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Intellectual Property, Individualism and Socialism attitudes in Australian Law

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Abstract

It is clear that what is one of the common parts to make either similarity or difference between ideas mentioned above is the legal status of the relationship between interests of individuals and their societies. It is going to be more complicated after raising human rights theories in national and, more in international atmosphere. Universal Declaration of Human Rights and other international instruments containing new and vast rules to preserve individuals have made deeper the current gap. In this essay, the author tries to do a deep research concentrating on the view of Australian Laws and precedent to locate legally the correct position of IP in each theory. He tries to answer this question whether Australian IP law is based on individualism or socialism and each of them should be preferred.

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1) Introduction: Lawyers and Law makers describe varied theories to justify the general idea for intellectual property (*"IP"*). Acceptance of each of them plays a key role to design legal strategies and approaches. Therefore, different theories have come up. Many of lecturers believe that the IP is originated by *Natural Right*. It is vastly accepted that a man who invent a work deserves to enjoy his creation. On the other hand, some people criticized this theory by raising a problem regarding temporal limitation of intellectual property rights. Then, some authors tried to justify the origin of IP with another notion entitled *personality theory*. This idea is based on the importance of personal self-assertion. Whereas this taught is backed by the necessity of the safeguarding of the individual`s freedom of expression, this theory cannot meet all expectation in public as well as academic atmospheres. The faculties of law have observed a new method nominated as *Utilitarian Theory* as well. Such a new idea justifies IP because it has a deep effect on the economic status of a community. In addition, David Lindsay is one of the writers who concentrates

on the complicated tie between copyright and freedom of expression'.[1] It deserves mentioning that Lindsay also outlines the foundational discourse in this context, in particular the US academic writing most extensively attended to. He copays attention to the key Anglo-Australian case law, *Commonwealth v John Fairfax*[2] and *Ashdown v Telegraph*.[3] This area has become controversial developments such as WikiLeaks and the News of the World scandal in the UK.[4]

2) Theoretical Challenges on IP:

A. *Natural Theory:*

Many of authors like *Fisher* believe the role of John *Locke* to originate *Natural Property Theory* or *Labor* was more than other philosophers like *Hegel*.[5] Fisher where he wants to explain the natural property theory, notes a natural property right allowing the inventor or author to extract professionally the result of his or her efforts. He consequently states a duty to respect and insure to respect and enforce such a right.[6] Although *Locke* focused on supporting individual property rights as *natural* rights, both Locke's natural theory and Hegel's *personhood theory of* property constitute the central core of natural rights supporting copyrights and patents ideas. They try to preserve copyrights and patents throughout extending property rights to intellectual works as well. Locke specially provides a principal foundation upon which other following perspectives are built.[7] Locke`s notion, therefore, was based on an exclusive ownership raised instantly for a work. This philosopher took the link between labor and ownership pertaining only to property that was unowned before such labor took place, into account. The European legal approach corresponded to USA copyright laws are entitled as *Author's Rights*.[8] Such rights are apparently derived from the link between artist or inventor with his work. This rationale needs to be approved that man by his nature has a right to own IP. Therefore, it is crystal clear that *European* IP laws are based in *non-utilitarian theories*.[9]

It is mentioned by some lawyers and philosophers like Weber that this theory fails to meet the actual requirements to order social order regarding IP.[10] This argument defends ownership of physical property. In addition, Weber tries to explain the Failure of Natural Rights Theories by describing the owner of the instance and other relevant persons. Consequently, the original argument for such a property is weakened. In contrast, the holder

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[1] - Dirk Voorhoof and Inger Høedt-Rasmussen, 'Copyright vs. freedom of expression' (2013).

[2] - Melissa de Zwart, 'eMerGING CHAlleNGes IN INTelleCTuAl ProPerTY' (1968).

[3] - ibid.

[4] - ibid.,p.290.

[5] - William Fisher, 'Theories of intellectual property' (2001) *Cambridge: Cambridge*., P2.

[6] -ibid., P1

[7] - Dane WEBER, 'A Critique of Intellectual Property Rights' (2002).p.148.

[8] - ibid.p

[9] - Dane Weber, 'Intellectual Property Rights'., p156.

[10] - WEBER, above n p .157.

of the copyright has not any power, when the primary owner is determined to have the authority. [11] Therefore, this theory cannot make a coherent account for IP rights.

B. Personality theory:

Caenegem[12] used Personality Theory conversely in front of Economic approach. He believes that both approaches are a start point to understand about IP`s function in law.[13] This theory prevails in civil law jurisdictions. It is noted it contains a reflection in a greater emphasis on *moral rights*.[14] This approach does not place IP law in a wider cultural and social context. Sunders Claims it risks becoming embroiled in historical revisionism.[15] Therefore, this theory has been defined as a principle of IP giving importance to the point of view of the individual inventor, author, or so on instead of society as a whole.

C. Utilitarian Theory:

Utilitarian theorists generally confirm IP rights as an appropriate means to promote innovation, but these rights are limited in duration to make a balance between the social welfare loss of monopoly exploitation.[16] *Bentham*[17] was one of the most famous authors who wrote about this theory. This notion does not want to claim that artists or the owner of a work have natural rights regarding the reproduction of their works. Alternatively, it preserves copyrights and constrains the benefit of these positive rights for the society as a whole.[18] The USA Constitution expressly ratifies patent and copyright laws throughout utilitarian foundation. The phrase *'…to Promote the Progress of Science and useful Arts…'* confirms such an approach. It deserves mentioning that Caenegem claims the personality rights as well as economic ones are unsatisfactory regarding IP in terms of as a whole.[19]

Acceptance of utilitarian theory does not mean that a natural law basis does not need in copyrights and patents.[20] This justification holds that IP benefits the common good of society by encouraging invention and art, which in turn benefit the common good.[21] It is worth mentioning that a beneficial discussion of the relative benefits of this scheme over

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[11] - ibid.p.201.

[12] - *William van Caenegem* (from Bond University)

[13] - William Van Caenegem, 'Intellectual property law and the idea of progress' (2003).,p.237.

[14] Doreen Stabinsky and Stephen B Brush, *Valuing local knowledge: indigenous people and intellectual property rights* (Island Press, 2007).,p.156.

[15] - ibid.

[16] - Richard A Spinello, 'Intellectual property rights' (2007) 25(1) *Library hi tech* 12., p129.

[17] - *Jeremy Bentham.*

[18] - WEBER, above n ,p.243.

[19] - Van Caenegem, above n ,p.238.

[20] - It deserves noting that the utilitarian argument is based on its relevancy with the common good. To explain more, the law should be for the common good as well, while it should contain a natural law basis for the human laws.

[21] - Intellectual Property theories, Peter S. Menell, p 159.

any other possible blueprint will not be possible without the principles of natural perspectives.

D. *Human rights Theory:*

It is obvious in law and Philosophy that some rights are functionally instrumental in terms of securing the feasibility of claiming other kinds of rights, like IP. In democratic sovereignty, such rights are to serve the citizens` benefits and needs identifying through the language of human rights as a fundamental rule.[22] Meanwhile, human rights would guide the development of intellectual property rights, then IP would be pressed into service on behalf of human rights.[23] While Universal Declaration of Human Rights[24] does not expressly refer to intellectual property rights, Article 27. (1) and (2), and 17. (1) and (2) and the ICCPR[25], ICESCR[26] and other regional and international instruments on human rights contain rules supporting directly or indirectly IP in all levels. Defending IP as a human right using the conceptual apparatus of natural right theory[27], whereas this view has been faced a number of critical points.

3) Chaos Between Individuality or Working for the Society as a whole

Recognition of correct approach of Australian intellectual property is complicated, while the vast range of lawyers as well as scholars have attempted to illustrate it. For example, the book titled *"Australian Intellectual Property: Commentary, Law and Practice" including more ten article collected by* Bowrey, Handler and Nicol, represents how the judicial approach of on IP law to new technologies and meet other social challenges.[28] Meanwhile, it is very hard to extract the correct and realistic approach from cases and judicial practices. The writer tries to clarify this track by using two samples mentioned below.

A) Legal Position & Origination on Australian IP Law

A myriad of IP law rules and orders was originally extracted from UK and less, from the legislative and common law legal systems. For example, Australia`s *Copy Right Act 1912 (Cth)* simply adopted the *Copy Right Act 1911* (UK). Therefore, it is clear that case law tended to obey UK case law precedent, for example Australian judicial tests for originality of literary works followed older English case law until recently. The case *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd (2012)*[29] can be raised as a sample to prove this idea. In addition, the impact of American legal system in IP on Australian courts is obvious.

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[22] - Peter Drahos, 'Intellectual property and human rights' (1999) *Intellectual Property Quarterly* 349.,p.9.

[23] - ibid.p.10.

[24] - 1948.

[25] - International Covenant on Civil and Political Rights- 1966.

[26] - The International Covenant on Economic, Social and Cultural Rights- 1966.

[27] Drahos, above n ,p.9.

[28] - de Zwart, above n ,p.288.

[29]-*General Newspapers Pty Ltd v. Telstra Corporation* (1993) 45 FCR 164.

Commonwealth of Australia Constitution Act Section 51[30], headed '*Legislative powers of the Parliament*', gives full auditory the Parliament to make laws for the peace, order regarding postal, telegraphic, telephonic, copyrights, patents of inventions and designs, and trademarks and other like services. Then it is worth mentioning that the Constitution law offers little indication of the either nature or purpose of IP laws. This approach ratified by the High Court in the case Attorney-General for NSW v Brewery Employees Union known as Labor Case.[31]

Generally speaking, it seems that the constitution law`s approach including the constitutional provision, supports reforms concerning performers and moral rights for authors and trade marks for services. Therefore, the mentioned approach is close to *Natural Law* and *Personality theory*. Due to the development of the technology and some critical point in Australian, law makers have been advised to amend Constitution to simply permit laws regarding with IP. Alternatively, some lawyers and governments propose to Australian Federal to attend to the value applied by a US-style provision. Of course, it is a must to provide a so-called foundation for constitutional challenges with reference to the overriding public purpose of IP laws.[32] While Australian government has tried to harmonized IP laws by applying international instruments and unifying laws and practices by performing international, regional and bilateral capacities like TARIFs and so on, it has stood on the traditional step of IP known *Natural law* and *Personality theory*. But in precedent, Australian High Court attempts to be closer to USA approach specially in *Utilitarian Theory* implicitly. The High Court, in Grain Pool case compared Australian and American system and then tried to extract some conception from USA system. Of course, such a comprehension is not comprehensive, but they are not mutually comprehensive.

Mentioning the point is necessary that while the US Constitution regulates a 'system' of copyright as well as patent laws in order to promote the 'Progress of Science and useful Arts', it was decided to pursue that objective and achieve the delicate balance of interests to be served for society as a whole. In the case *Eldred v Ashcroft 537 US 186 (2003),* can approved this idea[33]. Therefore, approach of Australia to the constitutional power places few limits on the freedom of Parliament to make laws about 'intellectual effort'.[34] My understanding is that respect for *individual* property rights including IP is deeply rooted in the individualism in Australia.[35] What can be claimed is the *Personality Theory* vastly

[30] - 1900(Imp)

[31] - *Attorney-General (NSW) v Brewery Employees Union of NSW (Union Label case)* [1908] HCA 94, (1908) 6 CLR 469

[32] - Christopher May, *The global political economy of intellectual property rights: The new enclosures* (Routledge, 2015).,p.253.

[33] - *Eldred v. Ashcroft* (2003) 537 US 186 (Supreme Court).

[34] - May, above n

[35] - Sara L McGaughey, Peter W Liesch and Duncan Poulson, 'An unconventional approach to intellectual property protection: The case of an Australian firm transferring shipbuilding technologies to China' (2000) 35(1) *Journal of World Business* 1.p.2.

accepted by Australian Constitutional law, although the Australian approach to be closer in order to mix between both *Utilitarian theory* and *Personality one*.[36]

B) Preserving Indigenous Heritage & Real Need for Utilitarianism

One of the most important issues to challenge *Australian Constitutional Law* and other approaches as a sign is the right of indigenous people to support their heritage as a whole. It would be useful to show to what extent the right of the society or its sections and the right of individuals made as intellectual works can cover each other. In the other word, whether *Personality theory* ratified by Constitutional Law can preserve the benefits of the community.

The western style of IP rights targets individual property rights designed to foster industrial and commercial sustainable development. Such systems are conceptually restricted in their ability to support and preserve of indigenous IP.[37] A vast range of legislation, recommendations and reports are noticeable to present Australian reactions over the last two decades. Australia works on IP laws, its heritage and environment issues.

The package of Australian IP law contains *Patents Act*[38], *Trademarks Act*[39], *Designs Act*[40], *Plant Breeders Rights Act*[41]. It includes common law areas of trade secrets and confidentiality as well. The *Copyright Act*[42] is regulated to support copyright as defined by McKeough as a form of property, a personal right, or a combination of both.[43] If this definition was accepted, IP laws would preserve all kind of ideas` expression, or whatever expressed in a literary, artistic, dramatic or musical form. A vast range of indigenous heritage have been excluded, because they belong not only to individuals, to the whole of the society as well. *Personality theory* cannot assist government and indigenous people to support their cultural heritage.

In addition, another similar issue is about the *Patents Act. The issue* may be considered in terms of applicability to the protection of Indigenous cultural products and different forms and expressions.[44] The requirements regarding the novelty, usefulness, and non-obviousness of inventions and the individual nature of these rights are not compatible with

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[36] - For a rare case where the High Court took into account the politics surrounding I Preform, see Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA58; (2005) 224CLR193.

[37]- https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp20

[38] - *1990*

[39] - *1955*

[40] - *1906*

[41] - *1994*

[42] -*1968*

[43] - Terri Janke, 'The Application of Copyright and Other Intellectual Property Laws to Aboriginal and Torres Strait Islander Cultural and Intellectual Property' (1997) 2 *Art Antiquity & L.* 13.,pp.23-23.

[44] - Colin Golvan, *An introduction to intellectual property law* (Wm Gaunt & Sons, 1992).p.1.

Indigenous society`s benefits as a whole.[45] Similarly, the *Designs Act* is more restricted than the *Copyright Act* concerning Indigenous rights. It needs similar requirements regarding originality, and offers a shorter term for protection. [46] By the notion of *Personality*, the indigenous society cannot prevent their heritage from misused behaviors. On the other side, the approach of precedent in Australia tried to replace utilitarian rather than individualism about indigenous heritage. In the case *Milpurrurru v. Indofurn Pty. Ltd*.[47], the court declared that the aboriginal artist must be compensated for the unauthorized use of the art.[48] But it was not enough. The indigenous artists were able to assert copyright successfully. Nevertheless, its requirement may still pose issues for other indigenous works.[49]

One of the important issues regarding indigenous heritage is the requirement of originality to be eligible for protection. Australian copyright law like Canadian system is close to Anglo-American system.[50] The root of such an originality is based on individualism. Although the Australian precedent attempts to preserve the rights of the society, individualism is standing on the top. It is worth, Meanwhile, considering the case *Yumbulul v. Reserve Bank of Australia*.[51] In this case, the Australian court sets out how copyright law`s individualistic tendency causes problems for the indigenous peoples.[52] Consequently, individualism in Australia cannot meet all necessary social benefits comprehensively.

C) Biotechnology Industry

Another item regarding socio-economic approach in IP to assist the writer to answer the main question is biotechnology industry issue. Governmental practices in Australia insist on biotechnology industry and its benefits for the Australian society, industrial environment.[53] For example, patent law system as a section of IP law, plays a key role in this approach. The traditional patent system in Australia cannot meet current new and modern requirements to line in modern and postmodern atmosphere to jump to sustainable development.[54] However,

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[45] - Jill McKeough, Phillip BC Griffith and Kathy Bowrey, *Intellectual property: commentary and materials* (Lawbook Co., 2002).,p.16.

[46] - Joseph Wambugu Githaiga, 'Intellectual property law and the protection of Indigenous folklore and knowledge' (1998) 5(2) *Murdoch University Electronic Journal of Law* 53.,p15.

[47] - *Milpurrurru v. Indofurn Pty Ltd* (1995) 30 IPR 209.

[48] - Christine Haight Farley, 'Protecting folklore of indigenous peoples: Is intellectual property the answer' (1997) 30 *Conn. L. Rev.* 1.,p.21.

[49] - ibid., p.7.

[50] - *Milpurrurru v. Indofurn Pty Ltd* (1995) 30 IPR 209.,p.19.

[51] - *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481.,p.33.

[52] - *Milpurrurru v. Indofurn Pty Ltd* (1995) 30 IPR 209.,p.38.

[53] -see Louise Staffas, Mathias Gustavsson and Kes McCormick, 'Strategies and policies for the bioeconomy and bio-based economy: An analysis of official national approaches' (2013) 5(6) *Sustainability* 2751.

[54] - Jeanne Clark et al, *Patent pools: a solution to the problem of access in biotechnology patents?*, mimeo, USPTO No (2000).at 8.

Australian IP law supports authors` works to be granted in this country.[55] This approach has been ratified in the case *Genetics Institute Inc v Kirin Amgen Inc (No 3)*.[56] Meanwhile, although the number of shortcomings are here to consider, it seems the general movement is to consider the benefits of the society as a low.

The necessity for reforming has been advised by the High Court in the case *D'Arcy v Myriad Genetics Inc.*[57] In addition, the approach has been accepted by Australian precedent, however USA cases law and approach under 35 USC 101 are different. As well, methods of medical treatment have been convinced patentable subject matter in *Apotex Pty Ltd v Sanofi Aventis Australia Pty Ltd*.[58] The recognition the criteria for patentability of a work to ensure continuing the development and investment in the diagnostics and personalized medicine area benefiting society as a whole.[59] In Australia by s18(1)(a) of the Patents Act 1990 (Cth), such a diagnostic approach is generally attended to be directed to an `artificially-created state of affairs for economic benefit` concerning the NRDC principles.[60] It seems it cannot be comprehensive to meet the benefits of the society as a whole.

4) Conclusion

Non-utilitarian theorists emphasized creators' moral rights to control their work [61] , while the necessity for living in 21st century is to consider both individualism as well as benefits of the society as a whole. It is obvious that individualism is a dominant notion in Australian legal system, but socialism is going to be located as a parallel with individualism moment by moment. While legislation supports individualism more, socialism has been supported more by precedent.

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[60] - ibid.

[61] - Spinello, above n , p129.

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