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## Duty, Consequences, & Intellectual Property

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ARTICLE

DUTY, CONSEQUENCES, &  
INTELLECTUAL PROPERTY

SHUBHA GHOSH\*

INTRODUCTION: THE ETHICS OF INTELLECTUAL PROPERTY

Intellectual property rights are often justified as providing incentives for creating and inventing new works. Such justification informs discussion of intellectual property rights in the United States<sup>1</sup> and globally through the World Trade Organization and the TRIPS Agreement.<sup>2</sup> With incentives as a foundation, intellectual property policy is evaluated through consequences of new rules and institutions for the creation and dissemination of new works.

This article examines the consequentialist justification for intellectual property through the debates over duty in ethical and religious thought found in the Hindu text *The Bhagavad Gita*. Incentives offer an unsatisfactory justification for intellectual property. There is doubt among scholars whether such incentives are necessary since individuals create out of innate desire or need.<sup>3</sup> Even if intellectual property rights do supplement the urge to innovate, the question remains whether innovation should be the solely relevant value of intellectual property. In an earlier article, for example, I

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1. The objectives of copyright and patent laws are laid out in the U.S. Constitution which grants Congress the power “[t]o promote the Progress in Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

2. The objectives of the TRIPS Agreement are stated as follows: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” Agreement on Trade-Related Aspects of Intellectual Property Rights, pt. I, art. 7.

3. See, e.g., Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 119–20 (1993) (questioning the incentives rationale for patent and copyright); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 29 (2011) (questioning the empirical basis of the theory of copyrights as incentives).

pointed to the role of conflicting use as the defining aspect of intellectual property law.<sup>4</sup> Specifically, I argued that intellectual property disputes arise from the conflicts over the use of created materials, works yet to be created, and inchoate works that serve as inputs for consumption and creation. Intellectual property design has consequences not only for creators and inventors, but also for consumers and other constituents, such as patients requiring access to medicines, students demanding access to educational materials, and citizens wanting information about their elected officials and representatives. If justifications for intellectual property are consequentialist, then what consequences should matter and how should they be weighed?

Because intellectual property law has multiple consequences beyond the effects on creative people, what duties should be placed on intellectual property owners for the management of new works? Sometimes this question is framed in terms of responsibility and obligations. More often, it is framed as a matter of limitations on exclusive rights. However, deriving duties (whether as affirmative obligations or limitations) from consequences can be complicated and futile, and tracing the effects of intellectual property laws can be indeterminate and speculative. The language of consequence readily gives way to debates over rights and duties based on deontic concepts, such as the right to the fruits of one's labor or the right to health and safety. While such rights talk can be engaging, it suffers from some of the same problems as open-ended consequentialism. How are we to balance when rights are in conflict? Is that balance itself based on consequentialism?

This back-and-forth arises from the challenge of identifying the role of intellectual property law in comporting to a sense of justice. What is the right set of rules and institutions and how are they to be identified? In *The Idea of Justice*, Amartya Sen presents the broad contours of this foundational question in his analysis of philosophers of social justice spanning over a millennium of thought.<sup>5</sup> Professor Sen identifies two approaches to social justice among these thinkers. One approach is an idealist notion that pursues a view of justice at any cost, while the other grounds justice in the experiences and needs of real people. Professor Sen traces this distinction to Hindu philosophy, which builds on two conceptions of justice—*niti* and *nyaya*.<sup>6</sup> The first view of justice (*niti*) is based on organizational propriety and behavioral correctness, while the second (*nyaya*) is based on a comprehensive concept of realized justice. As Professor Sen points out, justice as *niti* could justify the destruction of the world in order to avoid sacrificing a principle of correctness, while justice as *nyaya* would never countenance

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4. See Shubha Ghosh, *Managing the Intellectual Property Sprawl*, 49 SAN DIEGO L. REV. 979, 979–1032 (2012).

5. AMARTYA SEN, *THE IDEA OF JUSTICE* XV (2009).

6. *Id.* at 20.

such an outcome.<sup>7</sup> Justice as *niti* de-emphasizes consequences while justice as *nyaya* incorporates them.<sup>8</sup>

The challenge posed by Professor Sen is how to navigate the shoals of justice as *niti* and justice as *nyaya* to build decision making rules that consider consequences without sacrificing duty. I engage in the same challenge in this article in the context of intellectual property. Professor Sen brings this debate alive through appeal to The Bhagavad Gita (“the Gita”), a critical text in Hindu Scriptures dating from as late as the fifth century BCE.<sup>9</sup> The Gita, or The Song of God, is part of the Sanskrit epic the Mahabharata, which chronicles the battle between two sets of cousins over control of what is contemporary Hashtanipur in northern India. The Gita itself is a dialogue between the Lord Krishna, who has taken the form of a charioteer and spiritual guide, and Arjuna, a warrior from the set of cousins on the righteous side of the battle. Arjuna is hesitant to enter battle, concerned about the harm that war will cause. Krishna admonishes Arjuna to proceed into battle and perform his duty as a warrior. In this 700-line dialogue, Professor Sen identifies the essential arguments for and against consequentialism. He settles on Arjuna’s side, but with a more sophisticated conception of consequential analysis, one that incorporates elements of duty. This article builds on his ideas with application to intellectual property.

Before proceeding, let me first address a critical and potentially devastating threshold issue. Seeking guidance in Hindu scripture for contemporary intellectual property policy may seem like a curious and fanciful diversion. For those who ground laws in national traditions, the scriptures are irrelevant, since the Hindu tradition is part of only certain national traditions and not others.<sup>10</sup> What relevance could they have for United States law? More to the point, why should we look to religious traditions as a guide for secular laws? The first question raises deep questions about the foundations of legal analysis, while the second strikes at the heart of this Symposium. But I think both are misguided. My goal is not to ground legal doctrines in these ancient religious texts. Instead, I glean the debates in these texts for their profound examination of the moral and ethical issues that pervade intellectual property law and policy. I explore the ethics of intellectual property here. And from this ethical examination, I hope to re-think how we address intellectual property policy.

Without trying to sound grandiose, I parallel my discussion of the Gita with that of Mohandas Gandhi, who built on the ethics espoused in the Gita in shaping his legal and political movement for independence in colonial

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7. *Id.* at 21.

8. *Id.* at 22.

9. See MOHANDAS GANDHI, THE BHAGAVAD GITA ACCORDING TO GANDHI (John Strohmeier ed., Mohandas Gandhi trans., 2000).

10. For a history of Hindu and Buddhist thought in the United States, see RICK FIELDS, HOW THE SWANS CAME TO THE LAKE (1992).

India.<sup>11</sup> In fact, my reading of the Gita is from Gandhi's translation of the work. But Gandhi learned from the Gita a way of bringing about social change.<sup>12</sup> I do not plan anything as ambitious and life-altering as Gandhi's campaign of nonviolent resistance, or ahimsa, in changing intellectual property law. Instead, I look at the ethics of a problem to make the case for social and legal change in intellectual property. A change in outlook, one hopes and knows, can change the world.

The arc of this article is as follows. Section one presents the arguments from the Gita, filtered through the work of Professor Sen, on the debate between consequences and duty as the cornerstone of a theory of justice. Section two shows how these insights can serve to develop an ethical theory of intellectual property with implications for policy. Section three concludes with a proposal for a duty-based justification for intellectual property rights.

#### I. ACTION WITHOUT ATTACHMENT TO CONSEQUENCES

As background to the discussion of The Bhagavad Gita, several concepts are worth explaining. The first is that of dharma, which is often translated as "law." But, as Professor Don Davis emphasizes, dharma means law in the broadest sense, not limited to positive law or to the workings of particular institutions such as courts or legislatures. Instead, dharma means law which includes social mores, norms, customs, and expectations.<sup>13</sup> A concept related to dharma is that of karma, loosely translated as "right action." What makes an action right, as opposed to a wrong action that can be punished, is the concept of law as dharma. Karma embodies a form of consequentialism whereby right action leads to right results and fruits while bad action leads to punishment. But karma is understood in relationship to dharma.<sup>14</sup>

The relationship between dharma and karma dictates what it means for a person to be in the world and interact with others. Right action depends upon law in the broadest sense, going beyond mandates and statements of lawmakers. As Professor Davis explains, "Individuals act, but they act in social roles that only collectively define their worldly persona."<sup>15</sup> Action here refers to acts towards others. But often these acts between people are mediated by things and, according to Professor Davis, the relationship between individuals and things is fragmented. Property defines this set of relationships, and the fragmentation is transparent in the range of objects that fall into property relationships. Coincidentally for the purposes of this paper, Professor Davis discusses a music downloading website as an example

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11. See GANDHI, *supra* note 9, at 45.

12. See *id.* at 54.

13. DONALD R. DAVIS, JR., THE SPIRIT OF HINDU LAW 22–23 (2010).

14. *Id.* at 134–35.

15. *Id.* at 89.

of the fragmented notion of property in Hindu thought.<sup>16</sup> On such a website, there can be tens of thousands of property interests with respect to the multitude of files uploaded and downloaded. Similarly, in the Hindu concept of satva (the equivalent of property), relationships can have many dimensions and many claimants.

Professor Davis describes the contrast between satva and Western notions of property as follows: “In the Hindu view . . . property is a token of relationships, while [in the West] relationships are tokens of property and contract, the objectification of the will and the freedom to transact those objects through agreements.”<sup>17</sup> Satva is about relationships, but these relationships need to be understood against dharma.

On this point, Professor Davis identifies an unequal and unjust side to Hindu notions of property. As he observes, rules of inheritance and ownership reinforce an unegalitarian social order, which in turn is justified by Hindu law.<sup>18</sup> To counter this, Professor Davis advocates a more complete notion of property—one not rigidly grounded in social conventions and traditions, but in the Hindu precepts of persons and relationships. “To say that property has only socially determined value neglects the more purposive, expressly transcendental value imparted to property through conscious theological agendas, broadly defined.”<sup>19</sup> I take Professor Davis to mean that property relationships need to be understood against a broad concept of dharma. In the remainder of this article, I build on these foundational concepts of Hindu law to make the case for a form of consequentialism in intellectual property, one that takes to heart the relationships that undergird intellectual property.

A. *The dialogue between Arjuna and Krishna animates the consequentialist approach*

Arjuna’s choice to go into battle seems much graver than the relatively mundane decisions of actors within the intellectual property system, since whether or not to kill presents a graver question than whether or not to copy. But the dilemma facing Arjuna is not simply a matter of whether to engage in battle. After all, Arjuna is a warrior. He signed up for that role and has to act within that role. The question before Arjuna is not about killing, but about the consequences of acting even if the cause is justified. That question is no different from what confronts someone acting or designing within an intellectual property system.

Arjuna is one of the five Pandava brothers whose kingdom of Hastanipur was stolen through trickery in a game of dice by their five hundred

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16. *Id.* at 101.

17. *Id.* at 102–03.

18. DAVIS, *supra* note 13, at 106.

19. *Id.* at 107.

cousins, the Kauravas. Thus, Arjuna's battle is for the restoration of the kingdom. Since the Kauravas used deceit to win the kingdom, the cause for fighting is just. But Arjuna questions the means. Is the loss of life, the inevitable murder of one's family members, justified by the ends of righting the deceit? Arjuna also questions the ends. Is it better to have the kingdom restored to the Pandavas or should the ousted brothers just bear the rule of their cousins? Krishna, in the guise of Arjuna's charioteer, urges him to fight, not because the ends are just, but because it is his obligation to act. In Krishna's mind, the weighing of consequences detracts from the task at hand and the obligations of the warrior in battle.

Arjuna's dilemma can be applied to many contemporary situations. A doctor must decide how and to whom to render care. A judge must decide on the correct punishment, including the ultimate punishment of the death penalty. An attorney must decide which client to serve. For an inventor, action might lead to a new item being created. Such a person may be driven by many passions. The urge might be spiritual; it might also flow from a sense of pleasure or trivial amusement. Acting to create forecloses other options, such as direct service to others through education, provision of personal needs, or developing interpersonal relationships. But when the new item is created, the inventor must decide what to do with it. Shall it be given away for free? To the highest bidder? As with Arjuna, the critical question is *how* to decide, not simply what to decide. Arjuna's doubts stem from not understanding how to decide to act.

Since Arjuna confronts a question of life or death, we can posit an analogous problem for the inventor that illustrates the relevance of Arjuna's doubts to intellectual property law. Suppose our hypothetical inventor conceives of a wonder drug that can cure disease and comfort the suffering. Should this person invent the drug? Is there an obligation to invent? Or can the inventor decide that such an invention would not be desirable because of the consequences of overpopulation or the strain on economic resources? If the drug is invented, should it be made available to everyone or should we countenance the death of some who cannot have access because of lack of ability to pay, lack of medical care systems for drug distribution, or failure to provide alternatives such as generics? Is there a duty to provide the drug once invented? Or is the provision contingent on other factors, such as ability to pay? These questions ask us to confront deeper choices about how to organize invention and distribution.

With intellectual property, the parallels to Arjuna's dilemma point to the ethical underpinnings of technology and its role in social progress. A dominant assumption is that progress and innovation are the primary goals of intellectual property. Such a view echoes the poet T.S. Eliot, who, according to Sen, interprets Krishna's advice to Arjuna as follows: "'And do not think of the fruit of action./ Fare forward.' . . . 'Not fare well,/ But fare

forward, voyagers.’”<sup>20</sup> To Eliot’s thinking, people should create and invent without consideration of consequences. The act of creation itself that produces the new thing is what matters. In this way, invention “fares forward” and progresses. The goal is indiscernible and irrelevant.

My characterization of intellectual property in nonconsequentialist terms is counterintuitive. After all, creation does not occur randomly. A poet wants to write a specific poem, and a chemist wants to isolate a particular compound. Invention and creation are thus goal-oriented. But the shibboleth is not espousing randomness of any kind; rather, Eliot’s poetic rendition of Krishna’s encouraging Arjuna is in opposition to consequentialist thinking. Dr. J. Robert Oppenheimer quoted Krishna’s words during the first detonation of the atomic bomb in the New Mexico desert: “I am become death, the destroyer of worlds.”<sup>21</sup> As for technology, Dr. Oppenheimer in his own words stated a version of Krishna’s admonition against consequentialism: “When you see something that is technically sweet, you go ahead and do it and you argue about what to do about it only after you have had your technical success.”<sup>22</sup> Satirist Tom Lehrer expressed this sentiment in more stark and striking terms in a song about another rocket scientist: “Once the rockets are up, who cares where they come down? That’s not my department. (says Wernher von Braun).”<sup>23</sup>

#### B. Clarifying matters of language between the deontic, utilitarian, and consequentialist approaches

Scholars of intellectual property are familiar with deontic, or moral rights, justifications for intellectual property which are framed in opposition to utilitarian justifications.<sup>24</sup> But my argument in this paper rejects a purely moral rights view of intellectual property that would posit the rights of the creative and inventive person as the principal foundation for intellectual property law and policy.<sup>25</sup> By advocating for a consequentialist approach in

20. SEN, *supra* note 5, at 23 (quoting T.S. ELIOT, *Dry Salvages*, in *FOUR QUARTETS* 29–31 (1944)).

21. ALEX ABELLA, *SOLDIERS OF REASON: THE RAND CORPORATION AND THE RISE OF AMERICAN EMPIRE* 41 (2009).

22. SEN, *supra* note 5, at 211 (quoting U.S. ATOMIC ENERGY COMM’N, *IN THE MATTER OF J. ROBERT OPPENHEIMER: TRANSCRIPT OF HEARING BEFORE PERSONNEL SECURITY BOARD* 81 (1954)); *see id.* at n.\* (giving context and background to quote).

23. TOM LEHRER, *Werner Von Braun on THAT WAS THE YEAR THAT WAS* (Reprise Records, 1965).

24. *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1988) (examining Lockean and Hegelian theories justifying intellectual property rights); PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1996) (drawing on Lockean and Hegelian theories to develop a non-propietary basis for intellectual property rights). For a rethinking of intellectual property rights that accounts for users’ interests, see Ghosh, *supra* note 4, at 979–1032.

25. *See, e.g.*, ROBERTA K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010) (discussing the motives of human creativity and how intellectual property law should be reflective of those motivations).



the mode of Arjuna, however, I am not supporting a utilitarian basis for intellectual property either. Utilitarianism would base policy on aggregating the interests of a wide range of actors beyond those of the inventor.<sup>26</sup> My approach overlaps with utilitarianism only to the extent that people other than inventors matter for designing intellectual property. But I am skeptical about reducing people to utilities and interests. That is one reason why I am equally critical of utilitarian theories of intellectual property.

Additionally, a utilitarian justification leads to exactly the same error Dr. Oppenheimer cautioned against: technical success first, consideration of consequences second. Consider the following question: is technical success in developing a new product justified on utilitarian grounds? The new product is justified if aggregate utilities increase. The problem is that having something new is, in most instances, going to increase utility. A new item means more choices, and in a utilitarian framework, more choices are a good thing. In some rare situations, the invention might be an unalloyed bad, such as a harmful chemical. In other situations, there may be a mix of harms and benefits. But given the uncertainties over harms, the prospect of the new product will bias the utilitarian approach expressed by Dr. Oppenheimer.

As an alternative to a rigid form of utilitarianism, I argue for a view that considers consequences in a more precise and nuanced way.<sup>27</sup> Arjuna is right to have his doubts, and Krishna may seem to have tunnel vision in advising Arjuna to simply follow his duty as a warrior. At the same time, consequentialist thinking like that exhibited by Arjuna can lead to paralysis and inaction. Krishna's urging Arjuna to do his duty as a warrior offers an alternative to inaction.

Arjuna's dilemma and Krishna's attempt at consolation are revealed in some key passages from the text. Arjuna is uncertain whether his acts are justified given the potential adverse consequences, and he expresses his hesitancy as follows: "It were better far to live on alms in this world than to slay these venerable elders. Having slain them I should have blood-stained enjoyments."<sup>28</sup> Since any victory is hollow—it comes at the expense of killing others—Arjuna states a quandary: "Nor do we know what is better for us, that we conquer them, or they conquer us."<sup>29</sup> Arjuna wonders whether defeat would be better than victory in order to avoid killing. Conse-

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26. See WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 51–52 (2d ed. 2012) (describing how the Greatest Happiness Principle considers the interests of the whole of society as opposed to those of any one individual); MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 157 (2012) (explaining aggregation of interests through the concept of extended preferences).

27. See ADLER, *supra* note 26, at 22–23 (providing an example of rigid utilitarian calculations regarding consequences).

28. GANDHI, *supra* note 9, at 36.

29. *Id.*

quently, his doubt leads to inaction: “My being is paralyzed by faint-heartedness. My mind discerns not duty.”<sup>30</sup>

Krishna’s response is that Arjuna’s doubts flow from attachment that ties down his mind and blinds his vision to the right action. “Hold alike pleasure and pain, gain and loss, victory and defeat,” Krishna counsels, “and gird up thy loins for the fight. So doing thou shalt not incur sin.”<sup>31</sup> View all outcomes equally and be not overly attached to any particular result. Right action is action based not on seeking particular consequences, but in equanimity in action. “Thus have I set before thee the attitude of knowledge. Bear now the attitude of action. Resorting to this attitude thou shalt cast off the bondage of action,” Krishna urges.<sup>32</sup> “Action alone is the province, never the fruits thereof. Let not thy motive be the fruit of action, nor shouldst thou desire to avoid action.”<sup>33</sup> Krishna advises Arjuna to follow his duty rather than be immobilized by belabored and inhibiting consequentialism.

### C. *Reconciling Arjuna’s and Krishna’s positions*

In the remainder of this section, I address how to reconcile Arjuna’s positions with Krishna’s. My answer serves as the basis for understanding intellectual property presented in section two.

Following one’s duty and basing actions on consequences are not mutually exclusive. The positions of Krishna and Arjuna reflect the two different notions of justice (*niti* and *nyaya*) discussed earlier. *Niti* is justice as organizational propriety and behavioral correctness. It entails acting on rules for proper action at any cost. Krishna illustrates *niti* when he urges Arjuna to perform his duty for its own sake. Arjuna’s consequentialist position is also an example of *niti* as he seeks the correct act in order to reach the correct result. *Nyaya*, on the other hand, is justice as a comprehensive sense of the good. It includes not only good results but also good means, it allows for options outside of rules for proper action if such options themselves are beneficial. *Nyaya* is more flexible than *niti* in the conception of justice and, according to Sen, is more attuned to actual institutions and experiences of human lives. One thinks of Soren Kierkegaard’s criticism that Western philosophers have built cathedrals and lived in dog houses.<sup>34</sup> This criticism is aimed at justice as *niti*. *Nyaya* would not see the world as so

30. *Id.*

31. *Id.* at 44.

32. *Id.* (translation notes omitted).

33. *Id.* at 48.

34. SOREN KIERKEGAARD, *THE SICKNESS UNTO DEATH: A CHRISTIAN PSYCHOLOGICAL EXPOSITION FOR UPBUILDING AND AWAKENING* 43–44 (Howard Hong & Edna Hong eds., trans., Princeton University Press 1983) (1849) (“A thinker erects an immense building, a system, a system that embraces the whole of existence and world history, etc., and if his personal life is considered, to our amazement the appalling and ludicrous discovery is made that he himself does not personally live in this huge, domed palace but in a shed alongside it, or in a doghouse, or at

clearly divided into cathedrals and dog houses. Justice as *nyaya* is attuned to the context within which people must live and act.

Both Arjuna and Krishna espouse positions that reflect justice as *nyaya*. Despite his call to duty, Arjuna is wary to simply go out and engage in battle. He recognizes that his acts will change the world. People will be hurt, and the world will be different as a result of his engagement and as a result of his retreat. Furthermore, whatever his choice, the actions are his, and he is responsible as a matter of morality and must live with the results. Therefore, he must consider the results in reaching his decision. Finally, his acts occur in a context of relationships with friends, with families, and with enemies. Not only is Arjuna's agency at stake through his choices, but so is the agency of others. To simply act out of a sense of duty is to ignore one's responsibilities and one's relationships with others. Consideration of consequences allows an actor to avoid these types of ignorance.

Justice as *nyaya* informs Arjuna's position. It is meant to be flexible and contextual. But Krishna's position is not nearly as rigid as it might at first appear. As Gandhi emphasizes in the introduction to his translation of the *Gita*, Krishna advocates not only for the right action, but also for the right reason. In the battle against the Kauravas, Arjuna is correcting an injustice (the deceit of his cousins in appropriating the land). To contemplate all the possible consequences distracts from the task at hand. The right action is to be engrossed in the fulfillment of the task with the renunciation of the fruits. Action is not for the sake of personal pleasure, for personal gain or for the infliction of harm on others. For Krishna, the real battle is not on the field, but in one's self as one finds the right. But that internal battle is not about contemplation and measurement of means and ends, or costs and benefits. It is about purifying the mind of attachment and motive and moving forward. Krishna is not advocating blind devotion to duty as rule-bound and rigid *niti*.<sup>35</sup> Action without attachment leads to justice as *nyaya*—contextual, individual, the product of the battle within.

To act as Krishna teaches is not to adopt Dr. Oppenheimer's approach to achieving technical success. Acting without attachment does not mean acting with indifference to results. What Krishna teaches is action without expectation of a result, without attachment to specific consequences, or action solely as a means to an end. When Krishna speaks of duty, he is speaking of the correctness of the act, a correctness that is understood comprehensively. While such teaching guides individuals in spiritual battle, the question is whether Krishna teaches how to build a cathedral, dog house, or any edifice in between. Krishna's principle of action frees us from

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best in the janitor's quarters." Kierkegaard was referring to Hegel in this famous quote, but the sentiment is applicable to any builder of "intellectual cathedrals."

35. See GANDHI, *supra* note 9, at 15–24.

the threat of inaction and the myopia of means-end rationality. Arjuna, with all his doubts and indecision, becomes more appealing by comparison.

But the verbal battle between Arjuna and Krishna points to the internal battle of any decision maker. A judge chooses between following precedent, or breaking from it to reach the correct result. An advocate decides how to defend an indefensible client. Consequences matter; and right action does not entail indifference to ends. Instead, as Sen puts it, “sensitivity to consequences does not demand insensitivity to agencies and relations in evaluating what is happening in the world.”<sup>36</sup> Furthermore, attachment to consequences can cause tunnel vision and deviation from the right action. Arjuna’s and Krishna’s dialogue are the poles of any decision making process which reaches resolution through deliberation, an understanding of consequences, and a keen attention to action and service. Speaking broadly, the ethics of consequentialism can inform all action, especially the acts of creation and innovation that are the subject of intellectual property.

## II. ACTION AND DUTY IN INTELLECTUAL PROPERTY

The previous section presented the case for a consequentialist basis for intellectual property ethics drawn from the Gita. Although the section was written abstractly, the proposed ethical theory has two implications for practical aspects of intellectual property law and policy. The first pertains to political activism and intellectual property; the second, to intellectual property law reform.

One idea to draw from the discussion of Hindu law in section one is the concept of action which contrasts starkly with the labor that underlies intellectual property. Drawing on John Locke, many theorists of intellectual property see labor as a form of appropriation.<sup>37</sup> A person acts upon the material world and appropriates things as property in order to obtain value from the ownership. In the Gita, particularly Krishna’s concept of action without consideration of reward, labor is not a form of appropriation, but a form of service. One acts not to capture value, but to serve. Service may also be the product of seeking fruits and benefits. But that is a question of whether to act according to consequences (like Arjuna), or without regard for results (like Krishna). Action under Hindu law is within dharma, based on one’s relationship to the world and to others. But these relationships can be complex. In this section, I address two situations. The first regards action in a political context; the second regards action within the ethical order against which intellectual property arises. Through these examples, I illus-

36. SEN, *supra* note 5, at 221.

37. See, e.g., Seana Valentin Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138–67 (Stephen R. Munzer ed., 2001) (discussing labor as appropriation in the context of Lockean arguments for common ownership).

trate the arguments of section one about consequentialism and the implications for right action.

A. *Intellectual Property Civil Disobedience*

Protest against the strengthening of intellectual property laws at the expense of users arises from many sources.<sup>38</sup> Computer programmers, often labeled as hackers, expose flaws in encryption that restrict access to code. Even a cursory search on sites like YouTube reveals anonymous posters challenging copyright laws through uploads of copyrighted works. Aaron Swartz, computer programmer and internet activist, was driven to suicide in 2013 after being charged with violations of federal wire fraud statutes and the Computer Fraud and Abuse Act for downloading proprietary scholarly articles from the JSTOR database at MIT. His final act was a comment on the injustice of privatizing scientific research and knowledge through criminal laws.<sup>39</sup> Such acts are reminiscent of the self-immolation of Buddhist monks in Southeast Asia in the 1960s. These civil protests also parallel the strategies of Martin Luther King, Jr., who emulated the methods Gandhi used in South Africa in the 1900s and during the Indian independence movement of the 1920s and 1930s. Gandhi, in turn, was inspired by the Gita, and this connection demonstrates how the ethical system of the ancient text framed in the debate between Arjuna and Krishna provides the foundation for modern civil disobedience, whether for civil rights or for intellectual property limitations.

Of course, protest movements take many forms and have many sources other than Gandhi and the Gita. I do not want to oversimplify a rich and variegated history. But civil disobedience provides a stirring illustration of the refined consequentialism coming out of the dialect between Arjuna and Krishna. Gandhi's campaign of non-violence was based on the ethical system of the Gita. Of central importance to Gandhi was action without attachment to ends. Lack of attachment did not mean indifference to result or to consequences. Instead, Gandhi was following Krishna's instruction to Arjuna—right action according to one's duty. By engaging in civil disobedience, whether by evading the salt tax or protesting against the British government, Gandhi was attempting to expose the injustice of laws. The acts of disproportionate violence by the state in response to passive resistance to unjust laws exposes the injustice. The confrontation and conflict has its own consequentialist logic. Violently suppressing passive and morally strong protestors reveals the power of the state against the moral will of its citizens challenging unjust laws.

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38. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2002) (discussing how innovators in various fields are stifled by current intellectual property laws).

39. See Noam Scheiber, *So Open It Hurts: What the Internet Did to Aaron Swartz*, *THE NEW REPUBLIC*, Mar. 11, 2013, at 16 (discussing how Swartz's philosophical beliefs about intellectual property led to his suicide).

In a discussion of rights, however understood, Gandhi's strategy can readily be characterized as a means of securing individual rights. But that interpretation would be misguided. For Gandhi, the issue was not individual rights, but the exposure of an unjust system. Once the injustice is exposed, forces are set in motion to uproot and replace it with new institutions. Action leads to results, but the action must be pure and not motivated by consequences. Instead, the purity of the protestor contrasts with the purposeful suppression of the state. Nonattachment to consequences, including the securing of rights, is what keeps the protestors pure as they are mindful only of the right, just action.<sup>40</sup>

But it is impossible to remain pure, especially in the political realm. Gandhi himself was criticized for his tactics. He was accused of being too personal in his outlook and approaches. As the poet Sarojani Naidu quipped, India had to spend much money to keep Gandhi in poverty.<sup>41</sup> What she meant was that Gandhi's nonattachment to rights would sacrifice engagement in interest politics. Consequently, his approach created a rift with the Muslim minority on the subcontinent, sparking the division that led to the partition into India and Pakistan upon independence in 1947. Gandhi was also resistant to special set-asides and programs for the untouchable caste, again causing splits within the independence movement.<sup>42</sup> These examples illustrate the difficulty of being pure in action. They also raise the question of whether interest groups politics and rights talk can so readily be ignored through passive resistance. Even worse is the possibility that Gandhi's methods had its own majoritarian biases.

Civil disobedience to intellectual property law follows in Gandhi's wake. With the internet as a battleground, activists pursue the goals of free code and open access without any of Arjuna's hesitancy. The need to act without attachment to individual reward and with a belief in the truth of one's action drives scholars, programmers, and attorneys to preserve internet governance from corporate control and proprietary ownership. Battles continue in cyberspace, in legislatures, and in the courts. Professor Lawrence Lessig, a staunch advocate for copyright reform in the 1990s and 2000s, shifted his focus to reform of Congress and the legislative process, the root cause of excessive intellectual property legislation. Civil disobedience against intellectual property targets the unrelenting use of state power to quash individual freedom.<sup>43</sup>

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40. See GANDHI, *supra* note 9, at 59 (describing nonattachment to consequences as disinterest).

41. ARTHUR HERMAN, *GANDHI & CHURCHILL: THE EPIC RIVALRY THAT DESTROYED AN EMPIRE AND FORGED OUR AGE* 295 (2008).

42. B.R. AMBEDKAR, *MR. GANDHI AND THE EMANCIPATION OF THE UNTOUCHABLES* 17–20, 22 (1943).

43. See, e.g., LAWRENCE LESSIG, *LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT* 4–5 (2013) (discussing how corruption in the political system has led to laws biased against users).

However, contemporary civil disobedience is subject to the same criticism as was aimed at Gandhi. By suppressing attachment to private interest and emphasizing freedom and the public domain, the resistance ignores some of the virtues of intellectual property ownership, particularly among the economically and politically excluded.<sup>44</sup> This tension appears in the conflict between the so-called hacker community in developed countries and traditional knowledge holders in developing countries.<sup>45</sup> The former seek the minimization, if not the elimination, of intellectual property rights, while the latter values intellectual property rights in individual creators and communities. At stake is the use of property rights to suppress liberty in opposition to the recognition of property rights to secure equality and economic advantage. On a broader scale are the differing views of intellectual property rights in developed and developing countries. As with the debate over partition of the subcontinent, stakeholders are diverse and differ in commitments to legal rights. Advocates for strong intellectual property protection to support artists and creators ignore that most intellectual property are owned by publishers and others who commercialize intellectual property for their own benefit rather than the benefit of creators. Advocates for greater user rights or access ignore how products and services protected by intellectual property are created. Defenders of user rights in the developed world ignore how intellectual property might benefit rights holders in the developing world. These often conflicting interests reflect deeper distribution questions that intellectual property may not be able to alleviate.

While civil disobedience can be uncompromising, it can also be energizing. It is this spiritual and moral energy that Krishna seeks to unleash. By contrast, Arjuna is the pragmatist, overwhelmed by too many consequences and possibilities. Each position tempers the other. The nuanced consequentialism that flows from the dialectic has influence in the design of intellectual property reform. There is quite a chasm between the lofty discussion of Arjuna and Krishna and the mundane details of law. But the consequentialism presented in section one has implications for policy that go beyond the activities of those engaged in civil disobedience.

### *B. Intellectual Property Policy and Ethics*

The Gita teaches the ethics of decision making. As applied to intellectual property, the ethical theory might pose limitations to the exercise of self-interest by rights owners who seek to maximize their economic returns through strict enforcement of intellectual property rights. I am less con-

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44. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004) (arguing that throughout history the public domain has been used as a tool to exploit the poor).

45. See *id.* at 1357–63 (comparing how the Chinese and Indian governments are establishing public knowledge bases that prevent proprietization of knowledge, whereas the Linux programming community uses creative licensing to keep information free while not limiting ownership).

cerned with changing behavior—my assumption is that individuals will pursue their narrow self-interest. But over time, how one conceives of one’s interest might evolve to include broader constituencies and relationships that extend beyond one’s immediate material concerns. That said, I do not expect individuals to change their behavior and certainly not to engage in the soul searching of Arjuna. Intellectual property rights holders will not realistically adjust their sights to include the broad consequences of enforcing patents, copyrights, or other types of rights on society. Nor do I think the state—through its instrumentalities of the courts and the legislature—can nudge rights holders in a socially-beneficial direction. Instead, legal rules should be constituted around ethical norms, such as the nuanced consequentialism I identify in the Gita.

It is more than poetic to compare the debates among legislators and among judges to the back-and-forth of Arjuna and Krishna on the battlefield. Some actors agonize over consequences; others point to obligations. But the nuanced consequentialism I discern provides an ethical framework for defining intellectual property rights. While current intellectual property law assumes the primacy of the rights of owners (emphasizing the attachment to legal ownership), nuanced consequentialism would recognize the place of the intellectual property owner in a network of relationships which creates duties and obligations. Sensitivity to the consequences of intellectual property rights is, to quote Professor Sen, sensitive “to agencies and relations in evaluating what is happening in the world.”<sup>46</sup>

Three examples illustrate the prescribed “sensitivity.” In *Mayo v. Prometheus*, the Supreme Court addressed the question of whether a medical diagnostic method is patentable subject matter.<sup>47</sup> The Court ruled against Prometheus, the patent owner, holding that the diagnostic method at issue covered an unpatentable law of nature.<sup>48</sup> In reaching this ruling, the Court looked to the consequences of patenting medical diagnoses and treatment on the decisions and actions of medical professionals.<sup>49</sup> Justice Breyer’s opinion, for a unanimous court, illustrates two points from my argument. First, the Court does not emphasize the primacy of the patent owner’s interests, which would support a very broad conception of patentable subject matter. Instead, the Court recognizes limits on patent ownership.<sup>50</sup>

The nature of this limitation illustrates my second point. By identifying the consequences of broad patent rights, the Court ruled that these consequences would justify a narrowing of patentable subject matter.<sup>51</sup> Although couched in the legal category of “law of nature,” the limitation as reflected

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46. SEN, *supra* note 5, at 21.

47. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012).

48. *Id.* at 1293.

49. *Id.* at 1297–98.

50. *Id.* at 1301–02.

51. *Id.* at 1304–05 (detailing effects of patents on physician conduct).



in the Court's reasoning builds on specific relations and agencies. In short, the rights of the patent owner hinder the duty of the medical practitioner. To avoid this conflict, the Court created an exception to the rights of the patent owner.

The analysis in *Prometheus* goes beyond identifying juridical binary relationships of rights and duties. Implicit is a duty not to interfere with the duties of others. But I am less interested in these formal juridical pairings than in the Court's identification of the important consequences of its decision. The Court's reasoning demonstrates a useful style of consequentialism. Many critics of *Prometheus*' patent on diagnosing and treating Crohn's disease emphasized the harmful effects on patients and medical costs.<sup>52</sup> The Court, however, did not take this tack. Medical practitioners, and not patients, were the immediate focus for the Court. Knowledge of the patent would inhibit the ability of the medical professionals to communicate with patients and carry out their duties to treat and heal. Consequences matter but are cabined by the set of relationships implicated by the invention. The *Prometheus* case raises a challenge to the position of Krishna the charioteer. Do one's duty, even as an inventor and patentee, but what if one's duty conflicts with the obligations of others? To answer this question, one has to turn to Arjuna's self-questioning to identify the scope of consequences and limits on duty.

The guiding principle I advocate is one of recognizing the consequences of intellectual property rights for the duties of third parties, such as health care providers and medical practitioners. I will present two further examples that illustrate additional third parties that are affected by intellectual property rights. The first example comes from the fair use doctrine in copyright. The second addresses the first sale doctrine, a limitation on intellectual property rights arising under copyright, patent, and trademark laws. Both doctrines are relevant because of the debates they foster about rights. Courts have been very careful in not calling "fair use" a right of users.<sup>53</sup> Instead, judges adopt the formal designation of the fair use "defense." Analogously, courts do not treat first sale as a right to resell or redistribute a copyrighted (or patented or trademarked) work, but as a limitation on intellectual property arising from competition policy. Behind these formal designations is a focus on consequentialism. The nuanced consequentialism espoused in this article can serve as a model for reforming these two controversial areas of law.

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52. See, e.g., Brief for AARP and Public Patent Foundation as Amici Curiae Supporting Petitioners at 2–3, *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012) (No. 10–1150) (arguing that allowing patents based merely on medical correlations would increase costs and reduce quality of care).

53. See, e.g., *Golan v. Holder*, 132 S. Ct. 873 (2012) (referring to fair use as an accommodation).

Under current application, fair use in copyright suffers for emphasizing the primacy of the copyright owner's rights to commercially exploit the copyrighted work.<sup>54</sup> An unauthorized use of a copyrighted work is fair only if the use does not produce a commercial substitute for the copyrighted work. An exact copying of all the elements of work would rarely be considered fair unless the full scale copying transformed the work in some way or was necessary for communicative value.<sup>55</sup> However, even uses of portions of a work can fall out from fair use if these uses would exploit a market that the copyright owner could enter, as, for example, with university coursepacks,<sup>56</sup> with the sampling of sound recordings,<sup>57</sup> with the uploading of film clips on social networking sites,<sup>58</sup> and with the display of excerpts from books.<sup>59</sup>

In each of these examples, the fair use analysis would be attentive to the copyright law and the interests it serves to promote. Vesting strong rights in the copyright owners interferes with the creative endeavors of educators, musicians, movie documentarians, and digitizers of books. Each of these alleged infringers are also creative individuals who have audiences for their works. The challenge for the fair use doctrine is to delineate limitations on copyright that take into consideration the consequences of enforcing the rights of owners. As illustrated in the *Prometheus* opinion, attention to relations and agencies of other actors is desirable.

The first sale doctrine, as applied, is perhaps more attuned to the type of consequentialism I am advocating in this article. In a number of cases, courts have confronted the question of when an intellectual property owner can prevent redistribution of a work after an initial dissemination of the protected work. In *Kirtsaeng v. Wiley Publishing*, the Supreme Court addressed this broad question in the context of reselling imported textbooks.<sup>60</sup> In *Bowman v. Monsanto*, the issue of reusing genetically modified and patented seeds implicates the first sale doctrine for purchased seeds.<sup>61</sup> Whether the first sale doctrine allows the petitioners in these two cases to make use

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54. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008) (discussing how case law has minimized the fair use doctrine).

55. See, e.g., *Hustler Magazine v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) (holding that a full reproduction of a copyrighted work was fair use because it was used for an activity that plaintiff could not have used for economic gain).

56. See, e.g., *Cambridge Univ. Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 2012) (holding that copyrights in out-of-print textbooks still had economic value because of demand from permissions for excerpts).

57. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (holding that there is a direct market for samples of sound recordings).

58. See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (holding that an entity like YouTube cannot knowingly allow users to post infringing content).

59. See, e.g., *Authors Guild v. Google, Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012) (concerning unauthorized duplication and display of copyrighted books on the internet).

60. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

61. See *Bowman v. Monsanto Co.*, 133 S. Ct. 1761 (2013).

of the protected items rests on if and how the Court construes the consequences of allowing the reuse. In *Kirtsaeng*, lower courts (and the Supreme Court in its first consideration of this issue)<sup>62</sup> grappled with statutory language to discern the limitations on copyright. The intermediate appellate court in *Bowman* held that such reuse “eviscerated” the patent owners’ rights and therefore concluded that the first sale doctrine would not apply.<sup>63</sup> The Supreme Court rejected this broad approach although finding for the patent owner.<sup>64</sup> I propose that courts need to start with a consideration of consequences to determine whether the first sale doctrine provides a relevant defense. A consequentialist approach was the method in early first sale doctrine cases in the nineteenth and twentieth centuries.<sup>65</sup> The Supreme Court should start with that approach.

Whether to understand civil disobedience efforts or to guide legal reform, the verbal sparring of Arjuna and Krishna provides an ethical framework from which to rethink intellectual property law. Perhaps there are applications to legal analysis more broadly. But as this Article has shown, the strong slant of intellectual property legislation in favor of owners and the debates over the relevance of consequences for law provides a fruitful domain for understanding the Gita and its implications for acting and decision making in the model world of control over technology and information.

### III. CONCLUSION

A central battle underlying intellectual property policy is that between utilitarian and deontic foundations for intellectual property rights. Utilitarian foundations emphasize the balance of competing interests under a broad umbrella of benefits and costs. Deontic foundations, by contrast, emphasize certain interests as being primary. Both approaches can have further variations. Some utilitarians may emphasize the need for creating works and therefore support strong protections for authors and creators. Utilitarianism can also support the case for strong protection for users, especially in emphasizing the need for cumulative innovation or critical commentary. Intellectual property policies grounded in deontic approaches also demonstrate such ambiguity. Author-centered approaches would emphasize the primacy of authors as the source of new works. By contrast, user-centered approaches focus on members of the scientific or artistic communities that

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62. See *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010) (mem.).

63. See *Monsanto Co. v. Bowman*, 657 F.3d 1341, 1348 (2011).

64. See *Bowman*, 133 S. Ct. at 1769.

65. See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (holding that the first sale doctrine prevents a copyright holder from dictating the resale price); *Adams v. Burke*, 84 U.S. 453 (1873) (holding that while patents grant exclusive rights to make and sell goods, they cannot restrict the use of those goods after the first sale); see *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (adopting a broad reading of the first sale doctrine in copyright based on a consideration of common law, statute, and consequences).

incorporate new works into their culture as a basis for communication and intellectual exchange.

As this description shows, both approaches are unsatisfactory. Instead, I have made the case in this article for a consequentialist approach to intellectual property, one that requires a decision maker, whether court or legislature, to assess the effects of different rules and policies on society. Needless to say, consequences are open-ended and indeterminate. This uncertainty, I point out, is revealed in the dialogue between Krishna and Arjuna that is the substance of the Gita. I use this religious and philosophical text as a basis for presenting the consequentialist dilemma. I suggest that the text provides an ethical basis for a consequentialism based on consideration of the effect of rights on the duties and obligations of others. Such an approach expands consideration beyond the conception of intellectual property rights as a source of incentives to create and invent. Creations and inventions affect the decisions and choices of many actors such as doctors, educators, scientists, creative people, and researchers. While open-ended consequentialism is as unmoored as utilitarian and deontic approaches, the ethical precepts developed in this article serve as a basis for constructing and applying a more tempered and grounded consequentialism that can aid in resolving many intellectual property disputes.

Law and religion are estranged siblings. Symposia like this one allow scholars to examine that strained relationship. My goal in this article is to explore an important text from the Hindu tradition to address a current ethical debate about intellectual property rights. While law and religion perhaps will always be divergent streams, my exploration illustrates how dipping into the fount of religion can refresh understandings of law. As a result, the verbal sparring between Krishna and Arjuna on a historical and metaphorical battlefield resonates in political and legal battles over intellectual property's scope and domain and the ethical quandaries in designing legal institutions.