

# THE WIPO JOURNAL:

## ANALYSIS OF INTELLECTUAL PROPERTY ISSUES

GENERAL EDITOR: PROFESSOR PETER K. YU

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# Lockean Foundations of Intellectual Property

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☞ Freedom of expression; Intellectual property; Jurisprudence

Most of us would recoil at the thought of shoplifting a ballpoint pen from a bookstore, and yet many do not hesitate to copy software or music worth thousands of dollars without paying for it. When challenged, replies like “I wouldn’t have purchased the software anyway” or “they still have their copy” are given to try to quell the sinking feeling that something ethically wrong has occurred.

One way of understanding these replies is to take them to suggest a real difference between intellectual property and physical or tangible property. My use of your intellectual property does not interfere with your use of it, whereas this is not the case for most tangible goods. Justifying intellectual property in light of this feature raises deep questions and has led many to question the idea of owning “soft” goods.

Anglo-American systems of intellectual property are typically modelled as utilitarian.<sup>1</sup> It is argued that adopting the systems of copyright, patent and trade secret leads to an optimal amount of intellectual works being produced and a corresponding optimal amount of social utility. Granting use, possession and control rights to both ideas and expressions of ideas is important as an incentive for the production of intellectual works.

Many utilitarians argue that private ownership of *physical* goods is justified because of the tragedy of the commons or problems with efficiency. Systems of private property are more efficient, or so it is argued, than systems of common ownership. It should be clear that this way of arguing is also based on providing incentives. Owners of physical goods are given an incentive to maintain or increase the value of those goods because the costs of waste and the like are internalised. The incentives-based utilitarian argument for systems of intellectual property protection is very similar. In this case, the government grants rights as an incentive for the production of intellectual works, and production of this sort, in turn, maximises social progress.

I have argued at length that incentives-based utilitarian arguments for systems of intellectual property are untenable.<sup>2</sup> Beyond the problems that numerous others and I have noted, there is the following worry: when viewed as state-created legal instruments, detached from moral foundations, the institutions of copyright, patent, trademark and trade secret are generally viewed as tools deployed and used by the

\* Parts of this article draw upon material originally published in Adam D. Moore, “A Lockean Theory of Intellectual Property Revisited” (2012) 50 San Diego L. Rev. 1070, and Adam D. Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick: Transaction Publishing, 2004), Ch.5.

<sup>1</sup> Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton: Princeton University Press, 1962); US National Patent Planning Commission, *The American Patent System: Report of the National Patent Planning Commission* (Washington, 1943), pp.783–784; US President’s Commission on the Patent System, *To Promote the Progress of Useful Arts in an Age of Exploding Technology: Report by United States President’s Commission on the Patent System* (Washington, 1966); Patrick Croskery, “Institutional Utilitarianism and Intellectual Property” (1993) 68 Chi.-Kent L. Rev. 631; Edwin C. Hettinger, “Justifying Intellectual Property” in Adam D. Moore (ed.), *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham: Rowman and Littlefield, 1997); Roger Miners and Robert Staaf, “Patents, Copyrights, and Trademarks: Property or Monopoly?” (1990) 12 Harv. J.L. & Pub. Pol’y 911; S. Chesterfield Oppenheim, “A New Approach to Evaluation of the American Patent System” (1951) 33 J. Pat. & Trademark Off. Soc’y 555; Tom G. Palmer, “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects” in Adam D. Moore (ed.), *Information Ethics* (2005), p.123; Tom G. Palmer, “Intellectual Property: A Non-Posnerian Law and Economics Approach” in Adam D. Moore (ed.), *Intellectual Property: Moral, Legal, and International Dilemmas* (Lanham: Rowman and Littlefield, 1997).

<sup>2</sup> Moore, *Intellectual Property and Information Control* (2004), pp.37–71; Adam D. Moore, “Intellectual Property, Innovation, and Social Progress: The Case against Incentives Based Arguments” (2003) 26 Hamline L. Rev. 602.

economically advantaged. Such arrangements appear to be unjustified while at the same time protecting wealth, status and privilege.

For example, consider the recent uproar when Turing Pharmaceuticals acquired the rights to distribute Daraprim, a drug used to treat toxoplasmosis.<sup>3</sup> In late summer 2015, Turing Pharmaceuticals raised the price from \$13.50 per pill to \$750 per pill. Widely criticised and after much public outcry, the price was lowered again. Along the way, however, came the calls for dismantling systems of intellectual property protection, especially patents. Similar calls related to copyright came after the Aaron Swartz tragedy.<sup>4</sup>

I will argue that intellectual property rights are no different than rights to “lives, liberties, and estates”—that is, intellectual property rights should not be seen as state-created entities offered as an inducement to bring forth new knowledge. The upshot of viewing intellectual property rights as state-created monopolies, far too often controlled by the powerful and well connected, is the seemingly pervasive opinion that systems of intellectual property represent the mafia family on a global scale. In my view, to be justified and to warrant worldwide coercion, systems of intellectual property should be grounded in a Lockean theory of property—a theory that acknowledges and protects the natural rights of authors and inventors. After presenting a Lockean argument, I will consider, and ultimately reject, several common objections to intellectual property.

## Lockean foundations for intellectual property

John Locke argued that individuals are entitled to control the fruits of their labour. Labouring, producing, thinking and persevering are voluntary, and individuals who engage in these activities are entitled to what they produce. Subject to certain restrictions, rights are generated when individuals mix their labour with an unowned object. “The root idea of the labor theory is that people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry.”<sup>5</sup> The intuition is that the person who clears land, cultivates crops, builds a house, nurtures livestock or creates a new invention obtains property rights by engaging in these activities.

Locke begins with the view that individuals own their own bodies and labour—that is, they are self-owners.<sup>6</sup> When an individual labours on an unowned object, her labour becomes infused in the object, and, for the most part, the labour and the object cannot be separated. The idea is that there is a kind of expansion of rights. We each own our labour, and when that labour is mixed with objects in the commons, our rights are expanded to include these goods.

Locke’s argument is not without difficulties.<sup>7</sup> David Hume argued that the idea of mixing one’s labour is incoherent—actions cannot be mixed with objects.<sup>8</sup> Nozick asked “[W]hy isn’t mixing what I own with what I don’t own a way of losing what I own rather than a way of gaining what I don’t?”<sup>9</sup> P.J. Proudhon argued that, if labour was important, the second labourer should obtain a property right in an object as reliable as the first labourer.<sup>10</sup> Jeremy Waldron and others have argued that mixing one’s labour with an unowned object should yield more limited rights than rights of full ownership<sup>11</sup> Another worry is what constitutes the boundary of one’s labour. If one puts up a fence around ten acres of land, does one come to own all of the land within or merely the fence and the land on which it sits?<sup>12</sup> Finally, if the skills, tools

<sup>3</sup> Hadley Malcolm and Liz Szabo, “Turing Pharma CEO Recedes from Public after Backtracking on Drug Price Hike”, *USA Today*, September 24, 2015.

<sup>4</sup> Marcella Bombardieri, “The Inside Story of MIT and Aaron Swartz”, *Boston Globe*, March 30, 2014.

<sup>5</sup> Lawrence C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), p.32.

<sup>6</sup> There are several distinct strands to the Lockean argument. Becker, *Property Rights: Philosophic Foundations* (1977), pp.32–56.

<sup>7</sup> A. John Simmons voices these problems in *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), pp.267–269.

<sup>8</sup> David Hume, *Treatise of Human Nature*, s.3.2.3. See also Jeremy Waldron, “Two Worries about Mixing One’s Labor” (1983) 33 *Phil. Q.* 37, 40.

<sup>9</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p.175.

<sup>10</sup> P.J. Proudhon, *What Is Property?* (New York: Howard Fertig, 1966) (1867), p.61. See also John Plamenatz, *Man and Society* (London: Longmans, Green, 1963), p.247.

<sup>11</sup> Geraint Perry, *John Locke* (London: Allen & Unwin, 1978), p.52; Waldron, “Two Worries about Mixing One’s Labor” (1983) 33 *Phil. Q.* 37, 42.

<sup>12</sup> Nozick, *Anarchy, State, and Utopia* (1974), p.174, Thomas Mautner, “Locke on Original Appropriation” (1982) 19 *Am. Phil. Q.* 261.

and inventions used in labouring are social products, should society not have some claim on the labourer's property?<sup>13</sup>

Among defenders of Lockean-based arguments for private property, these challenges have not gone unnoticed.<sup>14</sup> Rather than rehearse these points and counterpoints, I would like to present a modified version of the Lockean argument—one that does not so easily fall prey to the objections mentioned above.

We may begin by asking how property rights to unowned objects are generated. This is known as the problem of original acquisition, and a common response is given by John Locke:

“For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is *enough and as good left for others*.”<sup>15</sup>

Locke claims that so long as the proviso that enough and as good is left for others is satisfied, an acquisition is of prejudice to no one.<sup>16</sup>

Suppose that mixing one's labour with an unowned object creates a prima facie claim against others not to interfere that can only be overridden by a comparable claim. The role of the proviso is to provide one possible set of conditions where the prima facie claim remains undefeated.<sup>17</sup> Another way of stating this position is that the proviso in addition to X, where X is labour, first occupancy or some other weak claim-generating activity, provides a sufficient condition for original appropriation.

Justification for the view that labour or possession may generate prima facie claims against others could proceed along several lines. First, labour, intellectual effort and creation are generally voluntary activities that can be unpleasant, exhilarating and everything in between. That we voluntarily do these things as sovereign moral agents may be enough to warrant non-interference claims against others.

A second, and possibly related, justification is based on merit. Sometimes individuals who voluntarily do or fail to do certain things deserve some outcome or other. Thus, students may deserve high honour grades, and criminals may deserve punishment. When notions of desert are invoked, claims and obligations are made against others—these non-absolute claims and obligations are generated by what individuals do or fail to do. Thus, in fairly uncontroversial cases of desert, we are willing to acknowledge that weak claims are generated, and if desert can properly attach to labour or creation, then claims may be generated in these cases as well.

Finally, a justification for the view that labour or possession may generate prima facie claims against others could be grounded in respect for individual autonomy and sovereignty. As sovereign and autonomous agents, especially within the liberal tradition, we are afforded the moral and legal space to order our lives as we see fit. As long as respect for others is maintained, we are each free to set the course and direction of our own lives, to choose between various lifelong goals and projects, and to develop our capacities and talents accordingly. Simple respect for individuals would prohibit wresting from their hands an unowned object that they acquired or produced. I hasten to add that, at this point, we are trying to justify weak non-interference claims, not full-blown property rights. Other things being equal, when an individual labours to create an intellectual work, then weak presumptive claims of non-interference have been generated on grounds of labour, desert or autonomy.

The underlying rationale of Locke's proviso is that, if no one's situation is worsened, then no one can complain about another individual appropriating part of the commons. If no one is harmed by an acquisition

<sup>13</sup> Ruth Grant, *John Locke's Liberalism* (Chicago: University of Chicago Press, 1987), p.112; John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971), p.104; Hettinger, “Justifying Intellectual Property” in Moore (ed.), *Intellectual Property* (1997), pp.22–26.

<sup>14</sup> Simmons, for example, provides a complex analysis of Lockean property theory and attempts to answer many of these problems. A. John Simmons, *The Lockean Theory of Rights* (1992).

<sup>15</sup> John Locke, *Second Treatise of Government* (1689), s.27 (emphasis added).

<sup>16</sup> Locke, *Second Treatise of Government* (1689), ss.33, 34, 36, 39.

<sup>17</sup> This view is summed up nicely by Clark Wolf, “Contemporary Property Rights, Lockean Provisos, and the Interests of Future Generations” (1995) 105 *Ethics* 791.

and one person is bettered, then the acquisition ought to be permitted. In fact, it is precisely because no one is harmed that it seems unreasonable to object to what is known as a Pareto-superior move.<sup>18</sup> Thus, the proviso can be understood as a version of a “no harm, no foul” principle.

Before continuing, I will briefly consider the plausibility of a Pareto-based proviso as a moral principle. First, to adopt a less-than-weak Pareto principle would permit individuals, in bettering themselves, to worsen others. Such provisos on acquisition are troubling because, at worst, they may open the door to predatory activity and, at best, they give anti-property theorists the ammunition to combat the weak presumptive claims that labour and possession may generate. Part of the intuitive force of a Pareto-based proviso is that it provides little or no ground for rational complaint. Moreover, if we can justify intellectual property rights with a more stringent principle, a principle that is harder to satisfy, then we have done something more robust, and perhaps more difficult to attack, when we reach the desired result.

To require individuals, in bettering themselves, to better others is to require them to give free rides.<sup>19</sup> In the absence of social interaction, what reason can be given for forcing one person, if she is to benefit herself, to benefit others?<sup>20</sup> If, absent social interaction, no benefit is required, then why is such benefit required within society? The crucial distinction that underlies this position is between worsening someone’s situation and failing to better it. I take this intuition to be central to a kind of deep moral individualism.<sup>21</sup> Moreover, the intuition that grounds a Pareto-based proviso fits well with the view that labour and possibly the mere possession of unowned objects creates a prima facie claim to those objects. Individuals are worthy of a deep moral respect, and this grounds a liberty to use and possess unowned objects.

Assuming a just initial position and that Pareto-superior moves are legitimate, there are two questions to consider when examining a Pareto-based proviso.<sup>22</sup> First, what are the terms of being worsened? This is a question of scale, measurement or value. An individual could be worsened in terms of subjective preference satisfaction, wealth, happiness, freedoms, opportunities etc. Which of these count in determining bettering and worsening (or do they all)? Secondly, once the terms of being worsened have been resolved, which two situations are we going to compare to determine if someone has been worsened? Is the question one of how others are now, after my appropriation, compared to how they would have been were I absent or had I not appropriated, or compared to some other state? This is known as the baseline problem.

In principle, the Lockean theory of intellectual property being sketched is consistent with a wide range of value theories.<sup>23</sup> So long as the preferred value theory has the resources to determine bettering and worsening with reference to acquisitions, then Pareto-superior moves can be made and acquisitions justified on Lockean grounds. For now, I will assume an Aristotelian eudaimonist account of value exhibited by the following theses is correct<sup>24</sup>:

<sup>18</sup> One state of the world,  $S_1$ , is Pareto-superior to another,  $S_2$ , if and only if no one is worse off in  $S_1$  than in  $S_2$  and if at least one person is better off in  $S_1$  than in  $S_2$ .  $S_1$  is *strongly* Pareto-superior to  $S_2$  if everyone is better off in  $S_1$  than in  $S_2$  and *weakly* Pareto-superior if at least one person is better off and no one is worse off.  $S_1$  is Pareto-optimal if no state is Pareto-superior to  $S_1$ , *strongly* Pareto-optimal if no state is *weakly* Pareto-superior to it, and *weakly* Pareto-optimal if no state is *strongly* Pareto-superior to it. Throughout this essay, I will use Pareto-superiority to stand for *weak* Pareto-superiority. Adapted from G.A. Cohen, “The Pareto Argument for Inequality” (1995) 12 Soc. Phil. & Pol’y 160. The “Pareto” condition is named after Vilfredo Pareto (1848–1923), an Italian economist and sociologist.

<sup>19</sup> I have in mind Nozick’s Robinson Crusoe case in *Anarchy, State, and Utopia* (1974), p.185.

<sup>20</sup> The distinction between worsening someone’s position and failing to better it is a hotly contested moral issue. E.g., David P. Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986) p.204; Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989).

<sup>21</sup> This view is summed up nicely by Anthony Fressola: “Yet, what is distinctive about persons is not merely that they are agents, but more that they are rational planners—that they are capable of engaging in complex projects of long duration, acting in the present to secure consequences in the future, or ordering their diverse actions into programs of activity, and ultimately, into plans of life.” Anthony Fressola, “Liberty and Property” (1981) 18 Am. Phil. Q. 320.

<sup>22</sup> One problem with a Pareto condition is that it says nothing about the initial position from which deviations may occur. If the initial position is unfair, then the Pareto condition allows those who are unjustly better off to remain better off. This is why the problem of original acquisition is traditionally set in the state of nature or the commons. The state of nature supposedly captures a fair initial starting point for Pareto improvements.

<sup>23</sup> It has been argued that subjective preference satisfaction theories fail to give an adequate account of bettering and worsening. Donald C. Hubin and Mark Lambeth, “Providing for Rights” (1988) 27 Dialogue: Can. Phil. Rev. 489.

<sup>24</sup> The following sketch of a theory of value is offered as a plausible contender for the correct account of bettering and worsening and should be taken as an assumption. Moreover, aside from being intuitive in its general outlines, the theory fits well with the moral individualism that grounds both a Pareto-based proviso and the view that liberty rights entail weak presumptive claims to objects.

1. Human well-being or flourishing is the sole standard of intrinsic value.
2. Human persons are rational project pursuers, and well-being or flourishing is attained through the setting, pursuing and completion of life goals and projects.<sup>25</sup>
3. The control of physical and intellectual objects is valuable. At a specific time, each individual has a certain set of things she can freely use and other things she owns, but she also has certain opportunities to use and appropriate things. This complex set of opportunities, along with what she can now freely use or has rights over, constitutes her position materially. This set constitutes her level of material well-being.

While it is certainly the case that there is more to bettering and worsening than an individual's level of material well-being, including opportunity costs, I will not pursue this matter further at present. Needless to say, a full-blown account of value will explicate all the ways in which individuals can be bettered and worsened with reference to acquisition.<sup>26</sup>

Lockeans as well as others who seek to ground rights to property in the proviso generally set the baseline of comparison as the state of nature. The commons or the state of nature is characterised as that state where the moral landscape has yet to be changed by formal property relations. Indeed, it would be odd to assume that individuals come into the world with complex property relations already intact with the universe. *Prima facie*, the assumption that the world is initially devoid of such property relations seems much more plausible. The moral landscape is barren of such relations until some process occurs. It is not assumed that the process for changing the moral landscape the Lockean would advocate is the only justified means to this end.<sup>27</sup>

For now, assume a state of nature situation where no injustice has occurred and where there are no property relations in terms of use, possession or rights. All anyone has in this initial state are opportunities to increase her material standing. Suppose Fred creates an intellectual work and does not worsen his fellows—alas, all they had were contingent opportunities—and Fred's creation and exclusion adequately benefits them in other ways. After the acquisition, Fred's level of material well-being has changed. Now he has a possession that he holds legitimately, as well as all of his previous opportunities. Along comes Ginger who creates her own intellectual work and considers whether her exclusion of it will worsen Fred. But which two situations should Ginger compare? Should the acquisitive case (Ginger's acquisition) be compared to Fred's initial state (where he had not yet legitimately acquired anything), his situation immediately before Ginger's taking, or some other baseline? If bettering and worsening are to be cashed out in terms of an individual's level of well-being with opportunity costs and this measure changes over time, then the baseline of comparison must also change. In the current case, we compare Fred's level of material well-being when Ginger possesses and excludes an intellectual work to his level of well-being immediately before Ginger's acquisition.<sup>28</sup>

A slightly different way to put this Lockean argument for intellectual property rights is:

**Step One: The generation of *prima facie* claims to control—**

Suppose Ginger creates a new intellectual work, creation, effort etc. yield her *prima facie* claims to control (similar to student desert for a grade).

<sup>25</sup> For similar views, see Aristotle, *Nicomachean Ethics*, bks I and X; Immanuel Kant, *The Fundamental Principles of the Metaphysics of Morals* (1785), academy edn; Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987); R.B. Perry, *General Theory of Value* (New York: Longmans, Green, 1926); Rawls, *A Theory of Justice* (1971), Ch.VII; Henry Sidgwick, *Methods of Ethics*, 7th edn (London: Macmillan, 1907).

<sup>26</sup> For a defence of this view of moral value, see Adam D. Moore, "Values, Objectivity, and Relationalism" (2004) 38 *J. Value Inquiry* 75.

<sup>27</sup> There may be many others such as consent theories, consequentialist theories, social contract theories, and theories of convention.

<sup>28</sup> For a defence of this baseline, see Adam D. Moore, "A Lockean Theory of Intellectual Property Revisited" (2012) 50 *San Diego L. Rev.* 1070.

**Step Two: Locke's proviso—**

If the acquisition of an intellectual object makes no one (else) worse off in terms of their level of well-being compared to how they were immediately before the acquisition, then the taking is permitted.

**Step Three: From prima facie claims to property rights—**

When are prima facie claims to control an intellectual work undefeated? Answer: when the proviso is satisfied. Alas, when no one else has been worsened, who could complain?

**Conclusion:**

So long as no harm is done, and the proviso is satisfied, the prima facie claims that labour and effort may generate turn into property claims.

**Illustrations**

Suppose Fred appropriates a grain of sand from an endless beach and paints a lovely, albeit small, picture on the surface. Ginger, who has excellent eyesight, likes Fred's grain of sand and snatches it away from him. On this interpretation of Locke's theory, Ginger has violated Fred's weak presumptive claim to the grain of sand. We may ask, what legitimate reason could Ginger have for taking Fred's grain of sand, rather than picking up her own grain of sand? If Ginger has no comparable claim, then Fred's prima facie claim remains undefeated. An undefeated prima facie claim can be understood as a right.<sup>29</sup>

Consider a different case. After weeks of effort and numerous failures, suppose I come up with an excellent recipe for spicy Chinese noodles—a recipe that I keep in my mind and do not write down. Would anyone argue that I do not have at least some minimal moral claim to control the recipe? Suppose that you sample some of my noodles and desire to purchase the recipe. Is there anything morally suspicious with an agreement between us that grants you a limited right to use my recipe provided that you do not disclose the process? You did not have to agree to my terms, and no matter how tasty the noodles are, you could eat something else. Here at the micro-level, we get the genesis of moral claims to intellectual works independent of social progress arguments. Like other rights and moral claims, effective enforcement or protection may be a matter left to governments. But protection of rights is one thing, while the existence of rights is another.

A common mistake about baseline worries and harming is illustrated by the following case. What if a perverse inventor creates a genetic enhancement technique that cures cancer, but decides to keep the technique secret or charge excessive prices for access? Those individuals who had no chance to survive before the creation now have a chance and are worsened because of the perverse inventor's refusal to let others use the machine.

The baseline this case implies cannot be correct. On this view, to determine bettering and worsening, we compare how individuals are before the creation of some value (in this case, the genetic enhancement technique) to how they would be if they possessed or consumed that value. But we are all worsened in this respect by any value that is exclusively held. I am worsened by your exclusive possession of your car because I would be better off if I exclusively controlled the car, even if I already owned hundreds of cars. If this were the correct comparison, then my exclusive possession of my heart (a value) would worsen others who did not have possession and an exclusive title. Any individual, especially one with a faulty heart, would be better off if he or she held title to my heart compared to anyone else's holding the title.

<sup>29</sup> For a defence of this view of rights, see Joel Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton University Press, 1986); George W. Rainbolt, "Rights as Normative Constraints" (1993) 53 *Phil. & Phenomenological Res.* 93.



Moreover, this would be true independent of anyone's choices. Imagine that you voluntarily toss your dinner into a vat of acid and then complain to me that I am worsening you because I, who happen to have two dinners, refuse to give you one. Clearly this account of the baseline makes the notions of bettering and worsening too broad. Simple failures to benefit cannot constitute morally relevant worsenings that may in turn justify moral or legal sanctions.

If correct, this account justifies moral claims to control intellectual property like genetic enhancement techniques, movies, novels or information. Independent from incentives-based social-progress arguments when an individual creates an intellectual work and fixes it in some fashion, then labour and possession create a prima facie claim to the work. Moreover, if the proviso is satisfied, the prima facie claim remains undefeated, and moral claims or rights are generated.

## General problems for intellectual property

Assuming the account offered so far is compelling, there are several general arguments against intellectual property and systems of intellectual property protection to consider. Addressing these general challenges is important because it could be the case that intellectual property rights are easily overridden by competing moral claims.

### *The non-rivalrous argument: But they still have their copy!*

As noted in the opening, a common argument given by scholars who defend "free access" is that making a copy does not deprive anyone of their possessions. Intangible works are non-rivalrous, meaning that they can be used and consumed by many individuals concurrently. Edwin Hettinger argues:

"The possession or use of an intellectual object by one person does not preclude others from possessing or using it as well. If someone borrows your lawn mower, you cannot use it, nor can anyone else. But if someone borrows your recipe for guacamole, that in no way precludes you, or anyone else, from using it. This feature is shared by all sorts of intellectual objects. ...

This characteristic of intellectual objects grounds a strong prima facie case against the wisdom of private and exclusive intellectual property rights. Why should one person have the exclusive right to possess and use something that all people could possess and use concurrently? ... [T]he unauthorized taking of an intellectual object does not feel like theft."<sup>30</sup>

Consider a more formal version of this argument:

- P1.** If a tangible or intangible work can be used and consumed by many individuals concurrently (non-rivalrous), then access and use should be permitted.
- P2.** Intellectual works falling under the domains of copyright, patent and trade secret protection are non-rivalrous.
- C3.** So it follows that there is an immediate prima facie case against intellectual property rights or for allowing access to intellectual works.

The weak point in this argument is the first premise—especially given that the second premise is generally true.<sup>31</sup> Consider sensitive personal information. It seems patently false to claim that just because this information can be used and consumed by many individuals concurrently that there is a prima facie moral claim that this be so. Snuff films, obscene pornography, information related to national security, personal financial information and private thoughts are each non-rivalrous. Nevertheless, this fact does not, by itself, generate prima facie moral claims for access and use.

<sup>30</sup> Hettinger, "Justifying Intellectual Property" in Moore (ed.), *Intellectual Property* (1997), p.30.

<sup>31</sup> Some kinds of information (e.g. stock tips) are rivalrously consumed.

In summary, the claim that access should be allowed and perhaps promoted for goods that are non-rivalrous is without merit. Intangible works of all sorts, including sensitive personal information, financial records and information related to national security, are non-rivalrous. It may even be the case that our bodies could be non-rivalrously used by others. Nevertheless, this feature of most intangible goods and some tangible goods does not obviously justify such use.

### *The free speech argument against intellectual property*

A prominent and widespread argument against legal protection of intellectual property is that these systems are inconsistent with our commitment to freedom of thought and speech.<sup>32</sup> For example, consider how the Church of Scientology has used copyright and other legal protections to restrict access to their religious views.<sup>33</sup> According to this objection, intellectual property rights are troublesome because they limit access to and uses of intellectual works. This sort of restriction impoverishes the commons of thought and discussion. Lawrence Lessig writes:

“*Gone with the Wind* was published in 1936 ... and the copyright would have expired in 1992. ... But because of extensions ... that copyright [has] now [been] extended. ... In 2001, Alice Randall tried to publish ... a parody ... called *The Wind Done Gone* ... and the Mitchell estate ... brought a federal lawsuit to stop its publication. ...

To most people, this is plainly absurd. *Gone with the Wind* is an extraordinarily important part of American culture; at some point the story should be free for others to take and criticize in whatever way they want.”<sup>34</sup>

The problem with this objection to intellectual property should be obvious. By allowing robust control with specific limits (fair use, the idea/expression distinction and sunsets on rights), we enhance rather than impoverish the commons of thought and discussion. To put the point another way, a system that allows initial restricted access incentivises authors and inventors to create intellectual works. These works are then published or distributed, and the result is an enhanced commons of thought and discussion. Simply put, we get more to talk about and build upon by adopting a system of intellectual property.

Moreover, consider the contentious, yet established, idea/expression rule of copyright.<sup>35</sup> Copyright only applies to fixed expressions, not to ideas that may make up a fixed expression. For example, I may read Einstein’s original articles on special and general relativity, express his ideas in my own words and obtain a copyright in my expression. Sure, I may be guilty of plagiarism, but so long as my expressions are not copied from, or substantially similar to, Einstein’s original, I can obtain a copyright.

If correct, the primary thrust of the free speech argument against intellectual property rights misses an important point. Aside from fair use, the idea/expression distinction in copyright provides a way for ideas to have an impact independent of how authors control their intellectual works. While it is true that a specific expression and substantially similar artefacts may be controlled and restricted, the ideas that make up the work are (in most cases) free for anyone to consider; information storehouses, like libraries and now the web, ensure that access is widespread.

<sup>32</sup> E.g., James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity* (New York: Penguin Press, 2004); Hettinger, “Justifying Intellectual Property” in Moore (ed.), *Intellectual Property* (1997), p.30; Melville Nimmer, “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?” (1970) 17 UCLA L. Rev. 1180; Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1992) 68 Chi.-Kent. L. Rev. 841, 866; John Perry Barlow, “The Economy of Ideas: A Framework for Rethinking Patents & Copyrights in the Digital Age (Everything You Know about Intellectual Property Is Wrong)”, *Wired*, March 1994.

<sup>33</sup> *Church of Scientology International v Fishman and Geertz* CV 91-6426, (HLH (Tx), US District Court for the Central District of California.

<sup>34</sup> Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), pp.198–199.

<sup>35</sup> US Copyright Act 1976 s.102(b) states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

Finally, it is not at all clear that free speech is so presumptively weighty that it nearly always trumps other values. Shouting at someone over a bullhorn all day is not something we would countenance as protected free speech. Hate speech, obscene expressions, sexual harassment and broadcasting private medical information about others are each examples of speech that we are willing to limit for various reasons. Perhaps intellectual property rights can be viewed in this light.

### *The social nature of intellectual works argument against intellectual property*

According to the “social nature of intellectual works” argument, intellectual property unjustly benefits authors and inventors by allowing individuals monopoly control over what is a social product. Proponents of this “shared culture” view would have us imagine that allowing intellectual property rights is like giving the person who places the last brick in a “public works” dam exclusive ownership of the dam. This view is widespread, and virtually every attack on intellectual property includes some version.<sup>36</sup>

But like the defender of the first cause argument for the existence of God who rides the principle of sufficient causation to a certain point and then conveniently abandons it (every event or object needs a sufficient cause and nothing is self-caused *except* God), the proponents of the “shared culture” view are guilty of a similar trick. “Shared culture” or the social nature of intellectual property view is sufficient for undermining intellectual property rights or robust control of intellectual works, but conveniently not strong enough to undermine student desert for a grade, criminal punishment or other sorts of moral evaluation.

Additionally, it is doubtful that the notion of “society” employed in this view is clear enough to carry the weight that the argument demands. In some vague sense, we may know what it means to say that Lincoln was a member of American *society* or that Aristotle’s political views were influenced by ancient Greek *society*. Nevertheless, the notion of “society” is conceptually imprecise—one to which it would be dubious to attach ownership or obligation claims. Those who would defend this view would have to clarify the notions of “society” and “social product” before the argument could be fully analysed.

But suppose for the sake of argument that supporters of this view come up with a concise notion of “society” and “social product”. We may ask further, why think that societies can be *owed* something or that they can *own* or *deserve* something?<sup>37</sup> Surely, it does not follow from the claim that X is a social product that society owns X. Likewise, it does not follow merely from the claim that X is produced by Ginger, that Ginger owns X—for example she could be working for Fred. It is true that interactions between individuals may produce increased market values or add to the common stock of knowledge. What may be denied is that these by-products of interaction, market value and shared information, are in some sense owned by society or that society is owed for their use. This should not be assumed without argument. It is one thing to claim that information and knowledge is a social product—something built up by thousands of individual contributions—but quite another to claim that this knowledge is owned by society or that individuals who use this information owe society something in return.<sup>38</sup>

Suppose that Fred and Ginger, along with numerous others, interact and benefit me in the following way. Their interaction produces knowledge that is then freely shared and allows me to create some new value, V. Upon creation of V, Fred and Ginger demand that they are owed something for their part. But what is the argument from third party benefits to demands of compensation for these benefits? Why think

<sup>36</sup> See, for example, the works of John Perry Barlow, James Boyle, Arthur Kuflik and Lawrence Lessig.

<sup>37</sup> Do notions of *ownership*, *owing* or *deserving* even make sense when attached to the concept of society? If so and if different societies can *own* knowledge, do they not have the problem of original acquisition? See Nozick, *Anarchy, State, and Utopia* (1974), p.178. Seana Shiffrin’s interpretation of Locke’s theory of property appears to fall prey to this worry. Seana Valentine Shiffrin, “Lockean Argument for Private Intellectual Property” in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001), p.138.

<sup>38</sup> Lysander Spooner argued that one’s culture or society plays almost no role in the production of ideas: “Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation, than a thought. It originates in the mind of a single individual. It can leave his mind only in obedience to his will. It dies with him, if he so elect.” Lysander Spooner, “The Law of Intellectual Property: Or an Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas” in Charles Shively (ed.), *The Collected Works of Lysander Spooner* (Weston: M&S Press, 1971), p.58.

that there are “strings” attached to freely shared information? And if such an argument can be made, it would seem that burdens create reverse demands. Suppose that the interaction of Fred and Ginger produces false information that is freely shared. Suppose further that I waste 10 years trying to produce some value based in part on this false information. Would Fred and Ginger, or society, owe me compensation?

The position that “strings” are attached in this case runs parallel to Robert Nozick’s benefit “foisting” example. In Nozick’s case, a benefit is foisted on someone and then payment is demanded. This seems an accurate account of what is going on in this case as well. As Nozick writes:

“One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this. If you may not charge and collect for benefits you bestow without prior agreement, you certainly may not do so for benefits whose bestowal costs you nothing, and most certainly people need not repay you for costless-to-provide benefits which yet *others* provided them. So the fact that we partially are “social products” in that we benefit from current patterns and forms created by the multitudinous actions of a long string of long-forgotten people, forms which include institutions, ways of doing things, and language, does not create in us a general free floating debt which the current society can collect and use as it will.”<sup>39</sup>

Arguably common knowledge and “shared culture” are the synergistic effects of individuals freely interacting. If a thousand of us *freely* give our new and original ideas to all of humankind, it would be illicit for us to demand compensation, after the fact, from individuals who have used our ideas to create things of value. It would even be more questionable for individuals 10 generations later to demand compensation for the ideas that we freely gave. Lysander Spooner puts the point succinctly:

“*What* rights society have, in ideas, which they did not produce, and have never purchased, it would probably be very difficult to define; and equally difficult to explain *how* society became possessed of those rights. It certainly requires something more than assertion, to prove that by simply coming to a knowledge of certain ideas—the products of individual labor—society acquires any valid title to them, or, consequently, any *rights* in them.”<sup>40</sup>

But once again, suppose for the sake of argument the defender of this view can justify societal ownership of general pools of knowledge and information. Nevertheless, it could be argued that we have already paid for the use of this collective wisdom when we pay for education and the like. When a parent pays for a child’s education, through fees or taxation, it would seem that the information—part of society’s common pool of knowledge—has been fairly purchased. And this extends through all levels of education and even to individuals who no longer attend school.

Finally, in many contexts where privacy interests are at stake, for example, an appeal to the social nature of intellectual property and information seems unconvincing—assuming that this view can be saved from the points already discussed. The fact that sensitive personal information about an individual’s medical history is a social product may have little force when it comes to questions of access and control. This is also true of information related to national security and financial information.

## Conclusion

As noted in the opening, it seems that adherence to an incentives-based social progress foundation for institutions of intellectual property has given way to the view that economically privileged elites shape our policy. How else could one interpret the US case of *Eldred v Ashcroft* which challenged the 20-year extension of copyright protection provided by the Sonny Bono Copyright Term Extension Act of 1998?<sup>41</sup>

<sup>39</sup> Nozick, *Anarchy, State, and Utopia* (1974), p.95.

<sup>40</sup> Spooner, “The Law of Intellectual Property” in Shively (ed.), *The Collected Works of Lysander Spooner* (1971), p.103.

<sup>41</sup> *Eldred v Ashcroft* 537 U.S. 186 (2003).

In *Eldred*, 17 prominent economists, including five Nobel laureates, claimed that adding 20 years to copyright protection would have little impact on incentives to create.<sup>42</sup> The Supreme Court ignored the views of these economists and simply extended copyright protection. If we continue down the road of economic privilege, then we risk undermining both the institutions and the very idea of intellectual property. This would explain the current attitudes about copying and piracy.

Locke wrote:

“Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst.”<sup>43</sup>

Given allowances for independent creation and that the frontier of intellectual property is practically infinite, the case for Locke’s water-drinker and the author or inventor are quite alike. Once a plausible measure and baseline are adopted, we are in a position to consider the actual contributions of authors and inventors. In most cases, we are bettered by these intellectual efforts even when we are denied immediate access. Perhaps less controversially, we are at least not worsened by these activities. In any case, by working out the theoretical underpinnings of a Lockean theory of intellectual property, we may provide a defensible moral foundation for systems of copyright, patent and trade secret protection. Intellectual property is not theft; rather, it reflects our commitments to innovative activity and to protecting the natural rights of authors and inventors.

<sup>42</sup> Stan J. Liebowitz and Stephen Margolis, “Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects” (2005) 18 Harv. J.L. & Tech. 435.

<sup>43</sup> Locke, *Second Treatise of Government* (1689), s.33.