On water drinkers and magical springs: Challenging the Lockean proviso as a justification for copyright

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Abstract

An influential attempt to justify intellectual property contends that nobody can reasonably object to such a regime because it will necessarily satisfy the Lockean proviso. Framed in these terms, the question therefore shifts from "why intellectual property?" to simply "why not?"

This paper discusses two versions of this argument in the context of copyright law, reconstructed from insights from Justin Hughes, Adam Moore and Robert Nozick. In essence, these two arguments support that intellectual appropriators necessarily satisfy the Lockean proviso because they deprive nobody, just like someone drinking from a river, or somewhat creating magical springs of water in the desert.

I argue that despite their intuitive appeals, these arguments either fail or lead to very weak conclusions. This in turn affects the plausibility of other proprietarian justifications for intellectual property which also require that the Lockean proviso be satisfied.

Keywords

Intellectual property, Lockean proviso, non-rival goods, Hohfeld, privilege, claim-right, Locke, Nozick, Hughes, Moore

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Does intellectual property satisfy the requirements of the Lockean proviso, that the appropriator leave "enough and as good" or that he at least not "deprive others"? If an author's

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appropriation of a work he has just created is analogous to a drinker "taking a good draught" in the flow of an inexhaustible river, or to someone magically "causing springs of water to flow in the desert," how could it not satisfy the Lockean proviso?

This paper will challenge the claim that the particular characteristics of intellectual creation ensure that intellectual property rights necessarily satisfy the Lockean proviso. As we shall see, the "water drinker" and "magical springs" arguments are intuitively appealing, but ultimately misleading. The fact that the Lockean proviso appears easier to satisfy in the intellectual realm than in the material realm is probably due to the difficulty of transposing the Lockean proviso to the former without adopting erroneous baselines or improper presuppositions.

This paper will proceed as follows. First of all, I will provide some context for this discussion, by framing the arguments from the Lockean proviso as belonging to the broader family of "proprietarian" justifications (1). Having distinguished between two readings of the proviso (2), I will assess whether a copyright regime satisfies even Locke's original proviso, by addressing arguments made by Nozick, Hughes and Moore (3). After considering some possible objections to my reasoning (4), I will then turn on the issue whether copyright at least satisfies Nozick's revised version of the proviso (5). I will eventually argue that these proprietarian arguments either fail, or must make such important concessions that their conclusions are not much stronger than the instrumental ("utilitarian") justifications of copyright law as an incentive for creation.

1. The Lockean proviso as a proprietarian justification for intellectual property

Among the main justifications for intellectual property, an influential trend consists of a broad cluster of arguments often called "Lockean" arguments, as they draw their inspiration from Locke's famous discourse on Property in the *Second Treatise of Governement (*Attas, 2008).

But considering that these arguments are only loosely related

to Locke, and that the "Lockean" label has therefore a rather poor descriptive value, I suggest that a more adequate label is that of "proprietarian" arguments. Proprietarianism is "the view that all enforceable moral rights are moral property rights (rights over things). The justice of a state of affairs is, on this view, a matter of whether individuals have a right to their holdings (the objects in their possession broadly understood)" (Vallentyne, 2012, 151). Most contemporary libertarian theories, such as Nozick's entitlement theory of justice (Nozick, 1974), are proprietarian in that sense.

Proprietarian arguments for intellectual property aim to show that because of certain circumstances, authors of intellectual works are entitled to property rights on their creations that are grounded in "natural" or "moral law", far stronger than the mere conventional rights protected by positive law (Fisher, 2001).

Being strictly non-consequentialist, proprietarian theories often lead to strong and uncompromising conclusions. Therefore, if a proprietarian case for intellectual property can be made, it could potentially justify absolute, far-reaching, or even perpetual property rights in intellectual works. Because of their continued influence in debates on the goals and limits of copyright law, it is important to address these arguments.

While proprietarian arguments often apply to intellectual property in general, the focus of this paper is on copyright law. I will occasionally refer to arguments related to other intellectual rights such as patents or trademarks, but only in so far as they can also be relevant in the context of copyright.

Proprietarian justifications for intellectual property often take the form of positive arguments, advancing some *prima facie* justification of why an author has a legitimate entitlement to the work she has created: because she has mixed her labour with it, because she deserves to be rewarded, or because her self-ownership has extended into the work, etc. (cf. Hughes, 1988; Becker, 1993)

Another important strand of arguments are negative arguments (Attas, 2008), which generally focus on whether

intellectual property respects the "Lockean proviso". In his discourse on Property, Locke mentions on multiple occasion the condition requiring that any appropriation of a natural resource leaves "enough, and as good" for others[1]:

> *"... for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others" (Locke, 1690, §23)*

> *"Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left"* (Locke, 1690, §33)

The most common reading treats the Lockean proviso as a mere necessary condition. On that reading, given some *prima facie* positive justification for an appropriation, it is only legitimate if it does leave others "enough and as good" for themselves.

But the Lockean proviso can also be seen as a necessary *and sufficient* condition, therefore grounding a purely negative justification for property rights. A good example of such purely negative justification can be found in Nozick's influential book, *Anarchy, State and Utopia* (Nozick, 1974). After discarding derisively some positive arguments for intellectual property, Nozick develops an original argumentative strategy: rather than trying to answer the question "why property?", he is interested in the opposite question, i.e. "why not property?". He therefore focus on the conditions under which an appropriation can be said to respect the Lockean proviso. Since he does not provide any positive argument for private property, Nozick's theory of appropriation can be read as consisting solely of an account of the Lockean proviso (Cohen, 1995, 75-76), showing that, under certain conditions, no one can reasonably object to an appropriation.

Nozick himself only discusses the issue of intellectual

1 Locke also provides a "non-waste" proviso, sometimes discussed in the context of intellectual property. We will not address this proviso here, as it is often considered redundant in contemporary literature (Nozick, 1974, 175-176; Attas, 2008, 46).

property in a brief but insightful passage. Others have made more comprehensive attempts to justify intellectual appropriation[2] on the basis of the Lockean proviso (Hughes, 1988; Moore, 1997). These arguments could all be interpreted as grounding a negative justification for intellectual property, which focus on the conditions under which no one could reasonably object to intellectual property.

To discuss this negative justification for intellectual property, I will distinguish between two interpretation of the proviso.

2. Two interpretations of the Lockean proviso

Taken literally, Locke's original proviso would forbid appropriation whenever it does not leave "enough and as good" for others, in other words whenever it restricts someone else's freedom to appropriate or use some resource. In this literal reading, the original Lockean proviso appears overly demanding. While Locke, writing in the seventeenth century, could believe that the unexplored land and wilderness were so vast that they were practically inexhaustible, the limits of earthly resources are nowadays impossible to ignore. And in a limited world, with limited resources, any appropriation worsens the position of others by diminishing the stock of resources available for them. Therefore, under Locke's original proviso, no appropriation could be justified.

In an influential passage of *Anarchy, State, and Utopia*, Nozick proposes a revised interpretation of the Lockean proviso (Nozick, 1974, 174-182)[3]. According to him, the fundamental purpose of the Lockean proviso is to guarantee that an

2 In what follows, we will use "appropriation" in the context of intellectual property to denote an individual's claim to a property right in an intellectual work.

3 I will however sidestep Nozick's laborious and somewhat confusing distinction between his "weaker" and "stringent" proviso (p. 176), that Cohen describes as a case of "expository sloppiness" (Cohen, 1995, 90). I take it that Nozick's most significant contribution is his emphasis on how the Lockean proviso is about not worsening the position of others, and his suggestion that such purpose can be attained by providing for a compensation.

appropriation does not *worsen* the position of others. If the position of no one is worsened, no one can reasonably complain against the appropriation. So Nozick's revision of the proviso permit failure to leave enough and as good, as an appropriate compensation is provided to ensure that the position of others is not worsened. Indeed, if the productive use of the resource appropriated can benefit non-appropriators (because of spillovers or direct compensation), then the net effect on the position of others could be positive or at least neutral. Nozick states his revised proviso as follows:

> *"A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened (...) Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened"*

Thus while the original proviso from Locke is violated whenever the position of others is worsened in the specific sense that they are deprived of opportunities to appropriate or use certain resources, Nozick's revised proviso is only breached when the *overall* situation of others is worsened, taking into account the possibility for compensation.

Of course, such theoretical exercise crucially depends on certains assumptions, notably regarding the relevant counter-factual situation (e.g. "the state of nature") in comparison to which others are deprived or made worse off by the appropriation. This is an important question, because depending on the choice of a baseline, compliance with the Lockean proviso can vary greatly. In the context of material property, Nozick's baseline is a situation where natural resources are not owned by anyone (Nozick, 1974, 175). Thus everyone is at liberty to use them, meaning that they have a privilege, in the Hohfeldian sense (Hohfeld, 1913)[4]. In this interpretation, the Lockean proviso therefore requires that the position of no one is worsened

4 According to Hohfeld's conceptualization of the fundamental jural relations, a privilege (or "liberty") implies the absence of a duty (not) to do something, while a claim-right implies a correlative duty for others (not) to do something.

in comparison to a baseline where everyone has privilege to use natural resources. As we will see below, Nozick adopts quite a different baseline when he considers the issue of intellectual property.

We will first discuss whether intellectual property satisfies Locke's original proviso, before making the same assessment with the revised proviso.

3. Intellectual property and Locke's original proviso: necessarily satisfied?

One could argue that for the sake of justifying intellectual property, Nozick's amendment to the Lockean proviso appears unnecessary. Indeed, according to some authors (Hughes, 1988; Moore, 1997) the proviso is far easier to satisfy in the intellectual realm than in the context of material resources. If they are right, and if even Locke's original proviso is necessarily satisfied, the case for intellectual property would be far stronger than the case for material property, as it could be justified even without compensation.

I will consider two strands of argument supporting this conclusion. The first argument, which we will call the "water drinker argument", can be found in the work of Hughes and Moore[5]. It argues that intellectual appropriations necessarily respect the Lockean proviso, because it does not reduce the common of ideas (**A)**). The second strand lies in the "magical springs argument" supported by Nozick, which contends that the author of a work deprives no one by appropriating it, as the work would not have been created without him (**B)**).

A) Some have noted that, while Locke's original is clearly untenable for natural resources, it seems far easier to satisfy in the intellectual realm.

5 For the sake of clarity, we will not discuss at length the complete reasonings of Hughes and Moore, each richer than our account suggest. However, we hope that by emphasizing on the premises that we frame in the context of what we call the "water drinker argument", we will be able to address a central issue for the justification of intellectual property

Indeed, according to Hughes, "[t]he 'field' of all possible ideas prior to the formation of property rights is more similar to Locke's common than is the unclaimed wilderness" (Hughes, 1988, 315). Or as Moore puts it, the case of an author appropriating a particular work from the common of ideas is quite alike Locke's example of a man drinking in the stream of a river (Moore, 2004, 117):

> *"No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst"* (Locke, 1690, §33)

According to Moore, the reason why the case of intellectual appropriation is similar to Locke's example of a man drinking in a river is that "[t]he number of ideas, collections of ideas, or intangible works available for appropriation is practically infinite" (Moore, 2004, 114). Although leading to the same conclusion, Hughes's argument is slightly different, as it relies on the idea-expression dichotomy in copyright law (a doctrine limiting the scope of copyright protection to particular expressions, not ideas themselves): "Because creating property rights in an idea never completely excludes others from using [the] idea, it need not be justified by Locke's legerdemain that increases in privately produced goods necessarily benefit the commonwealth. Nor does it require justification from Nozick's reconstitution of 'the Lockean proviso'" [*i.e.* the revised proviso] (Hughes, 1988, 319).

We will call this argument the water drinker argument. To clarify our discussion, let us sum up this argument by the following premises, in its two variants:

> *(H1) Intellectual property only covers expression, not ideas*
>
> Or alternatively:
>
> *(M1) The number of ideas or intangible works available for appropriation is practically infinite*
>
> *(HM2) Appropriating expressions does not affect the*

> *opportunities of others to draw on the intellectual common to create new works*
>
> *(HM3) Therefore an intellectual appropriation does not deprive others*

The core of the reasoning relies on premise (HM2), common to Hughes and Moore. But this premise raises some difficulties. In trying to transpose Locke's arguments, one must indeed find the right analogy with Locke's notion of the "common" in the intellectual realm. What would be the equivalent of the "common" or "resources" involved in the creation of an intellectual work? Would it be the set of all possible ideas? The set all factually existing ideas? The set of reachable ideas? The set of all ideas and expressions? Or the cultural heritage of a given society?[6].

Hughes himself admits that making these kinds of analogies requires "some leap of faith" (Hughes, 1988, 312). It is indeed quite a hazardous task, as others have noted (Fisher, 2001), since it requires taking position on a number of difficult questions, such as the nature of the creative process, or the ontological status of ideas or intellectual works. . If we want to reach a conclusion that is not undermined by such indeterminacies, it seems preferable to avoid making arguments built on metaphysical conjectures.

Moore's argument seems to be the most affected by these indeterminacies, as it relies on the premise that the intellectual commons is inexhaustible. Whereas Hughes's argument relies on the legal point that copyright law usually only covers expression, and not idea, so that intellectual appropriation does not lessen the commons of ideas. Clever as it is, this argument appears to be circular: it first excludes particular expressions from its definition of the "common", and then use this as evidence that the appropriation satisfies the Lockean proviso. If one defines the set of what shouldn't be depleted and the set of what can be appropriated in a way that they do not intersect, it is not surprising that the proviso appears to be necessarily satisfied. But is it really the case that the Lockean proviso should only be

6 Cf. Fisher, 2001, 24-27, for a detailed discussion of all these possibilities.

applied to a "commons" of pure ideas?

A related problem stems from the implications of that second premise. To recall, this later premise states is that the appropriation of particular expressions does not affect the opportunities of others, because they still have enough ideas or expressions in the public domain available to create new works (HM2). But why would this be sufficient to conclude that the Lockean proviso is satisfied (H3)? Even if others are not made worse off regarding their opportunities to create original works, they could be made worse off in many other respects, for example by being forbidden to use works made by appropriators, notably by integrating them in derivative works.

It seems that the water drinker argument rely on a questionable implicit premise:

(HM0) Individuals have no legitimate claim to use works that they have not themselves created

Indeed, to be able to hold that others have the same opportunities to draw on the common of ideas to create new works (HM2) and therefore that an intellectual appropriation does not deprive of others (HM3), one must also hold the implicit premise (HM0) that individuals have no legitimate claim to use works that they have not themselves created. If they had such a claim, then the appropriation would indeed deprive them of their claim to use the appropriated work.

Now, for such premise to be plausible, it should at least be qualified by certain exceptions. In a famous article, Wendy J. Gordon argues that individuals sometimes have legitimate claims to reuse works they have not themselves created (Gordon, 1992). Gordon's argument is that certain intellectual works come to have such an important influence on culture that preventing their use restricts freedom of expression. In a given cultural context, individuals often do not have "enough and as good" other ways to express themselves than by reusing and referring to existing works. Therefore, the appropriation would deprive individuals of the possibility to express themselves by using a protected work

Gordon gives a series of examples to support her thesis. A first case shows how the U.S. Olympic Committee trademark in the word "Olympic" limits the freedom of expression of the organizers of a competition that they wanted to call "Gay Olympics", with the intent of associating the positive and mainstream connotations of the word to help fight prejudices against gays and lesbians (Gordon, 1992, 1583). Another case shows how a group of authors of subversive comics (the "Air Pirates") were restricted in their freedom of expression when they were forbidden to disseminate parodies of Mickey Mouse intended to challenge Disney's influence on mass culture (Gordon, 1992, 1601; cf. also Waldron, 1993).

Hughes does acknowledge this difficulty when he observes that certain trademarks sometimes tend to have such influence on language that they end up being used as common nouns to describe a generic reality, e.g. "aspirine" or "cellophane"(Hughes, 1988, 23). It is as if authors and rightholders "lay[ed] a sort of trap for the people whose lives are touched by their productions" (Waldron, 1993, 883), by "lulling the society into a dependency on a privately owned word" (Hughes, 1988, 23). Having said that, Hughes can easily admit Gordon's modest conclusion, i.e. that a Lockean approach should provide some limitations and exceptions to allow for reuses of existing works when special claims such as freedom of expression are at stake.

But Gordon's objection might be overly modest, and one could question whether individuals need *any* special claim whatsoever to argue that they have been illegitimately by the appropriation. Indeed, in the process of justifying intellectual property rights, one cannot just assume that certain individuals already have a more legitimate claim than others to use intellectual works.

Thus a more fundamental challenge against the water drinker argument could consist in demanding justification for that premise (HM0). A possible justification might rely on a *prima facie* claim that the author would have to the product of its labour, as Moore explicitly argue:

> *"When an individual creates an original intellectual work and fixes it in some fashion, then labor and possession creates a prima facie claim to the work. Moreover, if the*

> *proviso is satisfied the prima facie claim remains undefeated and rights are generated"* (Moore, 2004, 113).

Moore then uses this *prima facie* claim in a thought experiment where he argues that because Fred is the creator of a noodle recipe, he can demand justification to Ginger for the "taking" of his recipe[7] (Moore, 2004, 115).

One could object that because the "possession" of an intellectual work only holds so long that it is kept secret, such *prima facie* claim would be severely weakened when the work is released to the public. But more importantly, we contend that the issue of whether such a *prima facie* claim could be supported (a question that fall outside the scope of this paper[8]) should normally not affect the baseline for the application of the Lockean proviso. The point of the Lockean proviso is to ascertain that no one is made worse off compared to a situation without appropriation. It would therefore be an illegitimate move to compare the result of the appropriation to a baseline where the author's claims are already partially granted. Absent a justification for premise (HM0) that does not preclude the application of the proviso, it is thus unclear why reuses of existing expressions should be excluded from the baseline for the application of the proviso.

Against (HM0), I contend that the appropriate baseline to apply the Lockean proviso should ot be one where some already have some special claims to use intellectual works, but rather a situation where everyone has a privilege to use existing intellectual works. So the water drinker analogy is misleading because it obscures the fact that intellectual creation does not draw its source from ideas, but also existing expressions. The flow of the intellectual river is comprised not only of possible ideas, but also of existing intellectual works, which, absent an intellectual property regime, everyone has a privilege to use.

This point will appear more clearly from our discussion of Nozick's argument, to which we now turn.

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7 Although it is unclear whether this "taking" necessarily involve a claim to an intellectual creation, since it is presented as a case of outright "theft" of a physical paper note.

8 For an insightful and rigorous discussion of this issue, see (Attas, 2008).

B) The second strand of argument supporting the claim that intellectual appropriation necessarily satisfies Locke's original proviso, and therefore does not require compensation, can be found in the short passage Nozick devotes to intellectual property (and patent law in particular). The core of the argument is stated as follows: "An inventor's patent does not deprive others of an object which would not exist if not for the inventor" (Nozick, 1974, 181).

The roots of such an argument could be traced back to authors such as John Stuart Mill (cf. Gordon, 1989, 1446), and has been most eloquently presented by Clark in the context of intellectual property:

> *"the [author] is allowed to have an exclusive control of something which otherwise might not and often would not have come into existence at all. If it would not, -if the patented article is something which society without a patent system would not have secured at all,- the inventor's monopoly hurts nobody. It is as though in some magical way he had caused springs of water to flow in the desert or loam to cover barren mountains or fertile islands to rise from the bottom of the sea. His gains consist in something which no one loses (...)"* (Hadfield, 1992, 28).

I will therefore dub this argument the "magical springs argument". Again, let us break it down in a few premises:

> *(N1) A given work would not have existed without its author*
>
> *(N2) The author does not deprive others by appropriating something that would otherwise not have existed*
>
> *(N3) Therefore an intellectual appropriation does not deprive others*

In other words, since the appropriation does not restrict the privileges of individuals compared to a baseline where the work would not have been created at all, Locke's original proviso is

necessarily respected.

But is it always true that a work would not have existed without its author? A first objection, which challenges the generality of premise (N1), involves the possibility of independent creation. It can happen that two individuals independently realize a very similar creation, more or less simultaneously. In the field of inventions, this phenomenon is quite common: prominent examples include the development of an almost identical theory of natural selection by Wallace and Darwin, the invention of the incandescent bulb by Swan in the UK and Edison in the US, or the filling of two distinct patent applications for the telephone by Bell and Gray on the exact same day[9] (Ogburn & Thomas, 1922). Considering the real possibility of independent creation, it cannot be said that the work would not have been created without its known author. Therefore, potential independent creators are clearly made worse off by the appropriation, in that they could have otherwise used their creation and no longer can.

One could object that while independent creations might well be frequent in the case of inventions, or "discoveries", it seems like a mere theoretical possibility in the case of cultural works, or "creations" (Moore, 1997, 103). However, given that cultural creation does not happen in a void, but is rather structured by a shared cultural framework, the possibility of independent creation of cultural works is real. It is particularly acute in domains where creators use a limited common grammar, as in the case of pop music, that typically uses a few standard chords and progressions: for example, the chord progression I-V-vi-IV (alternatively vi-IV-I-V) is common to numerous songs, from classic tunes such as "Let it Be" by the Beatles, "No Woman No Cry" by Bob Marley, "The Passenger" by Iggy Pop, to more contemporary hits like "Paparazzi" by Lady Gaga. Of course, sometimes similarities can result from blunt copying. But within a fairly limited set of chords and progressions, it is fairly plausible that two creators will eventually stumble on a similar song without conscious copying, or even without knowledge of

9 Although whether this is a proper case of independent creation is still controversial nowadays, because of Gray's accusations of misappropriation against Bell (Coe, 2006)

one another[10].

Nozick is well aware of the possibility of independent creation. He addresses this objection, and tries to neutralize it by admitting the possibility of a limitation of the duration of patent protection "*as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery*" (Nozick, 1974, 182). Although Nozick's solution is astute, it does not appear to do justice to the case of independent creators, who are still going to be excluded from using their creation for the whole duration of protection of intellectual property.

Other practical "rule of thumb" solutions could be proposed, such as providing a defense for independent creation, as certain legal regimes do[11]. However, in that scheme, the independent creator would still bear the significant burden of proving independent creation, which clearly affects his position. More fundamentally, it is highly problematic to support the strong claim that the appropriation does not deprive others, while having recourse to such tinkering as defenses, limitations or exceptions. Even if such corrections could reduce the probability of depriving independent creators, its mere possibility nonetheless undermines, in principle, the claim that intellectual property necessarily respects the original Lockean proviso.

This point could appear like a mere quibble. But let us emphasize that proprietarian reasoning, on which discussions on the Lockean proviso rely, is a principled, non-consequentialist mode of reasoning. If intellectual property rights are presented as a legitimate entitlement that does not encroach anyone's freedom, they can only be justified as such, and not by arguing that the probability of depriving others is small. The same objection was raised by libertarian author James L. Walker in 1888, in a comment that almost feels like an answer to Nozick's

10 As an illustration and (limited) support to this claim, a recent empirical study showed that given a background chord sequence, participants were likely to compose melodies that were not only similar to popular hit songs, but also similar to each other's compositions (Frieler and Riedermann, 2011)

11 In the United States, courts allow an independent creation defense. However, as some have noted, this defense is usually quite weak, as similarity alone is often enough to counter it (Litman, 1990, 1004)

"rule of thumb":

> *"To discuss the degrees of probability... is to shoot wide off the mark. Such questions as this are not to be decided by rule of thumb or by the law of chances, but in accordance with some general principle... [A]mong the things not logically impossible, I know of few nearer the limit of possibility than that I should ever desire to publish [libertarian journal] Liberty in the middle of the desert of Sahara; nevertheless, this would scarcely justify any great political power in giving Stanley a right to stake out a claim comprising that entire region and forbid me to set up a printing press"* (McElroy, 2003)

This is not to say that arguments on copyright limitations have no weight, notably with regards to the revised proviso or with an instrumental ("utilitarian") justification of copyright law. But to support the proprietarian claim that intellectual property necessarily satisfies Locke's original proviso, it is not enough to provide for some limitations and safeguards that minimize the effects on others. It should be shown that an appropriately defined intellectual property regime does not actually worsen the situation of others, as the original proviso requires.

Thus this first objection to Nozick's argument weakens the generality of its conclusion, by showing that the possibility of independent creation implies that intellectual property can deprive others.

A second, more general objection will allow us to rebut this conclusion altogether, and show that intellectual property does violate the original proviso. I will argue that the relevant baseline to apply the proviso should in fact be one where individuals have a general privilege to use existing works, and that under that baseline it can clearly be showed that intellectual property deprive others.

In order to make this objection, we need to challenge Nozick's way of framing the question. As we have seen, the issue of whether the Lockean proviso is respected is highly dependent on the choice of the baseline to assess whether the position of others has indeed been worsened. And as it happens, the baseline

chosen by Nozick to address the case of intellectual property is quite questionable. To recall, Nozick takes the relevant baseline to be the position where the work would not have been created: "An inventor's patent does not deprive others of an object which would not exist if not for the inventor" (Nozick, 1974, 181).

The argument essentially relies on the fact that the objects of intellectual appropriation are the result of human action, and are therefore affected by the dynamic effect of an intellectual property regime. Nozick's argument appeals to an apparent truism: if intellectual appropriation only covers objects which would not have existed under the considered baseline, how could anyone's position be affected at all in comparison with that baseline?

But Nozick's choice of baseline is misleading. While it is undeniable that a work would not have existed without its creator (N1) (except for the possibility of independent creation), it does not follow that a work would not have existed without the possibility to appropriate it, which is what Nozick wants to argue. The circumstance that an intellectual creation would not exist without its creator does not suffice to satisfy the lockean proviso. To justify the appropriation of a work by its creator, Nozick needs to show that it would not have existed *if there was no possibility of appropriation*, not in some other circumstance.

Because Nozick's baseline conflate creation with appropriation, it needs to presuppose that without the possibility of appropriation, the work would not have been created altogether (cf. Attas, 2008, 48). But of course this presupposition is excessive, since we cannot a priori exclude the possibility that the creator would have created the work anyway, even without the prospect of enjoying an exclusive right.

Rather than supposing that creators are solely moved by their economic interest, one should assume that creators are driven by diverse motivations. We could imagine different ideal-types: S, the "self-interested" creator, for whom the grant of a property right is the sine qua non condition for creation; A, the "altruistic" creator, who will create the work anyway, and will never claim any property right; and O, the "opportunistic" creator, who will create the work anyway, but will benefit from

the windfall gains coming from the exploitation of exclusive rights if she has the opportunity.

So perhaps a more appropriate phrasing of Nozick's argument would be: "An inventor's patent does not deprive others of the an object *which their inventor would not have created in the absence of a patent regime*". Stated in such terms, we can apply the proviso to the different possible cases. The proviso would be obviously satisfied in the case of S: if the invention would not have existed without the possibility to patent it, then Nozick is right that no one looses from the patent. The proviso would also be satisfied in the case of A, provided that there is a possibility to waive one's property right. But in the case of O, the proviso would certainly not be satisfied, because while O would have created the work anyway, she will protect the work if given the opportunity. Others are therefore deprived of the privilege to reuse a work that would have existed even absent an intellectual property regime.

However, what is the point of saying that the proviso is satisfied for creators that are S's or A's, but not for creators that are O's? Of what use can be a proviso that can only tell us that some appropriations might be legitimate or not, depending on the intentions of the appropriator?

What this discussion shows is that by focusing on a single case of appropriation, Nozick addresses the issue of the Lockean proviso at the wrong level. The issue at stake is not merely to inquire on the fate of particular works that might or might not have existed, or to assess the effect of particular appropriations. The purpose of applying the Lockean proviso is rather to judge the overall legitimacy of a general regime of intellectual property. Therefore the relevant question is to know whether the establishment of such a regime would in overall not deprive individuals. While Nozick sometimes addresses the issue of material property in this way (Nozick, 1974, 177-178), he never considers the issue of intellectual property at the same level of generality[12].

12 Moore explicitly addresses this point (Moore, 2004, 121). However, his main "institutional" justification for intellectual property (stating that the absence of legal protection of intellectual works would create a "tragedy of the commons"

So, in applying the Lockean proviso we must assess not only the effect of a particular appropriation, but the overall effects of an intellectual property regime, and we must also acknowledge the diversity of motivations of intellectual creators. We should therefore look for an alternative baseline for the application of the proviso. A more relevant baseline should be the situation *where there is no protection for intellectual property rights*. In this situation, while an author can exert control on his thoughts or his manuscript, she has no right to exclude others from using the work itself. Therefore everyone has a general privilege to use any work that has been published. This claim individuals have on using existing (divulged) works is limited: it is not a claim-right, such as an enforceable right of access, but merely a privilege, meaning that they have no duty not to use them. As we've already seen, this is the baseline that Nozick adopts in his discussion on material property:

> *"Whereas previously [others] were at liberty (in Hohfeld's sense) to use the object, they now no longer are. This change in the situation of others (by removing their liberty to act on a previously unowned object) need not worsen their situation"* (Nozick, 1974, 175)

In a sense, this baseline is the relevant "state of nature", from which to assess whether the proviso is respected: a situation where everyone is free to reuse whatever existing works came to his knowledge. This is the situation that prevailed for most of history, until the first modern copyright regimes were enacted.

What follows from the adoption of this alternative baseline? Admittedly, Nozick's paradox still complicates the comparison with regard to works which would not have existed in the absence of an intellectual property regime (because their creators are S's). It would indeed be difficult to argue that individuals are affected if a limitation of the privilege to use certain works is the condition for these works to exist. But the outcome is much more certain for works which would have existed anyway, but would be appropriated under an intellectual property regime

by causing creators not to disclose their inventions) does not appear to have much relevance in the context of works covered by copyright. Cf (Moore, 2004, 139)

(because their creators are O's). With regard to this set of works, Nozick's paradox does not apply, and we can clearly conclude that intellectual property makes others worse off by depriving them of their privilege to use these works.

In other words, even assuming intellectual creations are like some miraculous springs in the desert that are created out of nothing, in case they would have been created anyway then enforcing a property right on them *does* deprive others of the liberty they would have had otherwise to use and reuse them in derivative creations. Whether this might disincentivize certain authors to create new works is irrelevant in the context of the original proviso.

This alternative baseline is consistent with our rejection of the implicit premise (HM0) in the water drinker argument: if the baseline is one where individuals are at liberty to use existing works, it is not true that one has no legitimate claim to use works that it has not itself created. And, contrary to Gordon, we need not limit that claim to special claims to speech protected by freedom of expression. Indeed, under the alternative baseline, every individual has a general legitimate claim, in the form of a liberty (or privilege) to use existing works.

If we adopt that baseline, we can see that it is in fact not determinant to hold, as Hughes and Moore, that appropriating expressions does not reduce the intellectual commons or, as Nozick, that without the author, the work would not have been created. The decisive point is that, whereas initially everyone had the privilege to reuse existing works, the establishment of an intellectual property regime seriously restricts that privilege. Under such a regime, individuals can at best reuse old works for which protection has expired, or benefit form certain tolerated uses dependent on the good will of creators or the appreciation of judges.

Therefore under that baseline, an intellectual property regime inevitably violates Locke's original proviso, because it restricts the liberty of individuals to use existing works.

4. Possible objections

Before going on, let me address some possible objections to this way of reasoning.

A potentially powerful objection could be that this conclusion is wrong because it cannot be generalized to the material realm. Indeed, in the case of material property it appears implausible to argue that the Locke's original proviso would be violated if individuals are deprived of the possibility to use and enjoy the fruits of the labour of others. So why would it be different in the case of intellectual property? Why would the baseline for intellectual appropriation be one where individuals are free (or "privileged", in the Hohfeldian sense) to reuse works created by others, while for material appropriation individuals are only free to use natural resources, and not the objects that result from the labour of others? (cf. McGowan, 2004, 67, for a similar point)

Two reasons can be given to account for this difference. The first reason relies on the different characteristics of material and immaterial objects. One could argue that the intuition behind the objection against the free use of objects resulting from the labour of others appears is grounded in the respect for the self-ownership of the possessor of an object. Indeed, it would appear objectionable to snatch food from the hands of an eater, because that would involve using force to coerce him to let it go, which would violate his self-ownership. However, it hardly seems objectionable for a passerby to enjoy the sight (or the smell) of a wonderful garden, as it does not immediately affect the gardener.

Because ideas and intellectual works are immaterial goods, they cannot be "possessed" once they are released to the public. They are what economists call non-rival goods: people can use them in a lot of ways without impeding the ability of others to use them. In contrary to the context of material objects, simultaneous claim to use existing intellectual works are not bound to be contradictory. Enjoying an intellectual work is therefore akin to enjoying the sight of a garden: it does not immediately affect the author any more than it affects the gardener.

The second reason for the particularity of the baseline for intellectual appropriation is the fact that intellectual works are

at the same time "inputs" and "outputs" of creation. As the romantic picture of intellectual creation happening *ex nihilo* is now widely discredited, it is commonly admitted that new creations necessarily build on existing works (cf. Hettinger, 1989, 38; Waldron, 1993, 880; L. Zemer, 2006, 935). So, on any plausible view, it appears that the "raw materials" of intellectual creation should at least include existing works, and not merely "uncreated" possible ideas. Intellectual creation necessarily is a process where individuals borrow and build upon the work of others, and the baseline for the application of Lockean proviso should take that into account

Moreover, as we said earlier, arguing that the Lockean proviso must be assessed on the basis of some sort of *prima facie* right of non-interference that the author has on the work he created merely begs the question. Even if we could make some positive claims in line with Locke's arguments (based on labour or desert) to support a *prima facie* case for appropriation, it would still need to pass the test of the Lockean proviso. Thus we cannot assume that created works already belong to their author in the very process of assessing whether these works can indeed be appropriated. The same reply applies to arguments holding that copying a work essentially "harms"[13] or worsens the author's position, because it prevents him to make money from it (Gordon, 1992, p. 1548; Merges, 2011, p. 141). That the author has such a claim (to the profits of the work) remains to be proven, since at this point it cannot stem from the intellectual property right whose justification is in question[14].

Yet another objection could be that our baseline amounts to a "right to benefit from another's pains", which is explicitly dismissed by Locke and other proprietarian authors (Gordon, 1992, p. 1545), or to require "to better others", and "to give them free rides", thereby missing the crucial distinction "between worsening someone's situation and failing to better it" (Moore 2004, 111; 2012, 17). To that we can respond by stressing that, on the baseline we rely to apply the Lockean proviso, individuals

13 In this paper, we avoid the interpretation of the Lockean proviso in terms of the "non-harm principle", and stick with the aforementioned notion of "worsening" (or bettering) one's position, as defined by Nozick.

14 See the admirable rebuttal of that argument by Waldron, 1993, p. 871-874.

do not have a *right* to access the work, but merely a *privilege* to use intellectual works they can access. It is thus the loss of this mere general privilege that worsens the positions of individuals, and not the violation of a right of access or use intellectual works, nor the exclusion from the enjoyment of a particular work. This allows us to clear a potential misunderstanding: even if, in the absence of an intellectual property regime, individuals have a privilege to use works, authors would still have the privilege to restrict uses of a work under their control, by all means available to them. Because an author has control over his manuscript, he could prevent others to use it by keeping it secret, or build technical restrictions measures on copies he distributes to consumers. But, without a proper claim-right, authors would not be able to appeal to the State to enforce these restrictions on others. The baseline for the application of the Lockean proviso is thus the situation where both users and authors have certain privileges, but no right, on the use of intellectual works.

5. Intellectual property and the revised proviso: providing for compensations

Finally, we have to consider if intellectual property satisfies the revised proviso proposed by Nozick. Even though intellectual property restricts the privilege of individuals to use (and reuse) protected works, one could argue that its benefits provide an adequate compensation. If that is the case, the net situation of individuals would not be worsened, which would be sufficient to satisfy the revised proviso (Nozick, 1974, p. 176).

In that vein, one could contend that an intellectual property regime provides advantages that compensate the losses it creates (Moore, 1997, 79). For example, the incentive effect of an intellectual property regime might generate a vastly greater number of created works than without such regime, which could be considered an advantage in terms of welfare. This advantage would then make up for the loss of the privilege of individuals to reuse existing works (assuming that there is a metric that allows to compare the different effects on one's situation). An intellectual property regime would thus satisfy the revised

proviso as long as its effects are such that the net position of individuals are not worsened, compared to the situation where no such regime exist and everyone has the privilege to reuse all works.

This argument fall prey to an objection similar to the one Cohen made against Nozick, contending that his revised version of the proviso was far too lax (Cohen, 1995, p. 78): why should we narrow the relevant alternatives to a negative counter-factual, defined as the absence of a legal regime for intellectual works? If we are to take the Lockean proviso seriously, we should also consider how an intellectual property regime fares in comparison with other types of legal regimes for intellectual works. In that perspective, the prospects are rather bleak for intellectual property. Could we still argue that the introduction of intellectual property worsens the position of no one in comparison with a situation where an alternate compensation system incentivizes creators while leaving everyone privileged to use works? (cf. Fisher, 2004; Aigrain, 2012)

We can see that moving to the "revised" version of the Lockean proviso is not without consequences for those willing to justify intellectual property. As they cannot simply assume that intellectual property makes no one worse off *tout court* (as Locke's original proviso requires), they are forced to make empirical claims on the merits of such a regime. This does not amount to a utilitarian or consequentialist argument, as Nozick points out:

> *"These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the "enough and as good left over" proviso, not as a utilitarian justification of property. They enter to rebut the claim that because the proviso is violated no natural right to private property can arise by a Lockean process"* (Nozick, 1974, p. 177)

However, even if Nozick's revised proviso does not fall into the category of utilitarian arguments, it certainly shares some of their characteristics. In particular, its reliance on empirical claims makes it loose much of the appeal usually attributed to proprietarian reasoning:

> *"it is often thought to be a feature of libertarian political philosophy that, through its emphasis on rights, it finesses empirical questions about consequences which are hard to answer and in which utilitarianism becomes enmired. That is an illusion, since, as we now see, theses about consequences are foundational to Nozick's defense of private property rights, and the rights he affirms therefore lack the clarity and authority he would like us to suppose they have"* (Cohen, 1995, 86)

By relying on empirical claims, the proprietarian case for intellectual property is therefore vulnerable to the same empirical objections as the ones faced by the instrumental ("utilitarian") case. Moreover, not only are proponents of the Lockean justification forced to argue about the merits of intellectual property on an empirical basis, but they must also show that intellectual property is more efficient than other possible schemes, such as an alternative compensation system.

Even if such task proved feasible, Nozick's revised proviso will certainly not be able to legitimate the strong absolute property rights it ambitioned to support: at most, the revised proviso would allow for a regime providing a delicate trade-off between incentives and freedom to use works. Therefore, even if they could succeed, justifications of intellectual property on the basis of the Lockean proviso would not support stronger rights than the instrumental justification for intellectual property. As Gordon puts it, from a lockean as well as from an instrumentalist perspective, "only copyright's limiting doctrines make copyright tolerable" (Gordon, 2004).

Conclusion

There is some irony in the fact that what some regard as the main shortcoming of proprietarian (or libertarian) theories, *i.e.* their insensitivity to consequences, is often advocated as their strength in the literature on intellectual property. In his last book, *Justifying Intellectual Property*, Robert Merges notes that "through all the doubts over empirical proof, [his] faith in the necessity and importance of IP law has only grown" since he came to favor the proprietarian case for intellectual property (Merges, 2010, 3). Proprietarian arguments indeed permits to

build a justification of intellectual property without having to grapple with the intricacies and uncertainties of the kind of consequentialist reasoning specific to the instrumental justification.

But as convenient as the Lockean proviso appears for a justification of strong intellectual property rights, it is also quite a demanding criterion, especially in its original interpretation. It is not an easy task to show that an intellectual property regime really leaves no one worse off, in the sense of the original proviso. Therefore, it is not surprising that such attempts fail, as we have argued. While at first blush the water drinker or the magical springs arguments are intuitively appealing, after careful consideration they do not seem to provide much support for the proprietarian case for strong intellectual property rights.

As for the revised proviso proposed by Nozick, it ends up collapsing in a kind of quasi-utilitarian argument, offering neither the certainty of proprietarian reasonings, nor the intuitive appeal of utilitarian ones.

Of course, this is not to say that no proprietarian case for intellectual property could be made. In this paper, we only addressed a specific category of Lockean arguments, the negative justifications aiming to justify intellectual property on the grounds that it satisfies the intellectual proviso. Admittedly, other proprietarian arguments could provide positive justifications for the property right of an author to its work, based on the claim that he has mixed his labour, or that he deserves it, or that the work forms an extension of his self-ownership. But as some have showed, these arguments are also quite disputable (Attas, 2008). Moreover, in so far as the Lockean proviso is at least a necessary condition for the legitimacy of appropriations, these arguments would also be affected by the shortcomings of the arguments based on the Lockean proviso[15].

For those willing to reassert the legitimacy of copyright regime, the instrumental justification appears to be a more

15 Though admittedly, arguments grounded in self-ownership, or other arguments that do not involve a case of appropriation, will remain unaffected.

promising path. It is probably also a more suitable framework for those willing to push for a real balance between the competing values at stake in the regulation of intellectual creations in the digital environment.

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