# Owning Ideas: The Challenges of Intellectual Property

Many modern businesses make their profits by utilizing their control of intellectual propertyof various types. Among other things, this includes:

* **Copyrights** to books, movies, and music that grant the firm the exclusive right to sell copies of creative work.
* **Patents** to inventions as diverse as pharmaceutical agents and medical technologies, computer software, phones and computers, methods of transportation, food products, household appliances, and so on.
* **Trademarks** to symbols or slogans such as the McDonald’s arches, Nike swoosh, Apple and Google logos, and the Coke and Pepsi labels.
* **Trade secrets** involving manufacturing methods, algorithms, investment and marketing strategies, and personnel management, among many other things. Arguably, this may include individual citizens’ right to “privacy.”

In very general terms, we can think of **property** as collection of legal rights. So, for example, when you “own” your house, you get to enter and leave it at will, can make various improvements to it, and so on. Importantly, you can also choose to *alienate* your right to it, and sell it to someone else. However, every society limits property rights in various ways. For example, many communities forbid homeowners from painting their houses purple, grazing goats on the front lawn, building six-story houses, and so on. One important (and sometimes overlooked) consequence of this view is that one can’t “own” something until there is a state (i.e., a government) that can both pass laws, and enforce those laws. Without *some* sort of a governmental police force, peoples’ “rights” to their houses would be meaningless, since there would be no principled way of settling peoples’ competing claims to various things. This also means that “owning” a house will mean different things in different places, since the nature of property rights will depend on the particular policies adopted by the relevant governments.

Figure 1 Common trademarks.

**Intellectual property** is importantly different from “tangible” property such as houses or goats. Specifically, intellectual property is “non-exclusive,” in that one person’s using it does not prevent *another* person from using it. So, for example, both you and I can read the same book, use the same software program, or take the same antibiotic. In this lecture, we’ll look two related questions regarding intellectual property. First, from a big picture perspective, how *should* the government define intellectual property? Second, to what extents are *individuals* morally obligated to obey the current laws as they relate to intellectual property? The two most common theories of property are the **Lockean (or libertarian) theory of property** and the **utilitarian theory of property.** Both theories have played important roles in shaping governmental and judicial approaches to property, but (as we will see) both have well-known limitations.

## Lockean and Libertarian Theories of Property

**Property as a Moral Right.** According to the Lockean account of property (named after the philosopher John Locke, and more recently defended by the libertarian philosopher Robert Nozick), the right to property is a fundamental *moral* right of individuals, similar to “rights” to life or liberty. When we make laws regarding property, we should aim to capture this fundamental moral right as closely as possible. One acquires a right to property, according to Locke, by “mixing one’s labor” with parts of the natural world, and thus making it “yours.” So, for example, I can acquire ownership rights to a (previously owned) lump of stone by making it into a statue, or to a grove of trees by cutting them down and assembling them into a cabin. In the final draft of the U.S. Declaration of Independence, the Lockean notion of rights to “life, liberty, and property” was famously replaced by “life, liberty, and pursuit of happiness.”

**The Lockean Proviso.** The ability to acquire ownership over parts of the natural world is importantly limited by the **Lockean Proviso**, which requires that one always leaves “enough and as good for others.” So, for example, I couldn’t claim “ownership” rights to the world’s water supply by dumping a glass of wine into the ocean, and it would be immoral of me (through clever business acumen) to acquire *all* of the world’s stone or lumber supplies, because this wouldn’t leave any for others. This has several important consequences for legal property rights. First, it means the government is morally *obligated* to prevent people from acquiring monopolies over natural commodities such as water, oil, coal, and so on. Second, while people have some right to monopolies over the products they have invented or created, these monopolies must be time-limited. The basic idea is as follows: when an inventor first makes a product, they aren’t *harming* others by denying them use of it, since the product wouldn’t have existed if it weren’t for the inventor’s labor. However, after some time has passed, it becomes increasingly likely that *someone else* would have invented something similar. At this point, then, people *are* being harmed by the monopoly. This provides a justification for placing time limits on copyrights, patents, and so on.

**Property Rights and Taxation.** In the modern world, of course, there isn’t any unowned land for people to go “mix their labor with.” So, how is it possible for us to leave “enough and as good for others”? More specifically, how can *current* property owners meet their obligations toward new members of society (mostly children, but also immigrants) who don’t yet have any property? For many libertarians, the answer involves providing them with the resources to find productive employment in a market economy. This explains why the government isn’t “violating property rights” when it levies taxes to fund things like education and health care for children (which they’ll need to find employment), and even things such as defense, policing, and infrastructure (all of which the market economy depend on).

**Strengths and Limitations of the Theory.** The Lockean theory connects the right to property with fundamental rights to life and liberty, which may help the explain the *importance* of property rights to many people (both rich and poor). It also sees moral property rights as an important limitation on government power against individual citizens or firms, and affirms peoples’ rights to use their property “however they see fit,” even if this isn’t what society would prefer. However, it has a number of problems in accounting for intellectual property. First, there is often a big disconnect between “who labored on something” and “who owns it.” For example, consider the case of a software development team (or band, movie crew, etc.). In all of these cases, we award credit to the “creative” force behind the project, even if this person didn’t do nearly as much labor as others. Second, the libertarian account doesn’t deal well with the way we actually handle monopolies for new inventions, since it seems to imply the length of patents (and the extent to which one can profit from it) should depend on how close *others* were to achieving similar results. Instead, we nearly always award a full copyright/patent to the *first* person that achieves the result, and she or he gets *all* of the profits. Finally (and perhaps most seriously), the Lockean doesn’t provide any way of balancing property rights against the other sorts of goods important to both society and business. In extreme cases, Lockeans would seemingly be willing to choose a poor, highly unequal society over a rich, equitable one, if the only way to “get” to the latter society involved violating property rights.

Figure 2 Einstein in the 21st century (from xkcd.com).

## Utilitarian/consequentialist Accounts of Property

In contrast to libertarians, utilitarians (and consequentialists more generally) do NOT think that there is a fundamental moral right to property. This follows from a more general feature of utilitarian thinking: they don’t believe that there are fundamental moral “rights” to anything. Instead, utilitarians hold that legal rights to property (like legal rights to anything else) ought to be designed to produce the best overall consequences for society: they ought to maximize net happiness and minimize net suffering. In very general terms, utilitarians think that laws protecting property are justified because they encourage *investment* and *innovation.* After all, there would be no point to delaying consumption (or working hard) if you didn’t have some guarantee that you would benefit (in the long-run) from doing so. The U.S. Constitution suggests a utilitarian conception of property rights, at least as it comes to intellectual property: “Congress shall have the power. ... To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective discoveries” (Article 8).

**Designing Effective Laws.** Like libertarians, utilitarians recognize the importance of regulating monopolies. However, they have very different justifications for doing so. Where libertarians oppose monopolies because they prevent other people from exercising their rights to acquire private property through labor, utilitarians oppose them because they have *bad effects:* they raise costs for consumers, they serve to discourage innovation and competition, and so on. Also like libertarians, they generally hold that inventors, writers, and other “content creators” deserve to profit from their creation. For utilitarians, however, the “correct” time period for a patent/copyright depends not on the amount of labor that went it to it, but on the incentives it provides to *future* content creators. Ideally, utilitarians want to design a system that balances two competing goals: (1) providing adequate monetary incentives to encourage innovation and creativity and (2) making sure society *as a whole* benefits from new inventions.

**Strengths and Limitations of the Theory.** The utilitarian account can (correctly) explain why property rights don’t always track “amount of labor,” and why the law rewards being *first* to make an invention matters so much more than being a “close” second. It also does a better job in explaining why/how it is sometimes OK for society to weaken property rights to pursue other goals relating to market efficiency or social equality. This sort of “flexibility” is also the theory’s weakness, though. In contrast to the libertarian theory, the utilitarian theory gives no “guarantee” that any particular property will be respected. If society’s need is great enough, then individual property rights will need to bend.

## Are Current Laws Justified? Is it OK to Break Them?

Both libertarians and utilitarians favor laws protecting intellectual property, and reject the “Marxist” idea that property laws are *inherently* unjust and exploitative. However, in recent years, a number of scholars have argued that current intellectual property laws give the owners toomuch power, and cannot be justified on either Lockean or utilitarian grounds. These debates are on the “cutting edge” of both business ethics and legal scholarship:

**Media Piracy and the Public Domain.** Since the 1980s and 1990s, illegal piracy of software, music, movies, books, scientific articles, and other media has become increasingly common, both among individuals and in the business world. Media and software companies have argued that governments ought to provide them with increasingly strong tools to combat this. Among other things, this has included laws requiring that Internet Service Providers hand over user data, punishing those who break (or attempt to break) encryption, and imposing larger and larger penalties on those who break these laws. Large media companies have (successfully) lobbied the EU, US, and other organizations to extend the life of copyrights to prevent older material (Mickey Mouse, Superman, Hemingway novels, scientific research, etc.) from entering the public domain. Critics have argued that this harms both individual consumers and society at large, by making it more difficult for consumers to make use of content they have (legitimately) purchased, and by stifling creative/novel uses of old content.

**Rich and Poor: Intellectual Property in the Developing World.** Another major issue has concerned the effects of intellectual property laws on people living in poor, developing nations. Current trade treaties often require poor nations to obey IP laws/favored by rich nations, as the price of lowering other sorts of trade barriers (e.g., those regarding commodities or manufactured goods). So, for example, these treaties may commit poor countries to refrain from making generic versions of expensive life-saving drugs, or to extend copyrights and patents on scientific/artistic work and computer software to match those in developed nations. These policies may make it much more difficult for most consumers in these countries to get access to quality medical care or education. On the other hand, developed countries have often pushed developing countries to open their markets to Western media and technology, which may threaten existing cultural/ethical norms (often without anything to replace them).

**So, What Does This Mean for Me?** There is broad consensus that the law ought to give substantialprotection to intellectual property, both because this respects the creator’s moral rights to the fruits of their labor (the Lockean account), and because it encourages innovation, investment, and creativity (the utilitarian account). Moreover, most people would agree that we have a *prima facie* obligation to obey the law, especially where these laws are or less “just.” This suggests, at the very least, the individuals and businesses shouldn’t violate IP laws without having *good reasons for doing so.* Problems arise, however, when we try to get more specific than this, since there is considerable disagreement over the extent to which *current* IP laws are just, and on what might count as a “good reason” for breaking them. So, for example, many people are very sympathetic to doctors use of “illegal” generic drugs to save lives in developing nations, or a poor student using a pirated copy of an otherwise unaffordable textbook; however, most of us are much less sympathetic to a business that steals technologies using corporate espionage, or to someone who sells pirated copies of music or movies.

## Review Questions

1. What are the major differences between the Lockean and utilitarian accounts of property? Do you think that one is clearly superior to other? Or, if you are a “pluralist,” how do you think we can combine the theories?
2. Why do Lockean theorists oppose (certain sorts of) monopolies? Why do utilitarian theorists oppose them? Can you think of any real world case to which this might be applicable?
3. Under what conditions, if any, do you think it is OK for businesses or individuals to break IP laws? Defend your view (and make sure to provide some examples.)

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