Locke’s Property Argument and Intellectual Property Rights
Introduction

Locke’s argument for private property comes from natural reason, as well as revelation. His argument for incorporation of that which is public to that which is private rests on the mixing of labor with some public thing such as land or goods. This reasoning leads Locke to an account of why it is unjust for one to take another’s property without consent. The purpose of this paper is to determine if Locke’s argument can extend to intellectual property which is always capable of being infinitely reproduced without the consent of the owner. Intellectual property, or the labor of one’s mind, is never addressed directly in Chapter V of The Second Treatise on Government. This fact forces us to examine seemingly unrelated parts of his argument to determine if just compensation is due to the claimant of intellectual property, and if so for what reason it is due. Ultimately, we will find that Locke’s argument for property is neither effectual nor ineffectual for defending intellectual property. The properties of intellectual property are too bizarre to be addressed with what Locke leaves us. However, Locke’s consent based argument for allegiance to your state and its laws does provide support for defending intellectual property rights if your state’s legislation defends them. To begin we briefly describe Locke’s argument for private property, and the sources of value.

Property, Waste, Value and Money

Locke’s argument for private property is as follows: God has given us reason to make the best of our lives and the earth to ensure our lives are preserved. But, nature is originally given as a thing which we all have a common claim to so how is it that we can take anything for ourselves alone? There exists at least one thing in nature which no other man can claim and that is our self. Through the gift of reason and liberty we have the ability to do things. Some of those things are the acts of preserving our lives and included in that is the ability to nurture ourselves from our
surroundings. In order to nurture ourselves from our surroundings we need a mechanism for gathering from those surroundings and that mechanism is our labor. The act of laboring is an act of mixing oneself with that which is labored upon. In mixing ourselves with nature through labor we thus make a legitimate claim to ownership of what has been created. That ownership is justified by our self being a part of the new thing, and us having full claim to anything that is us. So through labor, we mix ourselves into the thing and create our own property. Simple enough and the argument extends to all things corporeal including not only sustenance but also land, which when labored upon becomes one’s own. (Chap. V, Sec.25-27 & Sec. 32-35)

The above argument provides fine reasoning for one to have a natural right to their things, but it does not address the issue of scarcity. To address scarcity, Locke incorporates a maxim through reason to limit self-interest. The maxim is that one shall only have what one can use before spoilage and this is reasonable to the self-interested man as they would have rational desire to have anything that is no longer of use to them. This prevents someone from taking too much from the natural stock of the world in both cultivating land and gathering from it. Although this does not account for population explosions, we cannot hold that against Locke for he did not foresee the growth potential of mankind. (Chap. V, Sec. 31)

Value, for Locke, comes about from both the land’s intrinsic value and the value instilled in it from our labor. The claim is that what nature provides is nearly, but not completely, useless to man until man mixes his labor with it. He goes so far as to claim that the ratio of value derived from labor and land is 100:1 and this reasoning makes sense when one considers just how valuable some land in Myanmar is to an individual in America in comparison to the garden in that individual’s back yard. The land in Myanmar is far harder to cultivate than the land in the
back yard due to proximity, thus the back yard offers much more utility and relative value to the individual. (Chap V, Sec. 40)

Considering the land situation above and the maxim of not wasting, it would be absurd for someone to own land which they cannot have access to, but it is common, in Locke’s time as well as our own, for people to own massive quantities of land they don’t and can’t use. Locke explains this phenomenon as admissible through the creation of money. For Locke money (gold) contains no intrinsic value but is instead a tacitly consented upon store of value that provides a medium of exchange for goods. Money’s being an exchange mechanism for goods, and a good’s value being derived from labor primarily, turns money into a sort of labor hour storage device without an expiration date. Money transfers labor hours between people without wasting the goods those labor hours produce, thus, defeating the problems of spoilage and waste. This allows our multi-national landowner to own the land he cannot use so long as the individual has the intention to trade the land for labor hours (money). Having exposed Locke’s system for property and trade in general we can investigate how a Lockean argument for property would affect intellectual property (from here on IP). (Chap. V, Sec 46-49.)

**Intellectual Property**

In this section we will be exploring the consequences of the Lockean argument to determine if it leads us to any clear answers about the IP issue. But, in order to do so we need to name and define four types of property rights. **Copyrights** refer to the ownership of a thing which exists as a body of ideas more so than a corporeal thing, like a book or song. In contrast, a **patent** is generally a method of creating, or the schematics of a thing which will take an identical physical form. There also exist **trademarks**, which are intended to allow a manufacturer to
differentiate their product from others. And finally trade secrets which are similar to patents in that they tend to pick out a process for manufacturing but instead of being a legally cataloged method with an expiration date, as patents are in American law, they are legally binding contracts preventing employees from taking their methods and their clients, a tactic referred to as moonlighting. Having defined the four types of IP we can examine the difficulties in defending them using the Lockean argument for private property.

The first thing we have to recognize is what the composition of any piece of IP is. Any piece of IP is composed of an idea, something without any corporeal properties. IP, not being corporeal, doesn't lie in the realm of immediate common goods. It instead lies within the mind of the individual, sometimes in the mind of multiple individuals simultaneously. The thinking involved in creating an idea should be considered to be the labor. It appears to be entirely composed of the labor of the individual, and if this is true, then according to Locke’s argument it belongs entirely to the individual.

Copyrighted material\(^1\), such as a book, begin as ideas and are brought to “life” through the physical embodiment of that idea in some sort of language, be that language digital, audible, visual or written. We have taken something that was purely labor, and mixed it with something that was at one point a common good. In one way this is the same as the case of tilling land, it is a mixing of labor with the world around us. But, instead of the good desired existing in the land itself and being freely accessible to the first to lay claim, it exists within us and only comes to exist in the world after we have decided to create it. Only at that point does it become accessible to any other individual.

\(^1\) For ease of argument we’ll try to confine our discussion of IP to copyrights alone. Where certain intrinsic differences exist between the types of IP that would affect the argument, it will be clearly stated which types of IP we are talking about and why the other type/s of IP are non-applicable.
Next we have to consider, “what was the motivation for turning an idea into a body?” and there are two possible answers to this. The first is that the creator made the piece for the creator's sake alone without the intention of offering it to any other individual. The second is that the creator made the piece for the sake of others. It's been introduced to the world which we share to be shared. If the second option is the reasoning behind creation, then it would have been produced either for the benefit of others, the benefit of the creator, or the benefit of both. In the case of a sharing of an opinion to prevent or provoke another to do or not do some action, the benefit is to the recipient and not the creator. In the case of giving a letter to a king urging him to commit suicide, the benefit is only to the creator alone unless he is mad. In most cases, the piece created is intended to be shared, but only if compensated for the piece, we'll focus on these cases as they are what pertain to IP issues.

Copyrights, patents, and trade secrets\(^2\) are infinitely reproducible without taking anything corporeal from the creator. It's possible to imagine that once the creator has sold the original copy, the creator has been justly compensated, and if the creator was wise, he would have sold the product at a price where just compensation for labor and good was attained. Had this product have been any product other than a form of intellectual property, the rights to do as one wills with the product would have been transferred with the product. If I sell you a herring, it's yours to do as you wish, whether you want to share it or not, but if I sell you a copyrighted book, you are legally prohibited from sharing the book for your own financial gain, as well as being prohibited from copying the book and sharing it with others for NO financial gain. The argument

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\(^2\) Trademarks don’t quite fit into this category. Their purpose is to differentiate products and to serve as a mark of authenticity. Whereas, the purpose of the other three is to prevent an idea from falling into someone’s hands without just compensation.
supporting this is that no rational consumer would purchase a thing they could get for free, and this would cut into expected, and maybe deserved, financial gain of the original creator.

This leads us to a split in the Lockean argument for property rights. On the one hand, Locke would want to say that the book creator deserves just compensation for the labor, and sharing a good through reproduction takes away from this. On the other hand, Locke makes a specific reference in section 29 of Chapter V to those things which he thought were infinite. The reference is to a fountain and Locke makes the claim that no matter how much someone took from it, it could harm no other man because there would be plenty left for others. This brings us to an odd conclusion about IP. It is something that only comes about from labor, but once it is created it is as infinite as the fountain. It is both something which deserves compensation and something that can harm no other man in the taking of it by an individual. But clearly, if it were to be taken prior to just compensation being met, it would do harm to another man.

Locke could have solved this riddle if he had given us a means for determining when just compensation is met. If he had given some grand game theory pricing system that was intended to determine the relative price of any good being traded based on costs of production including labor hours forgone towards some other end, he could come to some sort of just compensation price for any piece of IP. But, alas, he has not provided any such scheme and this opens up a further question about the hoarding of goods when a good ceases to, or does not have, any intrinsic value.

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3 I’m thinking of something similar to the deer/beaver trading game in Smith but on a much grander and modernized scale.
For the sake of fun, we will pretend Locke had given us a rule for just compensation, and then try to determine if Locke would have allowed an individual to hoard this good after compensation had been paid. The only thing we can compare our situation to in Chapter V is the origin of money. Money is the only thing which Locke will justify as hoardable. Hoarding any other good which is of no more use to the owner is considered unreasonable and thus violates the Law of Nature by taking from another individual. IP, like money, does not spoil. But, unlike money, not sharing IP is a damage to any other individual who could have benefited from having a copy of the IP and IP does not suffer from the problem of scarcity which the types of money Locke refers to do. These seem to make IP more akin to the Fountain than the gold piece. If this is accurate, then I believe that Locke would have only supported IP to the point of a reasonable compensation being met and any further hoarding of the object would be unjust. But, this is all a counter-factual experiment so it is of no use in determining Locke's position on IP.

In the end of Chapter V at Section 50 we are finally given Locke's position on IP, and that position is to hold no position. Instead Locke tells us that if we consent to a government, then we have also consented to its laws. So if IP rights are enforced by the government and you consent to that government, tacitly or explicitly, you ought to obey those laws. If IP rights are not enforced by the government, then copy away.

**Conclusion**

Sadly, the properties and origins of IP are too complex to be addressed directly by Locke's arguments in Chapter V. IP is created first from pure labor and then put into the common world through labor mixing with earth. It does not spoil. It is infinite. It deserves compensation.
It harms others when it is hoarded. It is Bizarre. But we can at least come to know that the Lockean would support, or not support, IP depending on the laws of his land.