**INTELLECTUAL PROPERTY LAW: INTRODUCTORY PERSPECTIVES**

**BY**

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1. **INTRODUCTION**

Intellectual Property (IP) is a genre of Property,[[1]](#footnote-1) albeit an intangible or non-tangible property. Thus like any other property, IP products may be transmitted assignment, testamentary disposition, or by operation of Law. This position was upheld by the Court in *Digital Communication Network (Nig) Ltd v. Ncc[[2]](#footnote-2)* when the court held copyright, an IP Right to be so transmissible:

…Copyright is transmissible by assignment, testamentary disposition or by operation of law, as movable property under Section 11(1) and (2) of the Act (supra). Subsections 11(3) and (a) of the Act provides as follows: "(3) No assignment of copyright and no exclusive licence to do an act, the doing of which is controlled by copyright, shall have effect unless it is in writing. (4) A non-exclusive licence to do an act, the doing of which is controlled by copyright, may be written or oral, or may be inferred from conduct.

The Law relating to Intellectual property is thus the legal regime that protects the products of one's intellect, mind, thoughts or reasoning. As is to be expected, the robust legal regime related to the protection of Intellectual Property as well as Intellectual Property Rights is a result of years and years of steady development of knowledge in that regard. The earliest action taken by a state to protect Intellectual Property is said to have occurred in 500 BCE when the Greek city state, Sybaris, granted her citizens the right to obtain a one-year patent for creating new luxurious items.[[3]](#footnote-3) In Medieval Europe, as trade became the driving force of the economy, trade associations of merchants and artisans arose, these associations grew to obtain power from the city-states to promote the conduct of commerce. Thus, the power to evolve new innovations in the making of goods and services became significantly the duty of the guilds.[[4]](#footnote-4)

The year 1623, saw the first pivotal move towards modern Intellectual Property Law when the English Parliament passed the ‘Stature of Monopolies’ which granted the “true and first inventor” 14 years’ window period of exclusive control over any invention he had made. The Parliament followed this with the Stature of Anne, under which inventors were granted the possibility of a 14-year renewal of the right of exclusive control over their invention, provided they satisfied the stipulated conditions.[[5]](#footnote-5)

Intellectual Property Law grew exponentially in the 1800s as it gained wider protections in Europe. This is seen clearly in the legislations that ensued from Europe, some of these include:

1. The Paris Convention of 1883 which granted inventors the right to protect their invention in whatever country they were being used.
2. The Berne Convention of 1886, which granted writers protection as regards all forms of written content, as well as musical compositions, drawings, artwork and so on internationally.
3. The Madrid Agreement of 1891, which provided for a wider protection for trademarks.
4. The United International Bureaux for the Protection of Intellectual Property of 1893, which was the combination of the Paris and Berne Conventions.

In Nigeria, the history of the development of intellectual Property Law can be discussed under three distinct epochs. The first is the pre-colonial era, in which era, intellectual acumen of the people found expression through various cultural and traditional practices such as folk songs, sculptures, pottery, paintings, designs, marks, textiles, scarification, traditional medical and herbal methods and so on. Whether these IP products (IPP) were so recognised and protected remains debatable. Although it is argued in favour of this notion that owing to the recognition granted some forebears in traditional oral renditions like in music, it is reflective of some sort of protection. The second is the colonial era which saw the reception of the English Common Law which was for all intents and purposes a formal legal order. This period is agreed to be the period in which a formal intellectual property legal regime was introduced in Nigeria. The third and final epoch is the post-colonial era, which period has been characterised by the steady growth of IPL in Nigeria, with the nation not only setting up a commission to oversee IP practice in Nigeria but also continually reviewing various Laws in the IP bundle to conform with international practices.

As has been shown, IPL development has spanned an appreciably long period of time but the relevance of IPL has never waned through the years. Rather, the importance thereof is becoming more and more pronounced as the economy of nations has shifted from product based to knowledge based economies.[[6]](#footnote-6) Though IPL keeps growing and therefore changing to suit the growing needs of the time through the ages, the core of the IPL has radically remained the same to wit – the protection of the rights of inventors, artists, and merchants with a view to encouraging the exchange of ideas and reward for people’s creativity or intellectual ingenuity.

* 1. **Nature and Definition of Intellectual Property (Law)**

Quite a number of scholars have defined IP(L), not necessarily for want of a definition to end all definitions nor in search of one. It is more as a result of the growing scholarship in the field and as can be seen, these definitions hardly miss the mark. For instance, the World Intellectual Property Organisation (WIPO) defines Intellectual Property (IP) as ‘creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.’[[7]](#footnote-7)

IP has also been defined as ‘a generic term that describes creations of the intellect in relation to which the law ascribes exclusive right of appropriation to the designated owners.’[[8]](#footnote-8) In other words, intellectual property is *prima facie* a type of property (a thing belonging to someone over which he can exercise the right of ownership) albeit an intangible one being a product of one’s intellect, thoughts, creativity of ingenuity.

Intellectual Property Law (IPL) on the other hand has been defined by William Fisher as:

…A loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia. The law of copyright protects various “original forms of expression,” including novels, movies, musical compositions, and computer software programs. Patent law protects inventions and some kinds of discoveries. Trademark law protects words and symbols that identify for consumers the goods and services manufactured or supplied by particular persons or firms. Trade-secret law protects commercially valuable information (soft-drink formulas, confidential marketing strategies, etc.) that companies attempt to conceal from their competitors. The “right of publicity” protects celebrities’ interests in their images and identities.[[9]](#footnote-9)

IPL has equally been defined as ‘the body of laws that governs all the relevant aspects (i.e. ownership, registration, protection, licensing, assignment, lifespan, etc.) of IP Rights.’[[10]](#footnote-10) In other words, IPL is the legal regime that operates to protect the persons who have the rights of ownership in any genre of intellectual property which is *prima facie* a type of property (a thing belonging to someone over which he can exercise the right of ownership) albeit an intangible one being a product of one’s intellect, thoughts, creativity of ingenuity.

* 1. **Intellectual Property and Industrial Property Distinguished**

 Intellectual property has been said to be ‘the set of legal tools that are specifically intended to **protect all creations of a human nature in which the personality of the author is reflected**.’ In which regard, copyright is highlighted as an example of Intellectual Property.[[11]](#footnote-11) On the other hand, Industrial property has been said to aim at protecting **‘the different creations that are, in some way, related to the industry**.  The purpose of this set of regulations is to protect creators by granting exclusive rights over their intangible creations similar to property rights.[[12]](#footnote-12)  Examples of Industrial Property are given to be:[[13]](#footnote-13)

1. **Industrial designs,** which protect the external appearance of the products**.**
2. **Trademarks and trade names,** these protect any graphic combination that distinguishes some products or services from others.
3. **Patents and utility models,** protects all products and processes that are likely to be copied by third parties for industrial purposes.
4. **Semiconductor topographies,** under this industrial property all the elements that make up an integrated circuit are protected.

In another sense, IP may be viewed as the larger set which may be divided into two, to wit: Copyright and Industrial Property.[[14]](#footnote-14) Industrial property legislation is thus said to be ‘part of the wider body of law known as intellectual property (IP) which refers broadly to the creations of the human mind. IP rights protect the interests of innovators and creators by giving them rights over their creations.’[[15]](#footnote-15)

The Paris Convention defines Industrial Property as to be ‘understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.’[[16]](#footnote-16)

1. **Theories underlying the Protection of Intellectual Property**

These are simply propositions in support of the existence and protection of IP from specific or varied ideological dispositions. These theories have significantly influenced the emergence of various IP legislation. Some of these include the Utilitarian theory, the Moral theory from which ensues the Labour and Personality theories, the Natural rights and Reward theories which ensue from the Labour theory, the Economic theory and the Development theory. As many as these theories may be, the have been argued to be deductible to two major ideological pinning to wit: Deontological (Fairness and Justice) theories or Consequentialist (Social Utility) theories.[[17]](#footnote-17) Some of these are discussed here below:

* 1. **The Economic Theory**

The Economic theory as the word implies, bases the justification for IP protection on economic implications, dynamics, realities and factors. These arguments are therefore based on the following:

* That products of IP are socially beneficial as well as public goods. To which end, the general public may all consume them at the same time and at no cost without a necessary reduction in their value.
* Again, because IP products are public goods, it is it is near impossible to stop people from consuming them, which could lead to ‘free riding.’
* Finally, those who engage in creative or innovative ventures, do so with the hope of getting a reward of some sort or the other. And no reward has proven to be more motivating for the creative industry than an economic reward. This was succinctly captured by Abraham Lincoln (who himself was holder of an IPR by way of holding a patent for a device to lift boats over shoals) when he said ‘the beauty of the patent system is that it ‘added the fuel of interest to the fire of genius.’[[18]](#footnote-18) While Lincoln spoke specifically in relation to Patent (a genre of IP) this applicable to IPR generally, irrespective of whatever genre it is.

This is further seen in the preamble to Connecticut's first copyright statute:

‘Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind…’[[19]](#footnote-19)

Again, in *Harper & Row v. Nation Enterprises*, the US Supreme Court gave vent to the same position, when the court pronounced thus:

We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.[[20]](#footnote-20)

From the above, it is clear that where there is no incentive for the creative and innovative minds to work, then the general public may also have no products to consume then hardship would set in and so would the market collapse.[[21]](#footnote-21) IP protections therefore operate to balance this dichotomy.

* 1. **The Labour Theory**

The Labour theory is said to be an offshoot of the Moral theory which is itself made up of the Personality theory on the one hand and the Labour theory on the other. The labour theory itself is branches into Natural Rights theory and the Reward theory. The Labour theory is rooted in John Locke’s Property Theory which holds that one’s ‘labor upon a resource held "in common" entitles the laborer to a property right in the resource itself.’[[22]](#footnote-22) Locke justified this position in Chapter 5 of his second Treatise also quoted by Fisher[[23]](#footnote-23) thus:

1. "Natural reason" tells us that men have "a right to their Preservation," and the only practicable way in which they can sustain themselves is by individually "appropriating" materials necessary to provide them food and shelter.
2. Religious obligation reinforces the foregoing proposition. God did not merely give the Earth to man in common, but "commanded" him to "subdue" it -- i.e., "improve it for the benefit of Life" -- which man can do only by both laboring upon it and appropriating the fruits of that labor.
3. Intuitions regarding self-ownership point in the same direction. Each person plainly has "a Property in his own Person," including the "Labour of his Body, and the Work of his Hands." It seems only natural that whatever he mixes that Labour with should belong to him as well.
4. The moral value of work reinforces the foregoing insight. God gave the World to "the Industrious and Rational, … not to the Fancy or Covetousness of the Quarrelsom and Contentious." It is thus fitting that the former acquire, through their labour, title to that which they labor upon.
5. A sense of proportionality and fairness also figures in the inquiry. Most of the value of things useful to men derives not from the value of the raw materials from which they are made, but from the labour expended on them. It is thus not "so Strange" that, when determining whether ownership should be assigned to the worker or the community, the individual "Property of labour should be able to over-balance the Community of Land.
6. Finally, Locke relies throughout the chapter on an imagery of productive transformation. By labouring upon unclaimed land or other resources, the worker changes them from wild to domestic, from raw to cultivated, from chaotic to ordered, from pointless to purposeful. The self-evident desirability of that transformation supports a reward for the worker.

The labour that the labourer may mix upon a resource held in common in the IP parlance have been distilled to include:[[24]](#footnote-24)

1. Time and effort (hours spent in front of the computer or in the lab);
2. Activity in which one would rather not engage (hours spent in the studio when one would rather be sailing);
3. Activity that results in social benefits (work on socially valuable inventions);
4. Creative activity (the production of new ideas).

While scholars argue that the Lockean thesis cannot fit perfectly into IP, the crux of the Labour theory is simply that a labourer’s labour upon an IP product entitles him to ownership thereof (which in turn vests in him rights thereupon) for which he requires protection.

* 1. **Reward Theory**

The Reward Theory is very similar to the Labour theory in that both recognise the efforts or labour exerted/expended by a party to produce an IP product, for which the Reward theory posits the party should be appreciated by way of a token called a ‘reward.’ This aligns with the biblical injunction that a ‘labourer is worthy of his reward.’[[25]](#footnote-25) This reward may be in form of the exclusive rights granted them in the IP product in issue. In other words, the Reward Theory is to be understood in that ‘a creator must be rewarded for the creation and in doing so the ethics behind intellectual property rights will be realized.’[[26]](#footnote-26)

Generally, the incentive-oriented theorists justify IPRs on the premise that they spur innovation as well as serving public interests. To which end they posit that, ‘the exclusive rights and monopoly that IPRs offers, motivates inventors to invest resources in developing new products.’[[27]](#footnote-27) Against this background, they hold that were IPRs to be freely infringed, there would be no incentive or motivation and conversely a decline in the production of original products. This opinion has been faulted in that monopolies also impair competition and innovation. Further still, not all inventors are spurred in so doing by reason of a reward, some do so for other reasons which could include; interest, passion, desire, pleasure, curiosity, expression, reputation or to solve societal needs.[[28]](#footnote-28)

**2.4 Development Theory**

The Development theory has also been described by Fisher[[29]](#footnote-29) as the social planning theory and Greg Alexander views it in terms of the ‘Proprietarian’ theory,[[30]](#footnote-30) but at the core of the thesis, the thoughts of the various scholars are not diametrically opposed one to another. The school of thought’s approach to intellectual property is not an end in itself, but as a means to social, technological and national development. Other proponents of the theory include Keith Aoki,[[31]](#footnote-31) Rosemary Coombe,[[32]](#footnote-32) Niva Elkin-Koren[[33]](#footnote-33) and Michael Madow.[[34]](#footnote-34)

The theory has been argued to be well suited for developing countries[[35]](#footnote-35) as it would guide the emerging jurisprudence on IP to be more suited to harness IP to propel the country towards overall development. This is more so as the core of the theory holds that ‘property rights in general – and intellectual property in particular – can and should be shaped to help foster the achievement of a just and attractive culture of innovation and creativity.’[[36]](#footnote-36)

This thesis has not only influenced nations, it has also greatly influenced policy making globally as can be seen at the level of the WIPO as well. This has found expression in the WIPO Development Agenda adopted in 2007, proposing forty-five recommendations which has been grouped into six key clusters:[[37]](#footnote-37)

1. The first cluster requires WIPO’s technical assistance to be transparent, driven by demand and focused on development.
2. The second cluster seeks to position WIPO’s intellectual property normative formulation to result balanced and inclusive outcomes. It requires that such rule making activities be supportive of the development objectives as encapsulated within the United Nations (UN) system, inclusive, and driven by member state.
3. The third cluster requires collaboration and cooperation among research and scientific institutions in developed and developing countries for the dissemination of information and technology transfer.
4. The fourth cluster seeks to enhance the capacity of WIPO to undertake objective assessment of the impact of its activities on development.
5. The fifth cluster focuses on WIPO’s mandate, its governance structure, and its interaction with other intergovernmental organisations and nongovernmental organisations.
6. The sixth cluster seeks to position WIPO’s approach to intellectual property enforcement to be in the context of broader societal interests.
7. **CONCLUSION**

That IPRs need be protected and that there is a direct link between the protection of IPRs and invention can never be emphasised. It is the justification for the protection of IPRs that has necessitated the various theories or schools of thought that justify the protection of IPR from the various ideological stand points. It is however to be stated that the justification for intellectual property protection does not wholesomely/entirely lie on any isolated/single theory to the exclusion of others. In others words, no theory in itself proffers a complete justification for the protection of IP to the exclusion of all others. Rather, it is as they are viewed together that a robust argument for the protection of IP is found. To this end, there is no single theoretical underpinning for the justification of IP to end all other theories. It is also for this reason that more and more theories continue to emerge even as offshoots of existing theories yet still in an effort to justify the protection of IPs.

1. See *Banire v NTA-Star TV Network Ltd* (2021) LPELR. [↑](#footnote-ref-1)
2. (2013) LPELR-20797(CA), per Joseph Tine Tur, JCA (P. 27, paras. B-E). See also, s. 14(3)b Copyright Act, 2022. [↑](#footnote-ref-2)
3. Oluwaseun Abioye, ‘Historical Development of Intellectual Property Laws in Nigeria’ <[https://www.linkedin.com/pulse/historical-development-intellectual-property-laws-abioye-oluwaseun](https://www.linkedin.com/pulse/historical-development-intellectual-property-laws-abioye-oluwaseun%20) > accessed 29 June 2023. [↑](#footnote-ref-3)
4. Upcounsel,’ Intellectual Property Rights History: Everything to Know’ <[https://www.upcounsel.com/intellectual-property-rights-history](https://www.upcounsel.com/intellectual-property-rights-history%20) > accessed 29 June 2023. [↑](#footnote-ref-4)
5. ibid. [↑](#footnote-ref-5)
6. This has seen a number of nations leverage on technology and knowledge to significantly grow their economies like Japan, UK, USA, China, Germany, Russia, Israel and so on. [↑](#footnote-ref-6)
7. WIPO, What is Intellectual Property? < <https://www.wipo.int/about-ip/en/>> accessed 02 July 2023. [↑](#footnote-ref-7)
8. Udo Udoma & Bello Osagie, *Intellectual Property Law in Nigeria* < <https://uubo.org/intellectual-property/>> accessed 02 July 2023. [↑](#footnote-ref-8)
9. William Fisher, *Theories of Intellectual Property* <<https://cyber.harvard.edu/people/tfisher/iptheory.pdf>> accessed 02 July 2023. [↑](#footnote-ref-9)
10. Udo Udoma & Bello Osagie, *Intellectual Property Law in Nigeria* < <https://uubo.org/intellectual-property/>> accessed 02 July 2023. [↑](#footnote-ref-10)
11. Industrial property and intellectual property. What are they and what are they for?

    < <https://comercio.acelerapyme.gob.es/en/news-comercio/pill/industrial-property-and-intellectual-property.-what-are-they-and-what-are-they-for%3F>> accessed 02 July 2023. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. WIPO, *Understanding Industrial Property* (World Intellectual Property Organization 34, chemin des Colombettes, (Switzerland) 2016). [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Paris Convention – Article 1(3). [↑](#footnote-ref-16)
17. Prof. Dr. Ansgar Ohly, *European and International IP Law* (Ludwig-Maximilians-Universität München, WS 2021/22) 57. [↑](#footnote-ref-17)
18. M.D Gary Michelson, M.D, *Introduction to Intellectual Property* (OpenStax Rice University) 22. [↑](#footnote-ref-18)
19. 1783 Conn. Pub. Acts Jan. Sess., reprinted in U.S. Copyright Office, Copyright Enactments of the United States, 1783-1906, at 11 (2d ed., Washington: G.P.O., 1906). [↑](#footnote-ref-19)
20. Harper & Row v Nation Enterprises, 471 U.S 539, 545-46 (1985). [↑](#footnote-ref-20)
21. This is what is called market failure. [↑](#footnote-ref-21)
22. William Fisher, *Theories of Intellectual Property* <<https://cyber.harvard.edu/people/tfisher/iptheory.pdf>> accessed 02 July 2023. [↑](#footnote-ref-22)
23. Ibid p. 15 [↑](#footnote-ref-23)
24. Ibid p. 16. [↑](#footnote-ref-24)
25. I Timothy 5:1 (KJV). [↑](#footnote-ref-25)
26. National Open University of Nigeria, Law of Industrial and Intellectual Property I [↑](#footnote-ref-26)
27. Flora IP, Justifying Intellectual Property Rights < <https://www.floraip.com/2018/02/19/justifying-intellectual-property-rights/>> accessed 14 July 2023. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. William Fisher, *Theories of Intellectual Property* <<https://cyber.harvard.edu/people/tfisher/iptheory.pdf>> accessed 02 July 2023. [↑](#footnote-ref-29)
30. Gregory S. Alexander, Commodity and Propriety (Chicago: University of Chicago Press, 1997), p. 1. [↑](#footnote-ref-30)
31. Keith Aoki, *Globalisation and Intellectual Property* (1st edn, Routledge, 2006). [↑](#footnote-ref-31)
32. Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue," Texas Law Review 69 (1991): 1853. [↑](#footnote-ref-32)
33. Niva Elkin-Koren, "Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators," Cardozo Arts & Entertainment Law Journal 13 (1995): 345. [↑](#footnote-ref-33)
34. Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights," California Law Review 81 (1993): 125. [↑](#footnote-ref-34)
35. National Open University of Nigeria, Law of Industrial and Intellectual Property I. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)