Objectives of Intellectual Property Protection

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1. INTRODUCTION

Intellectual property rights (IPRs) are rights to intellectual property (IP) – that is, legal entitlements granted in respect of intangible subject matter emanating from the human intellect. The rights provided by most forms of intellectual property are ‘chooses in action’ (‘things in action’), rights that are put into effect only by taking action as opposed to taking ownership. In *Torkington v. Magee*, Channell J described a chose in action in the following way:

‘Chose in action’ is known as a legal expression used to describe all personal rights which can only be enforced by action, and not by taking physical possession.¹

It is therefore unwise to believe that all ideas are forms of ‘property’ that belong to someone or some entity. There are a number of policy considerations that are relevant to determining what legal entitlements, if any, apply to ideas. Owing to the broad range of intellectual property laws, there are a number of strategies and issues at play regarding the nature and scope of rights accorded.

As we will see, there is a tension between the interests and aspirations of ideas creators on one hand and ideas users on the other. However, this discord is nothing new. In 1785, Lord Mansfield described the difficulties facing intellectual property law (specifically copyright) as follows:

*We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be derived of their just merit, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.*²

Today the justification of intellectual property protection continues to be a burning issue. In the current digital climate where information can be transferred instantly via electronic scanners, email and SMS, it is difficult for IP rights holders to enforce their exclusive legal

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¹ *Torkington v. Magee* [1902] 2 KB 427 at 430.

² *Sayre v Moore* (1785), 1 East. 361n, 102 E.R. 139n.
rights. Conventional justifications for IPRs are under attack as new technologies consistently update the number of ways information can be created, stored, manipulated and distributed.

In this draft chapter, we seek to understand the challenges facing IP rights holders by examining the nature of intellectual property rights and the policies that underlie IP protection. We analyse the moral and economic justifications for intellectual property rights, and the different arguments for each rationale. We also examine the strengths and limitations of each justification. We then look at how the differing objectives compare, and consider the difficulties in determining the scope of protection.

2. WHY HAVE IP RIGHTS?

2.1. Policy considerations

On a practical level, intellectual property rights are necessary devices for both the creation and dissemination of ideas. As Ricketson and Richardson write:

>In crude terms, such rights as patents, trade secrets, copyright and designs are directed at the stages at which new ideas and information are created, refined and developed into useful products and processes, while trade marks, passing off and, to some extent, copyright and designs are concerned with the subsequent stages at which the ideas and information generated at the earlier stages are marketed and distributed.  


Intellectual property rights can therefore be seen as important mechanisms for creating and exploiting innovative and creative forms of expression. However, they can equally be viewed as unnecessary devices that stifle freedom of expression and competition.

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Jo writes a song, ‘Love Conquers All’, which is protected by copyright. Jo’s song goes to the top of the music charts in the US and Europe. She receives various offers to use the song in films, advertisements and television shows. Jo enjoys the benefits that accrue as a result of copyright ownership and is pleased that the work and effort she put in to create the song have been rewarded. Shelia, an aspiring comedian, wants to parody Jo’s song and release it as a single titled ‘Love Kills All’. Shelia is upset that the copyright that protects Jo’s song may not allow her to release ‘Love Kills All’ without obtaining Shelia’s permission in the form of a licence.

As can be seen from the example above, IP policy makers are faced with the task of striking a balance between the incentives to invest in creative effort and the freedoms to access and develop the material created. In Jo’s mind, IP protection is a valuable means of excluding others, like Shelia, from ‘free riding’ the success of her catchy and popular song. However, according to Shelia, IP protection is a needless barrier to the development of ideas and to freedom of expression.

2.2. Justifications for IP protection

Justifying intellectual property protection can be difficult.

First, and as we saw in the previous draft chapter, traditional justifications for property become distorted when applied to ideas. For example, how can one occupy and possess something that is intangible? Unlike physical property that has defined boundaries, where do the boundaries of intellectual property begin and end?

Secondly, there are strong arguments against creating limits on the free flow of information. Why should one person be able to own an idea? Exclusive use and control of ideas or the way they are expressed appears to offend basic notions of morality and fairness. The monopolisation of information has the potential to impede social, economic and cultural innovations, as well as curb economic growth.

As Hettinger writes:

*Justifying intellectual property is a formidable task. The inadequacies of the traditional justifications for property become more severe when applied to intellectual property. Both the nonexclusive nature of intellectual objects and the presumption*
against allowing restrictions on the free flow of ideas create special burdens in justifying such property.  

2.3. How much IP protection is appropriate?

It is important that the law provides an adequate level of protection for intellectual property. While some scientific inventions and creative works have been known to occur by accident or with little effort, many creators spend considerable time, energy and money creating and developing their ideas. It is likely that others have also contributed to the innovation process by providing significant feedback and monetary backing. For most intangible subject matter protected by IP that reaches the market, a significant amount of labour and effort has gone in to its creation and development.

IP rights holders want their work to be safeguarded from unauthorised use and their efforts to be rewarded by the law.

A confectionary company develops a new type of edible sweet, ‘Sweetpaste’, which makes your teeth turn whiter. It takes five years of research and development as well as countless consultations with scientists, consumer groups, graphic designers and food technicians before ‘Sweetpaste’ is stocked on supermarket shelves. Every aspect of the product is scrutinised – from the taste, to the sugar content, to the advertising campaign. Hundreds of people contribute their time and effort creating and developing the product. The confectionary company spends millions of dollars ensuring not only that the quality of ‘Sweetpaste’ but that the market’s anticipation of the product is at fever pitch.

If there is too little protection offered by the law, individuals and firms may not bother spending valuable time and resources to create and develop new products. The confectionary company would have little incentive to create ‘Sweetpaste’ if the intellectual property they sought did not offer adequate safeguards from unauthorised exploitation. They would not want to see their innovation and creativity go unrewarded. Further, if the confectionary company’s rivals were free to manufacture or use ‘Sweetpaste’ without permission, the confectionary company would be deprived the opportunity to exploit their monopoly and recoup their expenditure.

However if there is too much protection of intellectual property, useful information may be locked up, stifling innovation and commercialisation. If the confectionary company was

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granted an absolute right to exploit and use ‘Sweetpaste’ in perpetuity, others would have little chance to develop or improve the product. The confectionary company would therefore be in a position to control the market to the disadvantage of competitors and consumers alike. Further, if intellectual property protection of ‘Sweetpaste’ was instantly granted on the basis of no innovation/creation thresholds, this would devalue all forms of IP protection. There would be little point in pursuing and maintaining intellectual property protection if it was available to everyone in relation to every idea.

In theory, the objective is to provide incentives that encourage the creation of innovative and creative ideas while enabling others to develop and improve the products created. In broad terms, it is said that it is in the public interest that the material protected by intellectual property be created and exploited. To ensure that the necessary resources are allocated to creation and exploitation of ideas, rewards, in the form of exclusive rights, are granted for limited times.

3. RATIONALES FOR PROTECTING IP

The different rationales for IP protection come under two separate headings – moral and economic. Each rationale emphasises a different set of values. A moral rationale for IPRs emphasises the importance of labour, as well as the significance of a person’s intellect and experiences in the creative process. It brings to the fore notions of individual justice in dealings between members of society. An economic rationale focuses on encouraging people to invest in the innovative process. It rewards innovators for making available to the public the fruits of their investment. As we will see, each rationale has its strengths as well as limitations, and there is a degree of overlap between them.

3.1. Moral rationales

According to a moral rationale for intellectual property rights, individuals have natural rights of entitlement to the products of their intellectual activity and labour. IP protection safeguards people’s ideas from derogation, misattribution, and unauthorised exploitation. IPRs prevent third parties from becoming unjustly enriched by ‘reaping what they have not sown’. This is based on a corrective, distributive justice between the owner and the taker. A taker who ‘reaps’ a reward that naturally belongs to the originator of an idea should be punished.
Moral legal theorists are divided as to what it is, exactly, that entitles creators to protection over their ideas. Some believe that a moral justification for IPRs is borne out of Locke’s understanding that creators have natural rights over the products of their labour. Others are influenced by Hegel’s notion that works should be protected because they are an expression of a creator’s personality.

(a) Locke’s labour theory of property

In the eyes of many legal theorists, a moral justification for intellectual property rights stems from John Locke’s labour theory of property, described in his Two Treatises of Government. Locke’s theory describes a scenario where goods are either held in common by the State or are unowned. A person may acquire property rights if he/she exerts labour in relation to these goods. However, this is only the case if, after the acquisition, ‘there is enough and as good left in common for others’.

Many commentators have debated the meaning of this proviso. Some contend that a condition of equality in the goods must exist after appropriation. According to Ryan, the proviso means that ‘as much as good’ should be left to others. According to Child, others are required to be ‘no worse off’ for the appropriation. Others argue that Locke’s condition is an equal opportunity provision leading to a desert-based but non-competitive allocation of goods. Hughes contends that the proviso is intended to mean that ‘each person can get as much as he is willing to work for without creating meritocratic competition against others’.

A moral rationale for IPRs based on Locke’s argument is therefore seen to rest on the proposition that a person who exerts labour upon resources that are either unowned or held in

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common has a natural property right to exploit those resources. The natural right must be protected and enforced by the nation state if, and only if, others do not suffer any harm.

However, Locke’s labour theory of property does have its limitations. While a person may own whatever labour he/she exerts over an item of physical property, does he/she own whatever that physical property is combined with or used to improve? As Nozick points out:

\begin{quote}
But why isn't mixing what I own with what I don’t own a way of losing what I own rather than gaining what I don’t? If I own a can of tomato juice and spill it in the sea so that its molecules ... mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?\end{quote}

10 It should also be noted that not all IP creators mix their labour with objects or resources that are held in common or are unowned.\textsuperscript{11} For example, while a sculptor may exert his labour over a piece of marble or wood and thereby own the sculpture or carving he creates, a lyricist may create the words of song from the ideas in her head. The lyricist does not exert labour over any material resources that are pre-existing, yet she is entitled to a natural property right to the fruits of her efforts.

\textbf{(b) Hegel’s personality theory of property}

Another moral rationale for intellectual property protection is that innovative works should be protected as they are expressions of a creator’s personality. This argument focuses on the self-expression of the creator rather than the labour exerted by the creator over goods that are held in common or are unowned. According to this rationale, the lyricist should be entitled to natural rights of entitlement to her song lyrics as they are an expression of her ideas, experiences and thoughts. The personality theory of intellectual property rights is understood to take its inspiration from G.W. Hegel’s \textit{Philosophy of Right}.


According to Hegel, an individual enjoys a moral right to the expression of his/her personality. The sphere of ‘personality’ is understood to encompass a variety of experiences, understandings and preferences.

Unlike Locke’s labour theory of property, Hegel’s personality justification:

*focuses on where a commodity ends up, not where and how it starts out. In addition, it focuses on the person with whom it ends up – on an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing.*

According to Hegel’s personality theory, all creative and innovative works are acts of self-expression or self-realisation. A book, song or painting should belong to a creator not just because it is a creative work, but because it is a part of the self.

However, like Locke’s labour justification of IP protection, Hegel’s personality theory has its limitations when practically applied. I am assumed to own my personality. However, do people really own their personalities? As Himma writes:

*If, as seems reasonable, personality comprises an important part of self...then it seems far more natural to say that “I am my personality” than that “I own my personality”.*

Therefore, if people do not own their personalities, it is difficult to see how they could own the products of their personalities.

If, however, it is accepted that people *can* own their personalities and that it is possible to possess a personality interest in particular objects, are works that reflect more of a person’s personality entitled to greater IP protection? While a poem, song, or painting may often reflect the personality of a creator, it is difficult to see how more scientific ideas are receptacles for personality. Inventions, integrated circuits, genetic information and other


technological categories of IP are usually not brimming with expressions of a creator’s personality.

As Hughes notes:

\[\text{We tend not to think of [scientific innovations] as manifesting the personality of an individual, but rather as manifesting a raw, almost generic insight. In inventing the lightbulb, Edison searched for the filament material that would burn the longest, not a filament that would reflect his personality. Marconi chose to use a particular wavelength for his radio because that wavelength could travel much farther than waves slightly longer, not because that wavelength was his preferred form of expression.}\]

3.2. Economic rationales

The economic rationale for IPRs presupposes that without IPRs, the creation and dissemination of cultural and scientific objects would not occur at an optimal level. That is to say, the economic view is that if creators are not given adequate legal protection over their work, many innovations would not occur and society would suffer as a result. According to this notion, an author would not invest the time and effort in writing a book which could be enjoyed by millions if his intellectual property rights were not properly protected. Likewise, a drug company would not spend years and large sums of money developing a life-saving vaccine which could benefit millions if the drug company were to receive no legal protection. Hence, intellectual property protection provides members of society with an incentive to create valuable ideas and to develop products based on them.

(a) IPRs as an incentive

According to an economic rationale, IPRs should be granted because such rights are for the good of society or the public in general. IPRs are justified on the basis that they provide incentives for the creation of enjoyable and useful products which benefit society as a whole.

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Incentive arguments emphasise how IPRs provide a motivation to invest in artistic and innovative activities. As McKeough, Stewart and Griffith note, ‘Protection today is still based on recognising the value of creative endeavour to those who are prepared to develop and exploit it.’ According to the economic rationale, one of the main functions of IP law is to provide incentives to create, maintain and improve creative and innovative works.

Incentive justifications of IPRs are usually countered by three criticisms.

First, some commentators question whether an incentive is necessary for the production and dissemination of ideas. If people enjoy the creative process and consistently express themselves in an artistic or innovative way, wouldn’t they continue to do so irrespective of intellectual property protection? While it could be argued that some people do not need any incentive to create, it is difficult to imagine that those capable of investing in the creative process would continue to do so without receiving the benefit of IP protection. As Hettinger explains:

> *If competitors could simply copy books, movies, and records, and take one another’s inventions and business techniques, there would be no incentive to spend the vast amounts of time, energy, and money necessary to develop these products and techniques. It would be in each firm’s self interest to let others develop products, and then mimic the result. No one would engage in original development, and consequently no new writings, inventions, or business techniques would be developed.*

The second criticism is that the grant of an exclusive property right is not the appropriate incentive. According to this argument, there are incentives to create or invest in the development of ideas other than IPRs. For example, the nation state may encourage the innovative process via tax concessions, subsidies, research and development grants and venture capital. However, the legitimacy of nation state intervention in the creative process should always be questioned. As McKeough, Stewart and Griffith note:

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There is scepticism as to whether the state’s ability to ‘pick winners’ is any better than the market’s. Concern has also been expressed at the reliance placed on unreviewable administrative discretion in the provision of assistance. Against this background pressure has mounted, particularly from those excluded from state favours, for a ‘level playing field’.\(^\text{18}\)

The third criticism is that we do not know how to optimally structure the incentive of IPRs. What exclusive rights should be offered by intellectual property protection, and for what duration? While some argue that the law should provide an absolute monopoly of protection, others contend that a lesser degree of protection is preferable. While some believe that all intellectual property rights should be granted in perpetuity, others argue that all information should be held in common and cost nothing to use. It really depends on what a person’s motives are as an ideas creator or as an ideas user. The law needs to provide a level of protection that safeguards both interests.

(b) The nature of the incentive of IPRs

According to an economic rationale, IPRs are justified because they provide a legal means whereby those who invest time, effort and money in producing ideas may be able to recoup their investment and prevent others from cashing in. It is important to note that IPRs are a conditional incentive. As we will see in the next draft chapter, IPRs are only granted if particular requirements and thresholds are satisfied. No matter how many years or how much money someone has spent developing a product, the benefits of IP protection will only apply if certain criteria are fulfilled.

In return for meeting various thresholds specified by the law, IPR holders are able to exploit, assign and licence the work. The monopoly owner has the power to produce as little of, and charge as much for, a product as he or she likes. The monopoly owner may also enter into licence negotiations with subsequent innovators seeking to develop or improve the product.

The economic rationale for IPRs is endorsed by Edmund W. Kitch, who likens the grant of a patent to the grant of a mining prospect. Kitch defines prospect as ‘a particular opportunity to

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develop a known technological possibility’. The patent holder has an exclusive right to exploit the prospect to the exclusion of all others. According to Kitch, a patent is a reward that enables the patent holder to exploit the returns from his/her investment. Others are not able to derive any economic benefit from the patent unless they negotiate directly with the patent holder to obtain a licence in the underlying technology.

According to this view, IPRs are needed because they allow IPR holders to exclusively control how a resulting work or product is to be commercially exploited. The IP rights holder is in an enviable position of controlling a bidding war over the future licensing or use of his/her creation. Therefore, an economic rationale justifies IPRs because they increase the ease with which IP is traded, divided and transferred.

IPRs allow IPR holders to safeguard their interests and capitalise on their product’s financial success. IPRs also allow IPR holders to negotiate or make arrangements regarding investment in IP. In addition, IPRs allow IPR holders to commercialise IP – by ‘moving the fruits of creative thinking, research and development from the laboratory bench, author’s study or designer’s computer to the market place’. IPRs allow creators to diffuse their innovations, in the hope of making a profit thereby. It is the licensing or sale of IP products, rather than their creation, that generates revenue for rights owners.

In the absence of IPRs, transactions involving IP would more difficult to arrange and enforce. In its Review of Intellectual Property Legislation under the Competition Principles Agreement, Australia’s Intellectual Property and Competition Review Committee (IPCRC) observed that without IPRs, investors in IP would have to rely on contractual mechanisms to protect their interests. According to the IPCRC, relying on contractual rather than IP means to safeguard the innovation process would not be wise. The IPCRC noted:

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\text{In many areas of technology, and particularly those where copying or reverse engineering are relatively easy, such contractual restraints could not provide adequate protection. Even in areas where contractual mechanisms could be effective.}
\]


it is not likely that they be efficient. Rather, social costs would almost certainly be higher under such arrangements, than they are under the current panel of protective instruments.  

It can therefore be seen that, once granted, IPRs provide IPR holders with significant economic advantages. When obtained, IPRs no longer operate as a conditional incentive but as a reward. IPRs give IPR holders a monopoly right to restrict output, control prices and trade their intellectual property (by licence or assignment).

There are three criticisms of a reward justification for intellectual property rights.

First, some question whether there is enough done on the part of the creator to justify the reward of intellectual property protection. While the laws that create IPRs generally specify a threshold of innovativeness or creativity that must be met for the subject matter to gain the benefit of the rights, sometimes this threshold is quite easy to satisfy. As Bently and Sherman write: ‘…copyright’s threshold is set at a very low level and thus catches works which are created for their own sake, such as letters, holiday photographs, and amateur paintings.’

IP thresholds will be discussed in greater detail in the next draft chapter, ‘Principles of Intellectual Property Rights’. While one person may spend years and large sums of money creating and developing an invention or innovation, another may exert very little effort or investment creating a work. No matter how much effort or investment is expended, both persons will attain the same level of protection if the intangible subject matter meets the requirements of the IP law. Intellectual property law recognises no general principle that only the utilisation of substantial ingenuity or the expenditure of substantial money gives rise to IP rights.

Secondly, rewarding a creator with a specified monopoly to control the exploitation of his/her creation creates problems. As Cooter and Ulen explain:

The distinguishing economic characteristic of each of the methods for establishing property rights in information is that they are monopoly rights. This seems paradoxical in that, in general, a monopoly is less efficient than a competitive industry, but information is an unusual commodity ... By giving monopoly power to the creator of an idea, that person is presented with a powerful incentive to discover new ideas. However a monopolist tends to discourage use of a good by overpricing it. Put succinctly, the dilemma is that without a legal monopoly not enough information will be produced but with the legal monopoly too little of the information will be used. 

According to this argument, rewarding a creator with a limited monopoly to commercially exploit his or her creation may lead to restricted supply and increased prices, with consequential losses to consumers.

Thirdly, owing to the conferral of a monopoly, it may take years for ideas to be modified or improved. Worse still, the development of certain ideas may be put on hold permanently. An IP rights holder may see some benefit in keeping valuable information secret. He may not want to assign or licence his valuable property rights to a competitor, even though that competitor may have more resources to exploit an invention to its fullest potential. Or, an IP rights holder may wish to simply bide his time before introducing a new product which vastly improves what is currently on offer.

4. **Conclusion**

Although distinct, the moral and economic rationales for IPRs are not completely dissimilar or removed from each other. The rationales are not mutually exclusive and, as we have seen, there is common characteristic to each. Both the moral and economic rationales value innovative and creative activity.

According to economic rationales, fewer innovative works would be created in the absence of IPRs. Lemley describes the traditional economic justification for IP as follows:

*Ideas are public goods: they can be copied freely and used by anyone who is aware of them without depriving others of their use. But ideas also take time and money to create. Because ideas are so easy to spread and so hard to control, only with difficulty may creators recoup their investment in creating the idea. As a result, absent*
intellectual property protection, most would prefer to copy rather than create ideas, and inefficiently few new ideas would be created.  

Economic justifications for IPRs therefore recognise the complexities in creating new products and innovations. They also appreciate the difficulties in exercising exclusive ownership over intangible assets. Accordingly, creators should be provided incentives that encourage the innovation process and be compensated when they share the fruits of their efforts with society as a whole. They should be rewarded a monopoly that entitles them, to the exclusion of all others, to exercise control over how their IP is managed and exploited.

The moral rationale also values and appreciates innovation. Notions of individual justice and fairness demand that a creator’s contribution to society be recognised. Rather than bringing to the fore the benefits that IPRs can bring to society in general or to those who invest in creative and innovative activity (as economic analysis does), moral justifications highlight the point of view of the person whose intellectual activity is in question. Whether innovations and inventions are expressions of labour or personality, people are seen as having a natural right to what they create. Like the economic rationale, moral rationales for IPRs support the notion that those involved in the innovation process should be rewarded. As Article 27(2) of the Universal Declaration of Human Rights states:

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Hence, each of the differing objectives of IPRs subscribe to the notions that (i) intangible subject matter should be safeguarded from unauthorised exploitation, and (ii) that the protection provided by the law should be based on the value of recognising creative and innovative endeavour.

The foregoing rationales place different emphases on how information should be protected by intellectual property law. While moral justifications for IPRs focus on the natural rights of those who create information, economic justifications highlight the incentives and rewards that are on offer when information is developed and traded. As Cooter and Ulen stated previously, information is indeed ‘an unusual commodity’. Yet it is precisely because

information is so unusual that there can be so many different justifications for why information should be protected by the law.

Additionally, there are a number of rationales as to why ideas should not be protected.25 According to these views, owning ideas leads to the suppression of innovation. IPRs are seen to impinge upon creative freedoms and only benefit a small minority.

For people like Sheila, intellectual property protection is viewed as an impenetrable barrier to the free flow of information. The copyright that protects the song ‘Love Conquers All’ prevents society from engaging with new and interesting ideas.

In the words of Macaulay, copyright is ‘a tax on readers for the purpose of giving a bounty to writers’.26

For others, the law has the potential to offer too much protection. According to Drahos:

IPRs are complex systems of rules that may in certain cases confer on their holders enormous economic power. For example, patents may in certain cases allow the patent owner the sole right to import goods into a market, meaning that the patent owner can price-discriminate between markets (Heath 1997). The monopoly nature of IPRs, including their potential to affect the free movement of goods, sits at odds with the economic case for allowing the free movement of goods across borders.27

Therefore, when determining the scope of intellectual property protection, it is important to be aware of the divergent objectives and policies that inform the creation of IPRs. There must be a system of checks and balances and a consideration of the different interests at play. The law needs to keep in mind the legitimacy of granting property rights over assets that are


intangible, non-rivalrous and cannot be depleted. Further, it is also important to consider the primary nature of these rights, and some of their common characteristics – questions we will consider in the next draft chapter.