'ALL YOUR INTELLECTUAL PROPERTY ARE BELONG TO US'[1]: HOW COPYRIGHT AND PATENT 'TROLLS' ARE QUESTIONING THE JURISPRUDENTIAL FOUNDATIONS OF TREATING INTELLECTUAL PROPERTY AS 'PROPERTY'

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I. Introduction

The assumption that intellectual property *is* property is not one that can be made easily and without generating a substantial amount of controversy. [2] However, it is not disputed that there exist certain irreconcilable differences between products of the intellect and their physical counterparts. *Non-rivalry* – the characteristic of intellectual property or knowledge that the consumption of it by one consumer does not impact the simultaneous use or consumption by another[3] - and *non-excludability* – the characteristic that once intellectual property is created it is extremely costly to exclude others' access to it[4] - being the two most obvious points of such divergence.[5] Despite this, theories that were formulated to deal with traditional tangible forms of property are commonly extended in an attempt to explain and on a broader level justify intellectual property.

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1 A variant of the '*All your base are belong to us*' internet meme. Used here to showcase the 'domination', excessive control over intellectual property exerted by intellectual property trolls. *See* Chris Taylor, All Your Base Are Belong To Us, *Time Magazine*, September 25, 2001; Jeffrey Benner, When Gamer Humor Attacks, *Wired Magazine,* February 23, 2001 (*available at* http://www.wired.com/culture/lifestyle /news/2001/02/42009).

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2 Stephen L. Carter, Does it Matter Whether Intellectual Property is Property?, *Chicago-Kent Law Review,* 68 (1992-3) 715 *citing* Frank H. Easterbrook, Intellectual Property is Still Property, 13 Harvard Journal of Law and Public Policy (1990).

3 For example the playing of a copyrighted song in no way affects the ability of another person to play the same song.

4 Knowledge or product of the intellect is of such a nature that once created, it is impossible to control its proliferation and dissemination.

5 Henry E Smith, Intellectual Property as Property: Delineating Entitlements in Information. *The Yale Law Journal*, 116(8) (2007) 1742.

This brief note, *first*, examines the various justificatory frameworks that are relied upon in order to support the treatment of intellectual property as traditional tangible 'property' (**II.**) before analysing the manner in which patent and copyright 'trolls' call these very frameworks into question (**III.**). It is, however, not the objective of this note to challenge the various justifications or their applicability to the intellectual property field. It assumes *arguendo* that these theories when construed in their broadest and most liberal sense are in fact *as applicable* to justify intellectual property as they are to traditional tangible property.

In other words I will not be challenging whether the Labour, Utilitarian and Personality theories are right to be extended to the realm of intellectual property. Notwithstanding the criticisms that subsist against such extension, it is merely the objective of this note to take these theoretical frameworks and to apply them to a recent phenomenon – that of intellectual property trolls.

This note while broadly applicable to the principles of intellectual property in general, largely pertains to copyrights and patents. Although recent times have seen the emergence of troll-like behaviour in the realm of trademarks[6], the links between creative input and the *protection* of that input manifest more clearly in copyrights and patents. Protection of trademarks, on the other hand, is oriented *more* towards the protection of a brand identity as opposed to the input and effort that went into designing the particular mark.[7] Therefore, I shall be focussing on the forms of intellectual property where the role of *creativity* is far more accentuated.

II. Common justifications to the treatment of Intellectual Property as 'property'

The perspectives that explain the existing systems of intellectual property are in fact extensions of the various moral justificatory theories that were initially formulated with respect to, and concerning, more

6 Roger Cheng, China to curtail trademark trolls, *CNET news*, December 24, 2012 (*available at http://news.cnet.com/8301-13579_3-57560710-37/china-to-curtail-trademark-trolls/*).

7 Peter S. Menell, Intellectual Property: General Theories, 149 (1999).

traditional notions of private property in its physical and tangible sense.[8] Therefore, in an attempt to justify itself, intellectual property has come to be treated as an outgrowth, and consequently as a subset, of 'property'.[9] It is however not to be assumed at any stage that any of these theories can serve to fully explain and encompass the entire genus of intellectual property rights. At best, some of these theoretical frameworks support '*to varying degrees*' the validity of the existing intellectual property system.[10] After all, in applying them to relatively intangible phenomena like Intellectual Property, it is taken for granted they are being stretched to lengths never contemplated by those who propounded them.[11]

The justifications dealt with herein are those that embody the Labour, Utilitarian-Economic, and Personality Theories of property.[12] The following sections aim to briefly introduce each of these theories and analyse how they may (and have been) extended in their application to cover decidedly intangible intellectual property rights.

A. THE LABOUR THEORY OF PROPERTY

Locke's labour theory of property hinges on the notion that the labour of a man 'increased the value of a thing' and that for any man "…*the Labour of his Body, and the Work of his Hands, we may say, are properly his*".[13] Thus, Locke advocates ownership of property *as a natural right* based on an individual's labour upon materials and resources that are held in common.[14] It is this very construction that is extended when one contends that it is mental labour that leads to the formation of intellectual property. Thus, an individual who labours on knowledge or information held in common to

8 Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 290.

9 Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 297-99.

10 Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 290-92.

11 As stated earlier, I will not be broaching the issue of whether such extensions may be made. (*See* footnote 6).

12 William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, (2001) 5.

13 John Locke, *Two Treatises of Government*, 1690, Section 27.

14 John Locke, *Two Treatises of Government*, 1690, Section 27.

produce an intellectual product should similarly be entitled to seek its protection.[15]

Due to its broad wording, Lockean theory has come to manifest as one of the most 'easily' relied upon justifications to intellectual property. Even his only qualification – the famous 'proviso'[16] that a person may acquire a right to property only when "*there is enough, and as good left in common for others*"[17] – has been interpreted to support the extension of the theory to intellectual property.[18] For instance, Nozick *partially*[19]argues that the proviso would not be violated by the protection of intellectual property as consumers would ultimately benefit from protected inventions. This would result in his sole criterion of there being no "net harm" being satisfied. For instance, a patented life-saving drug would *benefit* society more than if the drug had not been invented – for lack of economic incentive – in the first place. This line of reasoning is further pursued to argue that in the absence of intellectual property protection, the potential inventor might have been dis-incentivised by the lack of potential returns to the extent that he may have chosen to pursue an alternate livelihood (i.e. to not invent in the first place). The possibility is left open for one to go as far as to argue that the absence of such protection would lead to maintenance of status quo – leading to an opportunity of a "net benefit" being forgone.

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15 This is, however, not to say that the theory is applicable in its entirety. I feel one obvious inconsistency lies with the problem of 'derivative works' which are based not on resources held in common but on other instances of protected, *private* (as opposed to 'common') products of the intellect.

16 "…*It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others*."(Emphasis supplied) John Locke, *Two Treatises of Government*, 1690, Section 27.

17 John Locke, *Two Treatises of Government*, 1690, Section 27.

18 Nozick argues (in an attempt to interpret Locke's proviso) that the acquisition of property is valid and legitimate so long as such acquisition does not lead to "net harm" being caused to society. *See* Robert Nozick, *Anarchy, State and Utopia*, 1974, p. 179-81

19 Nozick however acknowledges that his interpretation of Locke's proviso is subject to two limitations on the inventor's entitlements. *First*, that an individual who invented a patented device *independently* must be permitted to manufacture and sell it in his own name. *Second*, that patents should not last longer than the length of time it would take for another inventor to invent the same device. *See* Robert Nozick, *Anarchy, State and Utopia*, 1974, p. 179-185.

B. THE UTILITARIAN-ECONOMIC JUSTIFICATION

The general argument from utilitarianism advocates the adoption of the most economically efficient and socially beneficial outcome – which, in effect, bears a mere semantic difference from Bentham's classic "*greatest good for the greatest number*" formulation.[20] In determining its applicability to intellectual property, the crucial question lies in determining the more efficient solution between granting an inventor a monopoly over the utilization of the work and excluding others from it, thereby causing social "harm", and the alternative of not recognizing intellectual property rights at the risk of dis-incentivising innovation.

The argument from utilitarianism in support of intellectual property protection reasons that by allowing a creator to profit from his work, monetary incentives are afforded for technological invention and artistic creation – activities which typically benefit society and humankind at large.[21] In what has been termed an *ex ante* justification by Lemley[22], theorists of this school advocate the proliferation of intellectual property rights as a means to foster investment of temporal and financial resources in innovation[23] in the hope that the inventions and works that result there from act to promote Millian "*general happiness*"[24] and increase the standard, quality of living and thereby the net welfare benefit amongst the general populace.

Despite its wide applicability, utilitarian theories have attracted criticism – mainly on the issue of whether intellectual property protection in its current state supported form is the most socially beneficial system possible. While critics point to alternative "*reward-based*" models[25], the

20 The simple pleasures human kind is susceptible to i.e. Section II of Chapter V of Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 1781, Chapter V.

21 William Fisher, "Theories of Intellectual Property", in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, (2001) 9.

22 Mark Lemley, Ex ante versus Ex post Justifications for Intellectual Property, *University Chicago Law Review*, 71 (2004) 129.

23 Peter S. Menell, Intellectual Property: General Theories*, Encyclopedia of Law & Economics: Volume II* (Boudewijn Bouckaert and Gerrit de Geest (eds.)) (2000) 130-131.

24 John Stuart Mill, *Utilitarianism,* 1863, Chapters 3-4.

25 Under such systems, the government would pay rewards to innovators whose inventions would thereupon pass into the public domain and become freely available.

combined effect of the difficulty in decisively computing welfare and the high costs in reforming existing intellectual property protection systems render utilitarian justifications difficult to dislodge from their current positions– justified or not – of strength.

It is of note that economic efficiency and social welfare measures take into their fold other measures like social and consumer benefit in computation of the net welfare effect.[26] The significance of this is that the various ancillary and seemingly trivial benefits are assigned increased weightage – in an interesting instance, Landes and Posner argue that trademarks have the added social benefit of improving the quality of a consumer's vocabulary and language[27] - in the computation of net welfare. It is such an approach that legislatures and judicial systems the world over have come to recognize and, to a certain extent, affirm.[28]

C. THE 'PERSONALITY' THEORY

In what has been classed as a variant of the natural rights genre of justifications[29], the approaches of Kant and Hegel to property rights centre on an individual's personality and the external extensions thereof. According to Hegel, man acquires an "*absolute right of appropriation*" by "*putting his will into any and every thing…thereby making it his*". The fundamental premise of the personality/personhood theory is that for a person to be able to develop fully, and strive towards 'self-actualisation'[30], it is required

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See Steven Shavell and Tanguy Van Ypersele, Rewards versus Intellectual Property Rights, *Journal of Law and Economics*, vol. XLIV (October 2001) 525.

26 William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, (2001) pp.8-10.

27 Landes and Posner argue that by "*creating words or phrases that people value for their intrinsic pleasingness as well as their information value*," an added measure of economy is inducted into day to day communications. An added effect is that of conversation becoming more 'pleasurable'. *Refer* William Landes and Richard Posner, "Trademark Law: An Economic Perspective," *Journal of Law and Economics*, 30 (1987) 265

28 *M/s Bishwanath Prasad RadheyShyam* v *M/s Hindustan Metal Industries* AIR 1962 SC 1444. Also see, *Fox Film Corp.* v *Doyal* 286 U.S. 123, 127-28 (1932); *Kendall* v *Winsor*, 62 U.S. (21 How.) 322, 327-28 (1858).

29 William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, (2001) 20.

30 Hegel writes that "*a person must translate his freedom into an external sphere in order to exist as an Idea*" and that "*personality is the first, still wholly abstract, determination of the absolute and*

that he have control over some elements of the external world.[31] Property rights, in this light, are a form of the "*necessary assurances of control*."[32] In what seems to be an argument better oriented towards justifying the protection of *creative* works rather than technical inventions[33], this justification provides for the protection of those works which are seen as intimate projections of one's personality into the external world – be it in the form of literary or artistic in nature. In other words, for the personality theory to apply there must be an intimate and/or emotional connection between the author-creator and his works or inventions.

Another school of thought promotes the establishment of protections for intellectual property due to their satisfaction of, according to Waldron, specific needs and interests that one wishes to promote.[34]

European nations like France and Germany have been noted to be more favourable towards relying on this justification to intellectual property.[35] However, this theory like its counterparts is not immune from criticism of which I feel the underlying thread is the lack of a definite scope. This stems from the fact that most manifestations of this theory, due to its emphasis on moral rights, provide only against the '*appropriation or modification'* of objects through which a creator's will has been expressed. This leaves open the question as to whether the theory was intended to be applicable to purely technical works and inventions given that these are less 'expressive' than the former.[36] While the personhood theory should in fact

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infinite will." This is the basis of self-actualisation. *See* Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 331-339.

31 Margaret Radin, *Reinterpreting Property*, 1982, p. 142.

32 Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 331-339.

33 I say this on account of the fact that inventions are generally perceived to be more impersonal than creative works. Where an emotional connection always plays a part in a creative work, the same cannot always apply to a technical invention which may also come about due to 'professional' commitments.

34 Fisher argues that Waldron's arguments of *Peace of Mind, Self-Reliance, Self-realisation of being a social being, Responsibility and Citizenship* (six out of ten arguments) justify the protection of intellectual property. William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, (2001) 20.

35 William Fisher, "Theories of Intellectual Property," in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, (2001) 6.

36 Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 290.

apply to inventions due to the fact that expressions may be extended in many directions and not just as works creative or artistic in nature; whether the likes of Kant and Hegel contemplated such an extension of the theory is, at best, ambiguous.

III. Theory in Practice? The Attack of the Trolls

A. INTRODUCTION

This section aims to apply these theories to the recent emergence of copyright and patent 'trolls'. As with innumerable others, the word 'troll' has come to acquire a secondary meaning come the technology era. In today's intellectual property parlance, a copyright or patent 'troll' (hereinafter "troll") is a non-innovating, non-manufacturing entity whose sole function is the 'acquisition' and enforcement of the intellectual property (here copyrights and patents) of other innovating entities against third parties most typically through litigation – or in practice as it is observed, the *threat* thereof. Such a company's business model would most typically consist of filing suit against bloggers, artists, freelance journalists and other 'small-fry' individual users fo*r alleged* unauthorised reproduction of works it had acquired the rights to enforce.

Most typically, the result that would follow is that defendants in such suits would be forced enter into pre-trial out-of-court settlements in the face of prohibitively high and debilitating litigation-defence costs prevalent in many modern Western economies. Such business models, I argue, are not only inherently exploitative and abusive of the legal process (as courts of late have come to recognise[37]) but that they also question the very theoretical justifications that are commonly put forth to support the treatment of intellectual property as 'traditional' tangible property as discussed above. I also argue that if the frameworks presented in the previous section are assumed to be the pillars of the modern intellectual

37 In *Righthaven*v *Democratic Underground* Case No.:2:10-cv-01356-RLH-GWF (US District of Nevada Court), it was found that Righthaven has no standing to sue for copyright infringement. A similar ruling of a federal judge in Colorado has put an end to all 57 proceedings that Righthaven had initiated in that state.

property, they do not support the continued existence much less functioning of such entities.

B. THE CAST: RIGHTHAVEN AND INTELLECTUAL VENTURES

Righthaven LLC[38] in the copyright field and Intellectual Ventures in patents are two companies that are often accused of conforming to the above described business model.[39] This section aims to analyse their functioning in the context of the theoretical justifications discussed earlier.

But first, who are they? Righthaven LLC is a copyright holding company founded in 2010. Its business model consists of entering into agreements with various publishers (often localised periodicals) and subsequently filing suits for copyright infringement against bloggers and website owners for unauthorised reproduction of the periodicals' photographs and other content.[40] Righthaven then proceeds to demand $75,000 from each alleged infringer in lieu of court action (but is known to agree to settle claims for a few thousand dollars per defendant). This coupled with Righthaven's propensity to swiftly settle cases and high expenses in defending such actions leads to a highly profitable business model – with Righthaven footing no more than the cost of the paper on which the initial demand was made. In recent times, the company has been criticised for bullying internet users into *unnecessary* settlements and has been fined for making material misrepresentations to federal courts.[41]

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38 The Company is now insolvent having failed to pay legal costs owed to the defendants in *Righthaven v. Thomas DiBiase* and *Righthaven v. Wayne Hoehn*. Its domain name (righthaven.com) was recently auctioned by the receiver to satisfy the company's debtors. *See* Steve Green, Righthaven ordered to pay nearly $120,000 in attorney fees, court costs, *Las Vegas Sun*, October 26, 2011 (*available at http://www.lasvegassun.com/news/2011/oct/26/righthaven-ordered-pay-nearly-120000/*); Mike Masnick, Righthaven loses again; Told to pay $34,045.50 In Legal Fees, *TechDirt*, August 16, 2011 (*available at http://www.techdirt.com/articles/20110815/17441215537/righthaven-loses-again-told-to-pay-3404550-legal-fees.shtml*).

39 As stated above, Righthaven is now (January 2013) virtually defunct. Many new companies have today stepped forward to fill its shoes. It has been chosen as a case purely because it will always remain one of the first and therefore 'quintessential' copyright holding NPEs .

40 As of July, 2011 it had filed around 274 such lawsuits. Steve Green, *Third judge rejects R-J copyright suit arrangement* (July 2011).

41 *Righthaven*v *Democratic Underground* Case No.:2:10-cv-01356-RLH-GWF (US District of Nevada Court).

Intellectual Ventures, on the other hand is a similarly structured enterprise in the patent 'industry' - founded in 2000, it has grown to become one of the five largest patent holders in the United States. Its business model consists of purchasing a large number of patents, licensing them and, where circumstances permit, suing third parties for patent infringement. Such behaviour has resulted in the company facing accusations of being a *patent troll*.[42]

The following portion of this note attempts to frame these facts in the context of the above-described justifications of intellectual property rights. In other words, I will attempt to establish whether the theories in their original forms could support such business models.

C. PERSPECTIVES FROM LABOUR THEORY

A basic tenet of Locke's labour analysis is that one should be rewarded for the labour of his body and the work of his hands on materials held in the common. However, Locke's analysis only provides scope for the original creator of the work i.e. the individual who labours to benefit from its protection and passing into the domain of private ownership and control. The Labour theory does not, in any manner, recognise a third party's right to benefit from the labour of another. Righthaven and Intellectual Ventures, both being Non-Innovating entities do *not* labour to create the good that is sought to be protected – here the creative work or the invention.

Moreover, the trolls' conduct violates Locke's proviso in that there is 'net harm' being caused to innovation in general. In the copyright realm, innovation in the form of creative expression which cites or comments upon copyrighted work is 'chilled' or curtailed for fear of over-zealous enforcement by trolls. A similar 'chilling effect' on innovation is observed in the domain of patents where the "net harm" is in the form of small innovators limiting themselves for fear of infringing on existing patents. Thus neither case leaves '*as good left in common*' for others. To take Nozick's approach to the proviso would mean the reading in of a "net harm" prohibition. Net harm to society is caused by the curtailments to free speech and expression caused by the threat of litigation. This angle is

42 Nicholas Varchaver , "Who's afraid of Nathan Myhrvold?", *Fortune Magazine* (July 10, 2006).

explained – drawing from the work of AmartyaSen – in the following portions of the note.

D. PERSPECTIVES FROM UTILITARIANISM

The utilitarian outlook advocates an approach that manifests the largest gain to social welfare. For the purposes of this note, social welfare is a function of economic development or growth – the former being, at least, proportional to the latter.[43] As discussed earlier, intellectual property protection is mandated to incentivise innovation by allowing a creator/inventor to profit from his work. However, in the context of the trolls, such an argument cannot hold. A recent study[44] shows how "Non Practicing Entities (NPEs)" in the patent industry like Intellectual Ventures and Lodsys have cost the industry half a trillion dollars in litigation costs and lost wealth[45] since 1990 – this is no less than fifty billion dollars a year.

This is on account of the hundreds of patent infringement suits filed against small innovators every year. The same study also reveals that there has been a five-time increase in the number of patent suits litigated by NPEs in 2011 to 2600. Not only does such a business model dissuade individuals from entering the innovation field but also forces existing innovators to adopt more conservative scientific and innovating approaches to minimise legal exposure. The net result hence is unquestionably not in favour of the end-consumer and in no way increases welfare - either economic or social.

The same line of reasoning may be extended to a copyright aggregator like Righthaven whose approach not only stifles free speech by infringing on the fair use doctrine but may also lead to a chilling effect which adversely affects an individual's right to expression. When such natural and fundamental rights are abridged, there can be nothing but an

43 Sardar M. N. Islam and Matthew Clarke, The Relationship between Economic Development and Social Welfare: A New Adjusted GDP Measure of Welfare, *Social Indicators Research*, 57(2) (2002) 203.

44 James Besson, Jennifer Ford, Michael Meuer, The Private and Social Costs of Patent Trolls, *Boston University School of Law Working Paper No. 11-45* (September 2011) 24.

45 James Besson, Jennifer Ford, Michael Meuer, The Private and Social Costs of Patent Trolls, *Boston University School of Law Working Paper No. 11-45* (September 2011) 18.

adverse impact on the quality and enjoyment of an individual's life[46] – as his freedom to perform certain legitimate activities is curtailed – in turn resulting in a negative impact on social welfare and completing the circle.[47]

E. PERSPECTIVES FROM PERSONALITY THEORY

The reasons that exclude the application of the labour theory by patent and copyright aggregators by and large may be extended to the personality theory. *In addendum*, this theory is not applicable, *first*, on account of the lack of any form of intimate or personal connection - one of the principle tenets of the Theory - to the intellectual property being enforced by the aggregators[48] – motives are purely profit-driven and suffer from no bonds of attachment to the subject matter of the intellectual property. This stems from the fact that they play no role whatsoever in their development or initial 'creation'.

Second, if there is anything that is clear about the abstract – and often murky – concept of personality, it is that it is an extension of a person's soul into the external domain. The theory seeks to protect such rights of individuals – whether these protections would extend to the alienated/sold rights of an individual is doubtful and at best, unclear on account of the emphasis laid on moral rights of authors by the framework.

IV. Conclusion

Thus, on account of the above application and discussion, it is submitted that not only do intellectual property aggregators like Righthaven and Intellectual Ventures act in a manner prejudicial to the interests of intellectual property owners, inventors and consumer at large but that their functioning finds no justification in traditional theories that sought to justify the creation of rights in intellectual property. It has been illustrated here how these entities function in a manner seemingly independent of the three dominant strains of property theory – the Labour, Utilitarian and Personality justifications.

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46 *See* AmartyaSen, Human Rights and Capabilities, *Journal of Human Development*, 6(2) (2005) 151.

47 John Stuart Mill, *On Liberty* (1859) Chapter II.

48 *See* Justin Hughes, The Philosophy of Intellectual Property, *Georgetown Law Journal* 77 (1988) 331-339.

While I do not wish to broach the subject of what the consequences of such "violations" should be – these observations alone, I believe are sufficient, at very least, to warrant the raising of more substantial and searching questions about these entities and their respective business models. As the US courts have recently started to recognise, they have no legal basis for continued functioning, I have attempted to show that this lack of basis extends to the jurisprudential and historical realms as well. At best, they can be characterised as capitalism-induced manifestations of corporate greed.