A

Critique

of

Intellectual Property Rights

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Introduction

Men who would decry any theft of physical property and would never permit themselves to steal will violate copyrights and patents with nary a qualm. This strange difference in behavior toward these two things, both of which are called "property," indicates a dichotomy in the minds of many with regard to the nature of physical and intellectual works. Even the law treats them in decidedly different ways: physical property rights are indefinite, while "intellectual property" rights are given time limits. Thus, in order to discern the validity and force of copyrights and patents, it is not enough simply to state that intellectual works are owned like property. The fundamental bases for these laws must be discovered in order to understand them.

The notion of intellectual works as property itself indicates a certain conception of the relationship between man and his intellectual works. If an intellectual work is the property of a man in the same way that physical works are his property, then certain conclusions follow from this premise. However, copyrights and patents in themselves do not imply this ownership of intellectual works. They are rights granted by the state, and as such do not indicate ownership of the thing to which the rights pertain. This is especially clear when considering the rights granted to those in authority; an example is the right to search a house granted by means of a search warrant. The search warrant does not indicate that the police officer owns either the house he is searching or the owner of the house.

While it is from the copyright and patent laws that theories of intellectual property stem, these laws themselves have been based upon utilitarian theories, at least in the United States. A utilitarian defense of copyrights and patents does not include the notion of intellectual property. It simply requires the weighing of relative goods and the final determination that granting copyrights and patents brings about more good than would exist without them. This utilitarian defense, however, is largely unsatisfactory. Even on its own grounds, a utilitarian comparison is not conclusive. While

some have calculated that copyrights and patents have a beneficial effect overall, others with equal authority claim that they have a detrimental effect overall. They both use conjecture and estimation in order to devise their figures, and they are both able to present hypothetical cases to support their arguments. This utilitarian method of comparing goods becomes incoherent because it can only compare goods that are qualitatively equal. Even when comparing goods in a simply quantitative manner, utilitarianism breaks down, especially when comparing the loss or gain of many to the respective gain or loss of a few. In order to avoid these difficulties, a different justification for copyrights and patents is necessary.

The notion of "intellectual property" allows for a defense of copyrights and patents based in rights. By extending ownership to intellectual works abstracted from material existence, property rights can account for the powers granted by copyrights and patents. These natural property rights over intellectual works are problematic, however, when considered in light of natural law.[1] Because human law is only legitimate insofar as it is based upon natural law,[2] a natural law basis must be found for copyrights and patents. Without a natural law basis, they are not even laws.[3]

Copyrights and patents are not the only laws which are considered under the category of "intellectual property" laws. They are, however, the only ones that do not derive directly from natural law. The realm of "intellectual property" laws generally comprises "at least copyrights, trademarks, patents, and trade secrets."[4] Many will also consider laws against plagiarism and forgery to be included with these. A trademark is "a legally protectable name, word, symbol, design, or combination which designates the manufacturer of a product or service."[5] Trademarks are violated when one who does not hold the trademark uses it to advertise his product. This is clearly an offense against truth because the violator is claiming that his good or

[1]Throughout this document, natural law will be considered according to its presentation by St. Thomas Aquinas, especially as it appears in his Summa Theologiae.

[2]Saint Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benzinger Brothers, 1948; reprint, Westminster: Christian Classics, 1981), Prima Secundae, Question 95, article 2, corpus. All subsequent references to the *Summa Theologica* will be from this translation and edition, and will follow the standard notation, e.g., ST I-II, Q. 95, a. 2, c.

[3]Ibid.

[4]N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 3.

[5]Peter S. Menell, "1600, Intellectual Property: General Theories," *Encyclopedia of Law and Economics*, ed. Boudewijn Bouckaert and Gerrit De Geest, work in progress; available from http://encyclo.findlaw.com/index.html; Internet; 149.

service originates in a way contrary to fact. Plagiarism and forgery are very similar. These crimes involve claiming authorship of that which was authored by another and claiming a source other than the true source of important or valuable items respectively. Thus trademark violation, plagiarism, and forgery are all offenses against truth. Trade secrets are protected by contracts and property laws preventing trespass. A trade secret is simply information, such as the Coca-Cola recipe, which is not publicized and all who are allowed to know said information are bound by contractual agreement not to disseminate the information. One who shares the privileged information has broken a contract, and one who spies in some way in order to learn the secret has trespassed. Thus trade secrets as well have a natural law basis which in no way needs the notion of "intellectual property."[6]

Copyrights and patents do not have immediately apparent natural law bases. Copyrights and patents govern artistic works and inventions respectively. They prevent men from reproducing a protected work without the permission of the holder of the copyright or patent. Neither copyright nor patent violations necessitate a claim contrary to truth, nor do they involve obtaining information illegally, since they both use publicized information. Because the simple, natural-law bases for the other laws governing intellectual works do not apply to copyrights and patents, other bases must be found in order to defend these rights.

The bases for copyrights and patents cannot be found explicitly in Thomistic writings. St. Thomas Aquinas, the great doctor of the natural law, could not deal with either copyrights or patents because he died in 1274, 200 years before the first patent, which preceded the first copyright, was granted in 1474.[7] Thus he does not have any articles or treatises concerning such laws. Copyrights and patents have only been granted by governments within the last half millenium. Even so, the very use of the term "intellectual property" is more recent:

> The libertarian writer Lysander Spooner used the phrase "intellectual property" in the 1850s, and may have been the first to do so. Its widespread use is recent, however. It first appeared as a heading in the Readers Guide to Periodical Literature in 1985, and only in 1993 did the relevant subcommittee of

[6]This paragraph is not intended as a defense of laws regarding trademarks, plagiarism, forgery, and trade secrets, nor is it intended to indicate that these laws derive directly from natural law. This paragraph merely indicates that the most basic defense of these laws does not include recourse to the notion of "intellectual property."

[7]Menell, 131.

> Congress change its name to Intellectual Property and Judicial Administration.[8]

If intellectual works can be owned in the way that physical works can, then there will be little difficulty in providing an adequate defense of copyrights and patents because St. Thomas gives a strong, natural-law defense of private property.[9] Most arguments that defend the notion of "intellectual property" are not based in St. Thomas's explanation of private property, however, but rather in the explanations given by more recent philosophers.

Philosophers who have actually dealt with the matter of copyrights and patents have written after the advent of these legal rights. Thus men such as Locke, Hume, Mill, and Hegel have more to say on the matter than does St. Thomas. These men have laid the foundations used in most modern defenses of copyrights and patents. While not all arguments in defense of copyrights and patents are based upon the notion of intellectual works as property, those that do base their defense upon the property argument have a fairly direct connection between "intellectual property" and the protection of certain rights over this property.

The arguments purporting that intellectual works abstracted from matter can be held as property derive in large part from modern philosophers who deal with property, such as Locke and Hegel. These men lay a certain foundation for property which is easily extended to intellectual works. Locke bases his defense of property in man's labor and his "ownership" of his own labor. This theory of the basis of property is easily extended to intellectual works, which do involve labor to be created. Hegel bases his defense of property in man's personality and his "right" to develop this personality in the physical world. If personality is fundamental to property, then something as personal as artistic expression would certainly seem to be as protected as private property.

There are certain deep problems with these theories, especially insofar as they relate to "intellectual property." These theories do not provide a cogent method for discerning who the owner is for a product where one man owned the raw material and another man owns the idea now expressed in the product. These theories also hold that the rights of an owner over his property are next to absolute. The control that an artist or inventor has over the property of others is a limitation that does not seem to fit with the treatment given property rights.

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[8] Tom Bethell, *Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martins Press, 1998), 259.

[9] *ST* II-II, Q. 66, a. 1–2.

These modern arguments from natural rights either treat "intellectual property" rights as the foundation for physical property rights, which seems a little absurd given the long-standing recognition of private property and the relatively recent recognition of "intellectual property," or treat these rights as completely compatible with each other, which they are not. There is a certain tension between physical property rights and "intellectual property" rights in these theories which is not resolved and is open for attack.

The notion of "intellectual property" allows for a defense of copyrights and patents where utilitarian arguments fall short. Yet it does not form a coherent whole with normal property rights. Thus after a critique of both prevalent modern theories, the utilitarian and the natural rights theories, an attempt must be made to explain the relationship of intellectual works to their originators. This explanation will have to take into consideration the very natures of the things involved and the basis for property itself.

Chapter 1

Overview and Critique of the Utilitarian Argument

THE UTILITARIAN DEFENSE of copyrights and patents sets out to prove not only that innovation and creation are good and necessary for the "general happiness," but also that they will occur at an unacceptably slow rate without the monetary incentive derived from copyrights and patents. Utilitarians make no claim that inventors or artists have natural rights regarding the reproduction of their works. Their defense of copyrights and patents is limited to the benefit these positive law rights have for the whole of society.

1.1 The Utilitarian Defense of Intellectual Property

In its formulation by John Stuart Mill (d. 1873), utilitarianism holds that a law is justified when it promotes the "general happiness." Mill's understanding of happiness is simply "pleasure, and freedom from pain,"[1] and this "general happiness" is "understood as the sum or perhaps average of the enlightened self-interests."[2] A good or just law for Mill's utilitarianism is thus one where its enforcement brings about more pleasure than would exist without it. The pleasure and pain considered here is not simply physical, but intellectual as well.

[1]Wendy Donner, "Mill's Utilitarianism," in *The Cambridge Companion to Mill*, ed. John Skorupski (Cambridge: Cambridge University Press, 1998), 257.

[2]Jonathan Riley, "Mill's political economy: Ricardian science and liberal utilitarian art" in *The Cambridge Companion to Mill*, 294.

Copyrights and patents are designed to promote the "general happiness" by allowing the inventor or artist to profit from his work. These profits give both a monetary incentive to invent and create and a possible means of support to those who are dedicated to invention or creation. This is the rationale given in the Constitution of the United States which justifies copyrights and patents as being enacted "to promote the progress of science and useful arts."[3] The copyright and patent system allows for the existence of a professional artist or inventor without the patronage of a ruler, wealthy merchant, or even a modern corporation.

In defense of patents, utilitarians must first hold that inventions, by and large, benefit society. While there are arguments to the effect that the use of certain inventions is harmful,[4] utilitarian defenders of patents argue that there is quite clearly an increase of pleasure and a decrease of pain in society as a whole because of advances in technology. Advances in medical technology especially have brought about this benefit to the general happiness. Other areas of technological advance have aided in their own ways, making for a generally healthier and safer society.[5] Therefore a law that promotes technological advancement benefits society, and would thus be justified for utilitarians.

In the same way, art is defended as benefitting society. Art does not relieve physical pain or prevent physical injury as some inventions do, but it does directly provide intellectual pleasure. Because Mill's understanding of "happiness" is based on "complex states of experience,"[6] Mill's philosophy is equipped to hold that art promotes happiness.

Given that art and invention promote the general happiness, the relative merits and demerits of any copyright or patent laws must still be considered. There would exist a certain level of invention and artistic creation without any monetary incentive. Amateur artists and inventive hobbyists do not need any sort of monetary incentive. Furthermore, even without copyrights or patents, certain monetary incentives for invention and creation still exist: men will invent to make their tasks easier and artists will perform live or

[3] *Constitution of the United States of America*, Article I, section 8, paragraph 8.

[4] Peter S. Menell, "1600, Intellectual Property: General Theories," *Encyclopedia of Law and Economics*, ed. Boudewijn Bouckaert and Gerrit De Geest, work in progress; available from http://encyclo.findlaw.com/index.html; Internet; 162.

[5] These advantages are here taken alone and not considered in the context of concomitant societal damage caused by many technologies developed alongside the beneficial technologies. While the discussion of the overall effects of technology on society is an important one, and one which is pertinent to the utilitarian defense of patents, technological progress in general is here assumed to be good for the sake of the utilitarian argument.

[6] Donner, 257.

sell original works for money. Therefore, the scope of the incentive given by the laws in question is limited; they are not the only source of incentive for invention or artistic creation. On the other hand, there are also certain costs involved with these laws. Most basically, there is the cost of enforcing the laws, as well as certain other costs associated with the limitations these laws place on the use of knowledge. Thus a complex calculus must be employed in order to determine whether these laws are good according to the utilitarian method.

The benefit of copyright and patent laws is thus the creation of a certain monetary incentive for invention and artistic creation. This monetary incentive has been distinguished above into two levels of benefit: the first level is the simple monetary reward, the second is the provision of a livelihood. The level of benefit that an artist or inventor receives is based upon both the quantity of work he produces and the value attributed to the work by those willing to pay for it. Among those who do not rely upon art or invention for their livelihood, copyrights and patents only provide the kind of incentive that contests and the like provide; that is, they provide a monetary prize for works considered worthy of it by the judges, in this case consumers of protected property. Thus for this group, copyrights and patents provide a government-enforced, publicly funded art or invention contest.

The benefit to those who do rely upon copyrights and patents for their livelihood is the ability to invent or create art without the distraction of another occupation. Renaissance artists, such as Michelangelo Buonarroti (d. 1564), and full-time inventors, such as Thomas Edison (d. 1931), could not have contributed as much as they did to society if they had needed to rely upon other occupations. The example of Michelangelo, however, who lived before copyrights protected painting or sculpture and worked under the patronage of the wealthy, does indicate that copyrights are not the only method by which an artist may dedicate his life to art. This further indicates the limitation of the benefit of copyrights and presumably patents as well.

1.2 The Failure of Utilitarianism

The benefit of these monetary incentives are real, but then so are the costs. While copyrights are free and automatic now, patents require application fees and usually legal fees to obtain. Furthermore, the government must provide an organization to catalog and file all patents. In order to enforce a copyright or patent, lawyers and court fees must be paid. These are the most basic costs. Additional costs include payment for additional licences

where no additional good or service is provided, the restriction of the use of beneficial information or techniques, and an emphasis on marketable art and invention at the expense of more beneficial art and invention.

Assigning each of these costs and benefits a value which can be compared to every other cost or benefit is, if not impossible, at least arbitrary. This is not a simple calculation involving comprehensible quantities. Within the utilitarian school there are many theories about what the costs and benefits of copyrights and patents are.[7] There could be many costs as well as benefits as yet undiscovered which might tip the scales one way or the other, this is especially true with regard to scientific inventions that might have undesirable consequences which emerge slowly. Thus one serious problem with the utility comparison is that the variables are not only vague and hard to define, but one can never be certain that every variable is being considered. This reduces the utilitarian defense of copyrights and patents to the level of a good guess that the laws will do more good than harm.

The utilitarian defense will fall woefully short in the eyes of one who holds that man has a natural right to his property. For those who hold to natural property rights, copyrights and patents are "force" exerted over an individual's property,[8] a limitation enforced by the government which causes the owner pain. The laws restrict the use of ones own property at the penalty of hefty fines or imprisonment. Restricting the individuals property rights calls for a strong justification, and the utilitarian argument simply does not provide one.

The benefit of a few privileged men at the expense of all property owners simply falls short of an adequate justification for copyrights and patents. For those who hold to a rights-based ethic, copyrights and patents can only be justified by the right of some party that preempts the property rights of others. While it is not required that every law be explained in terms of rights, copyrights and patents still require a natural law basis. The utilitarian defense does not provide such a basis to justify these laws. The value of the utilitarian argument lies in its relation to the common good. While there must be a natural law basis for the human laws,[9] the law must also be for the common good.[10] The utilitarian argument holds that copyrights and patents benefit the common good of society by promoting invention and art, which in turn benefit the common good. When determining whether something

[7]Menell, 133–146.

[8]N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 15.

[9]*ST* I-II, Q. 95, a. 4, c.

[10]*ST* I-II, Q. 95, a. 3, c.

benefits the common good, weighing the good and bad effects of legitimate options can be quite similar to utilitarian comparisons. Without the natural law principles behind copyrights and patents, however, a fruitful discussion of the relative merits of this scheme over any other possible scheme will be impossible.

Chapter 2

Overview and Critique of the Natural Rights Argument

Avoiding the whole muddy matter of comparing goods, the other set of justifications for copyright and patent law simply claims that inventors and artists have a certain right to their works by the very fact that they have created them. Lockes labor theory and Hegels personhood theory of property together make up the core of natural rights arguments defending copyrights and patents. Both theories defend copyrights and patents by extending property rights to intellectual works. These two theories provide the foundation upon which other modern theories are built. Because other natural rights arguments either derive from these two theories or do not defend the ability to charge for the reproduction of protected works, but rather protect the artist or inventors reputation in some way or another,[1] these two should provide a sufficient consideration of the matter.

The bodies of laws in Europe that correspond to copyright laws in the United States are labeled "author's rights."[2] These rights are supposedly rights derived from the relationship of the artist or inventor to his work. This rationale requires that man by his nature has a right to own intellectual property. European intellectual property laws are thus based in non-utilitarian theories of rights.[3]

[1]These other theories usually center around the authors supposed right to control his work. These theories only protect the author from misuse of his works, rather than his ability to exploit his work for profit.

[2]Peter S. Menell, "1600, Intellectual Property: General Theories," *Encyclopedia of Law and Economics*, ed. Boudewijn Bouckaert and Gerrit De Geest, work in progress; available from http://encyclo.findlaw.com/index.html; Internet; 156.

[3]Ibid., 156.

In a comprehensive overview of theories of intellectual property for *The Encyclopedia of Law and Economics*, Peter Menell lists eight "Non-Utilitarian Theories of Intellectual Property."[4] Among these, the two considered here, the labor theory and personhood theory, seem to be the only ones that are original. All of the other theories are derived from either one or both of them, or from utilitarianism. The "Libertarian,"[5] "Distributive Justice,"[6] "Democratic,"[7] and "Ecological"[8] theories are all based in these three foundational traditions. They may alter the emphasis given to certain aspects of these traditions, or change the value given to certain goods in the utilitarian calculus, but they finally rest on the same principles. Thus a consideration of Hegel and Locke's theories, as well as utilitarianism, will include these other theories.

The last two theories are based in a consideration of whether the artist or inventor is owed anything and by whom. The "Radical/Socialist"[9] theory simply denies that concepts such as "author" and "inventor" have meaning. This denial is fundamentally a critique of the arguments that inventors or artists are owed for their works. Because inventions and art are products of the community, the individual artist or inventor does not seem to be especially owed for the work. The "Unjust Enrichment"[10] theory seems to be the reverse of this. This theory holds that artists and inventors benefit society and thus need to be compensated by their labor. These last two theories will be considered below when considering who owes artists and inventors compensation.

2.1 Lockean Natural Rights

Locke's theory of property derives from man's labor. He explains this derivation in his Second Treatise on Government:

> Every Man has a Property in his own Person. This no Body has

[4] Ibid., 156–163.

[5] The Libertarian theories focus on the freedom of the individual and the effect that copyrights have on this freedom. Menell, 159.

[6] The Distributive justice theories are based upon justice and a number of varying philosophical traditions. Menell, 160–1.

[7] The Democratic theories focus on the political implications of copyrights, especially with regard to democratic freedom of expression. Menell, 161.

[8] The Ecological theories are built upon non-anthropomorphic premises. They focus on the relation of man to his environment. Menell, 162–3.

[9] Menell, 162.

[10] Ibid., 158.

> any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.[11]

Because property proceeds from labor, which is, in fact, "owned" according to this theory, it seems that labor can also be the basis of the ownership of intellectual property. Intellectual works are the product of ones mental labor, and only take form outside of the mind by means of the labor of the body.[12] Before the idea is expressed, it must belong to the man as a part of his person, and thus seems to be his property according to Locke's account of self-ownership. This idea that a man owns himself and his actions leads to a very strong interpretation of property rights to intellectual works. Every idea is owned by its original thinker and its original expression must also be his as it can only be expressed by his action.

There is an inherent difficulty with this strong account of ownership of ideas. If a man has complete ownership of himself, and his ideas are a part of himself, then what happens when he thinks something already thought by another? If the idea is owned by the original thinker, then the original thinker owns part of the second thinker. This is at odds with Locke's contention that nobody has any right to anothers person. But then if the idea is owned by the second thinker, he then has ownership of his expression of the idea, which then makes ownership of ideas nugatory.

Copyrights and patents are distinguished from ownership of ideas according to law. Copyrights, at least those covered in *Black's Law Dictionary*, do not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work."[13] In the same dictionary, a patent is limited to an inventors invention.[14] While these clarifications make it very clear that copyrights are not of ideas, but rather of "certain literary or artistic productions,"[15] it also makes it clear that

[11] John Locke, *Two Treatises of Government*, 2d ed. (New York: Cambridge University Press, 1967), 305–6.

[12] That property be the work of one's hands does not seem to be a requirement, else a man without hands could not own the work of his feet or teeth or so forth.

[13] Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 5th ed., the publisher's editorial staff (St. Paul, Minn.: West Publishing Co., 1979), 304.

[14] Ibid., 1013.

[15] Ibid., 304.

they are rights to intangible things. N. Stephan Kinsella, in a critique of intellectual property, considers intellectual property rights to be rights "to *ideas*, as expressed (copyrights), or as embodied in a practical implementation (patents)."[16] A copyright or patent does not simply extend to the one instance of the invention or artistic production made by the inventor or artist, but to every instance made by anyone. Thus while copyrights and patents might be limited to ideas expressed or embodied (in a practical implementation), they are rights to "ideal objects,"[17] in Kinsella's language, or "forms" in Thomistic language.

If a defense of copyrights and patents is based in Locke's theory of property, it must hold that ideas, even if only certain kinds and in certain ways, can be owned as property. The ownership of a certain idea when expressed or embodied, however, is not reconcilable with owning oneself and the product of one's labor. The product of one's labor becomes the property, to some extent, of the copyright or patent holder. Locke's theory does not lead to a coherent synthesis of copyrights, patents, and property rights.

2.2 Hegelian Natural Rights

Hegel, instead of concentrating on the labor involved in creating intellectual works, rather bases his defense of property in personality. In the *Philosophy of Right*, Hegel gives the basis for taking possession of things:

> A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'.[18]

This power over a thing "constitutes possession,"[19] and because "the true and right factor in possession" is property,[20] property is derived from man's right to "put" his will "into" a thing and make it his.

Because of this emphasis on personality, Hegel considers the very acts of copying a literary work to be expressions of personality:

[16]N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001): 3.

[17]Ibid., 8.

[18]Hegel, *Hegel's Philosophy of Right*, trans. T. M. Knox (London: Oxford University Press, 1967; reprint, New York: Oxford University Press, 1979), 41 (page citations are to the reprint edition).

[19]Ibid., 42.

[20]Ibid.

> In the case of works or art, the form—the portrayal of thought in an external medium—is, regarded as a thing, so peculiarly the property of the individual artist that a copy of a work of art is essentially a product of the copyist's own mental and technical ability.[21]

While this would seem to preclude any sort of right of the original author to the copy, Hegel does allow the author to retain the "*universal* ways and means of multiplying such books and machines, &c."[22] This is in spite of the fact that the owner of the copy "has complete and free ownership of that copy *qua* a *single* thing."[23]

Hegel distinguishes between the expression itself, the "single thing," and the method of expression. The expression itself is alienated when sold, but Hegel holds that the method of expression can be retained by the originator. He divides a work into the work as "possession" and the work as "capital asset."[24] When a copy of an intellectual work is purchased, it is simply a possession. The work as capital asset has not been sold or alienated in any way and is retained by the originator of the work. An unauthorized copyist is thus stealing the capital asset from its rightful owner.

Hegel sees at least part of the difficulty with this division as he continues to consider the properties of intellectual works as possessions. Although he claims that intellectual works are not "*accessio naturalis*,"[25] that is things which grow or reproduce by nature, he does admit that once one has learned from one's possessed work, one may freely reproduce ones learning in a book or other medium. On the other hand, he holds that, at some difficult-to-discern point, reproducing another's ideas in one's own work is plagiarism, but not just plagiarism, it is a theft of the other's capital asset. He thus points out an inherent difficulty in this system of dividing intellectual works into simple possessions and capital assets: the division is vague. This difficulty in distinguishing between the two aspects of intellectual works arises from the unity of the work. The work is one work. When using a work as intended, one learns the ideas of the work. These learned ideas will naturally and rightly be expressed in intellectual works. Expressing others' ideas without permission is theft, however. Thus the natural process of using an intellectual work as intended leads to violation of the originator's ownership of the universal method of expression.

[21] Ibid., 54.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.

Hegel's division is admittedly in the "sphere of *external* use,"[26] and not of the thing itself. This means that the division does not involve one part which is sold and another part which is retained, but rather the same thing sold for the purpose of a certain use. While Hegels theory provides an explanation of the distinction between owning the instance of a work which may be enjoyed and owning the abstract work and thus the ability to reproduce it in copies, his theory leaves the distinction admittedly vague.

The reason that the distinction between owning the instance of the work and not the abstract work must remain vague is that it becomes contradictory. The work does not exist in an abstract state where it may be owned. It only exists in its instances, which are each owned according to the normal manner. The kind of control that the holder of the copyright or patent is said to have over the instances which he does not own certainly seems to indicate a kind of ownership of the instances. Hegel's theory of expressing one's personality is at odds with the kind of limitations that copyrights and patents place upon owners of protected works.

2.3 The Failure of Natural Rights Theories

Both Lockean and Hegelian theories about copyrights and patents fail for the same reason. They both present arguments in defense of ownership of physical property. By then extending ownership to a thing abstracted from the actual instance, a new principle of ownership is created. There then exist two ways in which a thing can be owned by nature, and these two ways can come into conflict. These conflicts, where the owner of the instance wishes to copy the instance against the will of the owner of the abstracted thing, can only be settled by either contradicting the original argument for property, or by making "intellectual property" meaningless.

If the holder of the copyright or patent is determined to have authority over the owner of the instance, then the primary owner has lost either some part of his labor or the expression of his personality. The original argument for property is thus undermined. But if the primary owner is determined to have the authority, then the holder of the copyright or patent has no power at all. Thus the natural rights theories do not provide a coherent account for "intellectual property" rights. The reason for this failure lies in a poor understanding of the nature of material things and the reason for the ownership of them.

[26] Ibid.

Chapter 3

A Critique of the Notion of Intellectual Property

Because utilitarian and modern natural rights arguments do not yield a satisfactory account of rights over intellectual works, another tack must be taken. A cogent, consistent, and sound theory of rights to intellectual works must be based in the natural law, or else the rights will not be true rights. For man, this means that they must be based in his rational nature and in the nature of intellectual works. Thus by examining the basis of ownership, the notion of intellectual property can be critiqued. After this critique, the real basis for copyrights and patents can be found by looking at the nature of the activity of the artist or inventor and those affected by these legal restrictions.

3.1 Ownership and Limitation

In order to determine whether intellectual works can be owned, the principle by which a thing can be owned must be discerned. Ownership itself is a relation between a man and a thing, but not necessarily a substance. In order for ownership to be a good institution, this relation must be compatible with human nature, and indeed derivable from it. An example of an institution that meets this criteria is marriage, and an example of one that fails is slavery. This human nature with which the institution must be compatible implies its own flourishing as its purpose, and this flourishing involves man providing for his own rational, human existence. Because man is corporeal, in order to continue existing and fulfill his nature he must appropriate external goods for his use. Thus, it is certainly in accord with

human nature for man to use external goods.

Ownership is not simply the use of external goods, however. Ownership is an exclusive relation with things to procure and dispense them. This exclusive relation excludes other men, and yet, if it is based in human nature, it must be open to all. Since human nature is common to all men, it is good for all men to appropriate external goods to their own use. These external goods, however, can usually only be used for one purpose at a time. Thus, in order for each man to provide for his own life, external things must be divided among men. Thus a manner of division is needed in order for all men to flourish together, because all men have the same need to provide for human existence.

The manner of division most in accord with man's reason is a division such that each man may procure and dispense certain external goods as his own. This is the most reasonable manner because a man will take greater care to procure goods for himself than he would for all in common, the goods will be managed better because each thing will have a clearly defined governor, and men can be content with their own goods instead of relying on the community for their providence. Thus the ability to procure and dispense external goods is natural to man. This is ownership, and ownership of external goods is thus in accord with man's nature. The reason that ownership of external goods is necessary for mans nature is that the goods are limited. One man cannot enjoy these goods without diminishing the enjoyment of another man, and yet man must enjoy these goods to flourish. This is quite clear in the case of a consumable good where one man's eating an apple prevents another from eating the same apple. Productive goods, such as an ax, are also limited in this way. If one man is cutting a tree with his ax, another cannot at the same time cut another tree with the same ax. The sun, however, can be enjoyed by all men without diminishing the enjoyment of any other man. If one man enjoys the sun in his yard, the sun in another's yard is unaffected.

The criteria of limitation is not simply useful for determining whether something can be owned; it is in fact the quality of things which makes ownership necessary. If things were not limited, then there would be no need for property. If two men could eat the same, entire apple, and chop with the same ax at the same time, then the apple and the ax could remain unowned in the same way that the sun is unowned. They cannot, however, and so they are not. This property of limitation is crucial to determining whether intellectual works can be owned. Once it is granted that anything without this property of limitation cannot be owned as property, intellectual works can no longer be considered property.

3.2 Intellectual Works and Limitation

Intellectual works are not limited in their enjoyment, and thus not subject to ownership. Intellectual works, abstracted from the material in which they subsist, can be enjoyed by two men at the same time without diminishing the enjoyment of either. If one man hangs his copy of the Mona Lisa in a blue room in his house, and another man does something quite different with his own copy, the second man does not diminish the first mans copy being where it is. Nor does one mans reading or holding a book diminish another's reading or holding another copy of the same book. The same applies to music and a myriad of other inventions. This consideration of the unlimited quality of these intellectual works is only valid when the work is considered apart from its matter. As individuated in this book, for example, the thing is limited and can only be completely possessed by one man. This kind of limitation, however, only points to man's ability to own these pages and this ink, not the work as abstracted from this matter. Thus a book can be owned just as a log can be owned; the qualities of color and shape cannot be owned apart from the book or the log.

An apparent difficulty with this pronouncement that intellectual works are not limited is that when an additional man comes to possess a copy of a given item, all other items of that kind lose value. If a certain item loses value because of the possession of others, it would seem that the thing is in some way limited in its enjoyment. Three failures of this objection are that the value in question only derives from the failure of other men to adequately provide for a humane existence, that it does not apply much to publicized information (which is the domain of copyrights and patents), and that it concerns only the thing as individuated.

The first failure of this apparent difficulty is that the value lost by other's possessing the same kind of thing is simply value generated by the difficulty in obtaining a thing of its kind. This is why a rare, imported fruit is more expensive than a fruit grown locally. In addition, if one man guards the only book containing certain important pieces of information, that book is more valuable than it would be if there were another copy held by another. This additional value, however, only comes about because of some men's desire for the thing. This desire is only worth considering if it is a legitimate desire, and if it is a legitimate desire, then it is one that would be good for these men to have fulfilled. Thus the value generated by the rarity of a thing is the product of some men not being able to fulfill a legitimate desire. However, the purpose of property is to ensure that men are able to provide for a humane existence, which is for what all legitimate, human desires aim.

Thus an objection from loss of value due to loss of rarity does not extend the argument for property, and indeed seems contrary to human nature.

The second failure of this apparent difficulty is that it does not apply well to publicized information. The information in a publicized book is available to all. Copyrights and patents do nothing to prevent men from reading books, listening to music, looking at paintings, or studying schematics. Thus the enjoyment of these things is not protected by copyrights and patents. It is only the keeping of a secret or privileged information that can safeguard the informations value. Once a work has become publicized, it is no longer secret or privileged information. Secrets and such are governed by other natural law principles and applications of property rights. Once a thing has become public, its rarity is either negligible, or artificially induced. Thus this rarity and its attendant limitation of value are not natural consequences and thus do not derive from human nature.

The third failure of this apparent difficulty is that it only applies to the things as individuated. The value lost by the reproduction of an intellectual work is not that of viewing or otherwise enjoying the work, because the work is public. The value is only lost by the creation of additional copies which must be materially individuated. This is no different from the loss of value suffered by apples when they become more plentiful, or that of axes when more are made. It is only the individual apples or axes that lose value, not appleness or axeness themselves. An individual book loses some value as more copies are printed, but it is the individual book itself that loses value. This comparison only shows that a book can be owned in the same way that an apple is owned, not that the writing abstracted from the book can be owned.

The criteria of limitation needed for ownership is found in the nature of a material thing. There are two intrinsic causes for the material thing being the way it is: the first is its particular configuration, or form, and the other is what the thing is made of, or the matter. In the case of a bronze bust of Athena, the bronze is the matter of the statue, and the shape of Athena is the form of the statue. Now the bronze could have different forms, and the shape of Athena could be imposed on different matter. In this instance the bronze and the shape of Athena are together, and together they make the statue what it is. The limitation of the bust comes not from its form, but rather from its matter. It is not because the statue is of Athena that it cannot be made into two busts of Athena, equal in size and weight to the original. It is rather because of the matter of the statue, the bronze, that it is limited. The form of Athena admits many copies of the statue, but the particular bronze only admits a certain size and weight. It is the matter

that individuates the form and thus is the cause of its limitation. A form apart from the matter that individuates it is unlimited. Because a thing can only be owned if it is limited, it can only be owned as an individuated form. It is only when a form is individuated in matter that it becomes limited and thus subject to ownership. The form of apple is unlimited. It is only this apple, this instance of the form of apple individuated in this matter, that can be owned. Similarly with an ax, the form of ax is not limited; only the instances of the ax are limited. Because of the unlimited character of forms, they fail to meet the criteria needed for a thing to be owned.

Copyrights and patents protect a form from being reproduced in additional instances against the permission of a privileged individual. They do not protect a limited thing, but rather an unlimited thing. While the original manuscript of a book is individuated in matter and subject to ownership, its content is not owned apart from the manuscript. Thus when copies of the manuscript are printed and publicized, the original manuscript remains whole and its owner is unharmed apart from the loss of rarity value. Its form and use are still intact. The original manuscript is still completely owned by the author and is not injured by the publication. The copies, however, must be produced in matter which already belongs to someone. Because of the manner in which ownership is tied to the matter of a thing, it is actually the owner of the paper and ink used to produce the copy who truly owns the copy.

Ownership is tied to the matter of the thing owned because the thing can undergo a substantial change and yet remain the original owners property. Matter is not only the cause of the things limitation, but also its continuous ownership. If a tree is cut down and divided into logs, the tree has undergone substantial change. Yet the owner of the tree is the owner of the logs. The only thing which remains in this change is the matter of the tree, and thus the matter is the only thing which could continue to be related to the owner. Thus when the property of a man is given a copyrighted form, he is still the owner of the entire substance because he is the owner of that from which the matter came.

In sum, a form cannot be owned apart from matter. Thus the kind of ownership described by "intellectual property" is only property by analogy at most. This means that an artist does not naturally come to own the form of his artwork in a way that allows him to determine the procurement and disposal of all instances of that form. Concretely, this means that, apart from human positive law, a man may make a copy of a book in his possession without fear that he has violated the property rights of another.

3.3 The Basis for Copyrights and Patents

This conclusion will strike many as strange, unreasonable, or simply wrong. There seems to be an intuitive desire for the artist to be recompensed for his work. That the artist should be recompensed for his work, however, is a separate matter from property. Being paid for one's labor is a matter of commutative justice, and modern copyrights and patents derive their legitimacy from commutative justice. This matter of recompense for labor is not derived directly from ownership. This can be seen in the case of the woodsman who is hired to cut anothers tree must be paid, but not because he owns the tree or the logs he makes. He must be paid because of commutative justice. The woodsman increases the value of the property of another, and this other must increase the value of the woodsmans property equally for justice to be served.

The case of the author is different. An author does not increase the value of pages and ink in the same way that a woodsman increases the value of wood. The author is not the efficient cause of the book; it is the printer who made the book the way it is. The artist or inventor holds a position much more like a teacher or master craftsman who shows others how to do something. When the master blacksmith shows an apprentice how to forge a given piece, it is still the apprentice who has increased the value of the iron. When this apprentice goes on to make this piece elsewhere, it is he who is owed compensation, not his master. The teacher has passed on the knowledge by which the student does what he does. In the same way, the author passes on the knowledge needed to print a specific book; the inventor passes on the knowledge needed to make a certain device; the artist passes on the knowledge needed to reproduce a given painting, sculpture, or musical piece.

The knowledge involved in these intellectual works has value of an order different from that of the thing produced. Because this knowledge can be used to generate an unlimited number of the things, it transcends any material value, because material things are limited. In another sense, however, commutative justice is satisfied by the simple fact that the author, artist, or inventor possesses the good that he is giving others. When the woodsman cuts the tree, he does not possess the logs or the value that he added to the wood. Thus commutative justice is only satisfied when he is given something of value equal to that which he added. The teacher, however, already possesses the value that he gives to his student. The teacher should be recompensed for his time simply because he is employed to teach, and thus must support his existence from the wages he receives, but he does not

need to be paid for the value of his "product," knowledge, in the way that a farmer must be paid for his products.

Thus the artist or inventor may charge for the service of passing on the knowledge, the form of his book, painting, sculpture, song, or invention, but not for the value of this knowledge itself, because he still possesses the value. The value of his work would matter when selling an individual instance of his work, but not the knowledge of the work from which it may be reproduced. The reason that someone might want to purchase this given book, for example, may be the book's content. It would seem then that the author is the cause of the book's value to the individual purchaser. While this is certainly possible, as the form of the thing determines its value, it does not follow that the author is owed money for the copy. The master blacksmith gave a pattern to his apprentice which could very well be the reason that the apprentice's work is valuable in a given case. Thus the master would, indeed, be a cause of the ironwork's value, but he is not owed for the given piece, it is rather his apprentice who is owed.

Even though the artist or inventor cannot charge for the form apart from its matter, he should be paid for his labor. If, then, an artist is hired to sculpt a stone, he should be paid for this task in the same way that a woodsman is paid for cutting wood. If copies are then made of the statue by others, the sculptor did no more work and is owed no greater payment. A man is not owed twice his fee when two others benefit from what would normally benefit only one. Plowing a shared driveway, for example, takes no more work than an unshared driveway in similar conditions, and thus deserves no more total compensation. This principle applies to any work of art or invention. This method of payment is the foundation upon which the patron system was founded. The patron system is that system wherein certain men support artists or inventors, not only for their own good, but for the good of others as well. The patron may well be interested primarily in his own benefit, but the creation of intellectual works which are not kept secret then benefits others. Although the most stable patron would be a wealthy man who has adopted an artist, musicians playing on a street corner operate on the patron system where some individuals donate money, but all who pass by can listen to the music.

The patron system is fundamentally the basis of modern copyrights and patents. Rulers in the past have patronized artists and inventors, sometimes, perhaps, for the benefit of the country as well as their own. The copyright and patent system is, in fact, a method of patronage enacted and enforced by the modern state. The holder of the copyright or patent effectively becomes empowered by the state to impose and benefit from a tax upon all copies of

the protected work. This tax is accomplished by means of a prohibition on all copies made without the permission of the copyright or patent holder. Thus a copyright or patent is the grant of a temporary, state-enforced monopoly.

The natural law basis of copyrights and patents thus lies in the power of the state. The rights over intellectual works are not natural rights that must be recognized by all just governments, but rather a system of patronage chosen by certain states. Whether this patronage system is just is another question.

Conclusion

This critique of copyrights and patents leaves many protections for the author, artist, and inventor intact. Laws against plagiarism are unaffected, and thus men can achieve fame for their work apart from copyrights and patents. Trade secrets may still be kept in order to give an inventor an edge. In fact, even without copyrights, authors can keep their works secret until paid in advance, and thus make a livelihood. Abolishing copyrights and patents would not be quite as drastic as many would suppose. The fact that works no longer protected by copyrights are still published shows that publishers do not require copyrights in order to profit from such works. Musicians still make money by means of live performances. An original painting or sculpture still has far greater value than a copy. While it may be true that those who only engage in these intellectual pursuits in order to profit may no longer do so, there are still many others who would continue for the love of it. Fame and accolades are popular motivations.

In order to determine whether copyrights and patents should be abolished, their effect on the common good must be considered. This consideration will resemble that of a utilitarian cost comparison. It is critical to this consideration to understand that copyrights and patents derive from natural law principles which can be satisfied in other ways. The natural rights arguments which have been developing lead to a conclusion which would prevent any sort of consideration of abolishing copyrights and patents.

The man who wishes to make a copy of some protected work now, however, is not so much interested in changing the law as determining whether what he wishes to do is just. His attitude toward such works is explained by the fundamental difference between the state-sponsored patronage and actual theft. Copying a protected work is not theft in the way that stealing an apple or an ax is theft. However, if he is preventing the artist or inventor from being paid for his labor, not his goods, then he is causing injury. Once the artist or inventor has been fully compensated for his labor, he is owed no more in justice. Yet, the law itself must be considered. If the state has

the power to collect taxes, and if it has the power to censor for the common good (effectively creating a monopoly), and if copyrights and patents are just, then the laws must be obeyed.

Once a work has been published, it has been made available to all. The reason for making something public is so that it may be enjoyed by many. Notions of intellectual property work against this fundamental motive for publication, instead focusing the act of publication on profiting from the work. They even prevent men from being as generous as they wish to be with their neighbors and their property, because some of their property may not be shared legally. Copyrights and patents thus deserve a critical investigation which will determine their compatibility with the common good.

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Colophon

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