

0.2 outline for what follows

✓ 1. General paragraph saying Locke doesn't work so smoothly when one pays close attn, & the attraction of the common sense of it (if youre not hurting anyone why not) is therefore dangerous.

✓ 2. It's not using the common- it's using other people. Problems of demarcation.

3. Proviso is violated

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1. transaction costs
  2. independent invention
  3. standardization ar5-9 har

4. Doesn't help us with the tough problem of nonuse

1. No necessity arg (locke)
2. Desert is proportional (becker)- see ar5-8bec. Mill too.
3. unexploited markets- not "appropriated"

1. appropriate is a word that doesnt fit

2. we see the lack of fit especially ehre
4. waste (locke)
5. oub dom: the animal who escapes. But: wild v  
domestic.

at least potentially so, at any rate. So: not clear Locke applies.

### 0.3 No Harm

Locke suggests that a covetous stranger has no justification to complain of another's taking possession and ownership of land if, after the owner's appropriation, "there was as good left, as that already possessed, and more than he [the potential complainer] knew what to do with, or his Industry could reach to." Locke at 34. At first blush, the creation of i/p seems to meet the test of Locke's proviso. Since there seems to be a nearly infinite store of possible melodies, poems, novels, ideas, and the like, granting ownership over any one such product wouldn't seem to interfere with the stranger's ability to create his own.

In fact, however, there are limits on the seemingly infinite variety of i/p products. First, consider the problem of simultaneous invention. At a certain point in time, many scientists will likely be working on similar problems. If the first inventor gets a patent, all the others will have to give up their hope of perfecting their version for sale ~~(except for purchase of licenses etc.)~~ They are in a quite real sense left

with "not as good" opportunities left over.<sup>24</sup> They have invested precisely in the oppty now foreclosed.

The prior problem might be partially overcome simply by restricting the reach of the patent remedies. Under current patent law, any duplication of the invention-- even if produced by independent invention-- is prohibited as an infringement. This could be revised, to make the patent law's reach match<sup>25</sup> that of the copyright and trade secret laws, namely, to prohibit only those duplications of the creator's work which ~~copied~~<sup>from</sup> from that creator. Even under such a revised legal rule, however, there are problems. First, some inventors may use a combination of copying (or inspiration)<sup>26</sup> drawn from the first creator; their copying would condemn their efforts as infringements, while their independent work would go unrealized.<sup>27</sup> Second, even assuming these technical problems

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24. Remember Nozick on the opportunity v other interp. of the proviso.

25. Such an alteration in the patent law might cause other problems, of course, such as introducing the difficult question of proof of copying; potentially eroding the incentive effect of the patent grant by weakening its reach; interfering with the prospectors' centralization of research & dev't function put forward by Kitch.

26. Knowing an invention is possible is often a valuable piece of information, spurring results which might otherwise not be reached.

27. One might argue for partial property rights, of course, so that any infringement didn't yield injunctive relief, and any

28  
could be worked out, the fact remains that not all options are equal to each other. In Locke's example: he says not only that there's Land left remaining, but also that the remaining land is "as good." That will not always be the case with i/p.

In the realm of inventions, certain things are needed at certain times, and have more value at some times than others. ONce invented by an initial creator, they may be impossible for others NOT to copy. (Consider someone trying to independently "invent" the safety pin after having seen one. Some inventions "infect" one immediately with knowledge of their workings.) Giving property as against copying will therefore close off some of the best opportunities.

Even aside from the copying problem, there may be room for

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"improver" could do <sup>his</sup> their own invention (or in copyright, derivative work) subject only to an obligation to pay reasonable royalty. That option is discussed below at \_\_\_\_\_. The basic problem with the idea is the high cost in transforming everything to a liability rule system: great inefficiency in substantive result cuz central decisionmakers don't know much; lots of cost for the judicial system; loss of centralization of information; loss of the feeling of control impt for moral rights or other dignitary type concerns.

28. see prior note for one possibility

29. Note Nozicks'sides- give propr only for so long as will repay the ADVANCE INTIME you saved the world. If there are many simult inventions, you've saved the time ZIP. But, of course, without some sort of prop award, there may have been no inventions at all- so without the reward maybe neither you nor anyone else would create.

The usual snake's circle of time.

only one of a given type of thing. Many different handicapping systems might be developed for golfers; what they need, however, is one standardized system so that they can communicate with each other meaningfully to set up matches. Many different college admissions tests might be developed; what colleges need, however, is a finite and uniform set of tests to provide comparisons between candidates. Many different industrial averages might be developed for tracking the stock market; the one with the longest history, however, is likely to have the most importance, because only with the long history will people come to know how it functions and what to expect from it, so that the longevity can give it some uniqueness. It may also serve as a standardized mode of communication, like the handicaps.<sup>30</sup> Thus, the number of valuable options are likely to be limited, even if the possibilities for variation are in the abstract limitless.

The sometime impossibility of avoiding copying also leads to another point. Locke's provision seems to assume an independence among the various individuals comprising humankind; each lives from his own garden and, so long as there's enough good land left that one can make a good garden,  
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30. REstandard modes of communication, that's also what's at issue with trademarks. Is there a similar need for legalprotection here, to safeguard the communic function? Think on it.

one has no right to complain about another's appropriation of a plot of land. But we live interdependent lives today. If X were given a property right to pollute, Y might have quite a lot to complain about.<sup>31</sup> If what we're looking for is conditions under which strangers have no right to complain about property being granted, then it would seem appropriate to broaden the proviso a bit<sup>32</sup> and say, the stranger has no right to complain so long as he's not harmed by the grant of property.

In looking at what "harm" can be caused by the grant of intellectual property, we of course have a definitional problem. For now, let's assume "harm" doesn't include "refusal to bestow" a benefit, but merely means some bad impact on the actuality or expectations one would otherwise have (including changes in the calculus of risk, pro or con). Of course, if the new creation causes a special need for the benefit which wdnt otherwise be there, that's a divf matter. Example: you alter people's chemistry so they need a new rare earth to wurvive. You may have an oblig to supply that rarte earth in ways you wouldnd't be obligated to supply other nutrients.

When people make things they have investments. Great room

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31. Note a good example of the pt.

32. Nozick, Becker

for strategic begh,. The inj prob. W the reliance you cause comes obligations. So compelte "prop" shdnt be given. Prop limited by the need to avoid harm. (Fair use)

Similarly, showing how cration of interrelaitonship can give rise to duties: DUTY TO AID once there's a beginning relationship.

choice: no choice (artists' compulsion to create).----

---- re locke: He reasons as follows:

...I shall endeavour to show, 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.

--- The very range of possibility inheres in the blank page.

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describe the OO reasonsing. It may be reasoning such as this which accounts for the judicial receptivity to creating property rights in intellectual products: you made it, you deserve it, no one else made it or has a claim to it, so why not you.

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In Locke, the relation between labor and appropriation is pictured as simple:



...every Man has a Property in his own Person. ... 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 joyned to it something that is his own, and thereby makes it his Property....

Though the Water running in the Fountain be every ones, yet who can doubt, that that in the Pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature, where it was common, and belong'd equally to all her Children, and hath thereby appropriated it to himself.

Paragraphs 27, 29 (emphasis in original).] Creators of new ideas and literary writings would seem to be creating something out of nothing, and thus would seem to be unusually meritorious candidates for such rewards.

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Locke suggested that, at least in a some circumstances,  
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 one who wasted his property lost claim to it. Perishable

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33.

Before the Appropriation of Land, he who gathered as much of the wild Fruit, killed, caught, or tamed, as many of the Beasts as he could; he that to employed his Pains about any of the spontaneous Products of Nature, as any way to alter them, from the state which Nature put them in, by placing any of his Labour on them, did thereby acquire a Property in them: But if they perished... if the Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature, and was liable to be punished... for he had no Right, farther than his Use...

The same measures governed the Possession of Land

fruit, like intellectual property, can be wasted if not used - yet the law does not permit scavengers to take and eat all food which looks like it might spoil. To do so might, of course, create chaos in the market for fruit, and in the warehouses. Such a law against waste might create even more waste by undermining the usual modes of private property food distribution, and would not necessarily generate a rule of law in favor of the scavenger or gleaner. However, the problem of distributing intellectual property is a very different one, and may permit expression of the anti-waste impulse in purer form. First, the problem of waste is likely to be more significant, so that disruption might be more tolerable. More importantly, because such products are inexhaustible once produced, there isn't the usual problem of rationing a scarce resource to avoid overuse. Rather, the economic problems are primarily two: securing enough compensation to generate incentives for the intellectual property to be produced in the first instance, and allowing optimal distribution of use or access. Where there is no confidence in the private property model's being able to

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too... if either the Grass of his Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering... this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.

Locke, Rights to Property, in V. HELD, PROPERTY, PROFITS AND ECONOMIC JUSTICE at 32-3 (1980)(emphasis in original).

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accomplish these objectives , a concern with undermining the  
property system may lose its impact, and case-by-case inquiries  
into waste may become more important.

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34. (Cite to the Demsetz etc. debates)