

also: has to be on
late w/ PD. NOT aimed

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Desert Theory: The No-Harm Notion

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if 1.5.93 that

At first blush, the creation of i/p seems to meet this test of Locke's proviso, namely, that strangers cannot complain of the ownership ~~because even~~ after the appropriation, "there was as good left, as that already possessed, and more than he knew what to do with, or his Industry could reach to." Locke at 34. There would seem to be a nearly infinite store of possible melodies, poems, novels, ideas; granting ownership over one variant which has been reduced to expression by a creator wouldn't seem to interfere with the stranger's ability to create his own.

A grant of our may not leave "as good left"

In fact, however, there are limits on the 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.[1] They have invested precisely in the opportunity 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 that of the copyright and trade secret laws,[2] namely, to prohibit only those duplications of the creator's work which copied 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)[3] drawn from the first creator; their copying would condemn their efforts as infringements, while their independent work would go

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

2. 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 prospector's "centralization of research & dev't" function put forward by Kitch.

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

unrealized.[4] Second, even assuming these technical problems could be worked out[5], the fact remains that not all opties 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 immedaitely with knowledge of their workings.) Giving property as against copying will therefore close off some of the best opportunities.[6]

Even aside from the copying problem, there may be room for only one of a given type of thing. Many different handicappying 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

4. One might argue for parital property rights, of course, so that any infringement didn't yield injunctive relief, and any "improver" could do their own invention (or in copyrivht, derivative work) subject only to an obligation to pay reasonable royalty). That opiton 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 morall rights or other dignitary type concerns.

5. see prior note for one possibility

6. Note Nozicks'sides- give propr only for so long as will reqpay the ADVANCE INTIME yuou 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 ionventions at all- so without the reward maybe neither you nor anyone else would create.

The usual snake's circle of time.

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.[7] 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, 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.[8] 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[9] 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 woulnd't be obligated to supply other nutrients.

When people make things they have investments. Great room 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)

7. RE standard 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.

8. Note a good example of the pt.

9. Nozick, Becker

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)