Chapter 2

PHILOSOPHICAL JUSTIFICATION FOR LIMITATIONS AND EXCEPTIONS

2.1 Origin of Property – A Theoretical Overview

2.2 Theoretical Basis for Restrictions to Proprietary Rights

2.3 Philosophical Discourse into Intellectual Property Rights

2.4 Theoretical Underpinnings of Limitations and Exceptions to IP Rights

2.6 Conclusion

Intellectual property is really a mysterious concept. From the initial days of development of intellectual property one could notice the attempt of jurists to relate it with the traditional jurisprudence of property. With its ever widening horizons and addition of new rights it is really interesting to observe that this concept with its traditional jurisprudence survives. It is really astounding that it survived as a form of property even though strong and legally enforceable exceptions and limitations are placed on its fundamental characteristic nature of property. So our task is to find out the jurisprudential basis for justifying limitations and exceptions to intellectual property within the same conceptual context in which we justify the property rights. To achieve this task it is fruitful to
find out whether limitations to rights are incidental to all forms of property or peculiar to intellectual property alone. The enquiry is significant in the context of the origin of intellectual property as a state assured and regulated monopoly for attaining the larger public interest of access to information and industrial growth. So before turning to intellectual property in precise, it is important to ascertain the real nature of origin of ‘property’ as a legal phenomenon. Whether it originated simply as a natural phenomenon to meet individual interest or as a legal concept to meet the requirements of society? Or in turn our question will be the true rationale of private property rights and its basic features. The role of law and state in molding private property rights as part of states instrumentalist policy will be the concern, because very often intellectual property is criticized for its state assured and regulated monopoly. These issues are analyzed in this chapter taking recourse to the contributions made by the philosophers justifying private property in general and intellectual property in particular.

2.1 Origin of Property— A Theoretical Overview

Origin of property and private property in particular, as a legal phenomenon was always a matter of curious philosophical enquiry. The concept of property evolved over time in a dynamic, flexible manner, and has been construed in diverse manners across the societies, legal systems and periods in time. Even within the same society and legal system it has varied significantly. Man in his primitive state had no place for either law or property. The construction of the word "property" depends on the context with which it is used. Commonly, the word "property" is used in two different senses. First, it is applied to external things that are the objects of rights or estates; that is, things that are the object of ownership. Second, it is applied to the rights or estates that a person may acquire in or to things. In strict legal parlance, "property" is used to designate a right of ownership, or an aggregate of rights that are guaranteed and protected by the government. The word property may mean either the object of right of ownership or something proper to person or it may mean the right of ownership itself. Proprietary rights are extensions of the power of persons over the physical world. The essence of all such rights lay not so much in the enjoyment of the thing, but in the nature of relationship between the owner of the rights and other

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centrality of private property in the evolution of social and political institution has, inevitably encouraged a wide variety of philosophical discourse. Irrespective of the conflicts on fundamental tenets among the various philosophies and philosophers, all of them unanimously agree on the origin of private property from a common pool. On a deeper scrutiny we can see that the basic elements of origin of property as per these theories are occupation, labor, and contract. The point of divergence of these theories is the way in which each of these theories rationalizes the basic element into property. While the natural law school finds the justification of concretizing the grund norms into property on the basis of innate human reason, the philosophical school emphasize on the human people whom he excludes from the thing. Whatever technical definition of property we may prefer, we must recognize that property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. As a legal term property denotes not material things but bundle of rights. For a detailed study see; Lord Llyod of Hampstead (1985) Lloyds Introduction to Jurisprudence, Stevens and Sons, London, p. 436; Fitzgerald, P. J. (1964) Salmond On Jurisprudence, 12th edition, Sweet & Maxwell, London, p. 216; Menon, K. (1985) Outlines Of Jurisprudence, 3rd edition, Cambridge Law Publishers, Delhi, p. 57; Vecchio, D.G. (1969) The Formal Basis Of Law, Augustus M. Kelley Publishers, New York, p. 183; Wortley, B.A. (1967) Jurisprudence, Manchester University Press, New York, p. 303; Holland (1932) Jurisprudence, 13th edition Oxford University Press, London, p. 193; Pound, R. (1959) Jurisprudence, West Publishing Co., St.Paul, Minn, p. 56.

2 Most of these discussions reflect the prevailing social or political structure in existence at the time that they were written. Hepburn,S. (2001) Principle of Property Law, 3rd edition, Cavendish, London, p. 7.

3 Among the natural law theorists, Roman lawyers proceed on the conception of principles of natural reason derived from the nature of things, while others on the conception of human nature as the basis for origin of property rights. Grotius and Pufendorf are the older proponents of the natural law theory. According to Grotius, all things originally were res nullis. But men in society came to division of things by agreement. Things not so divided were afterward discovered by individuals and reduced to possession. Thus things came to individual control. Absolute power of acquisition and disposition was a characteristic feature of these things. Pufendorf rests his theory upon an original pact. He argues that there was in the beginning a negative community. That is all things were res communes. No one owned them. They were subject to use by all. Men abolished the negative community by mutual agreement and thus established private ownership. Thus even in the most primitive social system the concept owes its origin through some

4 Metaphysical theories emphasis on the abstract nature of man or an assumed compact for the justification of property. Pioneer in this field Kant, begins with idea of inviolability of the individual human personality. A thing is ones, when he has got actual physical possession of the thing and aggression of the thing will constitute a wrong to that person or aggression of his personality. He also justifies the origin of private property from the commons by occupation and civil compact. Occupation as per Kant is a legal transaction involving a unilateral pact not to disturb others in respect of their occupation of things. The efficacy of the pact does not depend on the inherent moral force of a promise or on the nature of man but in a principle of reconciling wills by the universal law. He also preconceives the need of a civil society for the recognition and enforcement of civil law society. Hegel denies the idea of occupation of property and treats property as a realization of the idea of liberty. Property, Hegel says, “makes objective my personal, individual will”. In order to reach the complete liberty involved in the idea of liberty, one must gave his liberty an external sphere. Hence a person has right to direct his will upon an external object and an object on which it is so directed becomes his. It is not an end in itself but gets the whole rational significance from his will and its recognition by the legal system. For a detailed study on these theories read: Fitzgerald, P. J. (1964) Salmond On Jurisprudence, 12th edition, Sweet & Maxwell, London, p. 216; Vecchio, G.D. (1969) The Formal Basis Of Law, 12th edition, Augustus M. Kelley Publishers, New York, p. 183; B.A, Wortley. (1967) Jurisprudence, Manchester University Press,
norms for origin and development of property, the sociological school emphasize the social element or social necessity and historical school emphasize the group element and evolutionary aspect.

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7 The sociological school emphasize the societal element in development of property or for them property arose to meet the societal demands and the values and interests of each of the societies exercised great influence on property norms. For a detailed study on these theories read: Fitzerald, P. G. (1964) *Salmond On Jurisprudence*, 12th edition, Sweet & Maxwell, London, p. 216; Vecchio, G.D.
Further we can see that the major constituent elements of the concept are the ‘thing’, a ‘person who possess the thing’, a ‘civil society’ recognizing that relationship and a well organized ‘political authority or system of laws’ to enforce and safeguard that relationship. On a close perusal of the history we can also see that wherever we find human beings living together, there we observe law and government existing, in however rudimentary form it may be. Some authority superior to the individual controlling his actions is always apparent among the savages and the civilized alike. The beginning of law can be seen in the dim past. Formal legal systems evolved long before the invention of art of writing. Informal controls was sufficient in a social setup when the members of the group agreed about the rules and their duties to follow them and when they share common views about their authority and when they are in a face to face contact. It was when the members of the group cannot agree on essentials or if they cannot or do not trust each other they put their rules and relationships in writing and make formal institutions for them.

Thus whether ‘property’ was appropriated by the act of first occupancy or by the employment of labour or even if it was divided by a set of contracts between the fellow beings, the concept was there in human life and society even before the dawn of civilization. However miserable and precarious was the notion of possession; it was there in the primitive society. When man began to think in terms of certain ‘rights attached to the thing’ rather than as ‘things’ only, we can see the need for

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law to regulate the property. This seems to be the reason for Bentham to observe that property, men and laws were born together and will die together and not merely property and laws.⁹ Thus at the end of the analysis it comes out that property is essentially a relation created by law and the proprietary norms are molded in accordance with the social system in which the legal system operates and are aimed towards the norms and values of the social system. It is also evident that all private property philosophies espouse a particular rationale for the continued existence of private ownership. And these defenses vary according to the period in which they are discussed and the perspective of the individual philosopher.

2.2 Theoretical Basis for Restrictions to Proprietary Rights

The above philosophical discourse has plainly established that the institution of ‘property’ was always a social phenomenon and was never an individual event. Consequently it is to be presumed that any rights attached to this social institution will also be a limited right. As one could not own earth, open space, or a planet our concept of ‘property’ inherently carries with itself the notion of ‘limitation’ i.e. for us objects with definite limits alone could be owned as property. Limitations and exceptions to absolute rights were present in our society from very primitive days. Before the dawn of any religion or social institutions i.e. from the moment man began to live together he was conscious of the needs of his brother and shared those which he found in excess. Thus an inner-consciousness to look into his fellow being was there from very initial days. This inner-consciousness grew from self without any institutional support. This care for the fellows can be taken as primitive

form of public interest concern. Another pre-legal existence of limitations and exceptions can be seen in our religious wordings. Let it be Quran or Bhagawat Geeta or Bible all impose a noble duty on those who have property in excess to satisfy his needs to give a part of it for his fellow beings who are in need. This moral duty backed by a moral sin on its violation is a good example of limitations to property rights in the present legal framework. Thus we can see that the limitations and exceptions were there from the moment of birth of property itself.

It is a usual absurdity that, natural law school based on human reason and individualism is often perceived as one that supports absolute rights and individual interests. Blackstone hailed as one of the exponents of absolutism realized that, absolute characterization of property is extravagant and untenable; he qualifies his despotism by making it

10 A very interesting analysis of this concept has been made by Frederick Engels in his book *Origins of the Family, Private Property, and the State*. The book is available at, [http://www.marxists.org/archive/marx/works/1884/origin-family/index.htm](http://www.marxists.org/archive/marx/works/1884/origin-family/index.htm) [Accessed on June 2010]. Engels opinions that, “thus in the Greek constitution of the heroic age we see the old gentile order as still a living force. But we also see the beginnings of its disintegration: father-right, with transmission of the property to the children, by which accumulation of wealth within the family was favored and the family itself became a power as against the gens; reaction of the inequality of wealth on the constitution by the formation of the first rudiments of hereditary nobility and monarchy; slavery, at first only of prisoners of war, but already preparing the way for the enslavement of fellow-members of the tribe and even of the gens; the old wars between tribe and tribe already degenerating into systematic pillage by land and sea for the acquisition of cattle, slaves and treasure, and becoming a regular source of wealth; in short, riches praised and respected as the highest good and the old gentile order misused to justify the violent seizure of riches. Only one thing was wanting: an institution which not only secured the newly acquired riches of individuals against the communistic traditions of the gentile order, which not only sanctified the private property formerly so little valued, and declared this sanctification to be the highest purpose of all human society; but an institution which set the seal of general social recognition on each new method of acquiring property and thus amassing wealth at continually increasing speed; an institution which perpetuated, not only this growing cleavage of society into classes, but also the right of the possessing class to exploit the non-possessing, and the rule of the former over the latter”.
subject to the control and diminution by the laws of the land.\textsuperscript{11} John Locke while emphasizing the natural right of human beings to acquire and possess property; qualifies the acquisition by the principles of spoilage limitation and sufficiency limitation.\textsuperscript{12}

For positivists like Bentham and Austin law is highly imperative or mandatory.\textsuperscript{13} They are issued by a sovereign whose power is indefinite, unless limited by express convention or by religious or political motivation. So individual rights and interests have no place in that community.\textsuperscript{14} Law is the will of the sovereign. He makes law for the entire community and is very cautious that no one else is enjoying any unlimited or indefinite powers and right. In that society power of each is limited by the other and each has a power to prescribe for the other. Similarly Professor H.L.A. Hart says that every legal phenomenon at the

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\textsuperscript{12} This will be discussed in detail later when we deal specifically with ‘Locke on intellectual property rights’.

\textsuperscript{13} For them law is based upon the idea of commands. Imperative nature of law implies that they are normative statements laying down rules to guide human conduct as distinguished from statements of facts. Both stress the subjection of persons by the sovereign to his power. For a detailed study see, Austin, J. (1954) \textit{The Province Of Jurisprudence Determined And The Uses Of The Study Of Jurisprudence}, H.L.A. Hart (ed.) George Weidenfeld & Nicolson Ltd., London and Bentham, J. (1970) \textit{An Introduction to the Principles of Morals and Legislation}, J.H Buns and H.L.A Hart (eds.) The Athlone Press, University of London, London.

\textsuperscript{14} Austin sees law as a technical instrument of government or administration, which should however be efficient and aimed at the common good as determined by utility. All laws, rights and duties are created by positioning rules, the laying down of rules as an act of government. Consequently there can be nothing inherently sacred about civil or political liberties. To the extent that they are valuable they are the by-product of effective government in the common interest. For a detailed study see, Austin, J. (1954) \textit{The Province Of Jurisprudence Determined And The Uses Of The Study Of Jurisprudence}, H.L.A. Hart., George Weidenfeld and Nicolson Ltd (eds), London, p. 294.
time of its formation have built-in limitations established by social and moral considerations.\textsuperscript{15} He is of the opinion that for the existence of any society there needs certain ‘minimum morality’ and limited resources is one of the basic elements of that minimum requirement.\textsuperscript{16}

Coming to the historical school, let it be the Savigny’s concept of ‘volkgeist’\textsuperscript{17} or Gierks philosophy of ‘association’\textsuperscript{18} or Hegel’s ‘will’\textsuperscript{19} they viewed property as a societal or collective necessity. They allowed the continuance of the institution of property only for the satisfaction of societal or collective needs and wants and not at all for the satisfaction of

\begin{itemize}
\item \textsuperscript{16} \textit{Ibid.} According to Hart, human beings exhibits fundamental characteristics like vulnerability, approximate equality, limited altruism, limited resources and limited understanding of strength and will. Limited resources means food, clothes and shelter which are limited. Because of these limitations there is a necessity for rules which protect persons and property. So the rules regulating private property rights will always be aiming at the larger social interest or in turn it says that property rights will be always subjugated for larger social interests.
\item \textsuperscript{17} His fundamental belief was that the law is located in the spirit of the people-volksgeist. The nature of any particular system of law, he said was a reflection of the spirit of people who evolved it. All law is the manifestation of this common consciousness. Consequently any legal phenomenon like language materializes spontaneously form its way of life, culture, traditions and customs. So private property rights are also an integral part of this social fabric. For a detailed See, Wacks, R.  (2009) \textit{Understanding Jurisprudence: An Introduction to Legal Theory,} 2nd edition, Oxford University Press, London, p. 238.
\item \textsuperscript{18} Associations has significance in law, and is sometimes treated as persons. The reality of social control lies in the way in which autonomous groups within society organize themselves. In his view legal and social history is most accurately portrayed as a perpetual struggle between associations. Lord Llyod of Hampstead  (1985) \textit{Lloyds Introduction to Jurisprudence,} 5th edition, Stevens and Sons, London, p. 436.
\item \textsuperscript{19} Law and other social institutions are the result of free subjective will endeavoring to realize freedom objectively. In this development starting point is the idea of freedom, which implies will. Freedom and will are complementary. Property is the first manifestation of will. It is not merely the will of one person; other persons will also come into purview. Individual will and social will is regulated by means of contract. Hegel, G.W.F  (1952) \textit{Philosophy of Right,} (trans. T.M.Knox), 1st edition , Oxford Publications, London, Para 46 [online]. Available at www.googlebooksresults.com [Accessed on March 2010].
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any individual interests. Incidentally proprietary monopoly has no role to play unless it was properly and carefully regulated for the national existence. According to the Sociological school, law does not exist for the individual as an end in himself, but serves his interest with the good of the society.20 For example for Ihering, property is both a social and individual institution, which justifies expropriation and limitation of the individual’s rights.21 Standing with the Historical school, Sociological school also regulated the institution of property for serving the larger interest of society. In case of conflict between individual and social interest, it was always the societal interest that dominated.22

Similar is the view of Karl Marx who developed an economic approach to property. Marx viewed private property as a form of alienation.23 He said private property is a class instrument and ruling idea. For him private property entrenches inequality.24 The primitive

22 For example see the philosophy of social engineering by Roscoe Pound. For Pound the task of lawyers and legislators is ‘social engineering’. The law by identifying and protecting certain ‘interests’, ensures social cohesion. An interest is defined as a demand as a ‘demand or desire which human beings either individually or through groups or associations or in relations seek to satisfy’. It is legally protected by attributing the status of right. The purpose of social engineering is to construct as efficient a society as possible, one which ensures the satisfaction of the maximum of interests and minimal friction and waste of resources. He argues that when private interests conflict with public and social interests, the latter has to prevail. For a detailed study see, Pound, R. (1954) Outlines of Jurisprudence, Harvard University Press, London, Chapter 2,3&4; Pound, R. (1963) Philosophy of Law, Yale University Press, London, chapter 1&2.
tribal society was within his view an Eden, since distribution of resources was equal.\textsuperscript{25} So he was of the opinion that, the society will witness communal harmony only if we return to the primitive stage of communal ownership of property. He had strong faith in his philosophy that out of conflict between capitalists and proletariats communism will emerge. Domination and inequality will be absent in such society and resources of the state will be owned and distributed according to the needs of the people.\textsuperscript{26} Thus Marxian philosophy was against the monopolistic privileges to property and allowed only the communal ownership of property.

Utilitarian principle of Bentham insisted that the function of laws should be the promotion of greatest happiness to the greatest number.\textsuperscript{27} The sovereign power for making laws should wielded, not to guarantee the selfish desires of individuals but consciously to secure the common good.\textsuperscript{28} The ‘public good’ ought to be the object of legislator. For this legislator has to make an intelligent balancing of individual interests and communal interest. Similarly the proprietorial laws should also conform to this basic principle of utility. Individual ownership and monopoly was allowed provided it satisfied the basic principle of utility. Hence restrictions to individual rights and monopoly were a common feature of property laws to ensure happiness to the maximum number.


\textsuperscript{28} \textit{Ibid.}
Apart from the general principles regulating private property rights, these theories also offers a philosophical perspective into the evolution of these limitations to property rights. According to Julius Stone even the right of a man to neglect his own land is disappearing.\textsuperscript{29} He says that the right of property from being the mere subjective right of the proprietor had turned into the means whereby its holder fulfilled the social function, and property itself into something to be used conformably with social purpose.\textsuperscript{30} Some sociological jurists have also pointed the evolution of property rights. According Hobhouse property has undergone three phases; the first in which there is little social differentiation, little inequality, and in which economic resources are in common or are strictly controlled by the community, the second in which wealth increases, great inequalities appears, and individual or collective ownership escapes from community control, and a third in which a conscious attempt is made to diminish inequality and to restore community control.\textsuperscript{31} This scheme has resemblances to the Marxist distinction into three stages; that of primitive classless society, followed by class differentiation and the growth of inequality, and the final stage of a classless society at a higher level.\textsuperscript{32} Vinogradoff distinguished four principal stages; the establishment of property rights in tribal and communal context, the application of notion of tenure to land, the development of individual appropriation; and finally the


Philosophical Justification for Limitations and Exceptions

imposition of restrictions under the modern collectivist ideas. Roscoe Pound points out the differences in the definitions of property in the eighteenth century and the nineteenth centuries and those of the present century, in that the former make no reservations from the power and control of the owner over the thing owned, whereas the latter recognize legal limitations of the owners powers. As to the restrictions upon or limitations of the liberties and powers of an owner which stand out in the twentieth-codes, they are not a new phenomenon in law.

Thus the philosophical enquiry establishes that, in course of evolution of society from a subsistence level to a settled and industrialized stage the social norms are also progressing to regulate proprietary norms. Based on the above philosophies we can see that property generally goes through three evolutionary stages. Starting from ‘common ownership’ to ‘communal ownership’ and ending with ‘individual ownership’. It is to be noted that, even in the stage of common ownership human behavior towards property was molded by social norms of acquisition and disposition originating from natural law principles. In the next stage of communal ownership, the norms of acquisition and disposition will have sanction from the community as the case. And in the final stage of individual ownership, state through its well refined legal norms will be regulating the vesting and divesting of property rights. Thus in every stages of social life, all societies civilized or not have imposed restrictions upon property rights through custom or law.

Thus however individualistic and egocentric a philosophy appears to be, we can see that each of these philosophies and their propounders were conscious of the needs of their societies and was very cautious to make an

Philosophical Justification for Limitations and Exceptions

Chapter 2

intelligent balancing of the claims of individual and society. So each time when they assert the need of property as an institution for the development and nurturing of the self, they also emphasized the need for controlling that phenomenon for the wider perspective of the society. Only those philosophies and legal regimes, which made this intelligent balancing of individual rights with social interest survived. Very often it happens that either the societal interest or the individual interest dominates the scenario. History has given us ample evidence of the downfall and decay of those regimes which failed to do this. That is the reason why Hitler’s despotism failed on the one hand and the experiment of the communism of Marx failed on the other end. So while we recognize and accept the fact that property as an individual institution is a concomitant factor for human development, it is also a vital organ of the society for its survival and continuance.

2.3 Philosophical Discourse into Intellectual Property Rights

Intellectual property is a relatively new term that means different things to different people. In literal sense intellectual property refers to

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35 Modern usage of the term "intellectual property" began with the 1967 establishment of the World Intellectual Property Organization (WIPO). It did not enter popular usage however until passage of the Bayh-Dole Act in 1980. The concept appears to have made its first appearance after the French revolution. In an 1818 collection of his writings, the French liberal theorist, Benjamin Constant, argued against the recently-introduced idea of "property which has been called intellectual." The term intellectual property can be found used in an October 1845 Massachusetts Circuit Court ruling in the patent case Davoll et al. v Brown, in which Justice Charles L. Woodbury wrote that "only in this way can we protect intellectual property, the labors of the mind, productions and interests are as much a man's own...as the wheat he cultivates, or the flocks he rears." (Woodb. & M. 53, 3 West. L. J. 151, 7 F. Cas. 197, No. 3662, 2 Robb. Pat. Cas. 303, Merw. Pat. Inv. 414). The statement that "discoveries are...property" goes back earlier. Section 1 of the French law of 1791 stated, "All new discoveries are the property of the author; to assure the inventor the property and temporary enjoyment of his discovery, there shall be delivered to him a patent for five, ten or fifteen years." In Europe, French author A. Nion mentioned propriété intellectuelle in his Droits civils des auteurs, artistes et inventeurs, published in 1846. The concept's origins can potentially be traced back further. Jewish law includes several considerations whose effects are similar to those of modern intellectual property laws, though the notion of intellectual creations as property does not seem to exist – notably the principle of Hasagat Ge'vul (unfair encroachment) was used to
all those proprietary creation of human intellect. It ranges from all those rights relating to literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trade marks, service marks and commercial names and designations; protection against unfair competition.\(^{37}\) Intellectual property protects the application of ideas and information that are of commercial value.\(^{38}\) So intellectual property law is that area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill.\(^{39}\)

In legal sense, intellectual property is an umbrella term for various legal entitlements which attach to certain names, written and recorded media, and inventions. The holders of these legal entitlements may exercise various exclusive rights in relation to the subject matter of the IP. The adjective "intellectual" reflects the fact that this term concerns a process of the mind. The noun "property" implies that ideation is analogous to the construction of tangible objects. Basically we can say that all intellectual property rights are property rights.\(^{40}\) The monopoly conferred on the holder of intellectual property has all the attributes of monopoly.

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appended to the owner of other proprietary interests like exclusive use, possession, alienation etc. except in the case that these monopolies are limited in point of use\textsuperscript{41} and duration.\textsuperscript{42}

However the intangibility of subject matter and limited nature of monopoly usually pulled out intellectual property from the general cannons of property. From the above philosophical discussion with respect to the nature of property, it is established that the existence of absolute property rights is really a fairy tale. At no point of time any kind of property rights was free from restrictions. It was restricted by the principle of “eminent domain”, or by the taxation laws or by anticompetitive laws. And even the power of alienation was regulated by the personal and general laws of the land or by the principles of “rule against perpetuity” or by principles of vesting and divesting of estates.

The issue of ‘abstractness’ of subject is also frivolous. All property rights are a bundle of rights recognized by an established legal frame work. It is really interesting that we used to say intellectual property rights as intangible rights and other property rights as tangible. All rights are abstract whether appended to property or humans or animals or inanimate objects.\textsuperscript{43} Therefore ‘abstractness’ of rights is not unique to intellectual property; it is common to all properties. All property rights place the right holder in a juridical relation with others. Property describes the relationship between an individual and an object or

\textsuperscript{41} The exclusive right is limited by permissible uses like personal use, research use, government use, social and cultural exceptions, compulsory licenses etc.

\textsuperscript{42} Patent is granted for only twenty years and copyright is restricted to life plus sixty years.

resource; it does not refer to the object itself. The property relationship confers a legally enforceable right or, more accurately a bundle of rights entitling the holder to control an object or resource.

Adhering to these basic assumptions we can justify intellectual property by any theories of private property. However the philosophical development of intellectual property rights began during the European Enlightenment of the 17th and 18th centuries. Two British authors, John Locke and Edward Young were particularly influential in nurturing this concept. Locke’s theory of property can be regarded as a union of two basic theses. The first is that everyone has a property right in the labor of his own body. The second thesis is that the appropriation of an unowned object arises out of the application of human labor to that object. The idea is that mixing one’s own labour with an unowned thing confers upon one a property right in the whole thing. Applying this theory to intangible property does not appear to be farfetched. The notion of body as used in the first thesis, according to which everyone has a property right in his own body, clearly embraces the mind or the human genius or his personal skills. The second thesis according to which the mixing of labour with an unowned object creates a property right in the whole object, must extend to his intellectual labour. No labour is purely physical. Locke

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45 Ibid.


47 Ibid.

48 Ibid.

49 Locke, *Two Treatises of Government* at pp. 305-306
has not stressed on the nature of labour that is to be blended with the unowned object. It seems plain that the notion of mixing relevant here is not material but legal economic: human labour is mixed with an unowned object, be it abstract or material, in the sense that it becomes an essential factor in raising its economic value, either by changing the conditions of availability or by changing its nature.  

In addition to these basic principles of property we can see a lot of theoretical underpinnings in his theory to support intellectual property and on comprehensive analysis of his writing we can see that it will be really fallacy to say that Locke does not think of intellectual property. When he speaks on labour, he speaks not simply about manual labour to improve land, but labour based on human reason to improve the amenities of life. He speaks about the labour of rational and industrious man, unlike an ordinary man’s labour. Further he defines property in a very wide sense as “lives, liberties, and estates which I call by the general name, property.” This wide connotation of the term property includes in its ambit intellectual property rights also. Further when he says that “for that he leaves as much as another can make use of does as good as take nothing at all”, is best suited to the non-rivalrousness of intellectual property. Apart from all this general principles, his statement that “through arts and inventions on commons men can improve the conveniences of life” definitely conceives the notion of

50  Ibid.  
51  Ibid.  
52  Locke, *Two Treatises of Government* at Para.123.  
53  Ibid.  
54  Locke, *Two Treatises of Government* at Para.124.  
55  Ibid.
intellectual property. Thus Locke’s philosophy offers an influential justification for intellectual property rights. The power of Locke’s thesis is evidenced by its eventual assimilation into English legal thought and practice from the time of Blackstone down to the beginning of the 20th century. Locke’s philosophy made a powerful influence in judicial process also.

Another major philosophy extended towards intellectual property is the personality theory of Hegel. Hegelian philosophy offers a strong justification for intellectual property in two levels. In the first level we

56 Locke, Two Treatises of Government at Para. 44.
58 Sawin v Guild, Millar v Taylor, Ruckelshaus v Monsanto Co., 467 U.S. 986, 1002-03 (1984) (citing Locke's Second Treatise, among other sources, in holding that trade-secret rights can be "property" under Fifth Amendment). See, e.g., Harper & Row, Publishers v Nation Enterprises, 471 U.S. 539, 546 (1985) (suggesting that authors deserve "fair return" for labor); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002-03 (1984) (noting that treating trade secrets as "property" is consistent with labor theories of property); Whelan Assoc. v Jaslow Dental Lab., 797 F.2d, 1222, 1235 11.27 (3d Cir. 1986) (noting copyright's longstanding concern for "just merits" as well as for public benefit); see also Denicola, R.C. (1981) 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', COLUM L. REV., 81 (4), 519-20,528, 530 (suggesting that "the act of aggregating isolated pieces of information" should be grounds for copyright protection, in part because of considerations of "natural right to the fruits of one's labor" and unjust enrichment): Ladd, D. (1983) 'The Harm of the Concept of Harm in Copyright', J. Copyright soc'y, 30 (4), 421, 426 For many years courts addressing the copyrightability of compilations stretched the constitutional and statutory schemes in order to provide reward and incentives for labor. See, e.g., Nat'l Bus. Lists v Dun & Bradstreet, Inc., 552 F. Supp. 89, 92 (N.D. Ill. 1982). This line of precedent was discussed and repudiated by the Supreme Court in Feist Publications v Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287-89 (1991) (denying copyright in telephone book white pages on the ground that such an uncreative compilation, no matter how laboriously generated, contained no authorship).

can justify intellectual property relying on his general theory of property and at the second level he makes a very specific and genuine account of characteristics of intellectual property. For Hegel property is the external manifestation of human will\textsuperscript{60} or it is the embodiment of human personality.\textsuperscript{61} This seemed especially true with intellectual property rights that are draped over creations of the human mind.\textsuperscript{62} Hegel’s rationale suggests that the inventor has imbued the invention with his

\textsuperscript{60} Hegel believed that each person has both an internal and an external existence. One’s internal existence is her will, and one’s external existence is her sphere of freedom. Hegel stressed the importance of self-actualization, or the lack of dependence on another. However, self-actualization and the extension of one’s sphere of freedom are achieved, in Hegel’s view, not by withdrawing from the external world but rather by “overcoming it,” or putting one’s will into external objects - into property. Property, then, is central to Hegel’s theory of the fully self-actualized free person; it is the essence of personality. For a detailed study on Hegelian Concept of Property See, Hegel, G.W.F. (1952) (trans.T.M.Knox), Philosophy of Right, 1st edition, Oxford Publications, London, \[online\]. Available at \url{www.googlebooksresults.com}. [Accessed on March 2009] (herein after Hegel, Philosophy of Right).

\textsuperscript{61} Personhood theory is supported by another scholar Immanuel Kant. The premise underlying the personhood perspective of Kant is that to achieve proper development - to be a person - an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights. The justification is strongest where an object or idea is closely intertwined with an individual’s personal identity and weakest where the ‘thing’ is valued by the individual at its market worth. Such a justification posits that property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person. Kant’s specific suggestion in relation to authors was that they enjoyed rights over their work by virtue of their personality. In his words “an authors right is an innate right, inherent in his own person”. For details see: Drahos, P. (2005) A Philosophy Of Intellectual Property, Ashgate Publishing Limited, London, p.80; Shell,M. (Feb., 1978), ‘Kant’s Theory of Property’, Political Theory, 6 (1), 75-90\[online\]; Available at \url{http://links.jstor.org/sici?sici=0090-9178197802%296%3A1%3C75%3AKTOP%3E2.0.CO%3B2-Y} [Accessed on April 2009].

personality or will, making the process of creation an intensely individualistic one.63

It is really interesting that at such a nascent stage of development of intellectual property he envisions a series of particular aspects of intellectual property. For Hegel writes:

“Mental aptitudes, erudition, artistic skill, even things ecclesiastical (like sermons, masses, prayers, consecration of votive objects), inventions, and so forth, become subjects of a contract, brought on to a parity, through being bought and sold, with things recognized as things. It may be asked whether the artist and scholar is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, etc., that is, whether such attainments are "things." We may hesitate to call such abilities, attainments, aptitudes, etc., "things," for while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it, and for this reason the understanding may be in perplexity about how to describe such possession in legal terms. Intellectual property provides a way out of this problem, by "materializing" these personal traits."64

Hegel goes on to say that "attainments, eruditions, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them

63 Hegel, Philosophy of Right at p. 68.
64 Hegel, Philosophy of Right at p. 68.
in something external and alienate them." Thus for Hegel, intellectual property need not be justified by analogy to physical property.

Again he makes an explicit reference to intellectual property when he says that, “the alienation of a single copy of a work need not entail the right to produce facsimiles because such reproduction is one of the "universal ways and means of expression which belong to the author." Just as he does not sell himself into slavery, the author keeps the universal aspect of expression as his own. The copy sold is for the buyer's own consumption; its only purpose is to allow the buyer to incorporate these ideas into his "self." Hegel says that an individual by coming into possession of externalized thoughts, whether in book or inventive form, comes into contact with universal methods of so expressing himself and producing numerous other things of the same sort. Thus he justifies the absolute right of copyright holder to multiply the copies of his work or recognizes the established principle of ‘every calf to the cow’ and at the same time recognizes the interest of public in having access to those works for personal use and development of the self. Here we can see the reflection of the most fundamental tenets of intellectual property jurisprudence. We can see that he is even conscious of the plagiarism that can arise in intellectual property scenario, which may adversely affect the economic benefit of the copyright owner. So he warns that due care should be given to process of

65 Hegel, Philosophy of Right at p. 68.
66 Ibid.
67 Hegel, Philosophy of Right at p. 689.
68 If we look to intellectual property legislations starting from fifteenth century this is one of the most fundamental and absolute right available to an author from the moment of grant of that right.
extraction of expression from idea. Thus we can see a robust footing for intellectual property grants in Hegelian philosophy. Another principal philosophical theory applied to the protection of intellectual works has been utilitarianism. The social value of utilitarian works lies principally if not exclusively in their ability to perform tasks or satisfy desires more effectively or at lower costs. Utilitarian theorists generally endorsed the creation of intellectual property rights as an appropriate means to foster innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation. According to Jeremy Bentham, “without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by

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69 Hegel, *Philosophy of Right* at p. 68. “Thus copyright legislation attains its end of securing the property rights of author and publisher only to a very restricted extent, though it does attain it within limits. The ease with which we may deliberately change something in the form of what we are expounding or invent a trifling modification in a large body of knowledge or a comprehensive theory which is another's work, and even the impossibility of sticking to the author's words in expounding something we have learnt, all lead of themselves (quite apart from the particular purposes for which such repetitions are required) to an endless multiplicity of alterations which more or less superficially stamp someone else's property as our own. For instance, the hundreds and hundreds of compendia, selections, anthologies, &c., arithmetic's, geometries, religious tracts, &c., show how every new idea in a review or annual or encyclopedia, &c., can be forthwith repeated over and over again under the same or a different title, and yet may be claimed as something peculiarly the writer's own. The result of this may easily be that the profit promised to the author, or the projector of the original undertaking, by his work or his original idea becomes negligible or reduced for both parties or lost to all concerned.”


Philosophical Justification for Limitations and Exceptions

Chapter - 2

selling at a lower price”. John Stuart Mill concurred that patent monopolies were justified, arguing that a temporary ‘exclusive privilege’ was preferable to general governmental awards on the ground that it avoided ‘discretion’ and ensure that the reward to the inventor was proportional to the ‘usefulness’ to consumers of the invention. Even Adam Smith while generally critical of monopoly power as detrimental to the operation of the ‘invisible hand’, nonetheless justified the need for limited monopolies to promote innovation and commerce requiring substantial up-front investments and risk. They used to justify their stand by resorting to two milestone documents of intellectual property: the statute of Anne and the U.S Constitution.

Thus while Locke and Hegel supports proprietary rewards from an individualistic angle, the utilitarianism justifies it because it is a social necessity. On a close perusal into the history of evolution of patent or copyright we can see that inevitability behind recognition of these privileges was of course a social stipulation, which could not have been accomplished without the risk of recognizing and rewarding the

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74 For a detailed study see, Chapter 2 of Book IV of Adam Smith’s *Wealth of Nation* [online]. Available at http://www2.hn.psu.edu/faculty/jmanis/adam-smith/Wealth-Nations.pdf [Accessed on March 2009].

75 The preamble of the Statute of Anne 1709, which is often hailed as the forefather of all intellectual property legislations, says: “To promote the growth of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries ….”

76 United States Constitution expressly conditions the grant of power to Congress to create patent and copyright laws upon a utilitarian foundation: ‘to promote the Progress of Science and useful Arts’. See the provision available at http://press-pubs.uchicago.edu/founders/tocs/a1_8_8.html [Accessed on January 2009].
individual labour or the individual personality behind that genuinity. However it should be remembered that their emphasis on individual effort has influenced the intellectual property framework to identify the true and genuine creator without which the balance of the system would have skewed.77

Apart from the extension of the traditional theories of private property, taking into account of the unique nature of intellectual property in particular a set of radical theories has also been developed in due course. One such view is the incentive justification.78 The incentive theory holds that too few inventions or creativity will be made in the absence of patent protection because inventions once made are easily appropriated by competitors of the original inventor who have not shared in the costs of invention.79 If successful inventions are quickly imitated by free riders, competition will drive prices down to a point where the inventor receives no return on the original investment in research and development. As a result, the original inventor may be unable to appropriate enough of the social value of the invention to justify the initial research and development expenditure.80 Next opinion is that

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77 This influence showed its first expression in the statute of Anne. See Statute of Anne [online]. Available at www.copyrighthistory.org [Accessed on January 2009].


intellectual property rights will *Optimize Patterns of Productivity*. Another practical justification is that the system tries to eliminate or reduce the tendency of intellectual-property rights to foster duplicative or uncoordinated inventive activities. Recently the post monopoly appended to intellectual grants has been supported by Joseph Schumpeter and Edmund Kitch. Competition from new commodities and new technologies is far more significant in this model than price competition among firms offering similar goods and services. Protection from competition also allows firms "to gain the time and space for further development". Finally, and perhaps most important, the prospect of earning more than an ordinary return permits innovators to secure the financial backing of capitalists and to bid productive resources away from their current use. According to the prospect

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83 The thesis that monopolies are conducive to innovation is generally associated with the work of Joseph Schumpeter. Innovation brings about incessant revolutionary changes in the economic system through what Schumpeter calls "a process of creative destruction. In this process, new firms continually arise to carry out new innovations, driving out old firms that provide obsolete goods and services. Schumpeter, J. (1950) *Capitalism, Socialism and Democracy*, 3rd edition, Harper and Row, London, pp. 81-110.


theory of Kitch intellectual property grants promote efficiency in the use of resources to develop further innovations and creativity by enabling subsequent research and development efforts. The patent owner is thus in a position to cause researchers to share information and thereby avoid duplicative research efforts.89

A recent group of theorists like Palmer, Barlow and Netanel constructs a libertarian argument against intellectual property rights by critiquing the dominant philosophical perspectives used to justify intellectual property protection.90 They are of the opinion that intellectual


89 In the absence of a patent, different investigators might try independently to develop the same invention in secrecy, each working without the benefit of the knowledge gained through the efforts of the others. Exclusive rights in technological prospects thus promote efficiency in research after the patent issues by putting the patent holder in a position to monitor and control such research.


These radical theories on intellectual property justify monopoly from a purely economic angle. Or we can infer that they view the monopoly privileges as the chief apparatus in rapid economic development, vis a vis the larger social, political and technological development of a nation. For them these privileges are the manipulators of future social and economic development. However the history of
patents and copyrights clearly depicts that since thirteenth century onwards they were a tool in the armory of the sovereign to realize their vested social, political and economic interest. So these new theories are not radical in pure sense. They were inspired by the pragmatic history of intellectual property grants itself.

On a spiky scrutinization of the above philosophical justification we end up with two divergent and incompatible observations. On one pole the justification for IP grant is simply because it is the product of individual will and labour. The other theories support the grant because it is a social, economic and political compulsion. A modern justification for this grant found support in its capability to shore up and sustain economic development and technological innovation. Thus just like the practical difficulty in mending up the crusade of individualism and socialism, the philosophical discord or inconsistency is also unrelenting.

2.4 Theoretical Underpinnings of Limitations and Exceptions to IP Rights

From the above philosophical discourse into the origin of intellectual property, it is only in the theory of Locke and Hegel that there arises the real struggle to incorporate public interest justifications to the continuance of private property as legal phenomenon.93

In utilitarian perspective the social value of works lies principally if not exclusively in their ability to perform tasks or satisfy desires more effectively or at lower costs.94 Utilitarian theorists generally endorsed the


creation of intellectual property rights as an appropriate means to foster innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation. Bentham and John Stuart Mill concurred that a temporary ‘exclusive privilege’ was preferable to general governmental awards on the ground that it avoided ‘discretion’ and ensure that the reward to the inventor was proportional to the ‘usefulness’ to consumers of the invention.

Limitations found a solid justification in the recent pragmatic theories also. One such view is the incentive justification. The incentive theory holds that too few inventions or creativity will be made in the absence of patent protection. So this theory supports the

instrumental justification for patents or copyright as the case may be. Objective of those grants are not mere reward of author, but they are for promoting innovations and inventions. Another justification is that intellectual property rights will **Optimize Patterns of Productivity**.\(^{101}\) In line with this view, authors hold that copyright and patent systems play the important roles of letting potential producers of intellectual products know what consumers want and thus channeling productive efforts in directions most likely to enhance consumer welfare. Similarly a recent group of theorists like Palmer, Barlow and Netanel constructs a libertarian argument and are vehemently opposing the right centered approach and they justify intellectual property grants only if they are properly regulated and controlled for the larger public interest.\(^{102}\)

But it is usually said that according to the natural law theorists property rights are inalienable and absolute rights and any limitation appended to it is a vindication of his natural right. But a properly conceived natural-rights theory of intellectual property would provide significant protection for public interest while protecting the natural right of the author. Gordon says that, natural rights theory, however, is necessarily concerned with the rights of the public as well as with the

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rights of those whose labors create intellectual products.  

He is of the opinion that, when the limitations in natural law's premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests.

Theory of Locke and Hegel starts from the premise of a common stock which is inevitable for potential creativity and appropriation. To justify the origin of private property or acquisition in general both philosophers begins there postulate from a state of ‘commons’ which by its nomenclature itself designates something diametrically opposite to individualism inherent in these theories. Though both of them stress absolute right of an individual to appropriate from this common stock, it should be remembered that this right is available to each and every individual in the society. Thus this individual right of appropriation is something which is socially recognised and regulated. Thus it is really interesting to examine whether limitations and restrictions exist even at the preliminary stage of acquisition. For example while Locke begins his philosophy from the concept of ‘commons’, he says that, “first law of nature imposes a natural duty on mankind: everyone is bound to preserve


105 Locke, Two Treatises on Government, Chapter V, Of Property, Para 24: “God, has given the earth to the children of men, given it to mankind in common”. Similarly in Hegelian philosophy the human will is left free to dominate over the entire things in common. This is from this basic proposition the Hegelian concept of property starts. “everyone has the right to make his will the thing or to make the thing his will, or in other words to destroy the thing and transform it into his own; for the thing, as externality, has no end in itself; it is not infinite self-relation but something external to itself”- Hegel, Philosophy of Right - Para 44.
himself and, other things being equal, to preserve the rest of the mankind.” Here we can identify two sets of duties. Firstly, it pertains to a duty to utilise the commons for self preservation and secondly a duty to ensure that he is contributing to the preservation of mankind in common. Locke never perceives the acquisition from commons and creation of property as an individual right, on the other hand it is a divine duty dictated by divine reason. Mathew Kramer commenting on Locke rightly points out that any pattern of individualistic entitlements in state of nature would directly flow from that prime communitarian mandate. Similarly Hegel’s philosophy also does not entail rights of absolute appropriation. Hegel posits the case of the ‘extremely needy

106 Locke, Two Treatises on Government, Chapter V, Of Property, Para 25.
107 But the question is whether these duties can also have a corresponding set of rights also. Then, his theory can be interpreted as to confer on each and every individual the natural right of appropriation. Here starts the conflict between individual right of appropriation and the interest of community in maintaining themselves. Locke never perceived this problem in his state of nature, because he envisioned that all these privileges and duties as divinely built and consequently human reason will adhere to it because these all are finally controlled by God.
108 "The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it. Locke, Two Treatises of Government, p. 271.
109 Kramer, M. H. (2004) John Locke and the Origins of Private Property, Cambridge University Press, London, at p. 246. He says that prerogatives of ownership that encouraged rapacity and harsh self-concern were nothing but vehicles for the implementation of communal objectives. Hence, no matter how individualistic were the rules in state of nature that defined any entitlements to resources they were pure functions of collective needs and constraints? He argues that when individualism surfaced, it surfaced as a mode and a product of communitarians.
Philosophical Justification for Limitations and Exceptions

individual’ and ‘the rightful property of someone else’ in his philosophy.111 There is in this situation ‘right of distresses’112. The needy individual is entitled to take those resources he requires for survival.113 For them it is only through and by the commons that creativity can be ensured.114 So maintenance of this common stock in a way providing equitable access is the first and of course most important task of any system.115 Thus this grund norm from which their private property originates itself negates the very individualistic character of the natural law theory.

Many a scholars are of the opinion that this concept of creative commons is more apt in the case of intellectual property rights.116 It is

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111 Hegel, Philosophy of Right at Para 67.
112 Hegel, Philosophy of Right at Para 68.
114 Locke, Two Treatises of Government at Para 27, “We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the common is of no use”.
argued that the concept of commons is well-built in intellectual property arena, when the patent law requires novelty and copyright law follows the principles of originality and idea expression dichotomy. They justify the pre-grant restrictions to patent as an extension of this general principle of commons in the context of intellectual property reflecting the principle of intergenerational equity. But there exists much absurdity in the concept of ‘commons’ intended by Locke and Hegel. Neither Locke nor Hegel defines the concept in relative, quantitative or qualitative terms. From a common prudence in the case of physical objects we perceive commons as the vast un-owned, inexhaustible, boundless and infinite group of land, water and air which are left open for the continuance of the humanity that are collectively owned or shared between or among communities. If by ‘commons’ they mean this vast array of unowned land, air and water, there restriction to appropriation and their call for preservation of mankind is really inane. Because by application of common sense itself, one can ask the question, ‘how can these commons be appropriated by an individual in whole?’ So here it is really doubtful whether they are limiting the right of acquisition or justifying an absolute right of appropriation? This restriction is absolutely pointless when it comes to the abstract realm of physically inexhaustible nature of commons in intellectual property arena. It will create the impression that once a patent or copyright as the case may be, successfully proves ‘creativity and novelty’ leaving the abstract inexhaustible realm of ideas they will become absolute individual property rights. So the question here is, once a laborer has satisfied the preliminary substantive tests of novelty or originality whether he becomes an absolute despot in his realm of acquired rights?

Equally apprehending is their philosophy restricting the power of acquisition. After the presumption of existence of commons the natural
law theory precedes to the right of appropriation from this common stock. It is really interesting that at this juncture they foresees the intricate task of legal system in balancing two sharply conflicting interests, the absolute right of an individual on the common and an equitable right of public in having access to it. Locke tries to solve this crisis by his principles of spoilage limitation and sufficiency limitation in addition to his first principle of no-harm. In case of conflict between individual interest and public interest no natural right to property could exist where a laborer's claims would conflict with the public's claim in the common. According to Locke, the law of nature is that all persons have a duty to refrain from causing harm. All persons

117 “As 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. Whatever is beyond this is more than his share, and belongs to others”. Nothing was made by God for man to spoil or destroy. Locke recognised that this condition would not serve in a money economy, to limit large property holdings because men could through process of exchange amass non-perishable wealth. Locke, *Two Treatises of Government* at p. 117, Para 30.

118 “Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same”. Locke, *Two Treatises of Government* at Para 32.

119 On a close perusal of his philosophy it is evident that even when men enters civil society he is governed by the moral percepts of state of nature or he says that in civil society the moral rules of state of nature is converted into legal norms. See for detailed study: Locke, *Two Treatises of Government* at pp. 138 – 146.

120 Locke, *Two Treatises on Government* at Para-27; Yolton, J.W. (1958) ‘Locke on the Law of Nature’ *PHIL. REV.*, 67 (3), 483 ; Goldwin, R.A. (1976) ‘Locke’s State of Nature in Political Society’, *W. POL.Q.*, 29 (1), 126, 126-28 Locke tells us that in the even in state of nature there exists moral duties that constrain persons’ behavior toward each other. Locke argues that these duties are imposed by God and are discernable by reason. Since all humanity is equal in the state of nature, the duties we owe others are also the duties they owe us, and the rights I have against others they have against me. One can discern in Locke's theory two general classes of rights: liberty rights (areas free of duty) and claim rights
have two central duties in regard to their resources. Each person has a
duty to let others share in her resources other than her body in times of
great need, so long as the sharer’s own survival is not imperiled by such
charity, and each has a duty to share any of her non-bodily resources
which would otherwise spoil or go to waste.  

With the proviso on sufficiency limitation Locke argues that one
person’s joining of her labor with resources that God gave mankind
"appropriation" should not give that individual a right to exclude others
from the resulting product, unless the exclusion will leave these other
people with as much opportunity to use the common as they otherwise

(areas where the right- holder is owed a duty by other). First and foremost, all
persons have a duty not to harm others, except in some cases of extreme need. This
right not to be harmed is lexically prior to the other natural rights; thus, except in
cases of extreme need, the no harm duty would prevail in any conflict arising
between the no-harm duty and the other natural laws mentioned below. Second, there
are two key liberty rights: 1) all persons have a liberty right to dispose of their efforts
as they see fit and 2) all persons have a liberty right to use the common- "the earth
and all its fruits—which God gave to humankind. These two liberty rights mean that,
at least in the absence of extreme need, the law of nature gives no one a claim right
over any other person's non harmful use of her own efforts, or her non harmful use of
the common. Third, all persons have a duty not to interfere with the resources others
have appropriated or produced by laboring on the common. This duty is conditional,
and is a keystone in the moral justification for property rights. Taken together, these
duties and liberties generate moral claims and entitlements. Of these, some we
possess by virtue of what we do, and some we possess by virtue of our humanity. Of
the humanity-based entitlements, three are most important: our claim right to be free
from harm, our claim right to have a share of others’ plenty in times of our great
need, and our liberty right to use the common. We might call these three unearned
rights "fundamental human entitlement.

121 In the First Treatise, Locke writes: But we know God hath not left one Man so to
the Mercy of another, that he may starve him if he please . . . he has given his
needy Brother a Right to the Surplus Usage of his Goods . . . so Charity gives
every Man a Title to so much out of another’s Plenty, as will keep him from
extreme want, where he has no means to subsist otherwise. Locke, Two Treatises
of Government at p. 170; Locke, Two Treatises of Government, pp. 270-71. Thus
Locke writes that one can "acquire a Propriety" in wild fruits or beasts, But if
they perished, in his Possession, without their due use; if the Fruits rotted, or the
Venison putrified. Before he could spend it, he offended against the common law
of Nature, and was liable to be punished; he invaded his Neighbor’s share, for he
had no Right, farther than his Use . . . ; see Locke, Two Treatises of Government
at p. 295
would have had. A person who wants access is entitled to complain only if he is worse off in regard to the common when he is denied access than he would have been if the item had never come into existence. Thus the enough and as good condition protects Locke's labor justification from any attacks asserting that property introduces immoral inequalities. Thus it has been argued that, essentially the enough and as good condition is an equal opportunity provision leading to a desert-based, but noncompetitive allocation of goods: each person can get as much as he is willing to work for without creating meritocratic competition against others. However it is also criticized that the proviso was relevant in the age of scarcity and claims that the “enough and as good” requirement is merely “a fact about acquisition in the early ages of man”.

As per this proviso, when extended to intellectual property creators should have property in their original works, only provided that such grant of property does no harm to other persons' equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage. Here again the principles of novelty and originality was extended to justify acquisition of intellectual property rights from commons. Once a legal regime can successfully filter idea from expression and novelty from prior-art the commons is left in its full virginity for future creations. It has been argued that meaningful satisfaction of the proviso’s ‘enough

122 Locke states the proviso thus: "Labor being the unquestionable Property of the Laborer, no Man but he 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”. See John Locke, Two Treatises of Government at pp. 287-288, Para 27.
and as good’ component may preclude substantive amounts of appropriation when real property is scarce. Shiffrin points it out that this problem appears less formidable for intellectual property because the terrain of intellectual works for acquisition or creation does not seem at risk of depletion. On some views, it can be regenerated or expanded through our efforts. Hughes is of the opinion that, the "enough and as good" condition seems to hold true only in intellectual property systems because creating property rights in an idea never completely excludes others from using idea. Under Nozick's reconstruction, the public would be better off even if an intellectual property owner could completely exclude others from his idea because it could still buy the goods and services developed from that idea. But it has been argued that, if an intellectual labourer is only rewarded with property rights in his product—the expression—and not some part of the common—the ideas—then the common is never depleted either quantitatively or qualitatively. The creation and appropriation of an intellectual product can add to but not take away from the intellectual common, so the “enough and as good proviso” does nothing to limit intellectual property rights. Thus the efficiency of the proviso is really cynical in the context of intellectual property.


127 Similarly, Moore remarks, “The individual who takes a good drink from a river does as much as to take nothing at all. The same may be said of those who acquire intellectual property”. See, Moore, A.D. (1997) ‘A Lockean Theory of Intellectual Property’, HAMLINE L. REV., 21 (1), 65


130 Ibid.
Apart from that, we have to appreciate the other side of the proviso. One can agree with Gordon, when he rightly points it out that the proviso offers only limited protection for members of the public. Persons whose rights in the common are not adversely affected by the creator's property right would have no ground of complaint, and the creator could assert property rights against them unimpeded. Further, even as to the individuals whose freedom from property-based restraints may be guaranteed by the proviso, the proviso gives such individuals no entitlement to affirmative societal intervention on their behalf. This condition was sound in his primitive society were the limited capacities of humans put a natural ceiling on how much each individual may appropriate through labor. But how far this is appropriate in the modern money and technological market is really perplexing. Especially when it comes to intellectual property the doubt is that, as long as there is an ever-growing common of ideas available for everyone's unlimited use, every person has at least as much opportunity to appropriate ideas as had the first man in the wilderness. Thus this proviso also finally cast doubt on its efficacy in enhancing public interest by restricting the power of acquisition. In a way it is enhancing the rights of owners of property and is justifying any kind of aggressive acquisition. Going literally by the proviso, the situation will be really intricate when it comes to the non-rivalrous and imperishable nature of ‘commons’ in intellectual property arena. Apart from that, the unique feature of intellectual creativity needs backward looking and forward seeing. So the commons


132 Ibid.

in intellectual property includes actual and potential creative commons. Consequently if the objective of sufficiency limitation is to ensure a robust public domain it has to be verified that whether Lockean proviso can be extended to ensure the availability of intellectual property rights even after their acquisition from intellectual commons.

The second limit on acquisitiveness, the spoilage limitation, is derived by Locke from God’s purposes. God has made goods to enjoy and not to spoil or destroy. The spoilage proviso thus puts limits on the level of appropriation. This proviso thus usefully limits the amount of property that can be claimed by an individual. Locke maintains that a laborer who, for instance, appropriates more apples than he can use and allows them to perish commits an injury against others and violates the “the common Law of Nature.”\textsuperscript{134} He is “liable to be punished; he invaded his Neighbour’s share, for he had no Right, farther than his use called for any of them.”\textsuperscript{135} This law of nature, the no spoliation proviso, is an absolute condition set on appropriation and ensures that “Nothing” was made by God to spoil or be destroyed.\textsuperscript{136}

Some scholars are of the opinion that, unlike the sufficiency limitation the spoilage limitation is an absolute limitation. It cannot be overridden even by consent.\textsuperscript{137} In the logic of Gopal Sreenivasan, the spoilage condition actually imposes a due-use condition on nonmonetary goods; in addition to the requirement that one not allow one’s

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\item [\textsuperscript{134}] Locke, \textit{Two Treatises of Government} at Para 31-37.
\item [\textsuperscript{135}] Locke, \textit{Two Treatises of Government} at Para 35.
\item [\textsuperscript{136}] Locke, J. \textit{Two Treatises of Government} at Para 32.
\end{itemize}
\end{footnotesize}
possessions to spoil.\textsuperscript{138} Similarly Damstedt also gives a progressive interpretation for the proviso that, “the waste prohibition requires that each unit be put to some use or sold to retain a property right in the good.”\textsuperscript{139} His reading is not simply that individuals must not appropriate more than they can before spoilage, but that any good must be put to some fully effective use and continuous use if property rights are to be justifiably maintained. Thus this proviso can be constructed as obliging not only actual effective use but also cautions as of any potential non-use which is hailed as an instance of spoilage. The proviso is thus capable of two kind of interpretation. On a restrictive interpretation we can take for granted that, Locke presumed the application of the proviso to only perishable goods. On a progressive interpretation we can assume that Locke foresee the extension of the proviso to non-perishable goods and by spoilage he meant the actual and potential instances of non-use and waste of goods. The first interpretation is meaningless from the example of apples itself, through which he is justifying his proviso. There is no need for a philosophical justification for acquisition of such trivial. So it is explicit that he was building up a superior and refined theory of property itself. So we can go by the second interpretation which commands that no property should be left idle and ravage. Since his philosophy is concentrated on the notion of ‘human labor’ this proviso should also be interpreted in that context. Then we can presume that by this proviso he obliged the acquirer of property from commons to continuously compulsory labor upon for further advances. When this proviso is extended to any property in general or intellectual property in

\textsuperscript{138} \textit{Ibid}. He gives the homestead system in North America, which required a homesteader to work his property for five continuous years in order to gain title as an illustration of the application of this proviso in practice.

particular we can see that any kind of post grant intervention in the monopoly of the property owner to ensure non-waste is justified. Consequently as per this proviso, failure to publish a creative work or withholding it form public or failure to work an invention is a waste. Thus the instances of post grant restrictions like permissible uses or compulsory licensing mechanism under patent and copyright regime are absolutely justified from the Lockean perspective.\textsuperscript{140}

But again just as in the case of sufficiency limitation the application of the proviso will create confusion in the intellectual property frame work due to the unique nature of non-rivalrous and imperishable nature of creative commons. Some criticize it as not applicable to intellectual property rights.\textsuperscript{141} As per this opinion, the non spoilation proviso leaves the allocation of strong private intellectual property rights intact. In and of themselves, ideas are non-rivalrous: they do not perish, and the law allows us to consume as many ideas as we wish. Even if we consume more than we can use, we cannot prevent anyone else from doing the same—ideas are free as the air.\textsuperscript{142} Drahos, for example, observes that “ideas can spoil in the sense that once appropriated, their time span of useful application in many cases is limited. Those who appropriate ideas

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\textsuperscript{140} A deep analysis of pre-grant and post grant limitations to patent and copyright will be done in the subsequent chapters.
\textsuperscript{141} Justin Hughes for example says that, “While the social value of an idea may decline below an optimal point, the value of the idea, apart from its value to society, may remain constant. An unpublished story may still give an author joy when shared with intimates. The secret recipe for Kentucky Fried Chicken will taste as good to the creator whether or not it is shared with Madison Avenue. With intellectual property, there is no waste to the \textit{individual} because the act of "consumption" is inseparable from the act of production. Intellectual property holds value derived solely from the act of creation”. He further substantiates the argument by saying that, “for example, new technical improvements in equestrian equipment and train engines can still be very profitable despite the appearance of automobiles and Boeing 757s. Hughes, J. (1988) The Philosophy of Intellectual Property, GEO. L.J., 77 (2),287.
\textsuperscript{142} \textit{Ibid.}
\end{flushleft}
with a view to do nothing with them arguably infringe Locke’s spoilage proviso.” Craig illustrates a situation where “the intellectual property owner wasted the idea by preventing its communication and development”. However Justin Hughes defends the situation by arguing that, “even though the value lost by hoarding an idea until it becomes obsolete is a very different kind of loss than food spoilage. There is no internal deterioration in the idea and the loss in value is seen only against a social backdrop. The loss is speculative and may be reversible.” Thus just like in the case of sufficiency limitation the doubt is on its extension to advanced economic systems in general and intellectual property rights in particular.

However scholars criticize Locke by arguing that his provisos are not applicable to intellectual property and his theory is not applicable to the advanced social and economic systems. It is to be appreciated that while writing about state of nature and on origin of property, Locke was not in state of nature. On the other hand he was in a society with all the features of the contemporary market economy and was writing from his personal experiences with the social and economic systems prevalent in that society. This is quite evident from his ‘liberty of the Press’,

which Zemer quotes in his writing to justify fair use in Lockean theory.\footnote{Zemer, L. (2008) ‘The Making of a New Copyright Lockean’, \textit{Harvard Journal of Law & Public Policy}, 29 (7), 891-947.} In his letter, Locke combines arguments for freedom of expression and social exchange, economic equality, common equity, and recognition of authors’ rights.\footnote{Ibid.} The idea of a limited in time property right in authorial works has a central part in Locke’s vision of authorial rights.\footnote{Locke himself had a personal interest in scrapping the 1662 Act. His project to publish a new edition of \textit{Aesop’s Fables} as a Latin English primer was rejected by the Company. The project was not published until 1703, although Locke worked on it during 1693.} His argument for a limited authorial right though arose from his personal concern is a reflection of his concern for availability of knowledge for future creativity and research. He was also concerned with giving copies of printed books to libraries for disseminating information and enhancing education. Thus Locke’s philosophy can be rightly extended to intellectual property. Gordon argues that the proviso limits intellectual property rights as follows: “Creators should have property in their original works, only provided that such grant of property does no harm to other persons’ equal abilities to create or to draw upon the pre-existing cultural matrix and scientific heritage”\footnote{Gordon, W.J. (2005) ‘Render Copyright unto Caesar: On Taking Incentives Seriously’, \textit{U. CHI. L. REV.} (71)75, 1563-1564.}. Intellectual property rights are justified only if they do not harm other persons’ access to the common. One might object that new expressions never hinder access to the common. But Gordon responds that in order to contribute to one’s culture, one needs access to the ever advancing intellectual resources of that culture.\footnote{Ibid.}
In fact, Locke developed his property theory to refute Sir Robert Filmer’s argument that God gave the world to Adam—an argument that was ultimately used to support the unlimited authority of monarchs.\(^{152}\) Locke’s purpose was to show how a common donation could be individuated. With this purpose as a starting point, Barbara Friedman argues that Locke was willing to (and indeed intended to) undo the power of private property rights after they had served this polemical purpose.\(^{153}\) According to Friedman’s interpretation of Locke, absolute property rights acquired through labor do not survive the transition to civil society. According to Locke “Every Man, when he at first incorporates himself into any Commonwealth, he, by his uniting himself thereunto, annexes also, and submits to the Community, those Possessions which he has or shall acquire.”\(^{154}\) Having entered civil society, property acquired in the state of nature “which was before free,” is now “to be regulated by the Laws of Society”.\(^{155}\) In civil society, the government is responsible for “the regulating of Property between the Subjects one amongst another,” and such government authority is to be exercised “as the good of Society shall require”.\(^{156}\) The departure from the state of nature might therefore mark the end of the role of deontological private property in Lockean theory.\(^{157}\) Thus it is proved beyond doubt that Locke’s no harm principle together with the sufficiency limitation when extended to intellectual property regime

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154 Ibid., at 163.

155 Ibid., at 163.

156 Locke, Two Treatises of Government in Chapter – 7.

157 Ibid.
tremendously and incredibly supports the limitations both at the pre grant and post grant stage or in turn we can say that Locke’s philosophy exercised tremendous influence on IP limitations. The proviso protects peoples' liberty to use what has already been created and is in the public domain. Nothing can be taken from the public domain unless "enough and as good" is left. It is the proviso therefore that gives Locke's theory much of its moral force.158 Locke here takes a step that helps to justify an exclusion right, for, with the proviso satisfied, the public's fundamental entitlements will not be impaired if the owner excludes it from the owned resource.159 The exclusion of idea from copyright protection and novelty requirement coupled with stipulation of an obvious and apparent specification under patent tries to achieve this task of maintaining the common pool. The post grant limitations like research use and educational exceptions are also contributing to this objective by releasing newly created knowledge elements into the existing stock and thereby maintain the stream of knowledge flowing in full vigor. If we look to certain post grant limitations like compulsory licensing we can see that they are an untainted reflection of Locke’s spoilage limitation. The intellectual property regime ensures that no copyright owner or a patent holder will keep their right being unexploited and spoiled, because the primary reason for the grant of that monopoly is its social utility. Thus we can conclude that Locke’s philosophy is a double edged sword,


supporting natural right of the author on the one hand and offers a very strapping and brawny justification for public interest on the other hand.

Unlike Locke, Hegel is more individualistic.\textsuperscript{160} However Hegel’s philosophy does not entail rights of absolute appropriation.\textsuperscript{161} Like others before him, Hegel posits the case of the ‘extremely needy individual’ and ‘the rightful property of some one else’. There is in this situation ‘right of distresses’. The needy individual is entitled to take those resources he requires for survival.\textsuperscript{162} Just like Locke he is also of the opinion that in case of conflict between individual interest and social interest, the specific characteristics pertaining to private property may have to be subordinated to a higher sphere of right (e.g. to a society or the state).\textsuperscript{163}

While the state may cancel private ownership in exceptional cases, it is

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\textsuperscript{160} In his view “the general principle that underlies Plato's ideal state violates the right of personality by forbidding the holding of private property. The idea of a pious or friendly and even a compulsory brotherhood of men holding their goods in common and rejecting the principle of private property may readily present itself to the disposition which mistakes the true nature of the freedom of mind and right and fails to apprehend it in its determinate moments. As for the moral or religious view behind this idea, when Epicurus's friends proposed to form such an association holding goods in common, he forbade them, precisely on the ground that their proposal betrayed distrust and that those who distrusted each other were not friends”- Hegel, \textit{Philosophy of Right} at Para 46.


\textsuperscript{163} Hegel, \textit{Philosophy of Right} at Para 46.
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nevertheless only the state that can do this.\textsuperscript{164} He acknowledges that property can exist only through contract, and at that moment individual will is merged with or subjugates to common will.\textsuperscript{165}

According to Hegel the demand sometimes made for an equal division of land, and other available resources too, is an intellectualism all the more empty and superficial in that at the heart of particular differences there lies not only the external contingency of nature but also the whole compass of mind, endlessly particularised and differentiated, and the rationality of mind developed into an organism.\textsuperscript{166} So the only attempt that can be made for equality is that every one ought to have subsistence enough for his needs.\textsuperscript{167} Apart from this general propositions which can be extend for justifying natural right of owner on property we can see that Hegel has more clear perceptions when it comes to intellectual property. He says that works of art and products of genius

\textsuperscript{164} Ibid.

\textsuperscript{165} “One aspect of property is that it is an existent as an external thing, and in this respect property exists for other external things and is connected with their necessity and contingency. But it is also an existent as an embodiment of the will, and from this point of view the ‘other’ for which it exists can only be the will of another person. This relation of will to will is the true and proper ground in which freedom is existent. — The sphere of contract is made up of this mediation whereby I hold property not merely by means of a thing and my subjective will, but by means of another person’s will as well and so hold it in virtue of my participation in a common will”. Hegel, \textit{Philosophy of Right} at Para 71.

\textsuperscript{166} Hegel, \textit{Philosophy of Right} at Para 49 : The equality which might be set up, e.g. in connection with the distribution of goods, would all the same soon be destroyed again, because wealth depends on diligence. But if a project cannot be executed, it ought not to be executed. Of course men are equal, but only qua persons, that is, with respect only to the source from which possession springs; the inference from this is that everyone must have property. Hence, if you wish to talk of equality, it is this equality which you must have in view. But this equality is something apart from the fixing of particular amounts, from the question of how much I own. From this point of view it is false to maintain that justice requires everyone’s property to be equal, since it requires only that everyone shall own property. Hegel, \textit{Philosophy of Right} at Para 49.

\textsuperscript{167} Ibid.
should be left to the enjoyment of the public at large, since potential creativity demands it. 168 Hegel admits that protecting intellectual property is "the purely negative, though the primary, means of advancing the sciences and arts." 169 Here also we can see one of the cardinal principle of intellectual property policy; the attainment of larger public interest by the award of individual monopolies. Thus he cannot be simply hailed as an ardent supporter of individualism; he was concerned about the public interest also.

However egocentric the natural law theory of Locke and Hegel appears to be, their stress on maintenance of a common stock and achievement of equality taking into account the principles of intergenerational equity and equitable access to natural resources makes the theory public oriented also. Both of them are very adamant on the requirement of the common pool in future creativity and also acknowledge the need of private property in fulfilling individual and social aspirations. Thus it is really admirable that their theory gets a mirror reflection in the intellectual property policy frame work. Even though they stressed the requirement of common stock and private

168 Hegel, *Philosophy of Right* at Para 64 : “Public memorials are national property, or, more precisely, like works of art in general so far as their enjoyment is concerned, they have life and count as ends in themselves so long as they enshrine the spirit of remembrance and honour. If they lose this spirit, they become in this respect res nullius in the eyes of a nation and the private possession of the first comer, like e.g. the Greek and Egyptian works of art in Turkey. The right of private property which the family of an author has in his publications dies out for a similar reason; such publications become res nullius in the sense that like public memorials, though in an opposite way, they become public property, and, by having their special handling of their topic copied, the private property of anyone”.

169 Hegel, *Philosophy of Right* at Para 69: “The purely negative, though the primary, means of advancing the sciences and arts is to guarantee scientists and artists against theft and to enable them to benefit from the protection of their property, just as it was the primary and most important means of advancing trade and industry to guarantee it against highway robbery”.
property, how to ensure the balance was really a perplexing question which they left to the legal and political framework.

Thus the philosophical discourse gives a strong foundation for both post grant and pre-grant limitations to patents and copyrights. But our final task is to elucidate the basic nature of these restrictions to property rights. Whether they are built up as absolute duty on the right holder with a corresponding right to the members of the society or as mere legal restrictions or as relative duties? This question has great relevance in the context of intellectual property rights arena, since we have to check whether the post grant limitations to copyrights and patents are user rights or simply ‘limitations and exceptions’. When J.S Mill, Bentham and Adam Smith spoke specifically on patent grants, they justified the monopoly enjoyed by the patent holder only because of its inevitability in promoting the larger social and economic interest. So in their philosophy rights owed their origin from a social and economic necessity and not from the individual instinctive. Consequently rights are something subordinate to the social commitments they have to fulfill and the rights are diametrically correlated to the duties for their existence, recognition and even for survival. So it appears that sometimes rights are inferior to duties appended to them. An equally interesting posture has evolved from the egotist and individualistic philosophy of Locke and Hegel. While in state of nature Lockean provisos and principles of charity was a matter of divine reason, which he put up as an absolute divine duty which each and every individual has to obey, when it comes to the civil society it is the duty of the state to regulate these duties and enforce the property norms. Thus be it in state of nature or civil society these provisos and principles of charity operate as mandatory duties which each and every individual has to follow at the time of acquisition. While in his ‘liberty of the press’ he was criticizing the Licensing Act
and the printing policy of government and was supporting for limited duration of author right through the statute and was insisting for a mandatory library deposit provision, it is obvious that he intended positive legal intervention in post and pre grant stage to ensure the compliance of the provisos. The fulfillment of provisos were not left to the discretion of the individuals, but was mandatory duties which they have to comply at the stage of acquisition. Otherwise their acquisitions are not justified. Thus each and every individual was assured with the right of equitable access to the commons and this right was protected with the duty appended to each and every individual to comply the provisos. Thus while the laborer had a right over his product of labor, the society was also assured with their equitable right over commons which was maintained through the duties appended on the laborer. So when we extend these provisos to intellectual property rights and justify the limitations appended to the rights of the patent and copyright owner, it is quite evident that these provisos should operate as absolute duty on the right holder or it should be incorporated as the fundamental user rights, otherwise the whole balance of acquisition and intergenerational equity which the proviso is trying to achieve will be meaningless. In Hegelian philosophy of right also, it is evident that all individual rights have their correlated duties and is subordinate to the larger social interest. He views the right ensured by intellectual property system as a negative phenomenon which is justified only because of its larger positive social benefit. Thus his individualistic theory also built up rights with their concomitant social duties. Thus when it comes to the end of our analysis, even the most individualistic theories create rights as a social phenomenon subject to the larger social interest and with a mandatory duty to ensure the fulfillment of the objectives for which they have been recognised. This proper balance between property rights and duties forms
2.6 Conclusion

From the above philosophical analysis with respect to the nature of property and intellectual property in particular, it is established that the existence of absolute property rights is really a fairy tale. At no point of time any kind of property rights was free from restrictions. It was restricted by the principle of “eminent domain”, or by the taxation laws or by anticompetitive laws. And even the power of alienation was regulated by the personal and general laws of the land like the principles of “rule against perpetuity” or by principles of vesting and divesting of estates. Even in primitive societies we observe law and government existing, in however rudimentary form it may be. Some authority superior to the individual controlling his actions is always apparent among the savages and the civilized alike. Informal controls was sufficient in a social setup when the members of the group agreed about the rules and their duties to follow them and when they share common views about their authority and when they are in a face to face contact. It was when the members of the group cannot agree on essentials or if they cannot or do not trust each other they put their rules and relationships in writing and make formal institutions for them. So whether “property” was appropriated by the act of first occupancy or by labor or through contracts between the fellow beings, it was considered as one of the strong pillars of society and was regulated and directed towards social good. Philosophy clearly substantiated that proprietary rights were
always adorned with corresponding duties depending upon the social, economic and political needs of the society. And it is really evident that rights and duties enjoyed an equivalent status. Duties appended to the property rights were not subservient to the rights and they owed their origin from a common source. It is also clear that without the existence and exercise of those duties the property rewards is irrational. However the philosophical discourse ends up in the adequacy of the concept of ‘limitations and exceptions’ in the context of intellectual property rights. It should have been assigned the status of ‘user rights’. So the real nature and scope of ‘limitations and exceptions’ appended to intellectual property from a pragmatic perspective forms the chore of upcoming chapters.