The Infinite Commons: A Critical look at Locke's Labor Theory of Property as a Justification for Intellectual Property Laws

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Intellectual property law, commonly understood as an umbrella term encompassing patent, trademark and copyright law,[1] can be - and frequently is - justified philosophically by appeals to Locke and Rawls, or more specifically by appeals to the labor theory of property, utilitarianism, or distributive justice. This essay will deal exclusively with justifications of intellectual property (IP) through the appeal to John Locke and his labor theory of property. I do not intend to demonstrate that IP is unjustifiable, but merely that attempts to equate property as understood by Locke with new conceptions of intangible forms of property is unfair to Locke, who did not envision property in such a way, and that such justifications ultimately fail due to the incompatibility of Locke's theory of physical property with contemporary conceptions of intellectual property.

John Locke described the labor theory of property in chapter five of his *Second Treatise on Government*. Locke believed that God had provided for humanity all that was necessary for life, and that these resources were available to all in common:

> God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being[2]

The existence of God, and God's role in providing humanity with all that is necessary for life was central to Locke's argument. But the resources that God provided were not ready for humans to use; the second element of Locke's idea was that labor was necessary to make use of the commons:

> yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property[3]

For Locke, what separated the commons from property was the application of labor. It would

seem clear on a first reading how this view of physical property could be used to justify various forms of intellectual property. In music, for instance, the twelve notes of the chromatic scale could be said to belong to the commons, but a musician's labor in arranging them in a unique configuration makes that configuration the property of the musician. The same relationship could be seen between the colors held in common and a particular painting created by an artist, or between the laws of physics and the creation of a new machine by an inventor.

It would appear at first glance that intellectual property is easy to justify on a strictly Lockean basis. Those who believe that Locke's arguments serve as sufficient justification for both physical property and intellectual property reveal in this belief the understanding that on a fundamental level the two types of property are similar. There are substantial differences between physical property and intellectual property, however, and if one intends to use Locke's explanation of the former to justify the latter, some challenging questions emerge.

To illustrate one of these differences, take the example of a craftsman who uses the resources of the commons - wood for raw material, metal for tools – and uses them to create something that becomes his property. It would be uncontroversial to assert that, according to Locke's labor theory of property, a craftsman would retain lifetime property rights over a chessboard that he carved by hand. Locke would also support the right of the craftsman to bequeath the chessboard to his children upon his death, as Locke argued in *First Treatise on Government* that children have a "natural right of inheritance to their fathers goods, which the rest of mankind cannot pretend to."[4] Following the same logic, the craftsman's heirs could retain possession of the chessboard for as many generations as they would like. In this case it would serve as a family heirloom, as a way to connect individuals to their family history, and as a point of pride – one could imagine holding such an item and feeling great satisfaction in the

knowledge that the same object was touched by half a dozen generations of family members. Because the chessboard is physical property, the decision of the craftsman's family to retain possession of it does not deny property rights to anyone else, nor does it prevent other craftsmen from making similar or even identical chessboards of their own. This example matches Locke's conception of property.

An image, song, poem, or other form of intellectual property does not function in the same way. Though a musician may have used creative energy to wrest a new song from the common elements of western music, for example, she or her descendants could still listen to it and feel the same sense of pride and connection regardless of whether the song generated a profit through the use of copyright laws. There is an important distinction between the ability to use and enjoy something and the ability to profit from it. With physical property a choice must be made between the two. With intellectual property, both are possible at the same time. The craftsman could earn money from the sale of the chessboard, but doing so would almost certainly involve parting with the object. Not only could the songwriter enjoy the song at the same time as millions of others, something that is impossible with physical property, but she could make money by charging a fee for others to listen to it. In the case of intellectual property, one can have their cake and eat it too. This is one of the fundamental differences between physical property and intellectual property, and it presents a major challenge to those who claim that Locke's labor theory of property can be used to justify intellectual property rights.

The heart of this first main objection to the notion that the labor theory of property can be used as a defense of intellectual property rights is that intellectual property, economically speaking, is made up exclusively of non-rival goods. This means that owners and producers of intellectual property could provide that property to two consumers for essentially the same cost

as providing it to only one. If a poet writes a poem, for example, and emails it to a friend, she has shared her intellectual property. If she emails it to two, or three or one-hundred friends, her cost is the same.

Unlike in the world of physical goods, where the consumption of the good by one person prevents the consumption of the same good by a different person, in the world of IP, the number of people in possession of a good has no effect on the number of people who *could* be in possession of it. If a merchant has a basket of ten apples, he can sell one apple to ten customers, or ten apples to one customer, or anything in between, but, assuming each customer must have at least a whole apple, he cannot sell ten apples to twenty customers. This is not so with IP. The merchant could sell ten songs to twenty people; for that matter he could sell ten songs to twenty million people. The differences between the two categories of property are extraordinary. It is not fair to consider intellectual property as the same sort of property as physical property.

This objection connects to Locke's philosophy in two major ways. The first, is that based on a reading of the *Second Treatise*, Lockean property belongs to a very different category of property as compared to intellectual property. The relationship between labor and property in Locke's philosophy, it is important to remember, is the relationship between labor and a specific and limited kind of property: physical property. The second way this objection connects to Locke's philosophy is through the limits that he placed on property rights. Locke argues that "as much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others."[5] These limitations make perfect sense when discussing physical goods. If one picks too many apples from a communal tree, the excess fruit will rot, and what could have been of use to someone else goes to waste. Applying these limitations to intellectual property, on the other

hand, produces a significantly less coherent account of property and demonstrates that Locke's ideas could not reasonably extend into the realm of intellectual property.

Locke thought that a prohibition on holding more property than could be used was necessary in order to prevent the property rights of others from being harmed. In the case of copyright, especially of digital goods, hoarding property is meaningless because possession of one copy of a copyrighted work does not physically prohibit others from possessing identical copies. The reason that Locke wanted to prohibit hoarding was because it negatively affected others who could make use of the same resources. In the case of digital music files, for example, the size of one person's music library has absolutely no effect on the ability of anyone else to build their own music library, because the files can be copied easily.

An Art project created by Peter Sunde, the founder of The Pirate Bay torrent search engine, illustrates this point. The project, called the "Kopimashin," is a small computer which creates, then immediately deletes hundreds of copies of an mp3 file each second.[6] The artist does not own the intellectual property rights to the mp3, so the computer also calculates the monetary losses of the copyright holder due to the millions of copies of the song that are made each day. The purpose of the project is to demonstrate that even though the IP rights holders claim that making unauthorized digital copies is an infringement upon their property rights, the property they claim a right to is effortlessly and endlessly reproducible; no matter how many copies exist, no one is denied access to the property.

Sunde's art project attempts to demonstrate on an instinctual level what is so often obscured by proponents of intellectual property: that IP is not property in the way that most people intuitively understand it. If one is to apply Locke's view of property to copyright law, how might his proposed limitations to property rights be implemented? How does - and more

importantly why would - one meaningfully prevent the hoarding of common resources when resources are infinite and hoarding has no effect on their supply? The problem with the appeal to Locke in defense of intellectual property is that a large amount of his theory, like these limitations, simply does not fit when applied to IP.

Patents, which secure an inventor's exclusive rights over an invention, suffer from a completely different problem when an attempt is made to reconcile them with Locke's philosophy. Because inventions are physical objects, patents function very differently from copyright. The widespread problem of piracy that exists within the world of copyright does not affect patents to the same extent because unlike the endlessly reproducible works covered by copyright, patented objects must be manufactured in the real world. The manufacturing process prevents patented objects from being shared as easily as copyrighted works. Because of the physical limitations involved in the production of patented objects, it is possible to hoard patents without using them and thus prevent others from using the commons to create property of their own.

In the US, the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy produced a report which condemns what they call patent assertion entities (PAE's), sometimes referred to as patent trolls, that hoard patents and use them to make money through litigation against those who are perceived to be in violation of the rights of the patent holder rather than by producing or licensing the inventions covered by the patents they hold.[7] It would appear that this actually is a case where Locke's analysis applies very well to IP, however not in a way that IP proponents might like. Patent trolls use their labor to hoard a common resource, denying others access without making use of it themselves, and under the limitations Locke imposed, they have no rightful claim to property.

The behavior of patent assertion entities, far from being limited by the existing IP laws, is actually enabled by them. The merits and morality of the use of IP for these ends can be debated, but whatever the conclusion, this form of IP is not firmly grounded in the philosophy of John Locke.

The second major objection to the use of the labor theory of property as a justification for intellectual property rights focuses on the premise of Locke's argument for property. Locke's labor theory of property is based on the notion that God provided the commons to humanity. This is no small part of Locke's theory, and in fact, it serves as the sole justification for it; one cannot appeal to Locke without appealing to God. In the final sentence of the first paragraph of the chapter on property, Locke says, "I shall endeavour to shew, how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[8] Locke's entire argument for property is predicated upon the assumption that God gave the Earth's resources to all of humanity in common. This premise is essential to the understanding of the remainder of Locke's argument, because without it, it would not be necessary for Locke to demonstrate that labor separates resources from the commons and converts those resources into personal property. Without the assumption that all of Earth's resources belong in common to humanity, there is no problem for Locke to solve.

Part of the problem that this premise creates when translating Locke's argument from one of physical property to one of intellectual property is that the commons of IP, the public domain, was not created by God at all; it was created by humanity. While it can be argued that someone who uses their labor to pick fruit from a wild fruit tree is appropriating property from the commons gifted to humanity by God, the same, quite obviously, cannot be said of someone who uses their labor to create intellectual property by coding a website from the commons of HTML,

PHP, and Javascript. While it may be argued that God created the tree, it cannot be argued that God created those programming languages. Absent the premise that God created the commons, an argument based on an appeal to Locke completely disintegrates.

This problem persists even amid efforts to secularize Locke's argument by substituting "nature" for "God" or using God as a metaphor, as in "an act of God" and so on. In the case where God is seen in Locke's argument as "the natural world" or is used as a simple metaphor, essentially the argument being made is that the thing in question is beyond the control of humanity – some resource which predates humanity (e.g. water, trees, or minerals) could not have been created by humanity intentionally and therefore belongs to everyone. Even when formulated this way the argument fails to account for the fact that the common resources that serve as the building blocks of IP stem from the public domain, which is comprised of products, not of the natural world, but of human innovation. The commons need not have been created by a literal God for the logic of Locke's argument to hold, but it must not have been created by humans.

A proponent of the Lockean notion of IP may interject at this point to say that Locke's appeal to God is intended only to show *why* the commons is common. Once the assumption is made that it *is* common, it does not matter who created it. If this objection is effective it must begin with the belief that there is something immutable about the distinction between property and the commons. Without a strong dividing line separating the two, the distinction becomes meaningless. If the commons is created by humans and not God, why shouldn't it be considered property instead? If human labor produced both the commons and property, Locke's argument that it is human labor that separates property from the commons becomes nonsensical. The distinction between the commons and property becomes one of mere semantics wherein the first

category contains the products of human labor that we all agree to share, and the second contains the products of human labor that we agree not to share.

Locke's argument depends upon a strong dividing line between property and the commons just as much as it depends upon the application of labor to the commons in order to form property. This dividing line is provided by Locke's insistence that God provided the commons to humanity as a gift, but it could just as well be provided by nature instead of God. Locke's argument recognizes a difference between that which exists as a resource apart from human labor, and that which exists as a resource as a result of human labor. The public domain is the result of human labor, so it cannot be considered part of the commons in the same sense that Locke envisioned it.

John Locke's view of property as being the combined product of one's labor and the resources of the commons was not intended to apply to intellectual property. The idea that IP can be justified on Lockean terms does not stand up to scrutiny. The two types of property are fundamentally different, the limits that Locke envisioned on property rights do not apply to IP, and Locke's argument is premised on the fact that the commons was not made by humanity. IP may be defensible of other grounds, but John Locke's labor theory of property does not provide sufficient justification for the existence of intellectual property rights.

Notes

1. “Intellectual Property: The Term.” Electronic Frontier Foundation, accessed July 21, 2016, https://www.eff.org/issues/intellectual-property/the-term.

2. John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 18.

3. Ibid. 19.

4. John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), 225.

5. John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 20-21.

6. “Kopimashin.” Konsthack, accessed July 21, 2016, http://konsthack.se/portfolio/kh000-kopimashin/.

7. The President’s Council of Economic Advisors, The National Economic Council, and The Office of Science and Technology Policy, *Patent Assertion and U.S. Innovation* (Washington, 2013), 1. https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf.

8. John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 18.