Table of Contents

0.1 Nature of the problem

In many areas courts are giving new intellectual property rights for reasons they largely leave unarticulated.[1] Noncopyrightable stock averages are being protected by state law.[2] Merchandising emblems and symbols are being protected in non-trademark contexts by trademark law.[3] The right of

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1. As has previously been observed, the most articulate statements of position have, ironically, been those opposing common-law intellectual property rights ; they have lost to conclusory and confused opinions bearing greater numbers of votes or coming later in time (consider e.g., Learned Hand in Cheney being implicitly overruled by Metropolitan Opera; Brandeis' dissent in INS)(cite). Part of the purpose of the instant enterprise is to examine what sort of claim the proponents of such property rights might make if they were called upon to give a systematic account.

2. (Dow Jones and Standard & Poors cases.)

3. Trademarks historically have been protected from copying only when they cause confusion as to source or sponsorship. Several recent cases have protected marks from copying even when no such confusion is present (e.g., giving sports teams a monopoly over the production of emblems bearing the team names and symbols, regardless of whether the defendants had made their "unauthorized" status clear by conspicous disclaimers on the packaging. Boston Hockey (5th Cir.)) Also cite Gay Toys, (monopoly over the production of toy cars resembling the automobile on the Duke of Hazard television show), etc.

publicity has expanded[4] to such an extent that judges and commentators alike bewail the imminent dangers to the First Amendment caused by the imprecision of the new right's boundaries.[5] Even in federal copyright law, which explicitly says that facts and ideas should be free of protection,[6] and where inadvertent copying is supposed to be as actionable as intentional piracy,[7] odd things are happening. Summaries of copyrighted factual reports are enjoined on the ground, inter alia,[8] that the copier is a "chiseler," and in a leading fair use case concerning The Nation magazine's publication of a

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4. Writes Paul Goldstein: "We can now expect an average of one or two reprinted decisions a month on same aspect of the right of publicity -- a right that twenty years ago wasn't litigated more than once a year." P. Goldstein, Publicity: The New Property?, STAN.LWYR. 8, 9-10 (Winter 1982/3).

5. (The dissents in the KING and HERE'S JOHNNY cases; articles.)

6. 17 U.S.C. section 102(b). The prohibition has gone further than prohibiting protection in facts and ideas per se; it has been held that where protection of expression would indirectly restrain communication of ideas, the expression must go unprotected even if otherwise copyrightable. Morrissey v. Proctor & Gamble.

7. Harrisongs. Also: mention that intentionality can be relevant to damages (e.g., innocent infringer provisions.)

8. Wainright Securities Inc. v Wall Street Transcript Corporation, 558 F.2d 91 (2nd Cir. 1977), cert. denied 434 U.S. 1014 (1978): "This was not legitimate coverage of a news event; instead it was, and there is no other way to describe it, chiseling for personal profit." 558 F.2d 91 at 96-97 (footnote omitted.)

summary of president Ford's memoirs,[9] Justice Brennan writes in dissent that the majority's analysis "has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history."[10]

Uniting these various developments is an urge to reward creators. Perhaps most obvious in the misappropriation cases,[11] but also underlying most of the arguments in favor of

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9. Harper & Row, Publishers v. Nation Enterprises, ___ U.S. ___, 105 S. Ct. 2218, 53 LW 4561 (1985), hereinafter referred to as "Harper & Row v. The Nation" or "The Nation case."

10. Wrote Justice Brennan,

> The urge to compensate for subsequent use of information and ideas is perhaps understandable. An inequity seems to lurk in the idea that much of the fruit of the historian's labor may be used without compensation. This, however, is not some unforseen by-product of a statutory scheme... Congress made the affirmative choice that the copyright laws should apply in this way....

53 LW at 4576.

11. The origins of the misappropriation doctrine are in the famous case of INS v. AP, 248 U.S. 215 (1918), where the Supreme Court enjoined the International News Service from, inter alia, wiring to its west coast member newspapers the news appearing in early morning editions of the Associated Press's east coast papers. In that case the natural rights strain was quite obvious:

> [INS]... admits that it is taking material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money... [INS] in appropriating it and selling it as its own

protecting emblems and symbols regardless of consumer confusion[12] and in favor of the right of publicity,[13] some variant of a labor theory of property seems to be operating. In the dispute over copyright treatment of historic and factual works, Justice Brennan similarly argues that his colleagues in The Nation case had been relying not on copyright law but on natural right sentiments: the "feeling that an author of history has been deprived of the full value of his or her labor,"[14] "the urge to compensate for subsequent use of information and ideas..."[15] Quoting 1909 legislative history, Justice Brennan in The Nation case chided his brethren that "The enactment of copyright legislation by Congress under the

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is endeavoring to reap where it has not sown...

248 U.S. at 138-9. Incentives were also important to that case, for, without protection, the Court believed that the plaintiff news service might be forced out of business as its competitor under-sold the plaintiff with the news plaintiff had been put to the expense of gathering. 248 U.S. at ____. Thus, "Although an artists's natural rights have been at best an undercurrent in federal intellectual property law, the misappropriation doctrine of INS and its progeny have recognized them explicitly. Individuals are protected both because they are deserving and because they serve the public's interest in the production of information." Baird, The Legacy of INS, 50 U. CHI. L.R. 411, 416 (1983) (footnote omitted).

12. (DeNicola's excellect article)

13. Here supplemented by privacy and personality arguments. (Cites)

14. 53 LW at 4576

15. 53 LW at 4576.

terms of the Constitution is not based upon any natural right that the author has in his writings..."[16]

The copyright issue is further complicated by the fact that under the federal copyright act of 1909, legal protection for unpublished works of expression was largely left to the state law of common-law copyright. In the state context natural law sentiments may play a definite, even respectable role.[17] When common-law copyright was abolished by the 1976 Copyright Act, unpublished writings were brought under the federal umbrella.[18] The Nation case involved federal copyright protection, under the 1976 Act, for an unpublished manuscript. It may be that in such a context, natural law sentiments are not entirely out of place.[19]

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16. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909), quoted by Justice Brennan at ___ US___, 53 LW 4562 at 4573.

17. Baird, U CHI L REV.

18. 17 U.S.C. section 301.

19. One can make the argument that when Congress unified the state and federal copyright systems, the major purpose of doing so was simply administrability (the wavering line between the two systems, "publication," had been so often reinterpreted through litigation that the resulting complexities were warping administration of the laws), and that Congress did not mean to forbid any of the natural law sentiments which attached to common-law copyright from carrying over into the newly-combined system, at least for those works which were the common law's concern, namely, unpublished works. (Cite to hearings, House Report.) In addition, while "reward to the creator" was always a mere secondary consideration for copyright law (Mazer v.

Stein, Aiken; etc.) it has not been ruled out of consideration altogether.

Also note that despite Justice Brennan's reference to the "terms of the Constitution," there may be nothing unconstitutional in Congress keeping natural law or "deservingness" sentiments attached to the unpublished works newly embraced by the federal law. True, the copyright clause speaks of giving authors and inventors rights for limited times "to promote the progress of science and useful arts", U.S. CONST., art I, sec. 8, cl. 8, phraseology which indicates authors' rights were seen as mere instruments in the goal of providing incentives for the creation of new works to which the public could have access. But while incentives and access may have been the Founder's first concern, it need not have been the only concern legitimately sheltered by the clause.

First, consider Madison's explanation of the copyright clause, in which he asserted that the public interest there coincided with the claims of individuals:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.

(Federalist #43). The Federalist account seems to leave room for legitimate consideration of creator's claims to "deserve" protection. (This brief excerpt is far from crystal clear, of course. For example, the Federalist's treatment of the clause is consistent with an interpretation that even individual claims had incentive roots. Also, Madison was historically in error in believing, as the excerpt suggests he did, that authors had common law rights in published works. See Abrams, Exploding the Myth of Common-Law Copyright (arguing that common law copyright even in England was limited to unpublished works.) Also, readers of the Federalist Papers must always keep in mind their purpose of encouraging adoption of the Constitution.)

Second, if Congress is furthering some Constitutionally permissible goal, it is ordinarily able at the same time to take account of other goals. (This point needs more research.)

Nature of this enterprise

The time is ripe for sustained consideration of natural rights arguments. This article will ~~take~~ build a the historically most important natural rights theory, John Locke's labor theory of property, and examine what natural rights (if any) would emerge in intellectual property. It will then apply those findings to illuminate the problems mentioned above, namely, (1) misappropriation law, (2) new growth in merchandising rights, (3) the so-called "first amendment" limitations on rights of publicity, and (4) the fair use doctrine of copyright law. Regarding fair use doctrine, the discussion will focus on (a) copying of factual material, (b) intentionality and (c) unpublished works.

Note that this article aims to "illuminate" these areas, not resolve them in any final way. I do not make the claim that Lockean analysis leads to "rights" which in fact are

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Third, legal recognition of "natural rights" can itself lead to positive incentive effects. (Discuss Becker's arguments briefly).

Fourth, if these "natural law" goals need separate support, such support might be found in the general commerce power. (Explain.) So the question is less whether the Constitution would permit Congress to incorporate some "reward the laborer" sentiments, and more whether Congress should be understood to have done so.

superior to those which our Constitution, legislatures and courts create. The phrase "natural rights" can indeed have those connotations, but I make no such strong claim; rather, the phrase as used here merely indicates the legal relationships which would result from one particular sort of argument. While I hope to show that the form of argument has some independent persuasive power, and while the Article as it proceeds will attempt to identify those junctures in which natural rights analyses would be most consistent with prior precedent, the goal here is less to provide programmatic guidance than to provide a heuristically interesting set of insights into the way a system of intellectual property rights might, or should, work.

This article has ~~one additional~~ a second object in view: to introduce non-specialists to the peculiarities of intellectual property law. Now that the field has gained salience, many scholars and students in varying areas of inquiry find they need to deal with its issues. The relationships surrounding intellectual products are governed by quite different ordering principles from those pertaining to tangible products and resources. Intellectual property law has its own classification systems (e.g., "subject matter"[20] and

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20. See ___, infra.

"exclusive rights"[21]), and its own policy assumptions.[22] To make matters more complex, the area is divided into several subfields, each governed by ~~different~~ statutes and precedent, and serving related, but somewhat different, purposes.[23] Of course, no one article can explain all of the ~~area~~ law affecting intellectual products. It is nevertheless hoped that by exploring a range of issues through the lens of one unifying inquiry, a labor theory of property, the reader will come to understand the distinct nature of the questions presented by the unusual set of physical characteristics, and the unusual power for influencing cultural and business life, possessed by these intangible products of mankind's ingenuity and labor.

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21. See ___, infra.

22. The clearest example of the difference in starting-points is probably duration. While most people assume that property lasts in perpetuity, most forms of intellectual property are time-bound. The Constitutional clause granting patent and copyright power to Congress says that such grants are to be made "for limited times." U.S.CONST. ART.8 CL. 8. James B. White in conversation has suggested that the wording of the Constitutional grant serves as a warning that when one deals with intellectual products, one deals with a realm of "policy, not property," and that usual assumptions regarding the proper dominion of a property owner must be foregone.

23. The usual list is: copyright, patent, trademarks, trade secrets, misappropriation, rights of publicity, and unfair competition. Most of these are hybrids of tort and property, which makes them capable of shedding light on the basic tort and property areas as well.

0.2 Locke

0.2.1 Locke's labor theory of property

In seeking to understand what lies behind the courts' apparent eagerness to grant property in intellectual products, the ~~most helpful~~ best starting place is probably the familiar theory of property found in John Locke's SECOND TREATISE OF GOVERNMENT.[24] Locke's account of how property might be justified in a state of nature seems itself to reflect or capture most peoples' intuitions about what would constitute a noncontroversial case of entitlement to property rights.[25]

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24. Locke has probably had more influence on this country than any other political philosopher. Locke's historic influence is admitted even by his critics. Thus, of Locke's theory of property, C.B. Macpherson writes, "[I]n spite of its strained logic... [Locke's] case soon became a standard one." Macpherson, John Locke (Introduction), PROPERTY: MAINSTREAM AND CRITICAL POSITIONS. (C.B. Macpherson, ed., at 14) (1978). (Macpherson's views on Locke can be found in C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE, 194-278 (1962).)

Unless otherwise indicated, all citations to Locke are to the SECOND TREATISE (1690) as found in T. COOK (Ed.), TWO TREATISES OF GOVERNMENT BY JOHN LOCKE (1964).

25. The account, as here applied, is noncontroversial from two points of view. First, many critics of Locke's theory attack the appropriateness of analyzing contemporary institutions of

Speaking broadly, Locke suggests that a person who [26] successfully uses his or her efforts to make useful those

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land ownership by reference to a set of standards which could be satisfied (if at all) only in a very different hypothetical or primeval state of nature. Such criticism loses its force when the analytic focus is on a form of intangible product which, although created today, might itself satisfy the Lockean standards.

Second, some criticism might be addressed to the very stringency or harshness of the Lockean standards. For example, Locke suggests that giving an appropriator property in what he has seized and labored upon is unjustified whenever the appropriation would harm others in a particular way; a utilitarian would probably argue instead that property might be justified even if it harmed some individuals, so long as the property award created a net increase in utility.

From the perspective of viewing the Lockean standards as insufficiently generous to property creation, there is nothing particularly controversial about using Locke to identify a minimum domain for property. This article makes no strong affirmative claim that the Lockean standards exhaust the categories of permissible property, and its use of Locke's framework is compatible with such a minimalist position. (For elaboration of the latter point, see ___ infra.)

There are other perspectives from which the Lockean standard case would be more controversial. One might, for example, mount an attack on the Lockean standards for being too generous toward property; thus, for example, a communitarian might demand that all benefits generated by one's labor be shared ("from each according to his means") regardless of other circumstances.

26. All of Locke's images are those of successful appropriation- the nuts gathered, the land plowed to yield crops, the water caught in the pitcher. Locke does not deal with those cases in which effort fails to result in successful appropriation.

Locke's theory would not seem to grant property in labor per se. He is also concerned with consequences. This is suggested by his imagery, which focuses on that labor which is

things which no one else has used or claimed may be rewarded with ~~ownership of~~ (property in) the things. American common law has long used a simpler variant of such a principle, awarding ownership to those who take possession of unclaimed physical resources,[27]

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appropriation, by his argument that he who gathers perishable fruit and lets it go to waste thereby loses his property in it despite the labor which he put into the initial gathering (LOCKE, Chapter V, par. 46, discussed below at ___) , and by his argument from necessity (LOCKE, Chapter V, par. 26.) (The matter is also discussed in the immediately following note.)

The potential gap between appropriation and labor, not accounted for by Locke, may be particularly relevant to the area of intellectual products.

27. The American common law rule of possession is simpler both in its definition (e.g., there is no requirement, as there is with Locke, that the appropriation leave "enough, and as good left" for other potential appropriators if it is to result in property) and in its administrability. Concerns with administrability may indeed have been the reason for the judicial hesitation to adopt labor as a sufficient basis for property in unowned resourced. See , e.g., the classic case of Pierson v. Post, 3 Cai.R. 175, 2 Am. Dec. 264 (N.Y. 1805) (he who captures a wild fox owns it; efforts at capture which fail to succeed yield no claim):

> If first seeing, starting, or pursuing such animals, without having so wounded, circumvented, or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

3 Cai.R. 175 at _____.

For a sketch of the possession principle, its applications and exceptions, see Epstein, Possession as the Root of Title.

Locke does not seem to deal explicitly with the possibility that labor (e.g., pursuing a fox) might not issue in success

suggesting that judges have indeed found attractive the notion that people who appropriate unused and unclaimed resources have some claim of right to them. Creators of new ideas and literary writings seem to be creating something out of nothing, and thus appear to be unusually meritorious candidates for such rewards.[28]

(catching it.) Some of his writing might suggest that labor itself creates the property. For reasons mentioned above (see note 26, supra), I think Locke does not mean to go so far, and that his conception of labor-plus-appropriation is close to the legal notion of possession.

It is ironic that one of the passages which stresses labor rather than appropriation is a passage in which Locke seems to be reaching out to common law (albeit English rather than American) for an analogy to buttress his labor principle.

> And even amongst us the Hare that any one is Hunting, is thought his who pursues her during the Chase... whoever has imploy'd so much labour about any of that Kind, as to find and pursue her, has thereby removed her from the state of Nature, wherein she was common, and hath begun a Property.

(LOCKE, Chapter V, par. 30. Emphasis in original.) Labor may "begin" property, but appropriation seems to complete it, and waste (as we shall see) to divest it.

28. Persons who employ creators would also seem to be meritorious candidates for ownership under Locke, for he thinks of "the Turfs my Servant has cut" as removed from the common by "labour that was mine". LOCKE, Chapter V, par. 28 (emphasis altered from original).

While a good deal could be said about whether creators and their employers should be treated differently, this article will by and large accept Locke's assumption; discussions of the creator's effort or labor in the text which follows should therefore be understood as also including the employer's effort or expense in hiring the creator.

Locke's labor theory demands more than mere labor as the precondition of property. Among other things, the labor must be mixed with something from the "common," or public domain (the theory does not apply to labor mixed with other persons' appropriated resources)[29], and property results only provided that the laborer's appropriation[30] of resources from the common leaves "enough, and as good left in common for others."[31] The latter condition is commonly known as the "proviso," or the "sufficiency condition." It is the presence of this proviso which gives Locke's theory much of its

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29. Many current rules of law embody this principle. For example, the `officious intermeddler' who labors in another's vineyard usually receives legal claim to neither property nor pay for his efforts, while he who labors in the wild may keep what he reaps. (Cite) The finder can keep what he finds only if it is unclaimed. (Cite.). The music arranger is free to sell his version of the melody only if the original is in the public domain. (Cite.)

30. "Labor" is of course not synonymous with "appropriation," but here in Locke, the relation between labor and appropriation is pictured as simple:

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

LOCKE, Chapter V, paragraphs 27, 29 (emphasis in original). See note 26, supra.

31. LOCKE, Chapter V, par. 27.

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force.

0.2.2 Locke and current controversies over the social justice implications of "law and economics"

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32. Many of the traditional critiques of Locke amount to asking "why should property form." Thus, for example, Nozick asks, why should property follow from the laborer mixing his effort with common resources-- after all, notes Nozick, when one dumps one's tomato juice into the sea, one merely loses the juice, and gains no claim to own the ocean. NOZICK, ANARCHY, STATE AND UTOPIA at ___.

The proviso serves to turn that question around. If the claims of the nonpropertied can be satisfied by the proviso, then the better issue is "why shouldn't property form." (Becker makes a similar point about the proviso. Cite.)

Nozick's tomato juice example, while vivid, overstates its case because it is offered in isolation. Combine his example with the proviso, and give it a slightly more realistic touch, and the following not-so-absurd argument emerges: "If by stirring some dye into the sea I change its color slightly, and I want to keep everyone else out of the colored area so that my aesthetic appreciation isn't marred by their eddies and diluents, I should be able to do so if the world offers all the other swimmers and aestheticians equally good oceans for their use. So long as the proviso is satisfied, they are not prejudiced by my claiming this particular ocean as my own, and therefore there is no reason for me not to have property in it."

Of course, the proviso could not be satisfied in a case where the resource being claimed was an ocean. So, under Locke, oceans cannot be owned. There is nothing surprising in that. In those cases where the proviso <u>can</u> be satisfied, the burden of persuasion falls on those who would <u>deny</u> that property follows from labor.

This and related issues recur throughout what follows.

0.2.2.1 Welfare criteria

The proviso that "enough, and as good" be left behind makes the Lockean analysis interesting for reasons other than Locke's pervasive historic influence, and other than the growing importance of natural law sentiments in intellectual property case law. For Locke, an appropriation which satisfies the proviso "does as good as take nothing at all."[33] The proviso operates therefore essentially as a requirement that other persons not be made worse off by a grant of property.[34]

The proviso tests the justice of resource distribution in much the same way as do the "paretan" criteria of welfare economics. Employed to evaluate shifts in social, legal, or economic relations, this modest set of criteria originated by Vilfredo Pareto approve only those changes which bring benefit to some participants, and hurt no one.[35] In recent years, Judge

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33. LOCKE, Chapter V at par. 33.

34. As such, it satisfies most fairness-based objections to private property systems. See note 25, supra (discussing the ways in which, and the perspectives from which, Locke's view is or is not likely to be controversial). Also see the discussion of whether "harm" can be distinguished from "benefits witheld" on a principled basis, below at ___.

35. The various paretan criteria work as follows: A situation is "pareto-inferior" to another if changes could be made to

Richard Posner and others have vigorously adapted the tools of welfare economics to the analysis of law.[36] In the transition,

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which all would consent; the various states of affairs to which all would consent are "pareto-superior" to the conditions prior to the change. A situation is "pareto-optimal" if no change could be made to which all could consent. Recommendations can be made to change from "pareto-inferior" to "pareto-superior" states of affairs, but "pareto-optimal" states are noncomparable.

The criteria are named after the originator of the "optimality" criterion, Vilfredo Pareto. See, V. PARETO, MANUAL OF POLITICAL ECONOMY, appendix at section 89 (Schwier trans. 1971). Renato Cirillo, a contemporary economist, summarizes the pareto-optimality criterion as follows:

> [T]here is quite a universal consensus as to what constitutes a Pareto optimum: it indicates a position (organization or point) such that any change which makes some people better off results in making others worse off. In other words, if such a state is reached it is not possible to increase the utility of some consumers without diminshing that of others."

R. CIRILLO, THE ECONOMICS OF VILFREDO PARETO (1979), 42, 44. According to Pareto, an economist cannot (though the same person wearing a non-economist's hat might) recommend changes away from a pareto-optimal point, or among such points, for any such recommendations would involve interpersonal comparisons of utility. Pareto's "definition of welfare... gives rise to the possibility of an infinite number of non-comparable optima." CIRILLO at 43.

36. See, e.g., R.POSNER, ECONOMIC ANALYSIS OF LAW (2d ed.) (1977); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1984).

Although there are many variants of "law and economics" (compare e.g. Adelstein's evolutionary view with the views of Posner), persons using an efficiency criterion will here be referred to as "law and economics" practitioners. Since I am occasionally one such person, (see Gordon, Fair Use as Market Failure, 82 COLUM.L.REV. 1600 (1982)), and ordinarily object strongly to any such label, I can only suggest that one must

the diffident paretan criteria were replaced. It was imagined that a no-harm criterion would be next to useless in practice, since most changes do hurt someone; to be "more useful",[37] the paretan criteria of doing no harm were gradually supplanted by the "efficiency" criterion of doing only cost-justified harm.[38] The common understanding of pareto-optimality even seemed to undergo a transformation.[39]

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occasionally bow to necessity; some summary form of reference is needed in order to make the differences between the criteria clear.

37. Markowitz.

38. Posner defines "efficiency" as the maximization of value. "Value," in turn, is defined as "human satisfaction as measured by aggregate consumer willingness to pay for goods and services." R. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977) (emphasis added). "Note that under this definition, it is `efficient' to take resources from a person in whose hands they have less "value" and give them to another person in whose hands they have more "value," even if the loser is not compensated for the value." Gordon, supra note 36 at 1606 n. 38 (1982).

39. Thus, Calabresi and Melamed write:

> Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before. This is often called pareto-optimality.

85 HARV. L. REV. 1089 at 1094 (emphasis added). In its original form, pareto-optimality asked not that the gainers "could" compensate the losers (which is how Calabresi and Melamed put it), but that gainers actually compensate and, by

recommendations were made for legal change which largely ignored the status of those persons who would be harmed in pursuit of the "greater good".[40]

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so doing, obtain the losers' consent to the change. Calabresi and Melamed were aware they were redefining the paretan criterion (see their article at note 10), though it is unclear which of the implications arising from their redefinition they were conscious of at that time. Their definition of the pareto-optimality criterion is closer to the criteria associated with Barone, Hicks, and Kaldor, which "do not presume actual payment". CIRILLO, supra note 35 at 50-51. Also see Coleman, Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law, 68 CALIF. L. REV. 221 (1980).

Although Calabresi and Melamed erred in suggesting that "economic efficiency" is the same as pareto-optimality, the two concepts are related. In a perfectly competitive system with no transaction costs and no strategic behavior, all participants will, generally speaking, "trade up" to an efficient result which will also be pareto-optimal. (See CIRILLO, supra note 35 at chapter IV, for a discussion of the qualifications which Arrow and others offer to that observation.) In an imperfect system, however, the "trades" may stop well before the efficient point. In other words: while an efficient allocation will be pareto-optimal, so will many nonefficient allocations. In an imperfect system, reallocating resources to maximize their net value might not be achievable consensually.

40. The most accessible account of the different welfare criteria is probably Jules Coleman's excellent piece, cited at note 39, supra.

"Law and economics" accounts are not oblivious to the problem of the "losers", of course. One of the most outstanding treatments of the compensation problem, Michelman's "JUST COMPENSATION" piece, drew heavily on the Law & Economics tradition, and some discussion of the compensation problem is now common. See, e.g., Polinsky, who argues that efficiency is the most appropriate criterion for choosing legal rules, and that it is best to handle questions regarding the redistribution of income separately. (Cite.) While I argue at

The efficiency criterion is not flawed because it refuses to honor all claims to keep one's status quo position (whatever it may be) unharmed. Few of us would argue that a thief is entitled to keep his loot. Rather, use of the efficiency criterion is flawed when it is employed to recommend changes in the law and no distinction is made (except on efficiency grounds) between those claims which should be honored and those which should not.[41] A wrongdoer is not ordinarily entitled to

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___ infra that a program such as Polinsky recommends is likely to retard appropriate distributional action, Polinsky's argument nevertheless admits that distributional concerns are a legitimate concern for social action. The matter is more one of emphasis, as piece after piece has stressed the net efficiency gains from one piece of legal rule-changing or another. See (e.g.)(cites)

(Perhaps discuss here how in my economically-based fair use test, the "losers" there (the copyright owners) were protected from substantial injury.)

41. Additionally, of course, the "efficiency" criterion has other problems. It shares many of the controversies of utilitarianism, for example, with one particularly notable exception. The problem of how to "count" the utility generated is not a problem for Posnerians, for money values are more easily measured than "utility". See POSNER, (THE ECONOMICS OF JUSTICE?) at ___.

On the other hand, this monetization "solution" generates its own problem, one of which is more troublesome than the controversy over how to define and measure utility: namely, that an economic viewpoint seeks to maximize value "as measured by willingness to pay." See note ___, supra. Willingness to pay is in turn dependent on ability to pay. Unless one is satisfied with the distribution of income as an initial matter, using willingness to pay as a measure of welfare is highly suspect. While economists recognize this (e.g., Posner says

be protected from being stripped of his gains,[42] but most of us would feel uncomfortable if a mere failure to use one's property efficiently were to count as a sufficient "wrong" to cause its forfeiture.[43]

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that the economist "cannot prescribe social change," ECONOMIC ANALYSIS OF LAW at 10), the efficiency criterion is often used for this normative purpose. (Cites.) I argue that such normative use will ordinarily be proper only if simultaneous attention is paid to the distributional issues.

42. The Kaldor-Hicks criterion, under which no payment need be made to those who would lose from an anticipated legal change, was originally created to deal with situations in which the losers had little in the way of justificable claims to entitlement, e.g., antitrust violators. See Coleman, supra note 39.

43. Although the "law and economics" school seeks to to encourage efficient resource use, most persons employing the "law and economics" analytic tools do not go so far as to argue that there should be no privilege of inefficient use. Rather, most such writers would permit a degree of inefficient use in some particular cases because of the inefficiencies which a rule requiring perfection would involve. (Such a rule would involve high supervisory costs, the state would face information-gathering problems in seeking to guarantee efficiency, etc.) See the discussion of Calabresi and Melamed's position at ___ in the Appendix, infra. In our law inefficiency causes one to forfeit some of the property entitlements only rarely or indirectly. As examples of forfeitures in our law which might credibly be explained by a societal desire to avoid inefficiency, consider e.g., nuisance injunctions which bar a landowner from some formerly privileged use or, e.g., contributory negligence rules which bar a plaintiff from obtaining compensation for possessions destroyed by a negligent defendant. (Cites.) Note that, of course, inefficient use can be enjoined, but the user compensated for the restriction. See the Appendix at ___.

A. Mitchell Polinsky[44] and others have argued that efficiency should be the primary criterion for choosing legal rules, and that redistributive concerns should be handled separately. Such a position would have some appeal, if indeed the use of efficiency criteria increased the size of the social pie available, and that larger pie were then divided in accord with some notion of equity. But I suspect a program of action such as Polinsky recommends is likely to lead to societal underattention to the distributional issues, and may actually retard appropriate redistribution since persons who "win" under applicable legal rules are likely to feel entitled to keep their gains.

Part of the goal of this Article is to explore whether the traditional, ethically more satisfying, no-harm criteria are really as toothless as supposed, or whether they can be meaningfully incorporated into rules of decision. It will be suggested that, at least for intellectual property law, no-harm criteria have already been influential,[45] and have additional,

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44. Cite.

45. See ___, infra (subject matter and exclusive rights) and ___ (fair use). I have previously suggested that courts in deciding fair use cases in copyright law have applied a rough equivalent to a no-harm criterion. See Gordon, Fair Use as Market Failure (I argued there that fair use should be granted to users of copyrighted materials when it would benefit society

previously unexplored explanatory power. From an institutional viewpoint, the proviso has a special appeal: being modest, and asking for legal intervention to enforce property rights only when no harm is done,[46] it helps courts avoid some of the difficult policy weighings for which they are arguably ill suited.[47]

0.2.2.2 The proviso as a no-harm criterion: caveats

Three caveats should be noted, however. First: Although

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and not deprive copyright owners of significant revenues; various situations in which new and valuable uses might not generate revenues for copyright owners, even if the owners' copyrights were fully enforced, were examined under the "market failure" rubric.)

(The no-harm criterion plays out somewhat differently in the contemporary copyright system than in a natural rights system, however; see the discussion entitled "New technologies" at ___ infra, for further discussion.)

46. For an explanation of how it can make logical sense to say that a defendant can be restrained from doing something he or she wants to do and yet be "not harmed", see ___ infra. Briefly, (1) making judgments about "harm" presupposes some sort of baseline (Feinberg; Wittman) from which the "harm" can be judged, and (2) persons who are restrained from doing things the system defines as "wrong" are not usually described as being "harmed" when this happens, since they had no baseline entitlement to the thing desired.

47. Baird characterizes the institutional judgment that judges may be "poorly situated to identify the policies at stake" as one of the key objections to state judge-made misappropriation doctrine. Baird, The Legacy of INS, 50 U. CHI. L. REV. 411, 416-7 (1983).

paretan criteria may simplify the value choices, their use would not ~~completely~~ eliminate the need for such judgments. As an initial matter, ~~of course,~~ to adopt a no-harm criterion involves deciding that nothing is more important than (i.e., nothing can "outweigh") the particular entitlement. Further, any criterion which works by addressing whether persons are made "worse off" in relation to some baseline, must make a normative choice of what baseline to employ. ~~Thus,~~ To apply those observations to the topic at issue here: the concern of this Article is with seeing if one can erect an intellectual property system even if one grants the nonpropertied an entitlement, which cannot be outweighed,[48] to be free from any duty to refrain from entering or using resources improved by another's labor if that duty would make them worse off than they would have been in a world without the laborer's

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48. Ordinarily, once one adopts a paretan set of criteria as the governing rod for social or legal change, one is taking the position that change will not be recommended if any harm- however minor- would be caused by the change. The harm cannot be **outweighed** by any benefits which the change would bring to other persons, though the harm might be **eliminated** by compensatory payment. (That change goes unrecommended does not mean the status quo will be recommended; the paretan is often agnostic, incapable of recommending either change or no-change.) It must be recognized that the paretan criteria do not themselves make weighing undesirable; in choosing a paretan criterion, one is deciding to choose a priority system which does not permit weighing.

efforts.[49] The latter hypothetical world constitutes the applicable baseline for our argument. While the Article defends using that choice of baseline ~~entitlement~~[50] to answer certain legal questions, other choices might legitimately be made, and the need for making some choice on the matter can be difficult for a court.

Second: The Lockean proviso is not fully equivalent to a no-harm criterion. When Locke identifies what arguments will defend property against the claims of a covetous and contentious stranger, he believes that being able to tell the stranger that there is "enough and as good left," i.e., that the proviso is satisfied, constitutes a full answer. However, even after the proviso is satisfied, the non-laboring neighbor may still object to his industrious neighbor's having exclusive

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49. Thus, all the economic arguments about how exclusive property rights aid in the efficient utilization of resources would be irrelevant; if imposing on the nonpropertied a duty to refrain from using others' creations would cause them harm, no duty would be imposed even if the duty would create great benefits for the rest of society.

50. For extensive discussion of this baseline entitlement and some alternatives, see subsection 3, "The proviso as a limitation," infra at ___.

(Basically-- the proviso is the least protection that someone should have. And if property is given despite the proviso, other compensating subisidies, rewards, privileges or etc. should be given the nonpropertied.)

access to the created resources. He may, e.g., feel aggrieved by the inequality of possession which he now perceives between himself and his industrious neighbor.[51] If that feeling, which we might call envy, is a harm,[52] then Locke's proviso diverges from a true no-harm criterion, for it takes no account of envy.[53]

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51. Even if he does not feel envy, he may refuse to give his consent simply because he wants to share in what the laborer has made. For further discussion of this issue, see ___, infra.

52. In common speech, envy might well be called a sort of harm. Some philosophers would argue that distinctions should be made between harms and other sources of unpleasantness, and that social and legal action which might be justified in order to prevent harm might not be justified in order to prevent lesser unpleasantness. Feinberg, for example, distinguishes between harms to interests, on the one hand, and "offenses" and other "disliked things," on the other hand. FEINBERG, ON DOING HARM, supra note ___ at 31-55. He would probably take the position that the covetous and contentious stranger might feel an "offense" if his industrious neighbor began to accumulate possessions, but that such envy does not consitute a "harm." Since at this point I am not prepared to justify on policy grounds the conceivable distinction between "harms to interests" and "other disliked things" which are also capable of making one worse off, that recourse is not open to me.

(Compare FEINBERG at 249 n.11) (acknowledging that the colloquial meaning of "worse off" can embrace offenses as well as harms.)

53. The proviso merely requires that the laborer's appropriation of resources from the common leave other persons' abilities to use the common unaffected, and does not require that the laborer soothe the non-propertied persons' covetousness by sharing with them what he has made or grown.

Locke gives no credence to any objection based on envy; he

This step of disregarding envy, which the proviso nearly shares with most other attempts to adapt no-harm criteria to particular situations,[54] should not make the proviso normatively

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simply seems to assume that natural law has no concern with protecting persons against it. Given the theological foundation of Locke's work, this is not surprising; one of the commandments is, "Thou shalt not covet." In addition, however, Locke also assumed that prior to the invention of money, no great inequalities would result from giving property in appropriations which fulfilled the proviso, for without a medium of exchange people could have property only in what they could use or store without spoilage. See LOCKE, Ch. V, Par. 36. He further assumed that when inequalities followed after the adoption of money, that the inequalities (and the medium of exchange which gave rise to them) were consented to, and thus not subject of complaint. Id.

54. Most applications of no-harm criteria will need to take the step of disregarding envy. (Becker). Thus, although one attraction of no-harm tests for social change is that they appear to free the decision maker of the need to weigh one person's desires or utility against another's, a no-harm criterion will be virtually unable to compare different world-states (even those involving intellectual property), unless the judgment is made not to "count" one particular kind of disutility, namely, envy. The dynamics work out this way:

Under the paretan criteria, any situation or point is optimal (and thus noncomparable with other points) if a change would cause even one person to object, regardless of the person's motives for objecting. It is usually imagined that under these criteria, changes would be acceptable even if not everyone gained, so long as no one were harmed. But if some persons gain and others' welfare levels stay the same, the gap between the two groups widens. An unpleasant sensation often results from the bare perception of inequality. Let us call that sensation envy. If envy "counts" as a harm, then (barring saintly dispositions among those affected) virtually all situations would be pareto-optimal. If envy does not "count," however, then a wider range of change opens up.

For further discussion of the nonpropertied person's

unacceptable. Where a possession causing envy is created by the efforts of another, and the envious person has the resources available to him[55] to create an equally desirable possession if he would but labor,[56] protecting that person against envy should not be an important goal.[57] (When we feel envy in such situations, we usually feel ashamed of the emotion, rather than entitled to share in the other person's goods.) I suggest we should feel little reluctance to approve a property criterion which refuses to take account of envy, but which does ensure that the law will not exclude nonowners from the resources they need to produce their own equivalents of the

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entitlement, see ___ infra.

55. The proviso seeks to ensure that "enough, and as good" common resources will still be available for all to work on.

56. RE handicapped persons, the amount of common which would be "enough" may be greater than the amount of common which would be "enough" for non-handicapped persons. The proviso is satisfied only when "enough" is left-- and therefore, a laborer might find it harder to get exclusive property rights if the other members of the community are handicapped. This is appropriate.

57. Thus, if the contentious stranger is truly covetous, and remains distressed even after learning that the common stands ready to provide him the same raw materials as it provided to the person being envied, then satisfying the proviso may not eliminate all possibility of doing harm. I have made the value judgment that it is more important to reward the laborer with an exclusion right than it is to avoid such an emotion. Others may disagree with this value judgment, or seek other ways to implement it. The Reader will thus hopefully find the proviso at least heuristically useful. (Thanks to Rick Lempert here.)

envied possession thing they envy.[58]

The third and last caveat also indicates the proviso's inability to serve as a perfect no-harm criterion.[59] It involves an interesting little paradox which suggests that no-harm criteria may not always be as easy for courts to apply as they may seem.[59]

Pareto developed his criteria in part because he wished economists to avoid making recommendations which would weigh one person's change in welfare against another's.[60] In order to avoid the hazards of trying to make interpersonal

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58. On occasion, as the argument progresses, the Article will evaluate whether discrete harms, motives, or claims should be "entitled" to the protection of the no-harm criterion. Any such judgments are as open to question as are, e.g., judgments that property owners should not be privileged to use their property inefficiently. But the value judgments when made will be explicit, as was the judgment regarding the relative unimportance of envy, above. The Reader can therefore evaluate them for what they may be worth, within the Reader's own value structure.

The style of making direct reference to my and my Reader's moral sentiments may seem a trifle odd for a Law Review: some introductory material about the method of discourse will probably be in order.

(Use Feinberg's intro as a model, perhaps.)

59. The difficulty here is, again, one which virtually any no-harm criterion will share when attempts are made to use it in practice.

60. See CIRILLO at ___.

comparisons of utility,[61] Pareto implicitly recommends[62] that eco decn make asking the participants how they feel about a proposed change, and rely on their consent to show that none are being harmed by it. However, someone may well refuse to consent to a change even if he is not going to be hurt by it, merely because he sees that the change will bring benefits to others in which he wants to share.[63] In other words, people do not always follow instructions. Similarly, though Locke argues that if the laborer's "neighbour... would still have room for as good and as large a possession-- after the other had taken out his--"[64] then the neighbor would not be "prejudiced" and would

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61. Many philosophers and economists have argued that utility, being a subjective phenomenon, cannot be objectively measured. See e.g., PARETO, supra note ___ at ___. Others, such as Brian Barry, contend that the importance of such difficulties is overstated. B. BARRY, POLITICAL ARGUMENT at 44-47 (1965)

62. (Need to review how well this is supported by the Manual; CWR person may assist here.)

63. The distinction between harm and nonbenefit it explored at ___, below, where it is argued that principled conceptual and policy distinctions can and should be made between "doing harm" and "not sharing benefit". (Also see generally, FEINBERG, ON DOING HARM (VOL. I of MORAL LIMITS OF THE CRIMINAL LAW) (1984) at chapters 2-3.)

Locke takes it as virtually axiomatic that, in most situations, one has "no right" to "the benefit of another's Pains." LOCKE, CH. V, par. 34. One can trace this belief to the privacy which he gives to liberty. Id. See ___, infra.

64. LOCKE, Ch. V, Par. 36.

have no "reason to complain or think [himself] injured",[65] recognizes that human nature is not limited to making complaints backed by "reason."[66] If a decisionmaker wants a criterion which will approve all changes where no harm is done, then relying on consent as the sole means of measuring whether harm is present will not work. Some form of "objective" measuring of welfare may be necessary -- and one would then be back in the business of making interpersonal comparisons.

To put this in more concrete terms: A laborer might have occasion to sue a stranger for entering on his property and using it or stealing it. If a Lockean rule of decision were adopted, the stranger might defend on the ground that excluding him would cause him "prejudice" or harm. The court would necessarily have to decide whether the defendant is telling the truth, i.e., whether the exclusion really does make the defendant worse off than he otherwise would have been according to a normatively appropriate baseline. If the Lockean court found that the defendant was merely making a specious claim of harm, the court would rule against his defense. Thus, while adopting no-harm criteria can simplify a court's fact-finding

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65. LOCKE, Ch. V, Par. 36 (by implication).

66. See LOCKE. Ch. V, par. 34.

role, some tasks of factual investigation will remain, along with the possibilities of error which inhere in them.[67]

To sum up: The foregoing placed Locke's proviso within the context of the modern debates regarding welfare criteria, and reviewed some of the difficulties which necessarily attend use of the proviso. We now return to applying Locke's test to the world and its resources.

0.2.3 Tangible and intangible property

Many attempts have been made to use Locke's theory as the

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67. Given the possibility of error, some harm might at some time be done. But such possibility inheres in any human system for decisionmaking. Cf., BARRY, supra note 61 at 45:

> Of course, there is no way of reading off on a dial the answer to the question whether a broken leg for A is worse than a pinprick for B, but that does not mean it is not open to evidence amounting in simple cases to proof. Establishing the relative importance of frustrating or satisfying different people's wants does not seem more (or, no doubt, less) insoluble than, for example, establishing causal dependencies in a complex train of social phenomena.

Thus there is an additional value-ordering underlying the Article's acceptance of the proviso, namely, the judgment that the institution of property should not be abandoned out of deference to a possibility of harm arising out of erroneous application of a no-harm criterion.

Determining if the proviso is satisfied may be a complex question. See ___, infra.

basis for evaluating private property today.[68] Most such accounts are complex, and depend for their application on still additional difficult questions.[69] In contemporary American settings it would appear virtually impossible to find a large amount of appropriable[70] resources not yet owned by individuals (a "common")[71], and harder still to find cases of appropriation which would meet the proviso's requirement of leaving "as good"

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68. Nozick suggests various interpretations under which one could ask whether a grant of property today would leave nonowners no worse off than they would be otherwise. In applying such an inquiry, he suggests, one would entertain "the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently ... experimentation is encouraged... [etc.]" R. NOZICK, ANARCHY, STATE AND UTOPIA at 174-182.

Note that even if the institution of private property is socially desirable, the distribution of private property rights among the populace raises its own difficult questions. Re intellectual products, the two questions tend to be mixed: to the extent private property is a desirable systemic mode of allocation, the creator has a special distributional claim; to the extent it is not a desirable mode, the creator's ownership claims are likely to be disregarded.

69. Consider, e.g., the way in which Nozick's version of Locke is dependent on empirical assumptions re efficiency and the like. Also, consider in this connection the complexity of applying Rawls' difference principle.

70. The resources in the U.S. which today are unowned are largely those which are not easily appropriable- e.g., the air.

71. (Explain why Locke views "unowned" property as "commonly" owned.)

for others.[72]

When attention turns to intellectual products, however, no such straining at interpretation appears necessary.[73] Since

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72. While today's pattern of ownership in tangible property might perhaps be justified by reference back to a time when Locke's conditions could more easily be met because land was undeveloped and population low, or by some variant of contractarian theory applied to today's status quo, the force of such arguments becomes attenuated with time or complexity.

73. For example, the argument has been made that so long as some eventual appropriation of land will deprive someone of the opportunity to appropriate his own plot of ground, no property in land is possible. Imagine: there are 1,000 ample plots of ground in the unclaimed wilds of America. Immigrants numbers 1 through 999 each takes one of these plots, and claims property in it. When Immigrant number 1,000 tries to take the last plot, a Lockean spokesperson tells him, "You can't take ownership in the last plot, because if you take it you will violate the proviso as to Immigrant number 1,001, whom we know is on her way here. By taking the last plot, you'd be leaving her with less than you'd have, and less than she could use; in fact, you'd be leaving her with nothing of the land which she owns in common with you and the rest of humanity. You're not entitled to take all the common that way. In short, any last (ultimate) potential appropriation is prohibited for it will leave some future potential appropriator frustrated without the possibility of property. You have the bad luck to be the last one." As to which, Immigrant number 1,000 may reply, "What you're telling me is that Immigrant number 999 took land which made the next comer, namely me, unable to own land. That means I'm left without `enough, and as good' as compared with Mister 999. Therefore, awarding property to Mister 999 would violate the proviso. The penultimate appropriation should be as prohibited as the ultimate one, for it leaves two frustrated potential appropriators: myself and Madame 1001." So number 999 would also not be entitled to property. And if the penultimate appropriation is prohibited, so would be the one before that, "zipping back" (in Nozick's phrase) to the first appropriation.

there seems to be a nearly infinite store of possible melodies, poems, novels, inventions, ideas, designs, and the like, the scope of the "common" seems broad and far ranging.

As for the ~~proviso~~ condition that "as good" be left for others, Locke suggests a test for determining whether the proviso is satisfied: a covetous and contentious stranger has no justification to complain of another's taking possession and ownership of land if, after the owner's appropriation, "there was as good left, as that already possessed, and more than he [the potential complainer] knew what to do with, or his Industry could reach to."[74] Such a test seems to be met here. Any particular intellectual product can be appropriated and owned without[75]

The problem does not seem to arise for intellectual products, for which an infinite range of creations is conceivable. If infinite, there is no "end point" from which to zip.

74. LOCKE at par. 34.

75. Locke's writing largely treats rightful appropriation as if it were coterminous with property, perhaps because of a confusion between privilege and right. One of Locke's arguments is this: that since one is justified in seeking to prolong one's life, this in turn justifies appropriation and injestion of food, and that in turn suggests the appropriateness of property. LOCKE, Ch. V at ___. This argument ignores the possibility that one might have a **privilege** to e.g., drink water from the spring, but have no property in it, and thus no right to exclude others from drinking. (The terms "right" and "privilege"are discussed below at ___, and their relation to this issue is discussed below at ___.)

depriving future creators of ample resources. Thus, property in intellectual products seems strongly supported by Locke's theory[76] -- more strongly than property in tangible forms property such as land.[77] Since our legal system clearly

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This article will follow Locke's treatment here, for, despite the potential for error, it is particularly fitting in the instant context to treat "appropriation" as equivalent to "owning" or "having property in", for the following reasons.

The word "appropriation" connotes a use which excludes outsiders or their use. Since intellectual products are susceptible to simultaneous physical use by many persons, a person "appropriates" only to the extent that the law gives him a privilege to physically exclude or a legal right to have the courts perform the excluding function. Physical exclusion is essentially unavailable for disseminated works; once a work is no longer secret, multiple reproductions can be made without the creator being aware of the copying. (Cite Liebowitz on the problems of physical exlcusion.) Given all this, in order to "appropriate" a disseminated intellectual product, one would indeed require a type of property right.

76. Locke himself seems not to have turned his attention to intellectual products when developing his property theory; his focus was on land, and its relation to civil society. It is clearly possible that Locke might not have conceptualized intellectual products as the proper subjects of property. (See, e.g., paragraph 44 of Chapter V.) However, Locke was concerned with examining the ownership of land and capital in his society, and their relationship to government, during a period when intellectual products were of comparatively little commercial value. Any specific conclusion he may have come to regarding the issue of intellectual property should not dissuade us from taking the mode of analysis he developed for analyzing his society's valuable resources and applying it to a type of resource increasingly more valuable in ours.

77. J.S. Mill, in the course of a utilitarian critique of land ownership, made a similar point about the favored status of created property using almost Lockean terms:

recognizes property in land, whose roots are more questionable,[78] courts may feel that property in one's creations should a fortiori be recognized.

0.3 General Applications

Of course the a fortiori argument just expressed has a flaw. Considerations of stability can persuade in favor of continuing established patterns, regardless of how

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> When the "sacredness of property" is talked of, it should always be remembered, that any such sacredness does not belong in the same degree to landed property. No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all. But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the new-comer.

J. S. MILL, PRINCIPLES OF POLITICAL ECONOMY, BOOK II, Chapter II, Section 6, at 233 (W. Ashley ed. London & NY 1909).

78. One need not make a Mill-type analysis (summarized in the preceding note) to have doubts about current distributional patterns in the ownership of tangible property. For example, the typical law student or lawyer will find it more congenial to make a strong argument on behalf of granting intellectual property in one's own creations than she will to make an argument on behalf of inheritance.

well-justified those patterns might or might not have been at the time they came into being,[79] so that existing patterns do not always provide reliable guides for dealing with new phenomena.[80] (This is one of the dangers in that mainstay of the common-law adjudicatory process, reasoning by analogy.)[81] Nonetheless, even discounting the a fortiori argument from land, the lure of the labor theory and the common-law possession cases[82] is strong. In the following sections, the

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79. Considerations of stability have great importance in the property field. Consider, e.g., (Esptein's defense of the posession principle), (discussions of inheritance, especially H. Pilpel's discussion of the need for continuity in publicity rights), etc.

80. The presence of an existing pattern may, however, provide similarly-situated persons claims based on fairness which they might not otherwise have had. This issue is briefly addressed at ___, infra, where it is argued essentially that intellectual products and physical products are sufficiently different that it is not unfair for the legal system to treat them dissimilarly.

The presence of a valuable existing pattern may also create a concern that new legal developments not erode what came before. The "slippery slope" and erosion problems are discussed at ___, infra.

81. Compare Baird, The Legacy of INS, 50 U.CHI.L.REV. 411 (1983) arguing that in the misappropriation area, reasoning by analogy should take precedence over systemic inquiry.

82. See the brief discussion of the role "possession" plays in the law of tangible personal property, at note 27, supra, and accompanying text. It has a similar importance in the law of real property (cites to e.g., adverse possession cases; Esptein's discussion of land, etc.)

article will explore what shape a Lockean intellectual property system might take. First the Article will examine the general shape of "property" in a Lockean system. Second, the Article will analyze whether, if one looks closely at the way intellectual products function in the world, persons creating them really do satisfy the Lockean preconditions for property (i.e., use of only "common" resources, and the proviso) as easily as it originally appeared. Third, the Article will focus on the nature of protectable subject matter, and on the particular forms which an owner's 'right to exclude' might take in a Lockean system.

After these basic issues have been dealt with, the Article will address particular controversies in the areas of misappropriation law, merchandising rights, rights of publicity, and fair use.[83] Much of the groundwork will already have been laid by the time the particular controversies come to be analyzed.

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83. See ___, infra. (Give page cites for each subsection.)