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"Copyright's Derivative Works Doctrine and an Upside-Down Proviso"

PRELIMINARY DRAFT: please do not quote or cite

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Introduction

It is sometimes observed that questions of "justice in acquisition" do not much arise any more. However, judges face those questions on a daily basis in courtrooms adjudicating copyright and patent matters. In United States copyright law, for example, an intriguing dilemma regarding derivative works has developed that raises what appears to be a new issue regarding John Locke's sufficiency proviso.

Many commentators and sometimes even courts look to Lockean theory as a source to justify the award, protection, or limitation[2] of property in intangibles. Thus, for example, the United States Supreme Court referred to chapter five of Locke's *Second Treatise* as authority for holding that a trade secret could be property.[3] It therefore can be useful as well as interesting to trace what implications Locke might hold for law.

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[1] Thanks are owed to Larry Becker, Laura Biron, Abraham Drassinower and Hillel Steiner for comments. This draft does not yet show all the benefits of their suggestions. The draft was initially presented at the American Philosophic Association as part of a panel dedicated to Larry Becker's work. I also appreciate the assistance of research assistant Boris Milman. Valuable background (though not on the Lockean proviso) appeared in a draft Mr. Milman and I coauthored, entitled *Derivative Rights and the Rule of Law: Judge Posner and Copyright.*

[2] See, e.g., GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY (1995). My own prior contribution has also focused on suggesting how Lockean theory should *limit* the scope of legitimate copyright claims. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE LAW JOURNAL 1533 (1993).

[3] See, e.g., Ruckelshaus v. Monsanto, 467 U.S. 986 at 1002-03 (1984) ("This general perception of trade secrets as property is consonant with a notion of "property" that extends beyond land and tangible goods and includes the products of an individual's "labour and invention." 2 W. Blackstone, Commentaries *405; see generally J. Locke, The Second Treatise of Civil Government, ch. 5 (J. Gough ed. 1947).")

The labor theory of property which Locke presents in chapter five has varying interpretations. One such interpretation goes as follows:[4] Locke sees it as foundational to natural law that people should avoid doing unjustified harm to each other. A person owns herself and her labor. If she mixes her labor with something not privately owned, and a third party takes the mixture from her, the laborer "loses" the labor and is harmed. Therefore, others are under a moral duty not to take the mixture from her. Their duty to refrain is equivalent to her having a right to exclude, and the right to exclude is a hallmark of property. The mixture is now "owned" by her. However, the putative owner is also obliged to do no harm. If her claim of ownership would hurt others—if it would fail to leave them with "enough, and as good"[5] of the plenitude that Locke believed God gave all of us in common—then her claim of ownership must fail. The latter condition of leaving "enough, and as good" is usually known as the "sufficiency proviso".

Virtually every element of this brief description can be and has been contested. Yet US copyright law seems to raise a new issue, one which as far as I know has not yet been explored in Locke scholarship. Historically, the proviso is seen as protecting the non-propertied, particularly later generations, who have not yet appropriated a share of the common. Can and should the sufficiency proviso also be used to protect pre-existing property owners from diminution in value? To put it otherwise: for those (like me) who think the sufficiency proviso is and should be a meaningful constraint on the grant of property, should the requirement of leaving "enough, and as good" be seen as temporally bi-directional? As we shall presently see, the issue arises out of copyright's derivative work doctrine.

The relevant fact pattern arises roughly in this temporal sequence:

First, someone has a valuable copyrighted work (let us call him the "parent"), and he commissions derivative works to be made: Perhaps the parent hires someone to make

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[4] Here I follow much of the argument in Gordon, supra note __, at 1544- 72.
[5] Second Treatise, Chapter V, at Sec. 27.

costumes, posters, photographs, or advertisements based on the parent's copyrighted work. Let's call the person who makes these derivatives with the parent's permission a 'descendant' author.

Second, the contract between the parent and the descendant does not require the copyright in any resulting derivative works to be assigned back to the parent. The parent could have required this—after all, the derivative work would have been unlawful if made without the parent's permission, so the parent had a great deal of leverage—but for some reason the contract is silent.

Under prevailing US law, although any mere duplication of the original work will not give a new copyright to the descendant, additions and variations on the original can be owned by the licensed descendant as a derivative work ("DW") type of copyright. The copyright in a derivative work based on a copyrighted work is quite limited: the DW copyright merely allows its holder to exclude other people from copying his contribution; anyone wanting to copy the whole (that is, the base work *with* its additions) would also need permission from the parent as owner of copyright in the base work. But the limited nature of the DW holder's rights does not mean the parent needn't be worried about the derivative work having copyright. If the descendant's derivative work has copyright, the parent (or his new licensees) would need the descendant's permission to use the copyrighted variations. Nevertheless, the contracts are often silent as to who owns copyright in the derivative works (DWs).

Third, the descendant uses creativity to make the adaptations requested. Under ordinary copyright law, as mentioned, people get copyrights in their additions/variations if they make creative derivative works lawfully—and the derivatives in these decided cases are lawful because authorized by the parent. So under ordinary US copyright law, the descendants would have copyright in their creative adaptations— arguably, say, if the descendant in making a costume based on a cartoon character puts a new expression on

the otherwise familiar cartoon face.[6] Under many US cases, such a change would be copyrightable.[7]

Then for some reason the parties disagree and a fourth stage arises: the parent decides to fire the particular descendant who has been making derivative works, and switches to a new creative supplier of DWs.

Fifth, the new creative supplier is alleged to take advantage of the variations and creativity of the initial derivative work maker. The latter may sue, basically arguing that he (the first creative supplier) owns copyright in these variations, and that the new (second) derivative-work maker should not use the first supplier's creative designs.

At this point the Second and Ninth Circuits have intervened on behalf of the original parent and his new supplier to deny copyright to the initial descendant; the first descendant gets no copyright in the variations contained in the DW he has made.[8] As reasons for intervention, the courts cite concerns that even if the parent's brand-new supplier doesn't copy any of the creative elements added by the initial descendant, there will still be inevitable overlaps in the works' appearance because both the initial

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[6] See footnote 8, infra.

[7] See, e.g., Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 34-35 (2d Cir.1982) (minor changes in Paddington Bear copyrightable.)

[8] Durham Industries, Inc., v Tomy Corp., 630 F.2d 905 (2nd Cir 1980) (hereinafter "Durham v. Tomy"); Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1219-20 (9th Cir. 1997) (hereinafter "ERG"). The interventions by these circuits have been in borderline cases. Had a fully distinct and separable addition been made by the derivative-work maker—such as painting a flower design on the side of a Barney the Dinosaur costume-- it is likely that even these Circuits would have upheld the derivative work makers' copyright. For anything less obvious, the courts seemed to strain to avoid copyright. For example: In *ERG,* the court wrote:

> ERG claims that the facial expressions of the costumes contain more than merely trivial differences from the facial expressions seen in the underlying drawings. Although ERG is correct that there are some differences in these facial expressions, no reasonable trier of fact would see anything but the underlying copyrighted character when looking at ERG's costumes.

122 F.3d 1211 at 1223. With all respect, the second sentence appears to me a non-sequitur.

descendant's work, and the new descendant-supplier's work, will be based on the same work by the parent.

So the new supplier might worry that a lawsuit, even unjustified, might have enough surface plausibility to require an expensive jury trial and enough potential for error that liability could be imposed. The parent might thus find it hard to locate a new creative supplier, and reluctant for the same reasons (fear of lawsuits by the initial descendant) to undertake the making of the DW itself. The end result may be a reduction in the value of the initial work, which is no longer as capable of being exploited in derivative form as it was before.

Comment [DL1]: Thankfully we don't have jury trials in Canada in civil matters (except for defamation)!

One might put the question this way: Should courts make it more difficult for DW makers to get copyright in what they make when they are building (with permission) on a copyrighted work that someone else owns, on the supposed ground that the DW copyright might make the built-upon work less valuable?[9]

The Second and Ninth circuit federal appeals courts have responded to this with a 'yes'. They use two devices:

First, they sometimes manipulate the standard of originality required as a precondition for the derivative work to have copyright. That is, when the base work's copyright is privately owned, these courts require more originality as a precondition for DW copyright, as compared to the degree of originality the courts require when the base work is something like a play or statue whose copyright has expired. This is not the focus of the instant paper.

Comment [DL2]: As we don't have the DW doctrine in Canada, our treatment of this matter will likely proceed along originality analysis.

The second device, and my focus, is the following judge-made rule: "To support a copyright [in] the original aspects of a derivative work... [The copyright in that

[9] As suggested earlier, under US copyright law, a DW copyright would enable the DW copyright holder to sue someone who copied him, but would not give him the ability to make duplicates of the derivative work unless he obtained the consent of the parent who owns of the underlying base work. That is: someone wanting to copy a work that embodies the copyrights of two people (here, the parent and the first DW) needs to obtain permission from both.

derivative work] must not in any way affect the scope of any copyright protection in that preexisting material."[10] This is known as the *Durham* test. Although the *Durham* test uses the word "scope", the fact patterns in the cases make clear that the concern is really not about 'affecting the scope' of the preexisting material's protection, but rather with the preserving the *value* of the preexisting material. Putting it another way: at issue is the parent's *ability* to exploit and profit from the formal incidents of ownership a la Honoré[11], and not with the *existence* of those formal incidents of ownership.

Comment [DL3]: Value: Is this clear from the reading from the test?

II Resemblance to the proviso

Both through the requirement of extra originality, and through the so-called *Durham* test of 'avoiding interference with the underlying copyright', these Circuit courts are refusing to grant later comers property in their creative works, the reason being the courts' deference to earlier-arising property. This sounds as if the courts are taking Locke's sufficiency proviso—namely, that private property not arise unless the private claim would leave "enough, and as good" for others-- and applying the sufficiency proviso in an upside-down sort of way: Although the proviso is usually understood to shelter the opportunities of the nonpropertied and later generations, the courts seem to be using the sufficiency proviso to also shelter the acquired value accrued to the already-propertied. I take my task to be investigating whether such a 'bi-directional' or upside down proviso makes sense.

Admittedly, even if I answer this general question, it may not resolve the specific case of how a Lockean might treat copyright in derivative works. The litigated cases I mentioned may be a special case, since the later laborers were directly building on the earlier comers' effort, and there is a statutory provision (17 USC sec 103(b))[12] which can

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[10][10] Durham v. Tomy, 630 F.2d 905 at 909, quoted and followed with approval in ERG, 122 F.3d 1211 at 1220.

[11] A.M. Honoré, Ownership, in PROPERTY: CASES, CONCEPTS, CRITIQUES 78 (L.C. Becker & K. Kipnis eds. 1984)

[12] With the applicable language italicized, that provision reads as follows:

be conceivably interpreted to support the courts' position.[13] However, there are grounds for disregarding those special aspects, first because the statute is open to other and better interpretations,[14] and second, because the position of the initial descendant DW authors is not so different from that of other authors. The first generation of descendants were using the previously copyrighted works with permission; the parent owners of the base work had issued no prohibition on the descendants claiming copyright what was original in their result; moreover, the first-generation descendants were not only using their own creativity and the parent's copyrighted work-- they were also using aspects of the commonly-owned public domain[15] (such as long-developed artistic techniques and conventions that made the new work comprehensible to the public.) Thus the makers of the derivative works in the decided cases were arguably much like any makers of new works, in that they made use of their own resources (e.g., creative ingenuity) and of the public domain, and made no wrongful use of any privately owned resources.

Comment [DL4]: A species of copyright misuse?

Sec 103...(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, *and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.*

[13] I take the Lockean arguments as capable of influencing courts in ambiguous and borderline cases, but not as trumping explicit statutory provisions. The statutory provision at issue here is hardly explicit on the preservation of prior owner's value.

[14] I would argue the statute's concern is primarily with curtailing authors who seek to *extend* their copyrights by means of derivative works—the opposite of the concern exhibited by the courts in the two cases discussed. The House of Representatives Report which is considered the most definitive document on the statute states, "Section 103(b) is also intended to define ...the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: *copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material." (H.R. Report 94-1476 (1976) at 57 (emphasis added).*

[15] Locke states that "God gave the world to Adam, and his posterity in common...." Second Treatise, Chapter 5, sec. 25. There can be many varieties of common; see, e.g, A. John Simmons, The Lockean Theory of Rights, at 238 (1992). I take the nature of Locke's common ownership as placing duties and preconditions on private appropriation.

Nevertheless, a distinction can be drawn between the situation of the DW makers and that of other authors. Therefore for the purposes of this essay, I will focus less on the special aspects of the derivative-works situation, and more on a general question: Assume that a principle of justice in acquisition needs to be conditioned by some protection for others such as Locke's sufficiency proviso. Under such an assumption, should a maker of a work be unable to claim a justifiable property right in it, unless she can show that her claim leaves the value of any preexisting property without negative effects? If so, the implementing principle, which I call an upside-down proviso, has at least three distinctions from the usual understandings of the sufficiency proviso.

First, the upside-down proviso attempts to safeguard pre-existing property claims as well as future property claims, that is, the *Durham* principle appears to look temporally backward. By contrast, the Lockean sufficiency proviso is usually understood as looking forward: aiming at sheltering the opportunities of later comers, those future citizens who have not yet had the opportunity to appropriate property.

Second, the new principle is concerned with dangers to property value caused by errors and mistaken litigation:[16] it is not clear that the Lockean proviso would similarly alter its operation because of the machinery of justice was imperfect.

Third, the Circuit courts are aiming to preserve not the early comer's ability to own property, but more particularly the property's monetary value and the parent-owner's ability to exploit that property. The Lockean proviso is variously understood, and some accounts do tie it to e effects rather than to property ownership. Nevertheless, for a court to invent a principle to secure the *value* of pre-existing property is questionable. For example, in US "takings" cases often emphasize that the government

Comment [DL5]: OK: see a comment above.

[16] The concern is that later courts and juries will not be able to tell the difference between what various derivative work makers have added, resulting in harassing litigation among them and a decreased ability on the part of the first property owner to license new derivative works.

need not compensate all property owners who suffer a mere diminution in their property's value as a result of government action.

I will now discuss the three issues just mentioned: the temporal direction of the proviso, problems arising out of imperfect machineries of justice, and whether the proviso should be concerned with the monetary value of property.

Temporal Directionality

As for the new principle's temporal directionality, there are Locke-inspired views of what it means to deserve to own property that do not distinguish between the kinds of harm a new property claimant might cause. Larry Becker's view is of this sort.[17] It might be construed as being bidirectional. But as he and others who use such general formulations do not appear to have explicitly considered the bi-directionality of their versions of the proviso, I think it appropriate to start from scratch in this preliminary discussion.

I first think the proviso should be understood as being concerned with sheltering the opportunities of *future* appropriators because that is the function that the sufficiency

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[17] At first, this Durham principle seems to match at least one philosopher's recommendations. Lawrence Becker, in his early reformulation of the Lockean labor theory as a desert principle, has this to say:

> A person who, in some morally permissible way, and without being morally required to do so, 'adds value' to others' lives deserves some benefit for it.
>
> But he adds, this "must be a double-edged principle: if a benefit is due for adding value, presumably a penalty is due for subtracting value."
>
> LAWRENCE BECKER, PROPERTY RIGHTS (1977) at 51.

Becker continues,

"Any diminution of value produced by labor must be assessed against the laborer as a penalty deserved for the loss thus produced." Id. at 55.

Applying these principles to the DW case, it is at least possible that Becker's principles would support the *Durham* approach. Denying the first DW maker an award of property avoids some monetary loss to the parent, and it may be that the loss avoided is great enough to outweigh whatever reward the first DW maker might otherwise deserve.

proviso served in Locke's original theory. He was facing the problem of consent: if the world is given to all in common, as he assumed it was, how can any one person claim a private segment without the unanimous consent of all? "If such a consent as that was necessary, Man had starved notwithstanding the Plenty God had given him." [18] Locke's own solution is more elegant. He specifies a ground for justifiably dispensing with consent: if there is "enough, and as good left in common for others" after the appropriator has taken up his share, [FN173] then the appropriation "does as good as take nothing at all." [FN174]

With Sreenivasan and others, I see the proviso as the answer to the crucial political question[19] of how private property could arise out of common ownership. If 'enough and as good' is left, then 'no one has ground for complaint' other than envy or covetousness. If no one has (respectable) ground for complaint, then that is (in Locke's eye) as good as consent—or at least sufficient to justify the property arising.

So why should the proviso be interpreted uni-directionally, not to protect pre-existing property owners but only to protect the propertyless in the future? One potential answer might be that persons who already have property would seem unlikely to withhold permission from a property system; they have already been benefited and thus do not need the proviso to protect them. But this point can be challenged, both on empirical grounds, and on grounds that the issue Locke faced was more than finding criteria that would justify 'a private property system in general'; he wanted also to find grounds that would justify 'a particular appropriation.'

An alternative defense of the uni-directionality of the proviso might point to the specific copyright cases out of which the issue arose. The initial property owners in the given cases had consented to others' use of their property—had in fact sought costumes and photos and advertisements featuring their works-- and neglected to assert by contract

Comment [DL6]: Agree with you and Gopal, but I think that one can strengthen this: Locke was in a political debate over the justifications for original acquisition from a commons, and hence the origins of society. DW is not part of such a political debate; of course, that means Locke should not be used in general discourse, a result that you might not want to live with, as you argue for limited uses of a (limited) Locke! In any event, it is good for the no-looking-back argument. But also, in a separate second argument, DW is by definition NOT an original acquisition; it is derivative. Though here too I note that you argue in effect that there is some originality on the DW creation process, using elements of the public domain (a Lockean common?) and ingenuity, as well as the first work.

Comment [DL7]: Particular, yes... but is it not a specific act that is part of a narrative about the origins of the property system. I.,e, while it is true he wanted to find the grounds for the justification of each particular appropriation, it is the first step in a long story, and one might not be convinced that he was trying to set out a theory to justify any one specific (and free standing) appropriation.

[18] Locke, bk. II, § 28

[19] One of Locke's goals was to refute Filmer's claims in PATRIARCHA for the entitlements of monarchs.

any rights in the resulting derivative works. They must have thought (by definition) the arrangement to their benefit. They issued contracts which, though they did not explicitly note the possibility of a DW maker claiming copyright in what he added, had this as the background possibility under the law prior to the contested cases. So it can be argued that the parent copyright owners essentially consented to the appropriation by the DW maker.

Comment [DL8]: I think this I better.

Putting it somewhat differently: the parent as authorizer of the derivative work had the power by contract to specify that he (the parent) would retain ownership and control. By not choosing to retain such control, the parent presumably enticed the derivative-work builder to work for a lesser price. Because the parent had chosen whatever advantage he got (or negligently or for other reason failed to get) arising from his choice of not demanding ownership, courts shouldn't go out of their way to help the parent get what he didn't bargain for. The initial property owner apparently thought the transaction as a whole benefited him, so he shouldn't cry 'harm' (or "proviso violation") after the fact.

But this line of argument, addressed to the original copyright situation, may not be open to me to the extent I am exploring a general principle, not limited to the copyright cases that gave salience to the issue.

Comment [DL9]: Fair point.

A third and more general line of argument is to point out the deadlock or circularity that would result from a bi-directional proviso. The parent says "Hey, you maker-of-derivative-works, even if I forgot to say so in the initial contract, you can't have any copyright (that is, you can't have any rights to exclude) in what you added. You can't have property in what you added because that would hurt my property."

The descendant responds, "If your complaint about loss of value is going to keep me from having property of my own that is enough and as good as yours, then your initial property claim is void under the classic sufficiency proviso."[20]

The two parties seem to be in a reciprocal relationship which might be characterized as deadlock. "I could as easily void part of your exclusion right as fail to get my own exclusion right."

That a deadlock arises is not fatal; it might simply mean that here is an area to which an alternative solution to the consent problem must be found. But the logic of Locke's concern—namely, with whether the nonpropertied[21] would have good reason to object[22] to private property claims that precede them-- suggest the way out of the 'dilemma' is to adopt a unidirectional proviso that faces toward the future.

Comment [DL10]: I think that this argument and example is quite compelling.

Imperfect machinery of justice

To illustrate how imperfect justice machinery can have an impact, consider an analogy to the Derivative Works problem but drawn from real property. Assume that someone obtains property by productively laboring and appropriating in a way that satisfies the Lockean sufficiency proviso. Call him the parent, or *P*. Part of the parent's property entitlement is to have a right to exclude. The parent property owner for his own

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[20] To expand: The descendant says, "You built lawfully on predecessor works and obtained copyright in your variations; yet the DURHAM rule prohibits me from building lawfully on a predecessor work and obtaining copyright in my variations. If your copyright prohibits me from obtaining 'enough and as good' then your initial copyright claim violates the proviso and is void."
Admittedly, it can be argued that the parent built on predecessor works in a manner less indebted to those works than the derivative work maker's efforts were indebted to the parent. If so, then the derivative work maker may be asking for something more than "as good." This requires separate discussion.

[21] I realize I sometimes conflate "propertyless" with "future generations." There are clear distinctions between the two categories to be explored.

[22] Of course, as David Lyons has reminded me, people in reality sometimes refuse consent on bad grounds, or for no reason at all. Locke's logic, however, seems to assume that at least when it comes to property appropriation, it is a sufficient substitute for consent if there are no harms to an interest Locke views as legitimate.

purposes allows someone – call him Descendant #1 or *D1*--to build on the parent's land... maybe to display the land to better advantage. No one disputes that the underlying land still belongs to the parent. But if the building erected by *D1* satisfies the proviso, and is done with permission, perhaps the building belongs to D1. This is debatable, but I will assume D1 owns the building, though he cannot enter it without permission of the underlying landowner.

The parent then wants another person – call him Descendant #2 or *D2*-- to build on the land, perhaps because the parent is not happy with the efforts of D1. Should *D1* have any rights to get in the way of *D2*? *D1*'s rights to do so would at best be pretty narrow, even if he has property in the building. Let us assume that unless *D1* holds some special contractual rights from the parent (and only if the parent failed to contractually reserve rights in the building), D1 might have something like a right prohibiting *D2* from building additional stories on top of the floors that D1 has built, or prohibiting D2 from building a structure that injuriously leaned on D1's building for support. The 'imperfect machinery' problem would arise if fact-finders couldn't tell whether D2 was building on or injuring D1's building. Would that uncertainty justify denying D1 any rights in the building?

The law of derivative works is limited in much the same way as the real property example. It would only allow D1 to sue D2 if D2 copied some copyrightable component added by D1. The law would not prohibit D2 from building his own derivative work on the parent's property. To avoid violating copyright law, all D2 has to do is avoid copying (drawing certain kinds of support from) D1's effort. That is the ordinary black-letter rule.

The Circuit courts' worry is that the rule won't work: that because the costumes or ads or photos produced by D1 and D2 will look similar (because both are based on the parent's work), D1 will be able to bring harassing suits that will diminish both the parent's property values and that of D2.

Comment [DL11]: I'm not sure about this real property example. These look too much like fragmented property rights. Now most mature property systems (common law, or civil law) have coherent means to allow for fragmented property rights. (It is the reason why Heller's anticommons is either not helpful analytically or even misleading. Draft paper attached.) But under whatever system, it is unlikely that P could create conflicting property or property-like rights for D1 and D2 via contract. And there is a question of whether one can create any such new rights at all (cf Tom Merrill and Henry Smith on information costs). To the extent that existing property structures could accommodate your example, they would not likely allow for conflicting rights.

If one really could create such contracts (i.e. contracts that create what look like property rights), surely D1 and-or D2 would take on P.

Put succinctly, property objects are characterized by their physical exclusivity in a way that copyright objects are not, and hence what the owners can do are bound (or not) by these physical limitations. You might try an example with intangible property, but I can't think of something off hand...

So what happens when the rule is a good rule—that is, giving D1 a property right that's very narrow—but judges are concerned that because of error, the rule will be misapplied, and D1 will get a broader property right than that to which he's entitled, or at least will be able to bring lawsuits which are plausible and cause great expense to D2 and the parent. It is this fear of error that is motivating the Circuit courts to be overeager to deny D1 copyright.

Comment [DL12]: My sense is that while judicial caution is not a bad thing in some cases, this tends to stifle creativity!

It's an important question, whether a Lockean principle of justice should be adapted to mere possibilities and human error. Admittedly many strands of Locke's argument suggest a keen awareness of human fallibility.[23] However, they do not compel the conclusion that property in new effort should be barred whenever the propensity for human error makes it *possible* that "enough, and as good" will fail to be left. Nor do these strands of Locke's argument suggest how *probable* a failure need be for the property bar to arise. It is particularly important not to give the possibility of human error too much weight when the party benefitting from the property bar (the parent) could himself have avoided the error problem: he could have provided by contract for the result desired, and paid for it.[24] Both parties could thus have avoided harm.

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[23] See, e.g,. Second Treatise, Chapter IX, at sec. 125:

> ...In the State of Nature there wants a known and indifferent Judge, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, *Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Men's.*

(Emphasis altered.)

[24] Consider the prophylactic legal device known as the strategy of "penalty default": the strategy advises lawmakers to adopt a default rule that, if unchanged, penalizes the more sophisticated and powerful contracting party. This encourages such sophisticated parties to change the default by an explicit contractual provision, so that the other, less knowledgeable, party will know how to react, what concessions to demand in exchange, and so on. I suspect that in the context of cases like *Durham* and *ERG*, it is likely the owner of the parent work (an owner such as Disney) who has the greater sophistication and bargaining power. The penalty default approach would suggest the law should make initial copyright owners decide what it's worth to them to have sole control over the derivative works, by having a default rule that says the courts will not rewrite the contract to add more control than was bargained for. The result would be that DW makers would be

Value and ability to exploit property

Some philosophers argue that the non-human things of the world should be divided according to their impact on welfare. On a welfare-based interpretation of the sufficiency proviso, one would indeed take into account the empirical ability to exploit property, and the property's value under varying circumstances. However, the strongest welfarist argument I have seen depends on egalitarian premises,[25] and protecting property owners' value is hardly egalitarian.

Nor can I see that the property owner's valuation "deserves" protection in any obvious way. The value of property depends on a myriad of things not within any one person's control: for example, the value of a stockpile of coal will depend inter alia on whether a blizzard blocks alternative methods of supply. I might argue that luck should not be so important to the question of justice in acquisition. Further, even effects that result from human agency instead of raw nature (such as the invention of a superior product by a third person) are "luck" as to the initial property owner. It is hard to see that giving a property owner the ability to control for the effects of such events would be a 'fitting reward' (using Becker's phrase) for labor.

In general, a new resource coming into being will have varying impacts on preexisting property rights. Sometimes it will reduce the price/value of the preexisting property because of competition (but make consumers better off by decreasing price). Sometimes the advent of a new resource will increase the price/value of preexisting

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compensated for their lack of copyright, as part of the basic contract. A lack of harm to both parties could be secured, and guesswork largely eliminated.

[25] Michael Otsuka argues for the following welfarist interpretation of the proviso: that "those who are, through no fault of theirs, less able to convert worldly resources into welfare are entitled to acquire additional resources in order to compensate for this lesser ability." Michael Otsuka, *Self-Ownership and Equality: A Lockean Reconciliation*, 27 Philosophy and Public Affairs 65 (1998) at 81. This is based on his interpretation of what he calls the "Egalitarian proviso: You may acquire previously unowned worldly resources if and only if you leave enough so that everyone else can ac quire an equally good share of unowned worldly resources." Id. at 79.

property because of complementarity, or, e.g., because the new resource opens up new markets for both itself and other products.

Comment [DL13]: Would add an element of unpredictability...

To the extent these effects on pre-existing welfare are negative, should that be relevant to whether the producer of the new resource[26] can claim private property in what she's caused to come into existence? (Or alternatively, should the negative effects make her obliged to give compensation, or some special treatment, to those whom her resource has harmed?) Even if a proviso were bi-directional, it is arguable that negative welfare effects on prior property ownership should be irrelevant. The reasons include:

- It's not clear that a property owner is entitled to any particular price in the world. A price is a contingent fact which depends upon myriads of happenings.
- While derivative works may be a special case (because such works are competing in part by means of the parent's work), in other cases the upside-down proviso could boil down to eliminating harm done by productive competition. Philosophers give many differing reasons for privileging harm done by productive competition, but their conclusions are fairly unanimous that such harm should *not* be prohibited. It's pretty clear at least from consequentialist perspectives that (in a world like ours with transaction costs), we'd all be worse off if new entrants had to compensate old businesses for competitive loss. The end result of requiring such payments could be paralysis. [27]
- The effect of an upside-down proviso might well be inegalitarian in unjustified ways.

Comment [DL14]: I might add "unpredictable"

[26] By "new" I am referring to something that recombines existing elements, as a play recombines existing words or a painting existing colors and textures. See, e.g., "making" versus "creating" in the Locke literature (discuss).

[27] Also, economists have long taught that prices are *communicative devices* that help direct resources to their highest-valued uses. From an instrumentalist perspective—and Locke did have his instrumentalist strands— it can be crucial to economic health to refrain from compensating or otherwise shielding those who experience prices decreases. The price decrease may indicate they should change their behavior, a signal from which they should not be insulated.

Interim conclusion

This brief essay introduces the question of whether Locke's sufficiency proviso can be read to void property claims that impair the value of pre-existing property. The essay identifies a number of issues that would need to be addressed in order to resolve the question. The essay preliminarily concludes that it would not be advisable to interpret Locke's sufficiency proviso in a way that forbad private property from arising whenever the new property would diminish the value of the old.

The Ubiquity and Usefulness of the Anticommons

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Abstract

The work of Michael Heller on the so-called anticommons, or using the more recent moniker, "gridlock" , and the abundance of scholarship that it has generated, is one of the more significant recent scholarly movements in the American property scholarship, at least if one counts pages of scholarly text. Yet, in my view, Heller's anticommons rests on a flawed view of private property ownership; indeed, some of examples of gridlock have little to do with private property as such. This view, which posits private property as being more or less absolute, then benefits from the counter-balance or corrective provided by the recognition of an anticommons. Yet, private property is not nearly as absolute as the tragedy of the anti-commons claims or indeed requires. Once property is seen in its proper light, the superstructure of the anticommons becomes unnecessary at best, obfuscating at worst. Starting with a more balanced view of private property, the central insight of the anticommons literature is already contained in the concept of private property. Thus at the very least, simplicity of thought demands that we not create unnecessary conceptual structures.

I. Introduction

Most contemporary property theorists have some familiarity with the concept of the anticommons. It is most common in current North American property theory, and while originally posited as a hypothetical construct by Frank Michelman,[1] is most closely identified with the writing of Michael Heller[2]. The construct seeks to provide remedies to situations where absolute property rights lead to nefarious results, mainly underuse. Contrary to the classical scenario posed by some efficiency-based property thinkers in which common property leads to the over-exploitation of a given resource, the so-called tragedy of the commons, Heller calls the 'tragedy of the anticommons' the scenario in which too much private property, especially where ownership is fragmentary and absolute results in the under-use of resources. In this setting, too many right-holders failing to put their resources to use, or even one right-holder neglecting to employ the resource, can result in the resource not being used at all.

A great deal of literature has been spawned by anticommons analysis, both in identifying anticommons "situations" and in proposing remedies for such situations. This research often uses the tools of economic analysis, whether these be in traditional areas of property law or intellectual property. As stated by Stephen Munzer, it is too early to tell how enduring this phenomenon will be.[3]

In my view, the thrust of anticommons scholarship is a reaction to the problems created when ownership is taken to be absolute. Given such a degree of control, an owner can simply choose not to use his resource, acting in a completely self-regarding fashion with seriously negative consequences to society. In effect, the argument of Heller and others is a plea for limiting some of the impact of what is seen as the traditional purview of *dominium* for purposes which do not always conform to what the individual owner shares. Some of these limiting purposes are social – for example, the wider diffusion of a base technology protected by a patent. Other limiting purposes, however, are more individualistic – the rights of another individual patent-holder whose patent requires the use of the patented technology that is not being deployed or blocked by the base technology patent holder.

It is a further question for anticommons scholars as to whether a less absolutist starting point for property would affect their analysis. That is, if property (or intellectual property) rights were not taken to be absolute, it is conceivable that a number of anticommons situations might never occur. Put another way, if an obligation to put to productive use is understood to accompany the granting of a patent, a compulsory license or outright expropriation of the patent takes care of the failure to put the patent to use employing more traditional property understandings and tools without recourse to anti-commons analysis. Certainly where objects of social wealth as understood by society contain a strong sense of expected uses or

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[1] "Ethics, Economics and the Law of Property", in J.R. Pennock & J.W. Chapman, eds, *NOMOS XXIV: Ethics, Economics and the Law* (NY; NYU Press 1982), 3.

[2] See, for example, M.A. Heller, 'The Tragedy of the Anticommons: Property in Transition from Marx to Markets' (1998) 11 *Harv. L. Rev.* 621. More recently he has renamed the phenomenon "gridlock": *Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York; Basic Books, 2008).

[3] S.R. Munzer, 'The Commons and Anticommons in the Law and Theory of Property' in M.P. Golding and W.A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2005), 148.

destination -- for example what Eduardo Penalver has called "land's memory"[4] – such expected uses form part of the contours of property analysis, and therefore in granting a property right in the resource to the exclusion of others society expects the resource to be used.

More attention must also be paid to the nature of private property relationships and to the nature of private property resources. Indeed, it may very well be that many of the problems identified as gridlock are not property questions at all, but rather the kind of coordination questions that any society faces. If this is true, then adding a construct such as the anticommons to the analytic mix may be more a hindrance than a help.

II. The Idea of the Anticommons

The construct is now so well-known in the literature, that I may safely proceed from the assumption that most people have now understand the basic premise of the anticommons, and its potential for tragedy. In Heller's words:

> ...[O]ne can understand anticommons property as the mirror image of commons property. In a commons, by definition, multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another. When too many owners have such privileges of use, the resource is prone to overuse – the tragedy of the commons. Canonical examples include depleted fisheries, overgrazed fields and polluted air.
>
> In the anticommons, by my definition, multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse – a tragedy of the anticommons. Legal and economic scholars have most overlooked this tragedy, but it can appear whenever governments create new property rights.[5]

The central idea, then, is that there is an over-fragmentation of ownership rights on the same object of social wealth. Heller's initial example is that of Russia's transition economy: storefronts remained empty because too many people "owned" rights in the storefront, allowing each owner to block or veto certain uses of the store. By contrast, sidewalk kiosks flourished in the mid-1990s because there were few impediments to setting up shop, and certainly no competing owners to block the opening and subsequent exploitation of a specific kiosk.

There is also a possibility, developed in subsequent literature especially on patents[6], that over-fragmentation may also occur with respect to different but related objects of property. So with respect to an inter-related set of patents, one holder of a single patent necessary in a larger application, say a single medicine used as part of a cocktail of pharmaceuticals used to fight a specific illness or condition, could block others patent-holders and indeed consumers from using the whole "invention".

In both cases, one might characterize the issue in the rhetorical terms used by Jim Harris: "too much property?" That is, too many ownership interests allows for one single owner to

[4] Land Virtues, 94 Cornell Law rev.
[5] Heller, pp 623-24.
[6] Heller & Eisenberg, ...

block the effective use of the resource. Given the primordial place of property rights in our cultures, it thus stands to reason that the anticommons is not merely a possibility, but rather is epiphenomenal. This is certainly the conclusion that Heller reaches in the most recent summation of examples in *Gridlock*: not just Moscow storefronts and patents but on radio frequencies, and in copyright law, and in real estate.

Let me say at the outset, that the sentiment behind Heller's analysis is one that I share. Ownership interests, taken to an extreme rights-based view, can sometimes lead to nefarious consequences in terms of the (under-)use of a given resource. That being said, I am not sure that the construction of the new concept of the anticommons does any new intellectual work, and indeed might serve to obfuscate important issues in property theory. As with the metaphor of Ockham's razor, adding additional layers of complexity to an analysis does not always assist the endeavour of understanding. In my view, property theory and structures were sufficiently supple to deal with the challenges posed by under-use of the resource. (The same is also true of the challenges posed in the intellectual property example, of rights in related or neighbouring resources.)

III. Flawed Points of Departure

Whether in theory or in practice, I am disinclined to share a number of Heller's basic assumptions in the construction of the anticommons model. The argument proceeds at three levels: first, at the level of the initial anecdote of Russian storefronts and Russian transition generally; second, at the level of existing private law structures and concerns; and third, at the level of property theory.

A. Russian Storefronts

The Russian storefront analysis is an illustrative starting point. It is indeed true, as Heller observed, that there were many different, often conflicting, interests in certain types of property resources in transition Russia. Given some of the nuances of the Civil Code of the Russian Federation[7], a number of these ambiguities still exist. Nevertheless, the example may not be as convincing as one might have thought at first glance.

There is no disputing the varied interests in a single storefront immovable (using the proper civil term for land and buildings), or indeed in the other examples that Heller identified. And indeed, many of these right-holders could block the use of the immovable or at least certain uses by others. However, it is a bit of a stretch in my view to extrapolate a new theoretical construct from this aspect of Russia's transition from a centrally-planned, socialist economy to a market economy. First, not all the interests in the storefront are identical and not all of them can be classified as property interests. While some of the interests are a result of holdover interests, including state interests, that existed prior privatization, others were a result of an attempt to create new private property rights in immovables. Conflicts in my view were mainly and simply a result of ill-defined and conflicting rights, that were a result of a lack of coordination among norms in a period of fundamental change. Indeed, if it was that case that no one had an effective right if use of the storefront, this would seem to have been more a result of poorly defined rights rather than any conceptual quandary. This was (and is) a transition period in which hard and soft Russian property norms were being rewritten and re-conceived in light of a new reality. That kiosks arose on Moscow streets was result of complex series of overlapping and inconsistent rules and interests: this was a temporary situation.

In any event, these competing rights as described by Heller were not all identical –lessees versus owners—such that the anticommons model does not really hold up. Like any other more developed property system, the example illustrates that a number of different kinds of interests are possible in the same object at the same time a private property system. These rights are part of a complex overlay of rights and obligations with sources in property and contract mainly, and are ordered so as to function. Indeed, as I shall discuss later, no distinction is made in Heller's analysis between property and non-property rights, or indeed between ownership and non-ownership property rights, distinctions which do serve to understand the way in which the fragmentation of rights is meant to be sorted. That there were problems was probably more a result of *badly-done* fragmentation that fragmentation itself.

[7] Zhiltsov-Maggs translation: articles on state actors; my article in CEELRev...

Finally, one of the central components of a functioning legal system that was lacking in Russia at the time (and still is, to a large degree[8]) is respect for the rule of law. Many of the blockages in Heller's example were simply illegal, and with no means of redress in front of a court system not yet acquainted with rule of law standards of procedural or substantive justice (and evolving basic norms), it is in no way surprising that Russians took to the streets to sell their wares.

It may have been an error, therefore, to have focused on a transition economy to draw larger lessons for property theory. Other factors might better explain the initial lack of storefront merchants. For example, there was not (and still is not) an efficient and effective system of land registration in Russia (though efforts are being made.) Thus if there were an "owner" with some overarching or residual interest, he would have no way of asserting that claim. Similarly, the difficulties with the Russian justice system, might have meant that (and still would mean) that even if there is a clear legal hierarchy of interests in the storefront there would be little chance of ever being able to sort out the problem logically or legally in front of a court, or even with potential recourse to a legal structure; better to resort to a strongman-protector or the mafia. The magnitude of the economic changes in Russia, and factors for the rapid rise of kiosks and slower development of storefronts – a problem that appears to me to no longer exist in Moscow or St. Petersburg – are less the result of an anticommons or over-fragmentation of rights than they are a result if underdevelopment of substantive and procedural norms.

B. Property Governance

Property governance, indeed all forms of governance, clearly have to tackle complex problems of competing claims, interests, and goals, both individual and societal. Although the picture pointed out by Heller of a transition economy fraught with complex mix of property interests can be partly responsible for slowing development in Russia, the challenge of having to deal with a mix of property interests is in no way unique to Russia. Common and civil law property law systems allow for the fragmentation of ownership, as well as the existence of other kinds of contractually-created non-property or near-property rights in the same resource. All of this fragmentation serves to facilitate market economic interaction. Owners, lessees, shareholders, lenders, employees, state authorities, etc. all have rights or enforceable interests in a going economic concern in any Western jurisdiction. While Russia's may have been overly complex in some unique ways – holdover or revised state actors, for example – the fact of mixed interests is not in any way unique conceptually. The goal is effective and efficient fragmentation: in the transition economy of Russia in the mid-nineties, fragmentation was badly done. In other Western economies, fragmentation is generally done better, and if mistakes are made at the outset, they improve over time.

Heller's claim that the anticommons is different from formal fragmentation[9] is in my view unconvincing, and again revolves around nature of ownership and other limited real rights. Here, what one might call the comparative semantics of property systems is useful: civil law, common law both allow for fragmentation, both allow for *numerus clausus*, as both have an interest in protecting resources, efficient use or non-use, ordering of rights. But common lawyers can get themselves into a great deal of conceptual difficulty when they use the word ownership carelessly. Although both the common law and civil law allow for an entitlement

[8] See the recently published collection of essays published on the rule of law and law reform in Russia: E. Novikova, ed. (Moscow, Statut, 2010)
[9] Fn 11

to capture the most powerful interest possible in a resource, and allow for a series of lesser entitlements in the same resource,[10] the two systems diverge in the labels that each employs. In the common law, one routinely calls *all* the entitlements "ownership" interests. This is the case with most common law writers, and Harris provides a good example:

> What one may 'own' (be entitled to) may be an ownership interest, or a lesser proprietary, or other, right. Only if the entitlement is to an ownership interest does 'ownership' function as an organising idea from which concrete privileges and powers may be inferred.[11]

That Heller and Harris (and the common law) use the term ownership so widely – often to cover all sorts of pecuniary, "patrimonial" rights[12] – makes it impossible to understand the term without some other qualifier to give additional precision. In Becker's words, the "varieties of ownership are not equal to full ownership."[13] Indeed, as Heller has used the term it covers some contractual rights as well. Thus, the multiplicity of adjectives used to qualify "ownership" in common law thinking is the direct result of using the word "ownership" widely and, perhaps, loosely,[14] and in Heller's case allows him to posit a situation where it

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[10]In theory, this division of interests in the same resource can be achieved in one of two ways: either one can divide or fragment interests at the level of *ownership itself*, thus creating two or more holders or "owners" of different "ownership" interests or "estates"; or one can preserve the singular ownership of property in one person while hiving off or "dismembering" *lesser real rights* and powers for the benefit of other persons. These dismembered rights, although when added together form the whole of the ownership package or "bundle" of rights, are nevertheless not placed on the same conceptual level as ownership. The holder of a dismembered right merely has title to a lesser real right. Ownership of property and control thereof can thus be divorced. Of these two alternative conceptual structures, the common law takes the first view, allowing the fragmentation of "ownership" through the doctrine of estates. The civil law opts for the latter approach, preserving ownership as a non-fragmented concept but allowing certain rights to be subtracted, even to the point where under usufruct or emphyteusis most of the real rights in the ownership bundle are part of the title of the usufructuary or emphyteutic lessee, leaving the bare owner with few of the real rights normally attributed to ownership. Thus, while fragmentation of *ownership* (ownership properly so-called) is only truly achieved in the common law, the civil law in practice can tolerate largely similar functional divisions of ownership rights.

[11]*P&J*, at 80.

[12] I have said elsewhere that the common law lacks a convenient term for patrimony. James Penner has suggested "wherewithal".

[13]Becker, "The Moral Basis", at 191.

[14]Examples include: Noyes ("complete property" which is equal to *dominium*, and limited by social reservations; complete property is absolute at its core, which is the bare right to the *residuum* [at 303-05]); Honoré ("liberal concept of full individual ownership" ["Ownership", at 161]); Harris ("full-blooded" ownership and his negative construct "totality ownership" [*P&J*, 29, 132]); and Becker ("Full exclusive ownership" which is equivalent to Honoré's "full ownership" less the duty and liability incidents, and where no one else has an interest in the same thing ["The Moral Basis", at 192]).

Conversely, in the civil law "ownership" in formal terms is, in the materialist conception, traditionally reserved only for the largest possible interest in a resource; the legal terms *dominium*, *propriété*, *eigentum* all suffice and mean roughly the same thing. One has "title" to other lesser entitlements, while the concept of patrimony takes care of attaching most other rights of monetary value to the individual. Obviously in lay discourse, the strict formal distinction is not always maintained. Moreover, there is a large body of literature that challenges the materialist view, and posits the view that one can "own" rights. For an introduction to the debate, see G L Gretton "Owning Rights and Things", (1997) Stellenbosch Law Review 176, and R.A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies", (1994) 39 McGill L.J. 761. See also Ginossar, ...Rudden...

appears that there are many "owners". Indeed, In *Gridlock*, Heller often resorts to putting ownetship in quotation marks.

The basic point of this perhaps overly technical distinction is that property interests – call them what you will – are different in content, and none are absolute. One can think of this in terms of Honoré's incidents: the better view, implicit in Honoré's structure, is that there is some hierarchy as among the incidents. The right to control use, for example has some pride of place. So while all the incidents help in some way to organize and define property ownership, the use of the word ownership itself for many interest-holders does not itself mean that all bundles are of equal strength, or even that they even conflict.

My fundamental point is all legal systems attempt to co-ordinate property interests. The variety of interests in the single resource as described by Heller as ownership or proprietary interests will not be same in terms of content, or at least should not be, in a property system with a coherent system of fragmented rights: any problems in "blocking" are not a result of any anticommons, but rather inefficiencies and inconsistencies in the ordering of interests. It is a case of *poor* fragmentation and not the mere fact of fragmentation in and of itself. The scepticism exhibited by property systems, and especially the more formal civil law, towards the unstructured fragmentation of ownership interests – the *numerus clausus* response – is an attempt to structure and limit fragmentation.[15] The same can also be said of the attempt to classify property rights (real or *in rem*) rights versus personal rights (*in personam*): each generates a hierarchy which enables property interests to be ordered, providing a potential response to situations or overlapping and complex interests. Moreover, property systems will deal with the duration of fragmentation: they often provide that fragmentation while lengthy, will ultimately be temporary: the "owner" may be the person who has only the ultimate residual interest in the longest term, but in the end will see the fragments of the ownership bundle reunified in his hands (or that of his heirs). Conversely, where fragmentation might be permanent, then it is usually for one specific right with very formal barriers to creation: a real servitude, easement or *profit-à-prendre*.

One might also consider the situation where the interests are indeed identical. But if there are in fact identical rights in the same resource, then private law systems may have already dealt with the situation: that is, it is either a form of common property or of private law co-ownership, a concept familiar to both the common and civil law (and indeed frowned upon in some sense).[16] In theory in such instances, all parties are complete owners in a symmetrical fashion over the same object. Such a situation often works well in family contexts, where the scope of uses is in effect conditioned by the informal but powerful normativity of the family structure: nevertheless, it is a structure that extends beyond family contexts, often with formal norms filling the normative gaps heretofore dealt with by family norms. By definition, the anticommons applies to this situation, yet property systems and informal norms have dealt with co-ownership from perhaps their very origins.

It is equally important to note that property governance systems attempt to classify the objects of private property rights, unfortunately often called "property" in English, but better expressed as *biens* in French or *beni* in Italian.[17] This realty and personalty, immovable and movable, metes and bounds description of land, and the charges and rights registered against

[15] The *numerus clausus* problem is known to all civil lawyers, but it has surfaced in the common law, law and economics literature: Merrill and Smith ...

[16] Civil law's traditional reticence to undivided co-ownership...

[17] For better or for worse, even the officially bilingual Civil Code of Quebec falls into this practice!

it, the fixation requirement in copyright, or the patent description and claim, all address this fundamental impulse to describe accurately the bounds of an object of property in order to focalize the rights (i.e., set out, fragment, limit) that may be possible with respect to the object. In some of his examples, the anticommons talks not of the same object of property as legally defined.

The best example here is that of patent. To the extent that some would call a patent right a property right – I have no truck with that – the object of property is that defined in the patent registration: description and claim. Heller's claim that the numerous drug patents necessary to create a better treatment for Alzheimer's will be subject to the veto of a single hold-out is a very real problem known as the "patent thicket" but technically is *not* an anticommons, as each individual patent is an object of property. It is only by calling all of the individual objects of property a larger object – a sewing machine, a drug cocktail, a Blackberry or iPhone – do we get to apply the term. Admittedly this is a rather technical point, but it illustrates something much more fundamental: the anticommons may not be an adequate construct to address the context of adjacent property rights, whether they be in a drug or a neighbourhood in Montreal. Larger collective action will be necessary, and indeed the anticommons label may obscure the real problem which is a lack of cooperation among actors or a failure to understand the (limited) nature of their property right. More will need to be said about this later.

Hold out problem is not equal to the anticommons. At best term hold out is already more than adequate.

All this points me to the conclusion – at once intuitive and technical – that legal systems and property structures have tended to deal quite well with complex and overlapping interests in the same resource. This is particularly true over time, and legal systems evolve: law reform insures that poor fragmentation is rectified, as is the ongoing case in Russia. An additional conceptual structure does not add much and, if one is profligate with the use of the word ownership, perhaps it even tends to mis-characterize rights. In any event, such a construct is not necessary to understand the essence of property objects and relations, or indeed of good ordering.

C. The Role of Property Theory

Property theory helps us understand the institutions of private property and ownership by forcing us to pay attention to property relationships and property's resources or objects. A similar focus helps to illuminate the study of the anticommons.

Turning first to property relationships, one turns to the idea of property rights and ownership and their scope. Whatever one might say by way of critique of some of Heller's structures and constructs, it is nevertheless true that his intuition is sound: if too many unstructured rights are created in a single resource, we might create a situation where the resource is prone to under-use. The civil law's bias against indivision or undivided co-ownership (joint tenancy to common lawyers) might be seen as a response to this kind of concern. What is the basis for this intuition?

In my view, one can only truly arrive at the tragedy of the anticommons if one's point of departure is overly rights-based. That is, one must use the term and concept of ownership in an absolutist fashion in order to arrive at the characterization of the anticommons

phenomenon. Otherwise, with a less absolute view of property or ownership rights, the tragedy of the anticommons will simply not arise. This type of position – perhaps distinctly American and ironically more closely tied to current trends in the common law – would then allow for a multiplicity of "owners" and with absolute interests in the same resource. I have already argued as to why this is not the case in practice: property systems historically have tried to regulate such situations, especially with respect to important resources, and have been relatively effective at doing so. Even Russia's transition challenges, in my view, could not be attributed uniquely, perhaps if at all, to such a phenomenon.

However, the same is true in theory as well. Even a full-blooded owner in theory does not have absolute rights over a resource, as noted above.[18] Private property rights from the fullest to the least, not to mention contractual rights like certain forms of property leases that resemble property rights in terms of the powers and privileges in their bundle (what civilian would call a *ius in rem trans personam*), all have limitations on some or many of the so-called incidents of property, or may exclude some of the incidents all together. The point here is that if all "owners" are limited in terms of the scope of their powers, the very possibility of the tragedy of the anticommons is circumscribed. The veto powers of the owner may not be present. Put another way, the range of governance options that an individual owner may have may be limited: the range of excludability that an owner may have over others in the governance of particular resource may vary.[19]

Thus the description of the anticommons as a situation where all "owners" of interests in the resource are in a position to block certain changes takes as its starting position a point that gives each "owner" an interest which is more absolute than property theory generally would allow in the same object. In reality, formal or informal limitations would deal with the conflicts. Take the example of property held jointly in a family or business context, the true anticommons situation. All are owners in theory over the whole resource. However, each is limited by the rights of the other in legal terms. Moreover, a family or business hierarchy – an older sibling, a parent or the managing partner – might be the person who informally acts as the owner. The point here is that is difficult to arrive at the conception of the anticommons without using ownership absolutely.

In *Gridlock*, Heller has re-fashioned a property spectrum as follows[20]:

Commons Property	Private Property	Anticommons Property

In my understanding of property, the anticommons category consists only of absolute and fragmented property ownership: Harris's Aunt Sally of Totality Ownership. (Recall, that the mere fact of fragmentation is conceptually neutral: if done properly, rights should not overlap.) At the far right of the spectrum, no pun intended, rights appear to mean one can do anything one wants with one's property objects: including blocking, vetoing, holding out. And in my understanding of property, with the exception of relatively low value resources, such absolute rights over resources simply do not exist. Ownership rights in land are always limited by a congeries of different norms at different levels, and finally are limited by the

[18] Indeed, Harris called the idea of totality ownership an Aunt Sally: *P&J*...
[19] Applying L. Katz, ownership as excludability.
[20] At p. 18 ff.

omnipresent right of the state to expropriate.[21] If this is true, the anticommons is relegated to its original state: a hypothesis about a property right requiring everyone else's agreement to be used, and posited for the sake of advancing argument. Once context is re-introduced in any actual property situation, and limitations on property rights properly understood, the anticommons is emptied as a practical alternative to private property or ownership. In positing the anticommons as its own point on the spectrum, Heller is perhaps guilty of reifying an extreme form of absolute property ownership before proceeding to easily demolish it. (Hence, he may be inadvertently guilty of constructing the anticommons for the purposes of critiquing it: the quintessential straw man.)[22]

I would add that, anecdotally, it is my experience that some American scholars and thinkers have the greatest tendency to treat property in this most absolute fashion. Perhaps a result of the constitutionalization early of an absolutely framed property right, or perhaps the result of a history where land scarcity was not a large problem, there is certainly a dominant discourse in American property thinking that treats property as a fundamental, natural and absolute right. It is also an attitude that has permeated lay discourse. And perhaps as a result of a pendulum-like reaction to Soviet communism, from my own anecdotal experience in Russia, Heller is certainly right when he implies that the vision of private property in Russia in the mid-nineties may have also been extremely absolutist.

American legal scholarship, much to its credit, appears to be self-correcting. A group of scholars, a number of whom are associated with the Cornell Law School, are making a substantial effort to remind us not only of private property's context and its limits, but also its obligations.[23] In sharing a scepticism with Heller about the impact of absolute property rights, these writers, in pointing out inherent and conceptual limits to ownership, render the additional conceptual construct of the anticommons unnecessary.

I would go further. I have argued elsewhere that property theory and practice needs to account for property objects as well as property relations.[24] The objects of property, in terms of their separable value, reflect the various social and contextual aspects that comprise this value. That is, we value land, or buildings, or patents, because of deeply-held and shared views of how such objects are valuable through use over time. Relations among individuals through these objects of property – the basic definition of property relations – reflect this social aspect: thus property relations are conditioned by the nature of the object in question, and thus are comprised of object-specific rights and duties. The value of a storefront property on Tverskaya street in Moscow, or a pharmaceutical patent in Montreal, are to be understood not just in terms of the rights held by the right-holder, but also the limits and duties that social context and obligations might impose.

The focal point of the object of property makes it much easier to understand the limitations that might be imposed on owners in these contexts. Such important resources such as land will be regulated by a myriad of property rules, some conferring rights while others limits and duties. One might frame this argument in terms of the complete control over uses that the

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[21] I take no stance at this stage on Kelo, other than to say that few question the power of the stage to expropriate for justified reasons and using appropriate legal means: the debate is over the standards for justification as well as proper process (all of which reflecting one's view of the individual towards the state.

[22] Note that Smith's semi-commons and Fennell's Mixed Ownership models are still possible.

[23] Manifesto, 94 Cornell Law Rev. See also G. Alexander & E. Penalver, eds. *Property and Community* (New York, OUP, 2010). See my "The Concept of Property", UTLJ.

[24] cites

Heller example seems to imply: such a complete control over a resource predicated by the concept of anticommons property is only possible for objects that have very little social value. As an object becomes more valuable, it is more likely to come with strings attached, land being the prime, traditional example. This recognition of limits might in a sense be enough to deal with many instances of any negative effect of the anticommons.

However, there may even be situations where the value of the object might require some proactive responsibilities of stewardship or even some requirement of economic use. Take the example of a valuable pharmaceutical patent. Patent protection is afforded by the state for the purposes of the betterment of society. Rather, the idea the there is a teleology to resources created by patent – a teleology made explicit by the patent bargain, effectively conditions the patent right. The temporary monopoly protection granted by the patent right is given in exchange bring the useful and innovative object to society: failure to do so justifies the granting of compulsory licences to use or even outright expropriation of the right.[25] Without use, the right is potentially lost. Anticommons analysis, effectively positing as it does an absolute right to the ownership of patent, obscures the nature of the patent bargain and the limited nature of patent ownership. It also takes the focus away from very real problems in the patent system itself – how patent description and claims are verified and tested for validity (and the information cost problems that would be averted), practices of patenting "trolling", "patenting around" and "evergreening", for example – that are the real cause of the problems with the patent system.

The anticommons almost posits such behaviour as acceptable or normal, when it is unethical in the patent context, and correctable. The terms anticommons puts the focus in the wrong place: the fragmentation, and not the unethical behaviour of certain patent owners.

Equally misleading conceptually is that the anticommons does not distinguish among types of objects, (or types of entitlements). Does not adjust for the identity of types of resources: obscured solutions, asks the wrong questions

Most of us would not go so far as to impose a similar duty to develop the resource on the part of the property owner of the Moscow storefront. The owner might simply be a speculator. Nevertheless, the fact that we might be sympathetic to the lessee or owner who is being blocked from developing tells us that even without a full-blown obligation, there is an expectation on the part of society as to how this resource will be used. Perhaps for certain other sensitive resources or valuable objects of social wealth, the expectation to use might translate into a full-blown duty, say, for example, of arable land in a context where scarcity is common. Property systems do account for such sentiments,[26] and I have contended elsewhere that the more valuable the resource the stronger the impulse and justification to attach limits and duties.[27] It may very well be that the better understanding of the virtue ethics of ownership will help channel resources to better uses.

What one might call property's social aspect is grounded in this teleology. Private property is necessarily social in part because of its underlying value and purposes – human survival, human development and flourishing, and so on – coupled with its scarcity. In short, property is social because of its ethical dimensions and implications. Add to this the relative scarcity

[25] Examples in patent acts

[26] Acquisitive prescription/adverse possession. See Lucy, Gray...

[27] Cite. All of this part of a larger Aristotelian view of property that I am developing: see "The Objects of Virtue" in Alexander & Penalver, *Community and Property, supra*, note ** at 1.

of objects of social wealth, its distributive impact and impact on justice, as well as its inherently controversial nature, and one realizes that the concept of private property is not as thin as the tragedy of the anticommons requires. Rather, all of these factors point clearly to a concept of property that is based on more than individual rights to exclusive use. Any attempt to describe the institution, or to frame its normative structure and assess its normative weight, must take these wider interests into account.[28]

Of course, the characterization of the object is of capital importance. A Moscow storefront or apartment has a physicality that seems to not only define its parameters but also situate it in context. Individual preferences and market forces will help to determine its separable value at any given point, and provide guidance for the type of property relations that the resource will bear.

The characterization of intangible resources is more challenging, but attention to the object can render unnecessary the resort to the anticommons structure. Take for example the series of inter-related and complex patents. Here each patent as described is an object in and of itself, so certainly the anticommons analysis does not add anything. As noted above, if a group of inter-related patents is blocked by the holder of a single, base patent the under-use is not a result of overlapping rights in the same object. In any event, the patent bargain might be sufficient in forcing a solution.[29]

This fuller understanding of private property might be sufficient in and of itself to prevent most instances of the so-called tragedy of the anticommons. Most commonly, limitations on absolute ownership rights help such rights to "co-habit" with other right holders in the same resource. And for certain extremely valuable resources, a potential duty to use, and the subsequent loss of rights where it is not done, certainly mitigates against the possibility of under-use.

V. The Potential Ubiquity of the Anticommons

The observations on patents and the objects of property point leads to a larger general concern. If one does not pay attention to the object of property, and given the complexity of modern economic processes and the nature of wealth-creation processes that require "assembly", we may begin to see the anticommons in every economic situation where wealth-creation is hurt by the failure of actors to cooperate. Heller hints that the banking crisis in 2008-2009 had an anticommons dimension that needed exploration. Like the bogeyman, gridlock is now everywhere. If true, as a consequence of this ubiquity the anticommons loses its conceptual usefulness.

The real problem becomes the governance of complex economic and social institutions, and while ownership of objects of property may be part of those institutions, property governance as such – as opposed to rules about, say, banking regulations or trade regulations – may not be the solution to the problem. Attaching the anticommons label, may push the analysis into the property sphere, introducing words like ownership and property which might then skew the debate.

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[28] The Concept of Property

[29] I would also note that in practice, informal solutions such as patent pools and technology platforms have arisen.

We need to be more careful before extending an analysis, fundamentally posited on the limited nature of ownership rights, across a wider swath of regulatory and governance challenges.

VI. Keeping Property Balanced

The basic point of the anticommons is that an over-fragmentation of ownership rights in the same resource could lead under-use. A balanced view of the component aspects of private property, as well as an understanding of property structures and their purposes, in my view provide enough suppleness to account for the insights provided by the anticommons construct. Property structures do try to prevent situations of conflicting rights and minimize under-use. And they do all this, without much fanfare. This renders the anticommons rather commonplace. Similarly, keeping property theory balanced between rights and limits, with some attention to potential duties and property's overall teleology, further limits the situations where tragedies of under-use might arise. If all this is true, we don't really need the additional complexity of a structure such as the anticommons.

Keeping property structures as simple as possible allows for an account of property objects and relations which focuses on rights and duties and underlying philosophies and assumptions, and allows us to track the value of resources over time and the evolving nature of resources. If situations such as Russian storefronts and communal housing blocks of the mid-1990s seem not to fit into existing structures, perhaps they are best understood as historical idiosyncrasies and relegated precisely to that: history.

Moreover, keeping property analyses focused on property relations, will allow societies to focus more directly on the governance challenges cited by Heller – the patent system in a rapidly-changing technological world, the nature of creation in the world of copyright, the regulation of banks and communications, and the challenges particular to transition economies – without the problems being unnecessarily obscured by property constructs and the attitudes. Not all governance challenges are property challenges; every failure to cooperate is not an anticommons. Indeed, to state the obvious, it may be that not every instance of regulatory gridlock is an instance of anticommons property ownership.

Finally, if the goal is to understand the limits of private property, and the negative impact of absolute ownership, we simply need not do it indirectly through the imposition of an additional construct. There is plenty of very good property theory that does it directly. In this sense, the anticommons, as is the case with Harris's hypothetical absolute or "totality ownership" is perhaps most useful as the hypothetical construct originally posited by Michelman.