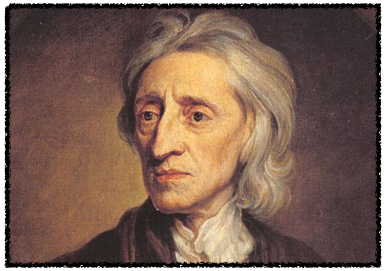
The Justification of Private Property

John Locke



Although everything in nature belongs to "mankind in common," "there must of necessity be a means to appropriate them some way or other before they can be of any use at all beneficial to any particular man" (235)

> What belongs to each of us is our "own person" and the "labour of [our] body and the work of [our] hands we may say are properly [ours]. Whatsoever, then, [we] remove out of the state that nature hath provided and left it in, [we] hath mixed [our] labour with, and joined to it something that is [our] own, and thereby makes it [our] property"

Self-ownership: "each person enjoys, over himself and his powers, full and exclusive rights of control and use, and therefore owes no service or product to anyone else that he has not contracted to supply."

So while the goods of nature are common, by using one's own effort to gather or modify them, one "can have a right to what this is once joined to, *at least where there is enough, and as good left in common for others*." (235)

> **Nozick calls this the *Lockean proviso:*** Nozick interprets it to mean that the newly private property is only justified if it doesn't make others worse off than before it became private

Locke again: No one can deny that the nourishment we get from e.g. gathered common apples is our own, but when did it become ours?

- After digestion?
- After processing (boiling)?
- Bringing the apples home?
- Picking them up?

Locke argues that "'tis plain if the first gathering made them not his, nothing else could. That labor put a distinction between them and common; that added something to them more than nature, the common mother of all, had done, and so they became his private right" (235)

If we cannot appropriate from the commons that which we need, we will starve, "notwithstanding the plenty God had given [us]" (236)

We don't need "express consent" from others for this

> **Aside:** Can we agree with Locke's conclusions but not his model?
>
> > That is, what other reason might be given to take from the commons, but which doesn't lead to full-blown private ownership?

Locke says that we can't take so much that it spoils: "As much as anyone can make use of any advantage of life before it spoils, so much he may by his labour fix a property in; whatever is beyond this, is more than his share, and belongs to others." (236)

Enclosing the Commons: "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does as it were enclose it from the common" (236)

> "Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left; and more than the yet unprovided could use."

Enclosing the Commons transferred commonly owned land to private owners (1400s to early 1800s)

Some (e.g. Marxists) argued that this process forced people from the lands into industrial labour

Locke: Although "God gave the world to men in common," the use of one's labour on the common ground entitles the labourer to their fruits, so long as …

> In cases where there are many people, under some government, some land can be left unappropriated by general agreement, as reflected in law.
>
> > Even so, the property is not common to all humanity, but some local or more general government

Central theme: Labour, by its very nature, creates private property: "the condition of human life, which requires labor and materials to work on, necessarily introduces private possessions"

When the world was unsettled, any person's appropriation left enough for others: "supposing the world, given as it was to the children of men in common, we see how labour could make men distinct titles to several parcels of it for their private uses, wherein there could be no doubt of right, no room for quarrel" (237)

> Labour trumps "the community of land. For it is labour indeed that puts the difference of value on everything; and let anyone consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labour makes the far greater part of the value—….we shall find that in most of [cases comparing the value of land to the labour invested in it] ninety-nine hundredths are wholly to be put on the account of labour" (237)

Locke cites as evidence that modern countries, by recognizing the proper dominion of other nations over certain lands, have "given up their pretenses to their natural common right, which originally they had to those countries" (238)

The beginnings of trade: Most of the things that are useful are perishable

> By contrast, "gold, silver, and diamonds are things that fancy or agreement have put the value on more than real use and the necessary support of life" (238)

Taking too many perishable things is foolish and robs others of the common share

> But trading these things e.g. "for nuts that would last good for his eating a whole year, [does] no injury; [it does not waste] the common stock, [and] destroy[s] no part of the portion of goods that belonged to others

"Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much as these durable things as he pleased, the exceeding of the bounds of his just property not lying in the largeness of his possessions, but the perishing of anything uselessly in it."

"And thus came in the use of money—some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life" (238)

Without the possibility of trade, there would be no need for large farms or ranches:

> "Find out something that hath the use and value of money amongst his neighbours, you shall see the same man will begin presently to enlarge his possessions"

So Locke accounts for the vast possessions of some, even granting his proviso, as arising from the ability to trade perishable goods for a non-perishable measure of their value

Marx and Locke's Labour theory of value: If the (surplus or trading value) of anything is given by the labour expended in producing it, then the profit made by capitalists amounts to stealing the worker's contribution

Chapter 18: The Information Age: Property and New Technologies

The Apple Versus Microsoft Case

"look and feel" copying and *Apple versus Microsoft*

> The first Macs had "pull-down screens or windows, windows within windows, and a variety of icons for a variety of different tasks (e.g., a file folder represented a file and a trash can represented discarded files)"

Microsoft then introduced Windows, an overlay on MS-DOS, that included many of the features in the Mac GUI

> Apple argued that the look of its GUI should be protected by copyright
>
> > It also argued that the "feel" or dynamical behaviour of the various "buttons" should be protectable

"The crucial question is this: If we consider all of the individual items that Apple claimed Microsoft copied, whether or not protected by copyright, can the *combination* of those in an artistic or creative manner be protected?" (209)

"Is there any way to argue that one or the other side was ***morally right*** in its claim, even though the copyright laws did or did not grant the disputed property right?" (210)

Utilitarian considerations: Are there greater benefits to society by *giving* legal copyright protection to the "look and feel" of software?

Rights-based considerations: Do those who create software with a particular look and feel *own* rights to those designs?

The "Information Age" is often touted as making available information available to almost anyone (e.g. Wikipedia)

At the same time, businesses have come to see much information as private (intellectual) property

Knowledge is different from tangible items, such as TVs, or even some intangibles, such as money

If I take your TV or money, you no longer have the item or spending power

However, if I learn what you know, you still have that information

Information and knowledge can give businesses competitive advantages

Information and knowledge are also costly to acquire and produce

So if my company goes to a lot of economic trouble to produce knowledge, techniques, etc., letting others have that erases my competitive advantage

It even puts me at a disadvantage, since I had to do the work for which other companies are benefiting

Moral issues:

"Who owns knowledge and information that have been developed by people in a corporation? Who owns knowledge and information about a corporation? From a moral point of view, what may be kept secret and what must be disclosed? Does it make any sense to talk about owning ideas?" (210)

What is property (ownership)?

"best analyzed as a *bundle of rights*" (211)

Different societies put different rights into the bundle

Tangible property: *things one can touch*

Common rights to tangible objects: exclusive use for one's (legally acceptable) purposes

- the right to sell/trade
- destroy
- keep, etc.

Real property: land, buildings and other additions on the land

Exclusive use is common, though owners are restricted about what they can do on that land

E.g.: toxic materials, types of vegetation, rusty cars, etc.

Rights to trade and sell are also common

Real property has a different bundle of rights than tangible property

Intangible property: e.g., "money, stocks, bonds, and other financial securities" (211)

While tokens of such property (e.g. coins, papers, certificates) are tangible, the power they confer is not

Still, if one loses the token, then one no longer has the power

Intellectual property: bundles of rights for intellectual products

Moral issues:

"Can one properly own ideas, or mathematical equations, or scientific formulas, or facts about the world?" (212)

There are four means for expressing and protecting bundles of intellectual property rights: trademarks, trade secrecy, copyright, and patent.

I. Trademarks

Defined by the U.S. Patent and Trademark office as: "a word, name, symbol or device which is used in trade with goods to indicate the source of the goods and to distinguish them from the goods of others." (212)

Registered trademarks involve "the right to prevent others from using the same or a very similar type of symbol to represent their products" (212)

Trademarks are protected indefinitely

Copying someone's trademark can be unethical, since it implies something false: the branded object is produced by the genuine trademark holder

II. Trade Secrets

Broad sense: any knowledge produced by a firm which it treats as proprietary

Narrow sense: a way to protect a firm's inventions or other creations, that differs from patents or copyrights

e.g., trade secrets are not revealed, though copyrights and patents are

Trade secret protection doesn't prevent others from creating the same idea

It is common for companies to treat inventions, etc. as trade secrets until they are seen to be worth protecting by patent

Factors in determining whether something is truly a trade secret:

1. The amount of trouble a company takes to protect information secrecy
   - restrict access
   - employees with access have to sign NDAs
2. The amount of resources devoted to creating the information
3. The value of the information to competitors

CASE 1: John Knosit CDE Electric case

Is John morally justified in developing the new filament for X Electric?

No: Utilitarian argument

Yes: Knosit is the real inventor, and the company only has the "shop right" to use it, but can't prevent Knosit from taking the knowledge with him

To resolve this:

Patents
NDAs

Abuse of NDAs:

Coercion into signing unreasonable NDAs

Sign NDAs only after leaving the firm

"Interestingly, the formula for Coca-Cola has never been patented precisely in order to keep it secret. Chemical analysis has not yielded the formula. The formula for Coca-Cola is one of the best-kept trade secrets in history." (215)

Companies don't have the right to keep secret information that might benefit society, even though it might harm the firm: e.g. knowledge about better batteries for electric cars kept secret by an oil company

CASE 2: Jane Berry case

Is Jane morally justified in using the customer list from her work at PG Refrigeration to sell EB Refrigeration products?

CASE 3: Henry Mangel case

Henry applies management techniques he learned and adapted while an assistant HR manager with DB Construction to employees at his new firm, GG Construction. Is he morally justified?

The skill we develop on a job is a part of us and so belongs to us

Some comments:

A. The duty not to sell or give away a firm's trade secrets is a moral duty, but attempts to make it a legal requirement haven't worked very well.

- Some employers have tried to prevent their employees from working for competing companies for two years after leaving
- These agreements violate the rights of employees to choose where they will work, and so are usually not upheld in court
- To prevent employees from revealing trade secrets, firms will emphasize ethical duties and sometimes offer consulting fees, retirement benefits, etc.

B. Appropriate trade secrets

The salaries of top executive are not trade secrets, since the employee is free to share that information

Shareholders will need such information, and such "is now a matter of public record" (217)

Balancing: A firm's desire for secrecy needs to be measured against

- the right of employees to freedom of speech and movement
- the needs of government, stockholders and the public to knowledge things that affect them
- "the right of society in general to benefit from socially useful information and knowledge" (217)

III. Copyrights

Here the firm gets protection for its inventions, etc. after making their contents known

We can't own ideas, since others may have the same ideas and create them independently

e.g., Descartes before the horse

But we can have rights on how those ideas get expressed

E.g., if I write a book, play or poem about the idea of love, then, if I copyright it, my own expression of that idea gives me "the exclusive right to sell that material and to profit from it. Others are prevented from copying it for sale and from claiming that the words are their own" (218)

Copyright protection was first created for printed word expression, but has been extended to "recordings, works of art, films, video tapes, and computer programs" (218)

Copyright protection isn't indefinite: "U.S. copyright law formerly protected copyrighted material for an initial period of 28 years, renewable for an additional 28 years. In 1978, the period was changed to life of the author plus 50 years, or 75 years for a work for hire by a corporation" (218)

1995 U.S. law was changed to match with international copyright agreements: protection up to 70 years after the author's death

Corporate authors were now protected for 95 years

So what do you own when you buy a tangible copyright-protected book, DVD of a movie, computer program on a disc?

You own the physical object and can sell, trade or destroy it

You don't own the story itself, the information or expression of ideas contained in these tangible object

Fair Use: Allows one to legally copy portions of some expression, usually for personal or educational, but not commercial, use

IV Patents

"Patents cover … inventions, machines, processes, or composition of matter" (218) and give their owners "exclusive use"

- Since 1995, patents protected inventions for 20 years after the application
- The products become public domain after that 20 years from the date of application.
- Patent holders can sell or license their rights to exclusive use

Reverse Engineering: If one can find a different way to create the same product, that's not covered by the patent

Ordinarily, it's cheaper to license the original product

Moral justification for copyrights and patents

Justice: The creator/inventor of an expression or invention, typically invested great effort, time or money

So it's unfair to profit from their labour, without appropriate compensation

Utilitarianism: If anyone could wait for others to go through the effort and expense of developing ideas or inventions, and then use that to their own advantage, no one would be willing to create new ideas or inventions

So society would have fewer ideas or inventions and thus would have a lower overall utility

Counter consideration: "every advance in knowledge is social and ultimately belongs to society, even though for practical purposes we can assign it temporarily to a given individual or firm. It is therefore appropriate that one's property rights be limited and that the contribution be added to the free store of the human inheritance of knowledge." (219)

Law, Ethics, and Fair Use

The legal protection of intellectual property arose after the invention of the printing press

Although there are general moral (rights-based and utilitarian) arguments for recognizing intellectual property, the details vary in different periods and locations

"Ethics can [only] tell us that some period is justified and that an indefinitely long period is too long" (219)

Odd consequences of legal/moral hybrid:

a. If we grant that we should obey just laws, and if the laws of different times and regions are just, our specific ethical duties will vary according to time and region

b. Copyright and patent laws are not enforced by the government, itself, but only by owners in civil court

c. Different countries interpret "fair use" differently

Broadly, fair use of copyrighted material allows "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

(i) Copying TV programmes through "time shifting" (by individuals) is now deemed fair use

(ii) If the court had decided differently what is now ethical would be unethical, simply because it is illegal

(iii) In Canada, downloading but not uploading mp3s is considered "fair use"

(iv) In Taiwan, both downloading and uploading files for personal use is considered "fair use" illegal in certain other jurisdictions

PROPERTY: INFORMATION AND SOFTWARE

Computer programs don't naturally fit the copyright pattern of an expression of an idea or an invention

"Program" is hard to define, since programs perform many purposes

Data and Information

Programs often manipulate "information"

But information can include "facts, data, knowledge, and understanding" (221)

Fact: "a statement of the way the world is"

- Facts are independent of knowledge of facts
- Facts can be shared without anyone being poorer
    - Still finding and storing facts can be difficult and expensive

Knowledge: a human relation to facts (and other things).

Understanding: Integration and evaluation of knowledge

- Strictly speaking, computers never have knowledge or understanding (at present), just as, strictly speaking, neither do books

Data: a means of representing facts (or falsehoods)

- Computers contain and manipulate data

Even though facts can't be owned, perhaps data can because "the data entered into the computer belong to whoever owns the computer and entered the data into it"

Rights: exclusive use of the data as entered into a computer

No one other than the owner, therefore, has the right to erase or tamper with these data, nor to copy them without permission, because copying them, although that does not violate the original owner's use (because the data will still be in [their] file), does violate [their] *exclusive* use" (222)

The Protection of Computer Software

Computer programs are typically created by encoding an algorithm or flowchart into a computer language or "source code"

This gets "translated by a compiler or assembler into an object code, a machine language of ones and zeros" which interacts directly with the computer

Logical processes (algorithms) ordinarily can't be copyrighted, but often the most difficult part in programming is working out the proper algorithm, not encoding it into source code

So how can we protect the work put into the logical process?

Intellectual Property and the Internet

(US 1998) Digital Millennium Copyright Act (DMCA): "makes illegal any attempt to circumvent any of the 'technological protection measures' that a copyright holder uses to limit access to the material" (230)

Criticism: Such DRM is unfair because:

1. It prevents "fair use" of the material
2. The law extends copyright to "technological protective measures," it effectively makes illegal, legitimate use of the material
3. It makes illegal using the software, etc. on any different system than that for which it was written (e.g. Windows, Mac, but not Linux)

Patents and Software

Patents are now possible for software

"Patent protection is much stronger than copyright protection, since it precludes any use without a license of the protected item, even if one arrives at the same item independently. Before applying for a patent, one has to do a search to make sure that one is not infringing on someone else's patent." (230-1)

This search can be expensive and dampens, instead of promotes, new products

Large companies file for patents on all sorts of new processes and then trade licenses among themselves, thus avoiding paying any licensing fees. Those without a large number of patents to trade must get licenses from all the patent holders, after first carrying out a costly process to find out exactly what is covered and what is not."

Amazon's attempt to patent "one-click" purchasing

PATENTS AND PHARMACEUTICAL DRUGS

"Pharmaceutical companies are blamed for not making their drugs available at prices those who need them can afford, and the patent system is criticized for enabling the companies to do so" (231)

In countries with socialized medicine the problem isn't as great (for the poor), though there are still issues about guaranteeing access to expensive drugs

Claim: On average a new drug costs about $800,000,000 to develop (disputed: 55 to $100,000,000)

Many drugs will fail because e.g. they are too toxic or ineffective

Pharmaceutical companies say they need a 20 year patent protection to "recoup their investment, make up for all the failed attempts, and make a profit" (232)

Even though lives are often at stake (e.g., anti-HIV virals), pharmaceuticals argue that they couldn't afford to develop the drugs without patent protection

Some approaches:

1. Sometimes the drug companies will grant the poor in the US and abroad drugs free or much cheaper
2. The "Doha Round of the WTO adopted a provision that a nation can force a drug company through mandatory licensing to make the drug available by generic companies in cases of national emergency (such as an epidemic) and other conditions of extreme urgency"
3. Some countries have threatened not to recognize drug patents in their country.

The goal of patent and copyright was to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

So any modification must attempt to meet this goal by balancing social needs and incentives to develop intellectual property

Discussion questions

1. Is downloading copyrighted material, such as music, from someone else's hard drive using peer-to-peer networks ethically defensible or is it unethical? Explain why people might hold the contrary view and why yours is better supported.
2. Would Nozick accept that governments can force pharmaceuticals to offer life-saving drugs for free or at a very low cost? Locke? Explain
3. How might Kant or a utilitarian reply to Nozick?
4. Is this a "new cases test" for Libertarianism? First define "new cases test" and briefly explain the idea. Next consider whether the issue of owni pharmaceuticals tests the viability of Libertarianism.