom do they succeed in influencing the international Intellectual Property standard setting process against the ‘webs of coercion’ by the North led by the US, the EU and Japan. Regardless of the South’s voice of dissent, the North ensured the inclusion of TRIPS in the domain of WTO with a strong dispute settlement mechanism and made the existence of stringent municipal Intellectual Property regimes in the developing nations mandatory. What further perplexes the South is the persistent drive by the North to push for greater protection and enforcement of Intellectual Property rights. This necessitates a South-South cooperation strategy to deal with identified common challenges like capacity building and strengthening innovation, among others (Kumar: 2009).

1.5 Intellectual Property Rights and Developing Countries

Increasing amounts of pressure are being brought on developing countries to strengthen their national Intellectual Property
(IP) regimes in order to synchronize them with those of developed countries. The movement towards strengthening IPRs in developing countries was initiated by developed countries. Developed nations argue that this would generate additional profits leading to more Research and Development (R&D), which could help fuel economic growth in developing countries. However, developed countries argue that IP could help bring in foreign direct investment (FDI), transfer of technologies, innovation in the home market, as well as research and development in developing countries. However, simply putting in place an IP regime will not usher in economic development. For that, the government in these developing countries needs to take steps to foster development through use of the Intellectual Property systems. Reverse engineering is important in many developing countries. However, this generally falls outside the scope of R&D. Only if reverse engineering is carried out within the framework of an R&D project to develop a new and different product, should it be considered R&D.

The IPR connecting this aspect (broadcasting rights) is the Copyright and neighbouring rights, which is a major part of the IPR put in place to incentivise intellectual efforts made to develop information technology (IT).

Here, a word on Neighbouring Rights in this regard would be in order. These are rights granted to persons/legal entities different other than those considered to be beneficiaries of copyrights in the traditional meaning of the term. However, it must be noted that the
width and breadth of protection given in the case of related rights is generally lower than that of copyrights. This is in recognition of the fact that those granted related rights are in reality not the original creators of the works but are only intermediaries in their production. Therefore, the term ‘neighbouring’ rights has been used (Tellez & Waitara, 2007).

In developing countries, over the years broadcasting has been seen as a “Public good”. That is, the effort and cost put in to bring it to one person or to a thousand would be the same. Understanding the long history of machinations by broadcasters in public relations and various regulatory agencies is crucial for those concerned with the future of public broadcasting. Currently, in developing countries, there are no state-owned broadcasting services that enjoy a monopoly over broadcasting in the nation coupled with public funding. Liberalization as well as FDI in the broadcasting market was followed by de-regulation. Besides ushering in greater competition, the market model of broadcasting sought to provide greater choice to the consumers. Viewers become consumers; this belief is exemplified by the emergence of multinational broadcasting companies.

Currently, the broadcasting organisations are having legal protection only over those transmissions made through wireless means. Since 1998, WIPO has been making efforts to protect the rights of broadcasting organizations vis-à-vis the problem of signal theft. And these discussions continue with the environment going increasingly digital. The draft treaty’s exclusive rights-based
approach is further complicating the present understanding and the future of broadcasting in developing countries like India.

### 1.6 Justifications for copyright

While a number of different theories exist regarding copyright, the main justifications for copyright fall into three broad areas mainly. The first is on the basis of economics; the second is on the basis of public policy (the cultural argument for copyright); and the third is on the basis of moral rights (or natural rights) (Kase: 2009). However, in Michael Spence’s words, none of these justifications offer a good logic for the law of copyright in any particular form. However, they have rhetorical force in the arguments between stakeholders (authors, producers/ distributors/ publishers and users) that have shaped modern copyright law (Kase: 2009).

In Anglo-American copyright law, arguments related to economics have been prevalent. For instance, it has been strongly argued that the purpose of copyright is basically to ensure continuing profit to the originator or creator of a copyrighted work. Therefore, the grant of exclusive rights to an author is an incentive to enterprises such as publishers, who rely on the copyright protection afforded to authors. Economic and public policy arguments are also embodied in the copyright clause of the US Constitution. The Federal Government the right ‘to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries (Art 1, para18, US Supreme Court in Mazer V Stein: 1954). The economic philosophy behind the
clause is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts. “Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” (Art 1, para 18, US Supreme Court in Mazer v Stein: 1954).

Putting it another way, the economic justifications for copyright have both static and dynamic elements; static in that the owner gets positive benefits as a result of ownership of the property right, and dynamic in that it acts as an incentive to invest in creating the work on the basis that only the author or his assigns can exploit it (Posers: 1987). To quote Anthony Trollope, “Take away from English authors their copyrights, and you would very soon take away from England her authors” (Copinger: 1996). Of course, it can be debated whether in the area of fine arts, the economic basis of copyright has much relevance: it is trite to say that Picasso, for example, would still have created his works regardless of the existence or otherwise of copyright. It is his original works as opposed to copies that command enormous prices. Better still, Picasso was able to exploit the market for his works during his lifetime. However, in applied arts and areas such as lithography, photography, online exploitation and engravings, where the copy has economic value in its own right, the economic justification has greater force (Kase: 2009).

Despite all this, it has been suggested that copyright has no effect on true artistic creativity. This is true for the world of popular
arts, where moods and fashions among the young change ever so fast, bringing with it the opportunity of quick returns for the entrepreneur. Yet, it cannot be assumed that serious works of art would be entirely unaffected: though artists would continue to express themselves, as they have done throughout history under all kinds of economic and social constraints, publishers, impresarios and galleries that need to bring their own works before the public might be less inclined sans copyright protection to take the financial risk (Thomas: 1998). In fact, the economic argument for copyright protection, in one guise or another, has a long history in English law. For instance, according to David Saunders, in the 17th century case of *Roper v Streeter*, the court ‘recognised investment and expense as justifying a claim to a property right in copyright’ (Saunders: 1992).

It is generally accepted that in the interest of public good, authors should be encouraged to publish their works so as to ensure as wide a dissemination of knowledge and culture as possible. The existence of copyright encourages this effort and in economic terms can help make such dissemination viable - indeed, the first British copyright Act, the Statute of Anne (Anne: 1709) was entitled ‘An Act for the Encouragement of Learning’. However, copyright protection raises conflicts too: it is one thing to encourage the production of copyright works, but if unregulated, copyright might act as a fetter on those who need to copy the works for desirable purposes, such as private study or research. Here, arguments in favour of exceptions to copyright protection on the basis of ‘fair use’ come into play.
As far as the moral base of Copyright is concluded, two major theories underpin arguments that authors have an intrinsic, just or moral right to their creative efforts. These are based on the idea of a ‘just reward’ for labour, and that under natural law authors have an exclusive right of property in their labours.

At its most basic, just reward theory can be summed up by Jesus’ injunction: For the labourer is worth his hire (Luke:1995). A variant of this is the desert theory, or as it is sometimes called, the value-added labour theory (Hughes: 1988). This is a moral theory which seeks to justify the grant of a property on the basis that the ‘effort’ in creating the thing ‘deserves’ to be recognized and rewarded such as the author has created something of benefit to society and therefore, he or she is entitled to receive a benefit from society, namely a property right (Issac: 1954).

Certainly, the desert argument is to be distinguished from the natural law argument discussed below. However, it has also been pointed out that the difficulty with the desert theory is in determining what sort of efforts are worthy of protection and what protection is given (Hettinger: 1989). For instance, many of the best value intangibles are the results of moments of inspiration that involve little or no apparent effort on the part of the person claiming the intangible. The work of the perspiring, but not the inspired, ‘creator’ would be protected by law (Spence: 1996). Thus, the desert principle is not without its problems: in terms of effort, the labours of the artisan might outweigh those of the inspired artistic genius. It can be
argued that a variant of the desert theory is the Sow Principle, or unjust enrichment argument as it is also called, although this also has utilitarian aspects. This has been used as a basis to prevent misappropriation or unfair competitions. A well-known example of this principle is the US case of International News Service v Associate Press (248 US 215 (SC): 1918). This principle also appears in UK copyright law from time to time, and it is also the basis of the famous copyright maxim ‘What is worth copying is worth protecting’. In 1964, Lord Devlin stated, “Free trade does not require that one should be allowed to appropriate the fruits of another’s labour, whether they are tangible or intangible. The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain states, and one of them is when it is expressed in words or print. The fact that protection is of limited necessity is no argument for diminishing it further, and it is nothing to the point to say that either side of the protective limits a man can obtain gratis, whatever his honesty permit him to pick up (University of London Press Ltd v University Tutorial Press Ltd:1916).

Indeed, it was referred to by the House of Lords in a relatively recent case involving artistic worksie, Designers Guild Ltd v Russell Williams (Textiles) Ltd: The law of copyright rests on a very clear principle: that anyone who, by his or her own skill and labour, creates an original work of whatever character, shall, for a limited period, enjoy an exclusive right to copy that work. No one else may, for a season, reap what the copyright owner has sown (Designers Guild: 2006).
1.7 Natural Law/Personality Bases

The bases are the ones most often raised by those seeking to protect authors’ rights, as opposed to those exploiting creative works for profit. These contain a number of aspects. One is the oft-cited statement on property by John Locke in his second treatise of Civil Government in 1690 “Every man has a property in his own person. This, nobody has any right to, but himself. The labour of his body and the work of his hands, we may say, are his properly. Whatsoever then he removes out of the state that Nature hath provided, and left in, he hath mixed his Labour with, and joined to something that is his own, and thereby makes it his Property.” Thus, through labour an individual converts the raw material of nature into private property, whether tangible or intangible. This argument features in the key 18th century literary property cases between booksellers (Miller v Taylor: 1976). Extended into the realm of literary production, this theory of property produced the notion put forward by London booksellers of property founded on the author’s labour, one the author could sell to the bookseller. Though immaterial, this property was no less real and permanent, they argued, than any other kind of estate.

It has been argued that Locke’s theory of a right of property deriving from personal labour was, from the start, embedded in the American copyright law and that the concept of English copyright law subsists in a literary, dramatic, musical or artistic work, if some, albeit limited, work or effort has gone into the creation of the work (Rahmatian: 2000). Certainly, in English law there was early judicial
acknowledgement that it was just to grant copyright to authors of literary works and that authors too, had what we now term ‘moral rights’, as Lord Mansfiled made clear in *Miller v Taylor*. It is but natural justice that the author/creator should gain financially from his creativity and labour; it is just that he should judge when to publish. It is fit that he should not only choose the time, but also the manner of publication (Burr: 1768).

However, in addition to the Lockean natural laws strand, Anglo-American copyright law also lays particular stress on the economics of copyright protection. The distinctiveness, artistic merits or originality of expression are less relevant than protecting the economic value of the author’s labour. (Rahmatian: 2000). Another theory underpinning copyright centers on the idea that an artist’s work is nothing less than an extension of the artist’s personality – also known as the ‘personality theory’. Kant defended copyright on this basis as did Hegel (Sterling: 1999). It has been argued that the personality justification is the one best applied to arts.

Herbert Spencer also argued in support of the personal nature of an artist’s work: “A production of mental labour may be regarded as property in a fuller sense than may be the product of bodily labour; since that which constitutes its value is exclusively created by the worker. Indeed, the link between copyright and the artist’s personality is regarded as the basis for copyright protection in civil law jurisdictions.”
The use of natural law arguments to justify intellectual property rights is not without its critics: if all labour or creative efforts resulted in grant of property rights, would this not prevent others from drawing on the common pool or public domain of works and ideas. Also, it has been argued that the Lockean theory fails to properly explain why property ought to be created in the item created; simply because a book is an author’s creation, is it a sufficient reason to make it the author’s property? What of creations which are 99% inspiration and 1% perspiration, for instance where little labour is expended.

A strong argument against over-reliance on natural rights justifications for copyright is the nature of artistic work. In reality, ‘authorship’ is not a solitary activity in which one person creates an entire work from imagination alone. As Bard and Kurlantzick have argued, all artists are part of artistic communities that shape their vision: an artistic work does not just reflect the artist’s personality, it embodies a mixture of his/ her personality, the influence of contemporary society and the works of other artists (Indeed, this fact argues strongly for the recognition of a strong public domain element to copyright) (Bard and Kurlantzick: 1999).