

## Lockean Arguments for Private Intellectual Property

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It has been pretended . . . that inventors have a natural and exclusive right to their inventions. . . . If nature has made any one thing less susceptible than others of exclusive property, it is the action of the thinking power called an idea. . . . Its peculiar character . . . is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should be freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been . . . designed by nature. . . . *Inventions then cannot, in nature, be a subject of property.* Society may give an exclusive right to the profits arising from them, as an encouragement . . . to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.<sup>1</sup>

### 1. Introduction

Thomas Jefferson was the first administrator of the U.S. patent system and a Lockean sympathizer. Nevertheless, he was fiercely critical of natural rights approaches to intellectual property. Many contemporary legal and philosophical commentators, however, seem to suppose the contrary: that Lockean justificatory foundations straightforwardly support a wide range of strong intellectual property rights.<sup>2</sup>

<sup>1</sup> I am grateful for constructive, stimulating comments from Tyler Burge, David Dolinko, William Fisher, Wendy Gordon, Barbara Herman, Timothy Hinton, Michael Jacobides, David Kaplan, Jerry Kang, Matthew Kramer, Mark Lemley, Gillian Lester, Eric MacK, Miles Morgan, Steve Munzer, Calvin Normore, Michael Otsuka, James Penner, Monroe Price, Steven Shiffrin, Lloyd Weinreb, Jonathan Willerding, Eugene Volokh, Clark Wolf, the Law and Philosophy Discussion Group of Los Angeles, and anonymous reviewers for Cambridge University Press.

<sup>2</sup> Thomas Jefferson, "The Invention of Elevators" (Letter, 1813), in Saul K. Padover, ed., *The Complete Jefferson* (New York: Dell, Sloan & Pearce, 1943), p. 1015 (emphasis added).

<sup>3</sup> See, for example, Lawrence C. Becker, "Deserving to Own Intellectual Property," *University of Chicago-Kent Law Review*, 68 (1993): 609-29, at 610-12 & 616; James Child, "The Moral Foundations of Intangible Property," *The Monist*, 73 (1990): 578-600; William W. Fisher III, "Reconstructing the Fair Use Doctrine," *Harvard Law Review*, 101 (1988): 1661-795, at 1688-90; Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown Law Journal*, 77

The desire to use Lockean theory to ground intellectual property rights is understandable in light of its theoretical and practical advantages. Locke's approach to property appears to offer a strong, principled justification for private property rights. It does not presuppose the justifiability of private property. Instead, it aims to arrive at justifications for both the institution, and the appropriation conditions, of private property from premises that assume a starting point of common ownership of resources. Moreover, it appears to offer a principled alternative to consequentialist approaches, one that might reduce the need for empirical investigation. Consequentialist foundations for property rights rely upon contingent, empirical facts that may fluctuate with variations in the economic context—for example, how effectively various incentives stimulate production, or whether restrictions on derivative use propel or deter innovation over time. These facts may be difficult and costly to investigate. By contrast, Lockean arguments seem to offer the prospect of justifying private ownership with little appeal to these potentially varying facts.

To many commentators, these advantages appear to be in easy reach. Intellectual property seems, at first, particularly well suited to the application of Locke's theory. In fact, it seems easier to satisfy Lockean conditions on appropriation for intellectual property than for real property. It is generally thought that Lockean principles permit private appropriation of property from the common stock of property, so long as the "Lockean proviso" is met. This proviso is understood to allow one to appropriate so long as one leaves "enough, and as good" for others and one does not appropriate so much that goods waste or spoil.<sup>3</sup> For three main reasons, many believe that these

(1988): 287-366, at 291, 300, 325, 365; Adam Moore, "Toward a Lockean Theory of Intellectual Property," in Adam Moore, ed., *Intellectual Property* (Lanham: Rowman and Littlefield, 1997), pp. 81-103; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 181-2; Alan Ryan, *Property* (Milton Keynes: Open University Press, 1987), pp. 68-9; *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002-03 (1984). For accounts of the historical influence of Lockean theory on the development of intellectual property rights, see Mark Rose, *Authors and Owners* (Cambridge, Mass: Harvard University Press, 1993), pp. 4-5, 8, and Diane Kepleaces and the Bill of Rights, *William & Mary Law Review*, 33 (1992): 665-740, at 676-7, 690-703, 705-6, 712. See also William Fisher's discussion in "Theories of Intellectual Property" in this volume.

Even some powerful critics of strong intellectual property rights acknowledge the prima facie permissibility of Lockean appropriation of intellectual property, although they dispute that the conditions of justified individual appropriation are met as often as is usually presumed. See, for example, Wendy Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory," *Stanford Law Review*, 41 (1989): 1343-469, at 1388-9 (1989); Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," *Yale Law Journal*, 102 (1993): 1533-609 at 1533, 1535, 1538, 1540; Edwin C. Hettinger, "Justifying Intellectual Property," *Philosophy & Public Affairs*, 18 (1989): 31-52, at 34-7, 41-2, 51; Jeremy Waldron, "From Authors to Copiers," *University of Chicago-Kent Law Review*, 68 (1993): 841-87, at 879.

<sup>3</sup> John Locke, *Two Treatises of Government* [1698] ed. Peter Laslett 2nd ed. (Cambridge: Cambridge University Press, 1994) at II.33, II.31. Further citations to this text will simply be in the form of Locke's name, followed by the treatise number (I or II), and then the section number (e.g. 33).

conditions are easier to fulfill for intellectual property than for real property. First, meaningful satisfaction of the proviso's "enough and as good" component may preclude substantive amounts of appropriation when real property is scarce. This problem appears less formidable for intellectual property because the terrain of intellectual stock for acquisition (or creation) does not seem at risk of depletion. On some views, it can even be regenerated or expanded through our efforts.<sup>4</sup> As an early British supporter of strong copyright protection urged, "The Field of Knowledge is large enough for all the World to find Ground in it to plant and improve."<sup>5</sup> Second, some regard intellectual products as less subject to waste through spoilage because, generally, their usefulness does not expire or decay in the way that, say, apples do.<sup>6</sup> Third, some regard it as easier, with intellectual products than with products involving work on real property, to isolate the value due to human labor from the value of the initial materials that are worked upon.<sup>7</sup> In many cases, the creation of intellectual products does not involve laboring on independent, physical materials.<sup>8</sup>

<sup>4</sup> See, for example, Becker, "Deserving to Own Intellectual Property," at 616; Gordon, "A Property Right in Self-Expression," at 1566; Child, "The Moral Foundations of Intangible Property," at 589; and Hughes, "The Philosophy of Intellectual Property," at 315, 325, 329, 365. I discuss the characterization of the intellectual common in Section III.

<sup>5</sup> Anonymous, "A letter from an author to a Member of Parliament. Occasioned by a late letter concerning the Bill now depending in the House of Commons, for the encouragement of learning, &c.," (London: April 17, 1735) (Goldsmiths-Kress Library of Economic Literature 7279; Hanson 4793; ESTCN 20589). Indeed, if the stock of intellectual property were that expansive, it could buttress the viability of Lockean theory for real property. Complaints that real property appropriation would not leave enough and as good for others could be answered, since plenty of valuable, tradeable, intellectual property is available for use and even appropriation.

<sup>6</sup> Hughes, "The Philosophy of Intellectual Property," at 328. But, although intellectual products may not spoil in the same way as agricultural products, they are not immune from spoilage or waste. The value of information may be time-dependent – consider stock tips or information about irrevocable decisions; if such information is hoarded, it may "spoil" or become useless. Some software programs may be useful only in combination with current hardware technology. Other intellectual products may be more useful at particular times – when, for instance, they draw upon or react to current events or contemporary culture. As I discuss in Section III, conditions of exclusive use may waste or significantly underuse some intellectual products.

<sup>7</sup> See, for example, Becker, "Deserving to Own Intellectual Property," at 611; Hughes, "The Philosophy of Intellectual Property," at 300; Waldron, "From Authors to Copiers," at 879; Ryan, *Property*, p. 68; and Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988), p. 279, n. 45. In brief, the problem for real property rights is that ownership of one's labor may not entail that one completely owns the products of one's labor. If one combined one's labor with raw resources to generate a product, one may only be entitled to the portion attributable to one's labor. If so, the part of a product's value attributable to labor must be disentangled from what is contributed by the material resources.

<sup>8</sup> This argument has difficulties. Paintings and sculptures generally involve substantial use of material objects. Also, similar difficulties arise because intellectual products typically involve substantial borrowing and interweaving with prior elements in the culture. See Hettiger, "Justifying Intellectual Property," Waldron, "From Authors to Copiers," and Jessica Litman, "The Public Domain," *Emory Law Journal*, 39 (1990), 965–1023. I propose here, though, to bracket concerns about dependence on prior works and to consider cases involving either the first generation of creators or contemporary, but purely original, intellectual products. In Section III, I address related issues concerning whether intellectual production involves mixing labor with elements of an intellectual, nonmaterial common.

Despite the attractions of a Lockean approach and its apparent amenability to intellectual property, I side with Jefferson. I will challenge the claim that Lockean foundations straightforwardly support most strong natural rights over intellectual works – such things as articles, plays, books, songs, paintings, methods, processes, and other inventions. I will also challenge the related claim that Lockean foundations for strong property rights come easier for these forms of intellectual property than for real property. As Jefferson observed and as I hope to explain, the nature of intellectual works makes them less, rather than more, susceptible to Lockean justifications for private appropriation.

Making this argument requires an extended excursion into the underlying motivations and structure of Locke's general theory of property. I do this first before addressing intellectual property specifically. In Section II, I lay out an interpretation of the Lockean defense for private property that places a strong emphasis on the significance of common property as a starting point. This interpretation generates special difficulties for asserting strong Lockean rights to intellectual property. In Section III, I return to the subject of intellectual property and discuss these difficulties in detail.

Before embarking on this task, I should clarify my subject matter and method. I mean to criticize the claim that Lockean theory, as I suggest it is most plausibly interpreted, generally supports the assertion of strong, natural rights over most intellectual products. For ease of expression, I speak broadly of "intellectual products" and "intellectual property," but I focus upon the rights associated with copyright and patent. Parts of my argument pertain to trademark protections, but little of it bears on trade secret law or its justifications.

In investigating Lockean theory, I mean to explore John Locke's theory of property and its animating themes, as I think they can be best interpreted and developed to provide a justification for private appropriation. My aim is to reconstruct Locke's strongest line of argument. I do not try to ascertain what John Locke, the person, would say if we put various questions to him about property rights and their justification.<sup>9</sup> Rather, I am primarily interested in interpreting the *Two Treatises*. This text has had a lasting appeal and pull on our sensibilities. I aim to interpret the text in a way that presents it in its best light (or at least, in a way that is illuminating and explains some of its appeal). In doing so, I de-emphasize what I take to be some of Locke's less felicitous as well as his less central views and remarks, in order to follow and expand upon what I take to be the foundational motivations of his account.<sup>10</sup> I put to the side some contrary lines of argument and interpretation for two reasons. First, it is

<sup>9</sup> In Section III, I discuss some letters of John Locke's that concern copyright. While these are also relevant to the project of identifying Locke's actual, historical intentions, I refer to them for a different reason. They help to elaborate my interpretation and the line of argument that I locate in the *Treatises*. They also shed light on how a thinker could embrace the line of arguments in the *Treatises* and still be critical of strong intellectual property rights.

<sup>10</sup> My description of Lockean theory follows A. John Simmons, *A Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), p. 4.

not clear to me that all of Locke's remarks can be reconciled. Second, my principal aim is to develop a less-emphasized line of thought in Locke's text—one that, I believe is true to Locke's starting point and provides his strongest, most appealing argument for property rights.

By *strong intellectual property rights*, I mean those core intellectual property rights that empower their bearers to exert exclusive control over access to and use of intellectual works. Those rights include the rights: to interfere with and to control the dissemination and use of intellectual products, whether through injunctions or by setting potentially prohibitive prices for access; to interfere with and even prevent others' production and distribution of similar or derivative works; and to sell, transfer, or devise these rights to others. For example, I have in mind the exclusive rights in the copyright law to reproduce and distribute copies of copyrighted works, to prepare derivative works, and to perform or display works. I also have in mind the power to enforce these rights through injunctions, impounding infringing articles, suits for damages, and the criminal law,<sup>11</sup> and the rights in the patent law to prevent others from using or making a patented invention or process, even if it is independently, subsequently discovered.<sup>12</sup>

So, to deny that creators have, as a natural right, strong property rights is not to deny that creators should be compensated and acknowledged for their work.<sup>13</sup> Of course, they should be compensated. But they may be compensated without affording them full, unrestricted abilities to control the use of such works, to charge any price for access, and to sell these rights to others. For example, compensation is divorced from strong rights under the U.S. compulsory licensing scheme that governs recordings of non-dramatic musical works.<sup>14</sup> They may be recorded and sold without the creator's or copyright owner's consent — thereby making the works widely available for public, common use. But, as compensation, the copyright owner receives a mandatory royalty for each use. Furthermore, the denial that there are strong, natural rights to intellectual property does not entail that there are no other grounds for positing strong intellectual property rights. Perhaps, a legal system that grants strong intellectual property rights generates unique incentives to production, or has other advantages. If so, as Jefferson argued, the public might then have good reasons to consent to and to create strong intellectual property rights *beyond* the sphere of natural rights.

<sup>11</sup> See 17 U.S.C. Secs. 106, 502–506 (West 2000).

<sup>12</sup> See 35 U.S.C. Secs. 271, 283–84 (West 2000).

<sup>13</sup> Many others have made the point that labor may deserve compensation but that this need not entail strong property rights, including rights of exclusive use and control. See, for example, Hetherington, "Justifying Intellectual Property," at 38, and Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Harvard University Press: 1991), pp. 325–6. A sufficiently high wage for labor and acknowledgment of authorship are other reasonable ways to compensate labor and investment.

<sup>14</sup> See 17 U.S.C. Sec. 115 (West: 2000).

## II. Lockean Arguments for Private Property

My view of Locke's theory of property, in general, and of its application to intellectual property, in particular, relies upon a distinction between two justificatory conditions on appropriation. To justify a person's appropriation of a thing, two conditions must be met: First, things of *that sort* must be susceptible to justified private ownership. Second, the person must satisfy the conditions necessary to appropriate that specific thing. Proponents of Lockean rights to intellectual property often seem to muddle these conditions. In particular, they neglect serious consideration of the first condition. The proviso, which represents the Lockean criteria for satisfying the second condition, may be simpler to satisfy for intellectual property than for real property. But there are prior issues of justification, regarding the institution of intellectual private property. These pose a more formidable challenge to asserting a broad range of strong intellectual property rights.

This section will sketch an interpretation of Locke's theory of the first condition about what justifies an institution of private property for certain sorts of things. As I interpret Locke's view, it supports a more limited scope of appropriation than is commonly attributed to him and than he, at times, may have aimed to defend.<sup>15</sup> Because it is unclear that there is a single, consistent position running through the *Treatises*, I will not attempt to reconcile all of Locke's remarks with my account. I will attempt, instead, to identify a deep, attractive, and foundational strand of his thought. I will stress neglected, but foundational, themes about the initial state of common ownership and outline what strikes me as the most defensible reconstruction of the *Treatises'* argument for private appropriation. On my reading, Locke's view does not endorse Lockean appropriation of most intellectual products.

My version of Locke's theory of private appropriation differs from standard accounts by assigning greater prominence to the common ownership thesis, namely, the view that the world is initially owned in common. The defense of this view, against critics like Robert Filmer, was a major impetus behind Locke's work and shapes his defense of private property. The account I will offer, unlike accounts that give pride of place to the themes of labor and self-ownership, preserves the importance of the common ownership thesis. I will claim that the conditions of effective use of common property, coupled with appeal to the right of self-preservation, initially justify some private appropriation out of the commonly held stock. Labor plays a subsidiary role. Labor is used, primarily, to justify the appropriation by one individual rather than

<sup>15</sup> Locke may have thought (if so, I think mistakenly) that his arguments yielded a more comprehensive justification for strong property rights in most or all things. Locke did, however, work against the renewal of strong copyright-like provisions of the Licensing Act of 1662 as I discuss in Section III.

another, assuming that some private appropriation of the given sort of property has been antecedently justified.

Locke is explicit that the *Treatises*' aim is to show that the world is initially held in common by all people.<sup>16</sup> His attack on Filmer's patriarchal theory of authority and property ownership is central to the *Treatises*.<sup>17</sup> Locke takes pains to emphasize the egalitarian nature of his contrary position.<sup>18</sup> He faults Filmer's patriarchal theory for exalting Adam above other human beings who share the same intellectual qualities as Adam. Locke maintains that God<sup>19</sup> grants human beings superiority over animals, "the inferior creatures." The community of human beings *together* enjoy dominion over the world. Locke also emphasizes that people have rights of subsistence or rights of self-preservation. These rights of subsistence, coupled with the right and duty to make use of God's grant, are what seem to motivate his endorsement of a right of private property in such things as fruits, animals, and land.

Locke acknowledges that the thesis of common ownership creates a puzzle about the justification of private property.<sup>20</sup> In the *Second Treatise*, he declares that he will attempt to show how people "might come to have a property in several parts of that which God gave to Mankind in common. . . ." <sup>21</sup> This

effort is crucial to the enterprise of defending the common ownership thesis. Filmer, as well as other critics, criticized the common ownership thesis on the ground that if it were true, then use of property could not be made without the consent of humankind.<sup>22</sup> Such a requirement of consent would be absurd, especially if subsistence materials could not be used without everyone's consent.<sup>23</sup> A consent requirement would also create tension with the egalitarian motivations of the theory: common ownership, so construed, could lend itself to subordinating exercises of power. A group or individual could use the veto power to deny the fulfillment of individuals' needs or to make others beholden to them.

To some versions of Filmer's objection, one may reply that they presuppose an inaccurate view of common ownership, one under which all use of the commons is impermissible without the consent of the members of humankind. Common ownership does not necessarily require common consent for all individual use, such as walking across a commonly owned plot of land. Some individual uses that do not destroy or diminish the common are consistent with common ownership, although individual appropriation of parts of it without consent of the common is not. Yet this reply, which I accept, does not answer all forms, including the most potent forms, of the objection. For there are important forms of use, such as the consumption of food, that do require appropriation and exclusive use and that are crucial to human survival and flourishing.

Locke's reply and his development of an account of justified private appropriation draw on individuals' natural rights of self-preservation and on the idea that the grant of common ownership should be meaningful. The argument runs roughly as follows: God gave the world in common to humankind for its benefit.<sup>24</sup> God's grant would be frustrated were the world not used to benefit people.<sup>25</sup> But, importantly, some articles cannot be used to benefit people if they must be used in common or be available for common use. Their use must be exclusive. Furthermore, each person enjoys a natural right for his or her subsistence needs to be met. Part of what propels God's grant is that it serves to

16 For examples, see John Locke, I.24 ("I shall shew . . . that by this Grant God gave [Adam] . . . a right [over the inferior creatures] in common with all Mankind"), I.29 ("Whatever God gave by the words of [his] Grant, it was not to Adam in particular . . . but a Dominion in common with the rest of Mankind"), I.30 ("God in this donation, gave the World to Mankind in common . . . , in which Locke emphasizes that all people are intellectual creatures, equally in God's image), I.40 ("God gives us all things richly to enjoy . . . this [Biblical] text is so far from proving Adam Sole Proprietor, that on the contrary, it is a Confirmation of the Original Community of all things amongst the Sons of Men. . . ."), II.4, II.25 (" . . . 'tis very clear, that 'God, who has given the Earth to the Children of Men, given it to Mankind in Common"), II.26 ("God, who has given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life and convenience . . . [his fruits and animals] belong to Mankind in common. . . and no body has originally a private Dominion, exclusive of the rest of Mankind . . ."), II.27 ("[T]he Earth, and all inferior Creatures be common to all Men . . ."), II.28 ("Filmer, but begins by reiterating the rejection of Filmer's theses. Locke at II.1-3. See, for example, Locke, II.4. (The state of nature is a 'state of perfect freedom' and a state of equality; '[T]here being nothing more evident, than that Creatures of the same species and rank should also be equal one amongst another without Subordination or Subjection . . .'). See also II.5, II.6 ('being furnished with like faculties, sharing all in one Community of Nature . . .').")

19 I retain references to God's grant as the simplest method of exegesis. I do not think religious premises are necessary for the argument. Lockean arguments could do without them. One could defend the common ownership thesis as the most plausible initial starting position, one that best reflects commitments to interpersonal and intergenerational equality. One could also appeal to secular premises about the value of using common property and secular rights of self-preservation. I do not attempt to supply those arguments here. Jeremy Waldron, however, has expressed skepticism about secular reformulations of Locke's position, *The Right to Private Property*, p. 142.

20 Locke at II.25.

21 Ibid.

22 See Robert Filmer, "The Originall of Government," in Robert Filmer, *Patriarcha and Other Writings*, ed. Johann P. Sommerville (New York: Cambridge University Press, 1991), p. 234; see also Alan Ryan, *Property and Political Theory* (New York: B. Blackwell, 1984), pp. 16-17; James Tully, *A Discourse on Property* (New York: Cambridge University Press, 1980), p. 97 (discussing similar objections by Putendorf and Tully). On such views, it is unclear whether such consent would need to flow from just living people (all or a majority?) or also, hypothetically, from future generations. (Problems relating to future generations may lessen if property reverts to the common after a lifetime.)

23 Locke at II.28. Locke correctly observes that this problem attaches as strongly to Filmer's theory as it does to Locke's. Filmer's theory hinges the fulfillment of subsistence needs upon the discretion of a single patriarch and his heirs. It, too, cannot guarantee the fulfillment of natural rights of self-preservation. Locke, I.41, II.25.

24 Ibid. at II.26. See also I.86.

25 Ibid.

fulfill the right of self-preservation.<sup>26</sup> But food cannot nourish unless it is fully appropriated by a single person and incorporated into his or her body. Significantly, Locke points to this type of example to *introduce* his argument for appropriation:

The earth and all that is therein is given to men for the support and comfort of their being. And though all the fruits it naturally produces and beasts it feeds belong to mankind in common, as they are produced by the spontaneous hand of nature; and not anybody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state; yet, being given for the use of men, there must of necessity be a means to appropriate them some way or other, *before they can be of any use or at all beneficial*. The fruit, or venison, which nourishes the wild Indian . . . must be his and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.<sup>27</sup>

Two paragraphs later, Locke remarks similarly that "it is the taking any part of what is common, and removing it out of the state nature leaves it in which begins the property; without which the common is of *no use*."<sup>28</sup> Where beneficial use requires exclusive possession, it is consistent with the grant's purposes to remove the item from the stock of commonly owned things and dedicate it to a particular individual's exclusive use. So, for those items that have a use that requires exclusive possession, the institution of private property would be

<sup>26</sup> *Ibid.*, especially, 186, 188, 192 and also 141, 142, II.25 and II.26. Gopal Sreenivasan also emphasizes common ownership as a starting point. He places more weight on the right to self-preservation. *The Limits of Lockean Rights in Private Property* (New York: Oxford University Press, 1995). He argues that Locke's solution to the "consent problem" lies in claiming that appropriation that leaves sufficient materials for others' subsistence is legitimate and does not require consent. If one leaves enough for others' subsistence, one does not violate the right of common ownership for "[t]his natural right to property in common, which everyone enjoys, is *equivalent* to the natural right to the means of preservation." p. 140. Although his reading is subtle, I find it unsatisfying. First, this justification for appropriation is only negative. It explains why appropriation does not violate rights but it does not supply a positive rationale for side-constraint. Second, the text he cites to support this reading of equivalence, II.26, is ambiguous. It could also be read to suggest that the earth was granted in common in order, partly, to fulfill the natural right to the means of support. Third, the equivalence claim suggests, oddly, that if all the world became privately owned in such a way that each citizen privately owned enough for her subsistence, then we would all still be in a state of common ownership. This interpretation vitiates the distinction between common and private ownership. It also makes it strange that Locke regards private property – even in the means of subsistence – as needing justification against the backdrop of common ownership. If they are identical, where is the puzzle?

<sup>27</sup> Jeremy Waldron and David Snyder also call attention to this preliminary justification for exclusive appropriation. See Waldron, *The Right to Private Property*, pp. 166–71; David Snyder, "Locke on Natural Law and Property Rights," *Canadian Journal of Philosophy*, 16 (1986): 723–50. David Snyder seems to assert without explanation that most other goods "must be owned to be useful," at 731, whereas Waldron worries that this argument's power is limited to the case of food, p. 168. I attempt to supply some of the missing further explanation of how this account could extend to other sorts of property besides food, and thereby to facilitate a more integrated interpretation of Locke's justification for property.

<sup>28</sup> II.28 (emphasis added).

justified and consistent with the purposes of God's grant. An institution of private appropriation in *some parts* of the common stock is justified on two grounds: because it comports with the underlying motivation of the common grant and because it is necessary to fulfill the natural right of self-preservation. The grant of common ownership should not be construed in such a way that it would make that grant nonsensical and counterproductive to its purposes.<sup>29</sup>

It remains to be explained what criteria govern individual appropriation, that is, how a specific individual may justifiably come to have a property right to a specific thing. Individual appropriation must proceed according to a criterion that respects the equal claims of all people to the means to subsistence and to the common. Furthermore, no more should be taken from the commonly owned stock than is justified. Here, the criteria of labor and spoilage become pertinent. Locke stresses that people are self-owners and that labor has moral value. But these facts alone do not themselves necessitate private appropriation. Rather, in the context in which private property is justified, labor is then an appropriate means to stake a claim. Between two individuals, the one who has exerted labor and improved the thing's value has a stronger claim over the thing than a rival who has not labored. Locke notes that "labour put a *distinction* between [acorns collected by a person] and the common."<sup>30</sup> The justification for collecting items and exerting one's labor toward those things in the first place stems from the right as a beneficiary to consume them so as to make God's grant worthwhile. Still, this method of staking a claim is not arbitrary. It connects to Locke's fundamental justification for privatization: for, as I will discuss below, Locke celebrates labor for bringing out the value of a thing and making it useful.

So, too, the "enough and as good" and waste conditions of the Lockean proviso serve to limit appropriation in ways related to Locke's justifications for private appropriation. These criteria ensure that appropriation does not disadvantage the equal rights of others to appropriate some goods and to use others, and to ensure that the common stock is not depleted past the point of fruitful use. Wasteful appropriation would frustrate the charge to make the common grant work to humankind's benefit.<sup>31</sup>

<sup>29</sup> See II.28 and II.29. This argument could be fleshed out in four ways and the text is not decisive among them. The claim might be that since the grant would be meaningless unless it could be used, we could infer by hypothetical consent to that exclusive use necessary to make use possible. Locke does endeavor to show why an "express" compact is unnecessary. See II.27. Or, perhaps the grant is circumscribed by the conditions for its meaningful use. Or, the claim might be that of God's grant) and therefore unnecessary. Or, the grant of common ownership might be trumped by a prior, superior right to the means of self-preservation, this is an unlikely interpretation, though, for the language of II.25 suggests that the grant is partly in the service of, and not at odds with, the right to self-preservation.

<sup>30</sup> II.28.  
<sup>31</sup> This interpretation has the advantage of not rendering the waste criterion redundant. Views like Gopal Sreenivasan's, which locate the constraint on appropriation solely in the right of self-

This interpretation differs from more standard accounts. On those accounts, the Lockean argument for private ownership goes roughly as follows. Each person enjoys the natural right of self-ownership. One's labor is a part of one's self and so one owns one's labor. Because one owns one's labor, one owns the products of one's labor. Others' use of one's labor or its products without one's permission is an encroachment upon one's self-ownership. It is as though they use *the person* without permission and thereby fail to respect the principle of self-ownership. The commonly perceived difficulty here is thought to lie in the step from ownership of one's labor to ownership of the fruits of one's labor. For, usually, to produce from one's labor, one needs to combine that labor with some part of the material common. But, it may be objected, what right does one have to approach the common and expend one's labor upon it? Why does one thereby gain the property by presumptuous expenditure instead of losing one's labor? Here, the proviso is thought to provide the answer. So long as there is enough and as good for others and so long as one's expenditure of labor will not lead to a wasteful appropriation, no harm is done to others through exertion of labor upon a nonprivately owned thing as a justified precursor to and constituent of appropriation.

If one has a standard account in mind, it is easy to see why some think Lockean natural rights to intellectual property are easily derived, given the abundance of sources for making intellectual products and the intimate connection between individual labor and intellectual products. Standard interpretations like these, however, neglect or effectively play down the *Treatises'* motivation to defend the thesis of initial common ownership. Although Locke's frequent remarks about labor and its connection to property strongly encourage aspects of the standard interpretation, that story, taken in full, is not consistent with Locke's stated fundamental concerns. On the standard interpretation, the claim of initial common ownership has almost no significance. At best, it underwrites the need for the Lockean proviso. But the proviso, it seems, could as easily have been posited from a no-ownership starting point – motivated by concerns of fairness about who should come to own the unowned. Likewise, if there is no presumption for common ownership and no presumption against private appropriation, it is difficult to understand why Locke stressed the right of self-preservation and the purpose of the grant in the context of his discussion of justified appropriation.

preservation, have a difficult time motivating Locke's insertion of the waste criterion alongside the "enough and as good" criterion. If others have enough to ensure their subsistence (and such holdings suffice to respect the right to common ownership, as Sreenivasan claims), then what explains the prohibition on taking more than one can use? In my view, taking more than one can use removes material from the common and prevents its use by others. Such behavior thereby frustrates the command and permission to make full use of the common grant. Edward McCaffery's "Must We Have a Right to Waste?", in this volume, investigates the significance of prohibitions on waste in a contemporary context.

Assigning such a role to the claim of common ownership, however, seems unduly subordinate given the prominence the claim plays in Locke's stated motivations. Locke was fully aware of the challenge common ownership posed to the permissibility of private appropriation, and he explicitly aimed to answer the challenge. It would be perverse to treat common ownership as relevant merely to the shape of the conditions of individual appropriation, absent an explanation of why a departure from the celebrated initial scheme of common ownership is justified.

Thus, I think that the standard account is called into question because it is unable to acknowledge the primacy of the thesis of common ownership and to explain how Locke understands the compatibility of private appropriation with this notion. An account more sensitive to Locke's own starting point can be culled from the text. However, such an account does not justify privatization of all sorts of property – at least as a matter of distinctively Lockean natural right. It only justifies privatization where, because of the nature of the property, it is necessary to make effective use of the grant of resources and to fulfill the right of self-preservation. Locke himself gives some indication that his justificatory account for property signals some such limits to the range of permissible appropriation. In discussing the land that remains common in England and may not be further inclosed or appropriated, he first notes that it remains common by "compact, i.e. by the law of the land. . . ." Importantly, though, he goes on to point out that "[b]esides, the remainder, after such inclosure, would not be as good to the rest of the Commoners as the whole was, when they could all make use of the whole: whereas in the beginning and first peopling of the great Common of the World, it was quite otherwise. The Law Man was under, was rather for appropriating."<sup>32</sup> I understand Locke to be saying that initially, there is a great need to appropriate from and labor upon the initial common in order to fulfill God's command that his grant be well-used. But, at some point – as with the common remaining in England – what property remains may only be properly used if it is left in common.<sup>33</sup>

<sup>32</sup> Locke, II.35.

<sup>33</sup> I take this passage, in conjunction with the general argumentative structure of the *Second Treatise*, as evidence that Locke endorsed neither the standard ideal of positive community nor that of negative community. These ideals were identified by Locke's contemporary, Samuel Pufendorf. Positive community is an ideal of strict joint ownership. In its strictest form, positive community involves complete control by the group over use and appropriation. Under connected to or designated for any particular person. See Stephen Buckle, *Natural Law and the Theory of Property* (Oxford: Clarendon Press, 1991), pp. 91–108. Locke is conspicuously silent with respect to these terms. His implicit conception of what owing in common involves seems to fall somewhere in between these ideals. On the one hand, his reply to Filmer and his description of the remaining common of England suggest that he rejects the ideal of pure traces to an agreement, he analogizes its conditions to those of the original common. He declares that it is open to use by all its members, seemingly at their individual instigation, although not their individual appropriation. On the other hand, it is difficult to make full sense



Against my more restrictive interpretation of Locke's view, it may be asked why Locke permits appropriation beyond that necessary to fulfill one's subsistence needs and to satisfy the right of self-preservation. It is clear that Locke envisions that further appropriation may be justified when it can be accomplished without waste. Indeed, Locke celebrates the introduction of money for facilitating additional appropriation and use without waste.<sup>34</sup> This suggests that Locke's vision of the permissible scope of appropriation was not especially constricted.

Of course, it may be that Locke's good arguments run out here. Or, this may be the spot at which a tension surfaces between the common ownership foundations and the other strands of argument that connect labor and self-ownership to justified appropriation. Both of these seem like possibilities, but I believe there is a reading of the text that reconciles Locke's endorsement of further appropriation with the interpretation I defend.

First, to elaborate on the problem: a puzzle for my reading seems to be as follows. On the one hand, one might read the two facts supporting appropriation (the need for exclusive use of some things to make certain sorts of use of them and the need for certain sorts of use to fulfill the rights of self-preservation) as both setting necessary conditions for appropriation. Yet, if they both must be in place, then it is unclear how Locke could justifiably approve of appropriation beyond subsistence needs. On the other hand, if the two facts are read as posing disjunctive requirements, then it is unclear why the right to self-preservation merits special mention. Isn't its inclusion otiose, since its preconditions would already be met by the disjunctive permission to appropriate things for those uses that require exclusive use? Furthermore, on either reading, why does Locke seem to endorse appropriation in cases where exclusive use does not seem strictly necessary for use?

of Locke's concerns if one assumes, in the alternative, that he had Putendorf's idea of negative community in mind, as some have claimed. See, for example, Buckle, pp. 165, 175, 183–7. If Locke did have this in mind, it is odd that he did not say so. Further, it is odd that his discussion of the norms of the remaining common includes a bar on individual appropriation, without any remark that this is out of the ordinary. Moreover, such an assumption is hard to square with what seem to be efforts to explain and justify appropriation. If the world is just available for appropriation and the only question is how to establish clear methods of title, then it seems odd that he introduces his account of how appropriation is justified with examples so specific as those in which exclusive use is necessary for use. Rather, the text seems to suggest a distinctive conception of common ownership in which the common is available to nonaltering use by each and all. To complement this negative right, there is a positive right, jointly owned, over the rights of exclusive use. This positive right complements the negative right by ensuring that no one may unilaterally infringe on the common right of use by appropriating things that could be exercised in common. Rights over exclusive use are jointly owned, subject to the proviso that their exercise is limited by the purpose of the common grant: to ensure the world's use for its benefit. In other words, the negative right of access trumps the positive right when the positive right does not complement the negative right, that is, only when we must either permit exclusive rights or frustrate the purpose of God's grant.

<sup>34</sup> Locke at II.45–6.

Locke does not, to put it mildly, confront this problem squarely. An interpretive solution to this puzzle, involving two speculative steps, runs as follows. God has given us the world in common to make use of it for our benefit. Some uses may require exclusive use and so might justify appropriation, assuming that these uses are appropriate ones. One clearly valid use for things is to fulfill the right of self-preservation. So far, on this reading, the two facts do not pose joint, necessary conditions. Rather, the first identifies a condition of appropriation (that exclusive use is required for a valid use) and the second identifies one especially clear and pertinent, valid use, supported by a natural right. This argument represents the first speculative step. It explains why Locke would not have regarded the reference to self-preservation as otiose. It also opens up the possibility that there might be appropriation for other purposes. For, on this reading, it would still be possible for other uses to justify appropriation if exclusive use were necessary for them and if they were valid purposes. This reading renders the reference to self-preservation sensible and non-redundant. It does, however, reveal a gap in Locke's account, namely the absence of a fuller, explicit account of what other uses are valid and appropriate.

The second speculative step of this reading attributes to him an expansive understanding of the way in which exclusive use is necessary to fulfill the purpose of God's grant. Although this interpretation is speculative, it, unlike most other interpretations, renders Locke's stance thematically consistent with the initial passages about appropriation for subsistence. One way to explain Locke's acceptance of "extra" private appropriation – that is, private appropriation beyond that needed for subsistence and beyond that needed to make the materials minimally useful – is to emphasize his apparent belief about how God's grant is to be fully, effectively exploited. Locke asserts that the main value of land is reaped through the addition and application of labor to it. This endorsement of further appropriation need not be understood as an unadorned endorsement of the view that labor deserves the reward of property. Rather, these passages suggest that Locke's emphasis was that such appropriation and the labor it engenders here are *very substantially* more efficient in realizing the productive potential of the land. That is, appropriation prevents the waste of land and enables the full realization of God's purpose to ensure that the common grant be used to benefit humankind.<sup>35</sup>

Locke's writings are quite difficult to interpret here. But his implicit argument for private ownership of more land than is necessary for a particular

<sup>35</sup> I have in mind especially II.35–37 and II.40–45, especially when read together with I.41, I.42, II.32 and II.34. II.34 contrasts, interestingly, those who productively labor with the "fancy or covetousness of the quarrelsome and contentious," and advises that others "ought not to meddle with what was already improved by another's labor." It is interesting that Locke advises against meddling and not just appropriating or using. This emphasis supports the hypothesis that Locke was concerned with some individuals interfering with others' plans for and management of land and not only concerned with individuals making use of others' labor.

individual's subsistence does not appear to draw on the idea that profit incentives are necessary to induce people to labor and produce on land. The text does not mention the incentive argument. This omission is not surprising, because a profit incentive argument would mark a sharp departure from the arguments offered earlier in Locke's exposition. It would locate the impetus for exclusive use not in the nature of the thing to be used and the natural requirements of its use but in contingent decisions and psychological features of the laborer.

Furthermore, to attribute to Locke the implicit stance that an incentive argument attributes to the laborer – a reasonable unwillingness to work unless more is received than is needed to ensure self-preservation and to sustain fully productive labor – would be in some tension with the Locke's view of the laborer's natural *duty* to make full use of God's grant.<sup>36</sup> A better interpretation would maintain more symmetry with the arguments about the nature of subsistence materials and the inherent, rather than imposed, conditions on the use of property.

Why, then, must the use of "extra" land be exclusive to facilitate full exploitation of God's gift? Locke does not squarely address this question, but he makes some suggestive remarks. He associates land remaining in common as "uncultivated" and then, significantly, asserts that "subduing or cultivating the Earth, and having Dominion, we see are joyed together."<sup>37</sup> In discussing the use he has in mind, he mentions the need to plow, plant, till, and perform other sorts of directed, long-term activities on the land. I suspect that he thought that fully effective use required exclusive control by someone with a determinate plan for the land. The land would not be as effectively used if a user's plans could be disrupted by the imposition of another's inconsistent plans or spontaneous use.<sup>38</sup> It would then make some sense that he endorsed private, nonconsensual appropriation of some things beyond what is necessary to subsist. Their appropriation would be justified where exclusive use of such things is necessary for their *fully* effective use.<sup>39</sup>

<sup>36</sup> In another context, G. A. Cohen argues that although incentives are often treated as a response to a given, fixed aspect of the economic context, the putative need for incentives in fact represents a choice on the part of a worker to withhold work that could be provided. Cohen contends that if the talented require incentives in the Rawlsian scheme, they do not behave as difference principle and its underlying rationale. See G. A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy & Public Affairs*, 26 (1997), 3–30; "The Pareto Inequality, and Community," in Gretchen B. Peterson, ed., *The Tanner Lectures on Human Values*, vol. 13 (Salt Lake City: University of Utah Press, 1992), 261–329.

<sup>37</sup> See Locke at II.34 and II.35.

<sup>38</sup> See Locke at II.32 and II.34.

<sup>39</sup> Of course, fully effective use may not require exclusive control by an individual – groups of individuals could cooperate. Even so, groups would need the ability to exclude noncooperators who sought to use that land for their own ends. A more comprehensive, state-run system of coordination could also achieve the same end. But, such a system would also involve taking the property out of the common (although not through private appropriation). In any

On my reading, the passages stressing labor's vast enhancement of land's value are meant to combine with both the mandate to make full, effective use of resources and an implicit view that the land requires exclusive control for such use. This combination yields a positive argument for privatizing more out of common stock than is necessary for subsistence. "Extra" appropriation is justified because it is necessary to fulfill our shared aim and duty of exploiting our common resources. Interestingly, the value of the land he draws attention to is its ability to produce agricultural goods. It is, thus, connected to a use he has already explicitly endorsed – the collection and production of goods that contribute to the fulfillment of people's needs.

Other suggested readings of these passages, by G. A. Cohen and Andrew Williams,<sup>40</sup> attribute a different strategy to Locke. On their readings, the enhancement of labor does all or most of the work to propel a more negative argument for appropriation. They maintain, roughly, that, for Locke, appropriation is justified when other individuals have no valid complaint against another's appropriation. Appropriation of land is justified because it takes little of value and thus deprives others of little; for, either the land itself is nearly worthless (Cohen) or it is not of unconditional value, that is, it has no value without labor (Williams).

Although these readings have strong textual support, my reading has certain advantages over them. Because my reading does not depend upon claiming that the land alone is worthless, it rescues Locke from what would be, as Cohen notes, a terrible argument for this claim.<sup>41</sup> It also makes Locke less vulnerable to another, severe criticism Cohen lodges, that Locke is insensitive to the opportunity costs involved in appropriating undeveloped land.<sup>42</sup> Furthermore, as Cohen notes, if Locke is making the argument that land alone is worthless, such a position would be in tension with the "as good" component of the proviso.<sup>43</sup> For, what exactly would it mean to leave enough and "as good" of that which is virtually worthless?

Most important, my reading provides an interpretation of the passages that Cohen and Williams draw upon. But, my reading is both consistent and continuous with Locke's initial argument for appropriation – the argument in which he justifies privatization of foods that are, without labor, already valuable. Locke provides a positive justification for appropriation, adducing the ground that appropriation is necessary for such goods to be properly used. He does not make the mere negative claim that such appropriation would not take

case, that suggestion is rather far removed from Locke's context here, namely the state of nature.

<sup>40</sup> G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), Ch. 7; Andrew Williams, "Cohen on Locke, Land, and Labour," *Political Studies*, 49 (1992), 51–66.

<sup>41</sup> Cohen, *Self-Ownership, Freedom and Equality*, pp. 182–5.

<sup>42</sup> *Ibid.*, pp. 186–7.

<sup>43</sup> *Ibid.*



anything valuable and therefore will not disadvantage others. If he had such a negative claim in mind, it would be odd not to voice it and it would be odd to instead offer a separate line of argument that gave a positive reason for appropriation. As Williams admits,<sup>44</sup> his interpretation does not fit well with the passages from II.26–31 about the appropriation of apples and venison. His reading locates the justification of appropriation in that it takes that which is only of conditional value – that is, that which depends on labor to be made valuable. This lack of fit presents a striking problem for these interpretations, I think, since Locke's first, main effort to justify appropriation tackles the problem of things of unconditional value, like food. He uses this case as the primary case to answer Filmer's challenge and to build his own account.

My interpretation maintains continuity with the common-property impetus of Locke's project. It places more emphasis on the nature of the property to be appropriated and the natural conditions of its effective use than do the more standard labor-desert interpretations. The nature of the property and the conditions of its full, effective use justify its removal from common ownership and render it susceptible to private appropriation.

My analysis of the Lockean account of what makes a given kind of property appropriable makes a difference when contemplating intellectual products and their susceptibility to private appropriation. Section III takes up the ramifications of this interpretation for intellectual property.

### III. A Lockean Approach to Intellectual Property

Locke did not direct sustained theoretical attention to intellectual property. But in 1694 he wrote a letter opposing the renewal of the Licensing Act of 1662.<sup>45</sup> In addition to criticizing the Act's censorship provisions, Locke objected to its "patent" (copyright-like) clauses on the grounds that they granted a monopoly to publishers and prevented scholars from obtaining "true or good copies of the best ancient Latin authors, unless they pay . . . 6s. 8d a book."<sup>46</sup> Locke declared that

nobody should have any peculiar right in any book which has been in print fifty years, but any one as well as another might have the liberty to print it, for by such titles as these, which lie dormant, and hinder others, many good books come quite to be lost. [N]or can there be any reason in nature why I might not print [classic texts] as well as the

<sup>44</sup> Williams, "Cohen on Locke and Labor," at 56, n. 18.

<sup>45</sup> An Act for preventing the frequent abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing Presses, 1662, 14 Car. II, Ch. 33 (Eng.).

<sup>46</sup> John Locke, "His Observations on the Censorship," in Peter King, *The Life and Letters of John Locke*, [1884] 2nd ed. (New York: B. Franklin, 1972), p. 205. Also in John Locke, *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), pp. 329–39.

Company of Stationers, if I thought fit. This liberty, to any one, of printing them, is certainly the way to have them the cheaper and the better.<sup>47</sup>

Locke's remarks have three very interesting features. First, Locke's proposal that anyone may publish a book after fifty years does not comfortably fit with the view that Locke's theory endorses most strong natural rights to intellectual property.<sup>48</sup> Second, Locke contends that there is no "reason in nature" to preclude a freer system of use, albeit to classical works.<sup>49</sup> Third, he complains that strong patent provisions obstruct access to and full use of these works.

I do not want to make too much of these brief, political remarks on their own.<sup>50</sup> Nevertheless, on my reading of Locke's approach to property, these remarks are not out of character. It is unsurprising that similar themes reemerge in a later anonymous pamphlet that resists copyright expansion on grounds appealing to natural rights (as well as in Jefferson's even later remarks).<sup>51</sup> Locke's concern about strong rights inducing the loss or substantial underuse

<sup>47</sup> *Ibid.*

<sup>48</sup> Locke's proposal – a term of years followed by lapse into the public domain – does not differ in kind from current legal protections, although it is significantly shorter. I question whether the stock story of Lockean appropriation can easily explain the endorsement of a reversion, especially since his proposal specifies a term of years, not a life term. Locke's concerns about lack of access to individual works also do not fit the stock story, given that other works may be available or created.

<sup>49</sup> It is possible, though, that he was denying that *publishers* had any natural right to benefit from a longer term. Much of the debate in the late seventeenth and early eighteenth centuries over copyright was phrased in terms of authors' rights but was waged between smaller and larger publishers. Those opposed to longer terms feared it would solidify the monopolies of large booksellers who would inflate prices and obstruct access to books. See generally Mark Rose, *Authors and Owners* (Cambridge, Mass.: Harvard University Press, 1993). Still, the substance of Locke's point has wider application beyond publishers. And, even if the point were limited to publishers' rights, it suggests that even if authors had full-fledged natural rights, they were not fully transferable.

<sup>50</sup> They were not, however, isolated remarks or private notes. Locke sent them to the parliamentarian Edward Clarke, who delivered them to a joint conference of the Parliamentary houses. "The lords at once gave way," H. R. F. Bourne, *The Life of John Locke*, vol. 2, pp. 315–16 [1876] (Aalen: Scientia-Verl, 1969). See also Thomas Fowler, *Locke*, (1888) (New York: AMS Press, 1968), pp. 82–3. Locke wrote rival, but unpassed, legislation to grant a limited period of copyright to authors, restricted to the right to reprint or authorize reprinting. See Locke, *Political Essays*, ed. Mark Goldie, pp. 329–30, 338–9. An earlier letter complains that the Licensing Act "put in the hands of ignorant and lazy stationers" a monopoly over ancient Latin books which are "excessively dear to scholars." He urges Clarke to "have some care of book-buyers" and worries that the copyright-holders will not generate "fairer or more correct editions." He objects that scholars (like himself) cannot publish new editions of the work, enacting a "great oppression on scholars." Locke, "Locke to Clarke," 2nd Jan. 1692[3] in Benjamin Rand, ed., *The Correspondence of John Locke and Edward Clarke* (Cambridge, Mass.: Harvard University Press, 1927), pp. 366–7.

<sup>51</sup> The pamphlet author complained that copyright expansion would solidify booksellers' monopolies, raise prices, and discourage reprinting, thereby threatening to "notoriously invade the natural Rights of Mankind." Anonymous, "A letter to a Member of Parliament concerning the bill now depending . . . an Act for the encouragement of learning . . ." (London: 1735) (Goldsmiths-Kress Library of Economic Literature 7300; Hanson 4792; ESTCT 53548).

of works is in keeping with his concern that property be used, so as to fulfill the purpose behind God's grant.

Under an interpretation stressing the common property presumption, Lockean justifications for private property are more strained for intellectual property than for real property. For real property, private appropriation proceeds because it is necessary for proper and full use to be made of the common. Failure to permit some private appropriation would be absurd, since it would frustrate the purpose for which common ownership of the resource was granted. "Extra" appropriation beyond that needed directly for subsistence, if it is permitted, appeals to analogous grounds — private appropriation facilitates the development and the full use of a resource.

For most forms of intellectual property, the analogous argument falls flat, even if one adopts the broad reading that permits "extra" appropriation beyond subsistence needs.<sup>52</sup> The fully effective use of an idea, proposition, concept, expression, method, invention, melody, picture, or sculpture generally does not require, by its nature, prolonged exclusive use or control. Generally, one's use or consumption of an idea, proposition, concept, expression, method, and so forth, is fully compatible with others' use, even their simultaneous use. Moreover, intellectual products often require at least some fairly concurrent, shared (though not necessarily coordinated) use for their full value to be achieved and appreciated. Ideas and their expressions are usually most effective when commented by many — when their truths are commonly appreciated and implemented, and their flaws discovered and shared. Indeed, there is a social presumption that ideas and expressions are the object of open dialogue, exchange, and discussion. Attempts to control, suppress, manipulate, or monopolize ideas and information run counter to the intellectual spirit of open public discussions that promote learning and appreciation for the truth.<sup>53</sup>

<sup>52</sup> Pursuing the analogy may require identifying the intellectual analog to the real property common. I discuss the intellectual common below. To simplify, I focus on appropriations of rare, created works raise further complications about how much an intellectual product owes to public domain. The resolution of these complications hinges upon how rights over initial products and the initial common are conceived.

<sup>53</sup> The First Amendment of the U.S. Constitution also embodies an attitude of openness. Its philosophical spirit counsels resistance to departures from the common ownership presumption. A growing literature comments on the tensions between the First Amendment and copyright protections. See Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain," *New York University Law Review* 74 (1999): 354–446; Robert Denicola, "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression," *California Law Review*, 67 (1979): 283–316; Gordon, "Property and Injunctions in Intellectual Property Cases," *Duke Law Journal*, 48 (1999): 147–242; Melville Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press?," *UCLA Law Review*, 17 (1970): 1180–204; Zimmerman, "Information as Speech," at 665–6.

For the bulk of intellectual products, then, the basic Lockean justification for parceling them out to specific individuals for exclusive control is missing. The abilities to prevent the use of given intellectual works by others and to prevent the creation of derivative works run counter to the presumption of common ownership and the concomitant concern to make full use of resources. Even if the proviso-based conditions for individual appropriation could easily be met, that would not suffice to justify individually initiated departures from the default presumption of common ownership and common use.<sup>54</sup>

To be sure, there are important exceptions to the generalization that intellectual works do not require exclusive possession or control for effective use. Works in progress may require exclusive control by the author or creator to be brought to full fruition. Premature forced publication, input from too many directions, and interference by others may impede proper development of a work by disrupting an author's full expression or a creator's process of discovery. In addition, some works may, by their nature, require prolonged exclusive or highly restricted use for their production to be possible, for their communicative purpose to be achieved, or for their meaning to be fully realized. Diaries, the transmission of secrets, and intimate letters come to mind. Were such materials public and not under the exclusive control of specific individuals, the public's use, scrutiny, and contributions could disrupt the pure, full expression of the author's personality. Valuable relations of intimacy partly constituted by the fact that they feature some privileged, exclusive communications would thereby be precluded. The use of such materials, then, would be only partial. Surprisingly, on grounds different from those that others have identified, some rights of privacy and control could derive from Lockean foundations for property, even as I strictly construed them. On related grounds, there might also be a Lockean argument for trademark protection that prevents consumer confusion.<sup>55</sup>

Of course, there may be hard cases in which it is unclear what promotes the full and effective use of a work. The proliferate use of some works may even lessen their impact, by making them clichéd or overfamiliar. Perhaps the recent overexposure of the image of Edward Munch's *The Scream* on stickers, t-shirts, mousepads, and even blow-up dolls represents such a example. Generally, though, the Lockean approach, as I have construed it, carries a presumption of common ownership. The nature of most intellectual products and the conditions

<sup>54</sup> By contrast, compulsory licensing schemes, like the one that currently governs recordings of nondramatic musical works, are more amenable to the Lockean approach. They take advantage of the fact that intellectual products may be fully used simultaneously by many users and creators. A copyright owner receives a royalty for each use, but musical works may be recorded and distributed without the owner's consent, thereby making the works widely available for public, common use, 17 U.S.C. Sec. 115 (West 2000).

<sup>55</sup> This argument may not support, however, the greater protection antidilution statutes offer. They grant companies exclusive use of a name, phrase, or symbol, even when there is little risk of consumer confusion.

conductive to their full use fail to supply direct, positive grounds for surmounting this presumption.

### An Objection

The argument I have sketched assumes that the presumption of initial common ownership applies to intellectual property. I now turn to examining this presumption and some variants on it. It may be objected that argument presupposes, in error, that intellectual products, or at least the foundational stuff from which they are made, are like real property and other raw physical materials, namely that they exist independently of human efforts. It may seem as though I (wrongly) assume there is some initial realm of commonly owned intellectual property in the same way that there is an initial expanse of commonly owned land. After all, it is the common grant of things that creates the common ownership presumption. If there is no common abstract expanse – if the initial, intellectual common is empty – then perhaps Locke's initial presumption against private appropriation does not apply.

Suppose ideas, expressions, methods, processes, and so on, were the pure *sui generis* creations of individual thinkers-cum-laborers. As one early British copyright advocate argued, "... in some Cases [the author] may be said rather to create, than to discover or plant his Land; and it cannot be said, that an Author's Work was ever common, as the Earth originally was to all the World."<sup>56</sup> If this were true, then it might seem that the intellectual products of fully self-owned labor could be owned without violating the common ownership thesis.

My counterargument to this objection will take some time to explain. The leading idea of my reply is that metaphysical facts do not settle the issue about property rights. We might agree that intellectual products or their bases are not independent of us; still, this would not imply that we have Lockean property rights over them. On the reading of Locke that I have developed, there is a Lockean reason to think that, *morally*, such creations should be regarded as commonly owned, irrespective of their origins.<sup>57</sup> To develop this argument, I begin by characterizing the initial intellectual common. There is more than one way to do this. On each characterization, there is a Lockean argument against expansive intellectual property rights.

The rival characterizations of the initial intellectual common could be crudely characterized as follows. The first characterization would place all

<sup>56</sup> Anon., "A letter from an author to a Member of Parliament. Occasioned by a late letter concerning the Bill now depending in the House of Commons, for the encouragement of learning, &c.," (London: April 17, 1735).

<sup>57</sup> For this reason, I bypass the challenge of exploring Locke's metaphysics, epistemology, and theology for indications about how he would have characterized the intellectual common. It would, however, be an important task for a full, historical treatment of Locke's approach to the subject.

intellectual products in the intellectual commons. Authors discover and bring such products out of the commons, but do not create, develop, or refine them. A second characterization would locate only the subject matter and materials of intellectual products in the commons, for example, facts, concepts, ideas, propositions, literary themes, musical themes, and values. Authors discover these things and their interconnections. They make them publicly accessible by expressing them, often, in unique ways. The third characterization presents the initial common as empty. Intellectual products are completely the inventions of their authors. The creation of intellectual products does not involve any use of common resources.

Of course, there is a final, plausible, hybrid view that holds that the appropriate characterization depends on the sort of intellectual product. Each of the first three characterizations, it might be thought, roughly describes some products, or, at least, some aspects of their creation. Some intellectual products mainly draw upon facts about the physical world that are discovered and not created by a single mind. The subjects of (some) patents may be like this. These products seem fruitfully analyzed under the first characterization.<sup>58</sup> Other intellectual products draw on common resources but also importantly depend upon authorial development, refinement, and expression – for example, the nonfictional reporting of facts, fictional treatments of love and betrayal, and portraits of landscapes. These seem like instances of the second characterization. Still other products, perhaps abstract paintings or performance art, may seem to be entirely authorial inventions.

Rendering these distinctions less crude and sorting out what products fall under what characterization would be a large, daunting task, far beyond the scope of this paper. As I hope to bring out through the discussion of these characterizations, though, I doubt the matter ultimately turns upon getting the classifications right. I will discuss these disparate characterizations in turn.

### *The First Characterization of the Initial Common (all products are in the initial common)*

Suppose that all products are in the initial common. If this were true, the Lockean argument (as I have construed it) against private appropriation would be fairly straightforward. Authors exert labor through discovering and delivering intellectual products to the public. For their labor they may deserve compensation, attribution, and admiration. Yet, because such products generally do not require exclusive use for fully effective use, the argument for a natural, strong right to appropriate would be a nonstarter.

One may object to this analysis that some appropriation of the intellectual common may make other parts of it newly accessible, facilitating its fuller use.

<sup>58</sup> Of course, to gain a patent, one must not just have an idea or discover a method or process. One's idea must be fixed in tangible form through expression. Nonetheless, patent protection is not limited to the description of the method or process, but extends to the method itself.

A profound insight or a probing discussion can spark ideas and open up new areas of thought. Thus, appropriation here might not reduce the total, accessible, usable common. Appropriation would, in fact, contribute to the Lockean aim of facilitating fuller use of the common.

But it is not the author's appropriation, *per se*, that expands the usable common. It is her distinctive *use* of the idea or expression, for example, and its communication to others that opens the way to the new appreciation and discovery of other facts and ideas. Again, this use need not be exclusive or subject to an individual's exclusive control to achieve this effect. To the contrary, the effect is generally compounded the less exclusive and more public the use is. Hence, it seems that on the first characterization Lockean arguments for strong intellectual property rights do not gain any firm footing.

Of course, the first characterization strikes most as unacceptably Platonist. Many find it implausible that musical works, diary entries, novels, scientific articles, and logos all have independent existence prior to the efforts of authors, creators, or "discoverers." Yet, it may seem difficult to resist the view that there are propositions about the world (broadly construed) that can be discovered and then expressed. The view that most such propositions can be owned by individuals is unattractive and rather hard to entertain.<sup>59</sup> This may make the second characterization (ideas, but not expressions, are common) more attractive, since it distinguishes between the underlying ideas, facts, and propositions that lie in the common and the expressions of them that are the product of creative labor.

But before proceeding to the second characterization, it is important to take stock. This analysis of the first characterization of the common, in which all is discovered and not made, yields rather significant results. Even if the first characterization implausibly describes intellectual products themselves, wholly or in part, its analysis still matters. The analysis suggests some minimal limitations on the permissible range of intellectual property rights. In law, intellectual property rights often extend protection to the author or creator beyond mere protection against use and copying of the actual product itself. Often, they extend protection against the creation of related, derivative works. Although this is a fuzzy area, this protection afforded to the creator may encompass enough that, in effect, it appropriates the sorts of things that seem to fall within the first characterization (even if the primary product itself does not squarely fall within the first characterization). Copyright law gives the owner an exclusive right to the production of derivative works.<sup>60</sup> In some cases, the specific plot or character sketches are protected. In patent law, protection will extend not just to the specific patented invention but it allows the patent owner

<sup>59</sup> Certain sorts of personal, private facts might be thought to "belong" to individuals, however. Examples may include information about one's grooming habits, one's purely personal relationships, or one's medical decisions and prescriptions.  
<sup>60</sup> See 17 U.S.C. Sec. 106(2) (West 2000).

to prevent the use, manufacture, or sale of sufficiently similar devices, processes, or inventions. If the analysis of the first characterization is right, Lockean arguments may reject this wider range of protection that extends the rights of exclusive use beyond that of control over the specific product.

*The Second Characterization of the Initial Common (the underlying ideas but not the works themselves are in the initial common)*

The second characterization of the common may seem especially amenable to a Lockean justification for intellectual property rights. It fits nicely with commonplace copyright distinctions between ideas and expressions, where the latter, but not the former, are deemed ownable.<sup>61</sup> On this characterization, expressions seem to resemble agricultural products. There is commonly owned material – the terrain of ideas, facts, propositions – that an intellectual laborer works on. The result is new material that, like harvested crops, is the product of interaction between individual labor and the common. In this case, though, these products – the expressions – even enhance the value of the common by rendering it more accessible.

Nevertheless, there is a significant difference between intellectual property, on the lights of the second characterization, and the paradigm real property case. The contents of the intellectual common (here, the ideas) need not be exclusively owned or controlled to be made useful. With real property, though, the products of agricultural efforts arise from materials, such as land, that Locke suggests must themselves be exclusively owned to be properly developed and fully used.

One might object that this disanalogy between real and intellectual property has little significance. Why should it matter that the initial property to be worked on need not be exclusively owned to be made useful? Might it even cut the other way, given that, with intellectual materials (unlike real property), many can labor over the same stretch of the intellectual common, simultaneously and without mutual interference? My contemplation of an idea does not preclude your contemplation of that same idea. Furthermore, my expression of that idea (and even my ownership of that expression) does not preclude your independent expression of that idea. Since ownership of an expression does not preclude others from access to the same underlying terrain of ideas, doesn't that strengthen the argument for private ownership of expressions?

I believe that it does not. Although this feature is important, it does not supply a positive, initial impetus for privatization. As I stressed in Section II, Locke's argument begins with a common property presumption, grounded in positive moral (albeit theologically grounded) motivations. Deviations from this default position are justified when full and effective use of the property

<sup>61</sup> See, for example, 17 U.S.C. Sec. 102 (West 2000). In practice, though, copyright protection over derivative works may be in tension with this distinction.

requires private appropriation. If the Lockean position were the contrary, namely that one could come to own material unless such private ownership interfered with the use of the common, then the ability to work simultaneously and without mutual interference on the same stretch of the intellectual common would be more significant.

But as I understand Locke's approach (and what makes it attractive), it has a different cast. Reasons of equality ground a common property presumption that is overcome because the nature of the property suggests it. The fact that the contents of the initial intellectual common need not be exclusively owned or controlled to be made useful matters because it precludes appropriation of ideas from the common, as was previously discussed. It also provides reason to resist ownership of expressions that make use of this nonappropriable common; the ownership of the expression is not necessary to make full, effective use of the idea or its expression. By contrast, for real property, Locke's belief that the underlying land must be exclusively owned does some work to justify exclusive ownership of the products of labor on it — ownership of the products is connected to the project of efficiently managing the productive land.

The fact that intellectual products can normally be used simultaneously lends even stronger support to the Lockean argument against a natural right to intellectual property. Apart from the previously noted exceptions of works-in-progress, the products of intellectual labor need not be exclusively owned for proper use of either these products themselves or of the underlying common. Often the opposite is true: intellectual products are put to their best use through common use and contemplation. So, again, there is no reason emanating from the nature of the property itself and the conditions of its full, effective use for departing from the common property presumption.

But is the contrast between real and intellectual property fair in this respect? Are the products of labor on real property always or generally the sorts of things that need to be exclusively owned to be properly used? We might consider a range of cases. Locke's prominent case was agriculture — in which labor either improved land that needed to be, he assumed, exclusively owned, or produced crops like food that required exclusive ownership for proper use. Of course, the producer need not have been the exclusive owner of her products; others could perform this service. But, as earlier suggested, Locke seems to have supposed that exclusive ownership of the products was part of the process of managing the underlying property that, itself, required exclusive control. For Locke's prototypical case, then, there is a difference between agricultural, real products and intellectual products: The nature of the former property directly or indirectly generates a need for exclusive control, whereas the nature of intellectual products does not directly or indirectly require exclusive control for effective use.

What about nonagricultural uses? Suppose a landowner builds a mansion, a park, or a wide path up a mountain on his or her property. Does the owner have

less of an exclusive claim to these products because they, like intellectual products, are more amenable to common use? Without much stretching, one can construct a neo-Lockean argument to justify the intuition that the legitimate landowner can exert exclusive control over the mansion — albeit by appealing to different values served by some sorts of property than just the value of self-preservation that Locke himself invoked. The mansion can be occupied by many people at once. But one cannot reliably achieve the sense of privacy, belonging, and the sense of an identity that it is part of the function of a home to provide, unless one may exert strong control over the number and identity of its occupants. But the park and the path pose harder cases. Although it is not the typical view of Lockean rights, on the account I have sketched it might matter for Lockean purposes that such places would be significantly underused were their creator to exert control over them by excluding the public from their enjoyment and use. Lockean concerns about waste and about the full, proper use of the property would be activated.

Returning to the copyright case, suppose we thought of expressions metaphorically — as ways to get to ideas. An expression is like a new, convenient path forged into a mountain in order to reach its valuable, commonly owned apex. Other paths, perhaps less direct or elegant, could be forged, maybe with great difficulty. Although it seems permissible to make this path and to charge compensation for the work, we might balk at the pathbreaker's being able to block access indefinitely, at his discretion, or to charge high fees for access that would deter fruitful use. One would need to give a positive reason for the full private appropriation of the path. Mere appeal to labor and the existence of alternatives would not suffice. On Lockean grounds, the pathbreaker's ability to appropriate might be blocked or restricted to require public access so long as these public-oriented uses were on it.<sup>62</sup>

As must be evident, my argument leans heavily on the common property presumption. One might worry that this presumption, for Locke, arises in response to a pre-existing set of things that is not, initially, clearly associated with or specially connected to particular individuals. We all stand in the same relation, initially, to land, most facts, the laws of nature, and so on. So we all have an equal claim to them. It might be objected that, under the second conception (and the third conception) of the initial common, this equal relation does not hold with respect to intellectual products. Under it, there is a special connection between a creator and her product. Other people do not stand in the same relation as the creator to intellectual products.

<sup>62</sup> These cases are more complex than the analogous intellectual property cases. The landowner might need to exert control over access to the park or the path in order to ensure the proper management of the underlying land — unregulated use might damage the land. In the case of intellectual property, it seems less likely that permissive public access to expression will damage the underlying ideas or impede their apprehension. There are parallel hazards, though; overuse of some intellectual products may make them hackneyed.

Yet, there is another plausible understanding of the impetus behind the common property presumption, one that views the presumption as a reflection and an expression of the equal moral status of individuals. On this alternative explanation, it should matter less whether intellectual products were in a preexisting initial common or whether they were partly or wholly human creations. Creations could become part of the common – available equally to all – when their nature did not require exclusive use, to symbolize the equal moral status of individuals.

Locke's writings do not directly develop the foundations of the common property presumption. But there is reason to favor the second understanding. It, unlike the first, reflects the themes that initially animate Locke: the emphasis on equality, the connection between equality and common ownership, and reasoning about property in light of its nature – that is, in light of what is necessary to make full and robust use of it. The qualities of intellectual property strongly engage these Lockean themes – especially the facts that exclusive use is generally unnecessary for its proper use and that, to the contrary, its full exploitation commonly depends on nonexclusive use. These features generate moral reasons to regard intellectual products as part of the intellectual common, even if they are pure authorial creations.

Since expressions do not require exclusive use for full, effective use, the Lockean impetus to make full, robust use of property may suggest that although an individual's unique expressions of the ideas are not preexisting components of the intellectual common, these works should be viewed as incorporated into the common upon their creation. They are properly viewed as becoming part of the common for two reasons. First, their nature is like the nature of other things properly left in common, that is, compatible with joint use. Second, their becoming part of the common jibes with the motivation of Locke's account of property – that things should be shared, equally, unless there is a strong reason to do otherwise.

*The Third Characterization (the initial common is empty)*

On the third characterization, the initial intellectual common is empty. Nothing is used or taken from it when intellectual products are formed; intellectual products are pure authorial creations. This characterization does seem extreme – at least for many intellectual products and their subject matter, especially historical works and other nonfictional prose. Suppose it were, though, a plausible description of at least some intellectual products, perhaps abstract paintings. Such products would seem like paradigm cases for the more traditional version of the Lockean story: that property, and hence property rights, arise through and as a reaction to the justifiable exertion of self-owned labor. But this alone, as I have contended, does not indicate that intellectual products are strongly owned by their producers, since they do not have to be

exclusively owned for their proper use. The argument I have just given would instead suggest that they should be viewed as incorporated into the common upon creation, even if they do not exist in some initial intellectual common, prior to human efforts.

This may be an apt place to consider a final reply, one that appeals to another important Lockean theme to which I have not paid much attention. Perhaps the Lockean right of self-ownership provides a normative reason to characterize the common as including only preexisting things. If intellectual products flow entirely from the creator's mind and labor, then they might be viewed as an extension of the self.<sup>63</sup> They are owned not through appropriation but because the author is a self-owner and these are aspects of his or herself. If intellectual products do flow entirely from a creator, I think such an argument may indeed provide an additional, independent Lockean ground for property rights over works-in-progress, private works, and perhaps unpublished works (of the living) altogether. These works are not yet completely distinct from the person. But completion and publication of a work seems to effect a separation from the private self.<sup>64</sup> It is not clear that the values animating the right of self-ownership can sensibly be extended to protect individuals' ability to disperse aspects of themselves into the public domain while simultaneously retaining complete control over them.

By analogy, suppose a person grows an extra length of hair, cuts it off from his or her head, and deliberately throws it onto the beach for public view. Is it clear that he or she should be able to prevent passersby from touching it or using it? Suppose this person discards many such lengths of hair onto the common, creating aisles of long, silky hair. Does the right of self-ownership really yield a natural right to restrict access to or control what is done to these clumps? How many such hair-aisles may she introduce into public space yet continue to subject to her control? Of course, when the hair is still attached to the body, there are reasons associated with the values underlying self-ownership to permit the owner to restrict access to it, to protect his or her autonomy and physical security. Such reasons hold even if the attached hair has been fashioned into an artwork or sculpture that others might appreciate. But once a person has deliberately separated from his or her products, it is harder to believe that the right to self-ownership grants rights to continue to control these things. To permit that control would be, in part, to grant a person exclusive

<sup>63</sup> Locke's remarks at II.44 might be read this way ("... though the things of Nature are given in common, yet Man had still in himself the great Foundation of Property: ... that which made up the great part of what he applied to the Support and Comfort of his being, when Invention and Arts had improved the conveniences of Life, was perfectly his own, and did not belong in common with others.")

<sup>64</sup> There are difficult questions about what constitutes publication, especially in digital media where web sites may be under constant construction and revision. These questions would require further discussion. One possible criterion might be whether the material has been deposited within the public domain or distributed to a wide group of people, as opposed to a discrete group of friends or associates.



control over an aspect of the public domain or the common. A person with such rights could introduce things into them, occupy their space, and control what was done to them. Such rights of control seem inconsistent with the norms of common ownership – those of free public access and use that govern what remains of the public commons.

Granted, an important asymmetry remains. Separating off one's body parts and putting them on display is not a typical part of individual development or self-expression. By contrast, creative expression in the public forum often does contribute importantly to the development and full expression of the self. It might be plausibly submitted that publication – unlike the public scattering of body parts – may be intimately connected to values that the right of self-ownership protects. Still, I do not think this asymmetry makes a salient difference here. To make such a difference, not only would publication have to be essential to self-development, but publication *coupled with strong rights of control* would have to be essential to self-development. The connection between self-development and public expression may undergird fundamental protection to publish and distribute creative materials into the public common, or the public culture. To develop oneself and one's talents fully, one may need the freedom to display and expose oneself and one's intellectual products to others. One may also need the opportunity to provoke and gauge the reaction of other people – just as if there were a connection between self-development and body-part scattering, this might yield a right to use the common in a way that could not be abridged by public regulation. The further right to control others' use, however, would follow only if full "use" of the self required control of others' use of the published material. This, it seems to me, is an implausible claim. For these reasons, I resist even the suggestion that the third characterization is fully amenable to Lockean arguments for the normal panoply of strong intellectual property rights.

#### IV. Conclusion

Although my arguments do not land intellectual products conclusively in the common property camp over the private property camp, there are two main Lockean arguments for resolving the balance of reasons in favor of common ownership. First, in contrast to the assumptions about real property and its effective use, the full, effective use of intellectual works generally depends upon *shared* use, not exclusive, private use. If effective exploitation of the grant of the world is a value that propels Locke's arguments for ownership, then, since free, shared use of intellectual products contributes to their effective exploitation, this sort of property seems unamenable to private appropriation that manifests in strong rights.

Second, the interpretation that I have urged suggests that the place of common ownership in Locke's scheme cuts against the argument for private owner-

ship of intellectual property. Common ownership, for Locke, is not, I think, best seen as a mere starting place or an easily overturned default rule. It is also a concrete expression of the equal standing of, and the community relationship between, all people. Important resources may not be monopolized without good reason. They should, if possible, be available to all for use freely. The symbolic significance of common ownership may be affirmed in a more manifest way within the intellectual property domain than with much real property. That is, where real property is appropriable, it may matter even more that intellectual property is not appropriable, so that the common ownership foundation behind property rights is not obscured or forgotten. Retaining some explicit common ownership underscores the common grant of the world and serves as a reminder of our equal status.

These Lockean arguments leave open the possibility of other arguments for strong privatization or for the public's consenting to create private intellectual property. But the force of my arguments is not restricted to undermining Lockean defenses of most strong intellectual property rights. Their further implication is that those who do subscribe to initial principles of common ownership may not just point to these other possible foundations for private intellectual property rights. They may also have to show that these alternative grounds offer sufficiently strong and well-supported reasons to override the value of the tangible symbol of equality manifested by the common ownership presumption.