

SCIENZA & POLITICA

per una storia delle dottrine



Lockean Intellectual Property Refuted

Critica della proprietà intellettuale in Locke

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ABSTRACT

Locke's theory of property is irreconcilable with intellectual property. Property-like titles in ideal objects cannot be introduced within the framework of the natural law, because they could constrain others from acts necessary for their survival. Nevertheless, followers of Locke's theory of politics choose to belittle this conclusion and even Locke himself supported early copyright legislation. The inconsistency is important, for it depicts the problem of legitimization of intellectual property as political and demonstrates liberal reification of various aspects of social life.

KEYWORDS: Intellectual Property; Locke; Liberalism; Philosophy of Law; Political and Legal Doctrines.

La teoria della proprietà in Locke è incompatibile con la proprietà intellettuale. I titoli di proprietà di oggetti ideali non possono rientrare nel quadro del diritto naturale, perché potrebbero impedire ad altre persone azioni necessarie alla loro sopravvivenza. Nondimeno, i seguaci della teoria lockeana della politica scelgono di sminuire questa conclusione e persino Locke stesso sostenne la prima legislazione sul copyright. Questa incoerenza è importante perché descrive il problema della legittimazione della proprietà intellettuale come questione politica e dimostra la reificazione liberale di vari aspetti della vita sociale.

PAROLE CHIAVE: Proprietà intellettuale; Locke; Liberalismo; Filosofia del diritto; Dottrine politiche e giuridiche.

1. Introduction

It appears intuitive that a connection between an originator and their idea should somehow imply a title in a product of their work. However, acknowledging any rights ought to be justified by a reason. Hence, the case of validation of intellectual property (IP) is an important issue in the philosophy of law. Moreover, the problem is also political. After all, the international system of the second half of the 20th century, which allowed “the North” (of the World) to maintain its advantage over “the South”, relied on copyrights and patent laws¹. And it is corporations’ control over the ideas and data that has remodeled our democracies in the last years². Capitalism has slowly evolved into the so-called “information capitalism”. Validation of IP is therefore not only a theoretical, but also a social problem.

Usually IP is rationalized on the grounds of consequentialist ethics. Asserting certain exclusive titles in intangibles, it is argued, leads to greater creativity and innovativeness (teleological approach) or promotes market effectiveness (economic-utilitarian approach). This reasoning is endorsed by many doctrines³ and even some regulations (the United States Constitution for instance explicitly makes this claim in the famous Copyright and Patent Clause⁴). Nevertheless, the consequentialism is still in contest with deontology and the very nature of utilitarianism makes its justification of IP open to a constant contention within the utilitarian framework. For these reasons some prefer to seek moral grounds for IP in natural law doctrines. And perhaps the most important and influential of those is John Locke’s philosophy of property provided in the *Second Treatise of Government*⁵.

The potential of Locke’s thought to serve as an apology for IP is linked with its totemic role in the Western world. Propertarianism⁶ speaks the language of natural rights which we find inherent to our political culture. It paved the way

¹ See e.g. M.P. PUGATCH, *The International Political Economy of Intellectual Property Rights*, Cheltenham–Northampton, Edward Elgar Publishing, 2004, pp. 47 ss.; R.P. MERGES, *The Economic Impact of Intellectual Property Rights: An Overview and Guide*, «Journal of Cultural Economics», 19, 2/1995, pp. 103–117.

² See e.g. Y.N. HARARI, *Homo Deus. A Brief History of Tomorrow* (2015), London, Harvill Secker, 2016, pp. 367 ss.; D. RUNCIMAN, *How Democracy Ends*, London, Profile Books, 2018, pp. 218 ss.; J.H. LORENZI – M. BERREBI, *Progress of Freedom. Who Gets to Govern Society’s Economic and Technological Future*, Cham, Palgrave Macmillan, 2019.

³ V.W.M. LANDES – R.A. POSNER, *The Political Economy of Intellectual Property Law*, Washington, AEI-Brookings Joint Center for Regulatory Studies, 2004.

⁴ U.S. Constitution, Art. I, § 8, cl. 8.

⁵ J. LOCKE, *Second Treatise*, in J. LOCKE, *Two Treatises of Government* (1690), Cambridge-New York-Melbourne-Madrid-Cape Town, Cambridge University Press, 2003, pp. 265-428. I shall henceforth refer to the *Second Treatise of Government* as the *Second Treatise*.

⁶ Describing Locke’s ethics and political philosophy as “propertarian” hardly raises any controversies. Most ideas included in the *Second Treatise* revolve around the individual and exclusive (right of) property. It is the key to understanding Locke’s political philosophy. Nb. throughout the *Second Treatise* Locke used the term “property” in two different ways: as a right to life, liberty and estate (e.g. §§ 87, 123, 173, 222) or with reference only to one’s possession (e.g. §§ 25, 28, 30, 32).



for capitalism and liberalism. Admittedly, various interpretations of Locke's thought have been formulated. The ambiguities of the text allowed for manifold theories – both Locke's (interpretations of Locke's thought) and Lockean (doctrines based on Locke's). Some notable readings come from Crawford B. Macpherson, James Tully, Gopal Sreenivasan, John Dunn, Leo Strauss, A. John Simmons, and Jeremy Waldron⁷. Robert Nozick's libertarian theory of entitlements also deserves a close attention⁸.

Since Locke did not explicitly refer to the appropriation of intangibles in the *Second Treatise*, it is hardly surprising that his theory has served both as a justification for and against IP (and either based on a strong protection regime or with a broad public domain). According to William Fisher there are six different frameworks within which one may place property as described in the *Second Treatise*, each leading to a different illation on IP⁹. There exists an immense literature on the subject, some notable works authored by Wendy J. Gordon, Adam D. Moore, J. Hughes, Peter Drahos and Steven J. Horowitz¹⁰. Some of their contentions ought to be mentioned; however, the aim of this paper is not to review the existing interpretations, but rather to construe an independent argument.

⁷ C.B. MACPHERSON, *The Political Theory of Possessive Individualism. Hobbes to Locke*, Oxford-New York, Oxford University Press, 1990; J. TULLY, *A Discourse on Property. John Locke and His Adversaries*, Cambridge, Cambridge University Press, 1980; G. SREENIVASAN, *The Limits of Lockean Rights in Property*, New York, Oxford University Press, 1995; J. DUNN, *The Political Thought of John Locke. An Historical Account of the Argument of the 'Two Treatises of Government'*, Cambridge, Cambridge University Press, 1975; L. STRAUSS, *Natural Right and History*, Chicago, The University of Chicago Press, 1953; A.J. SIMMONS, *The Lockean Theory of Rights*, Princeton, Princeton University Press, 1992; J. WALDRON, *The Right to Private Property*, Oxford, Clarendon Press, 1988.

⁸ R. NOZICK, *Anarchy, State, and Utopia*, Oxford-Cambridge, Blackwell, 1999.

⁹ W. FISHER, *Theories of Intellectual Property*, in S.R. MUNZER (ed), *New Essays in the Legal and Political Theory of Property*, New York, Cambridge University Press, 2001, pp. 184-185.

¹⁰ For the Lockean justification of IP see i.a.: S.J. HOROWITZ, *Rethinking Copyright and Fair Use*, «Deakin Law Review», 10/2005, pp. 209-235; W. FISHER, *Theories*, pp. 168-200; R.A. SPINELLO, *The Future of Intellectual Property*, «Ethics and Information Technology», 5/2003, pp. 1-16; D. MCGOWAN, *Copyright Nonconsequentialism*, «Missouri Law Review», 69/2004, pp. 1-117; B. FRIEDMAN, *From Deontology to Dialogue. The Cultural Consequences of Copyright*, «Cardozo Arts & Entertainment Law Journal», 13/1994, pp. 157-185; J. HUGHES, *The Philosophy of Intellectual Property*, «Georgetown Law Journal», 77/1988, pp. 287-366; A.D. MOORE, *Toward a Lockean Theory of Intellectual Property*, in A.D. MOORE, *Intellectual Property: Moral, Legal, and International Dilemmas*, Lanham, Md., Rowman & Littlefield, 1997, pp. 81-106; A.D. MOORE, *A Lockean Theory of Intellectual Property Revisited*, «San Diego Law Review», 49, 4/2012, pp. 1069-1113; for the interpretations against it see i.a.: S.V. SHIFFRIN, *Lockean Arguments for Private Intellectual Property*, in S.R. MUNZER (ed), *New Essays in the Legal and Political Theory of Property*, New York, Cambridge University Press, 2001, pp. 148-167; C.J. CRAIG, *Locke, Labour, and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, «Queen's Law Journal», 28, 1/2002, pp. 1-60; D. ATTAS, *Lockean Justifications of Intellectual Property*, in A. GOSSERIES – A. MARCIANO – A. STROWEL (eds), *Intellectual Property and Theories of Justice*, New York, Palgrave Macmillan, 2008, pp. 29-56. Peter Drahos presented reasons for both approaches (P. DRAHOS, *A Philosophy of Intellectual Property*, ed. 2, Aldershot-Burlington, Ashgate, 2001, pp. 41 ss.).

Hence, the purpose of this paper is to reexamine the notion of incorporeal rights in the view of Lockean propertarianism. As it will be argued, appropriation of intangibles is either impossible within the ethical framework set in the *Second Treatise* or it makes this doctrine self-contradictory, inoperable or incomplete (and thus all Lockean theories of IP are to be refuted). Nevertheless, followers of liberal theory of politics may choose to belittle this conclusion and there are even sources suggesting Locke himself supported early copyright legislation. This inconsistency leads to another observation. Refutation of Lockean IP is not merely an abstract exercise in philosophy. It adds up to the narrative of evolution of liberalism and depicts capitalism's tendency for reification of various aspects of social life.

Most importantly, though, it shows that the problem of legitimization of IP is in its essence political. One can hardly forget in this regard that the theory of property constitutes the cornerstone of Locke's political philosophy. Thus, the origin of property, its essence, limits, and consequently the structure of ownership relations are issues which are tied to the validation of a political regime. What is freedom? What rights does a citizenship entail? For liberalism (or at least for classical liberalism) these questions may be answered only through an analysis of the theory of property.

Since it is impossible to discuss the problem without inferring major ideas of Locke's propertarianism, the first part of this article provides a brief outline of the philosophy of property exhibited in the *Second Treatise* supplemented by a short discussion of the conditions necessary for privatization, whereas the second part concentrates on the issue of IP *per se*. Finally, the ultimate argument against IP, based on the fundamental premise of the natural law – the right or duty, thus being also called “the principle” of self-preservation – is presented¹¹. The article ends with broader reflections on liberal political theory inferred by the problem of legitimization of IP¹².

This paper aims at proving its thesis acquiescent to three principles. First, it approaches Locke's work as neutrally as possible. This attempt at objectivity is further reinforced by the second principle. In an endeavor to demonstrate that IP is irreconcilable with Locke's propertarianism, the article does not rely on any reading of the *Second Treatise* that may be reasonably contested. Third,

¹¹ The thesis that the ownership of creative works or inventions is irreconcilable with Locke's doctrine was expressed by scholars, such as S.V. SHIFFRIN (*Lockean Arguments*, pp. 148-167) and D. ATTAS (*Lockean*, pp. 29-56). This paper differs from their work though, as it attempts to demonstrate that introducing incorporeal rights in Locke's system leads to the inconsistency with the very core of his philosophy.

¹² It is worth an emphasis, that the applied reasoning does not require any analysis of current regulations. This outcome comes with an advantage since it allows for universally applicable conclusions. The findings shall also apply *mutatis mutandis* to most of the IP rights (especially to copyright and patent law).



the arguments inferred for the thesis are strictly rational and aprioristic¹³, therefore the deontological character of the core of Locke's theory remains intact.

2. Property

A comprehensive analysis of Locke's theory of property and review of its most influential interpretations would far exceed the length and scope of this paper. Therefore, only a sketch shall be presented. Locke's doctrine consists of three parts. It depicts how the establishment of private property is essential and possible. Furthermore, it explains how an individual may come to be an owner of a given thing. And finally, it sets the limits on acts of appropriation, thereby constituting the rules of just initial distribution of goods.

For Locke property was implied by a fundamental, inalienable, and axiomatic right – the principle of self-preservation. Since no individual exists outside of the physical realm and bodies have substantial needs, one must physically satisfy all the necessities requisite for survival, such as hunger, thirst, and shelter. Here the law of nature meets the natural law. A person deprived of the right to be and to reside in a certain place, or to act would have to either die or disperse. No rational normative system could lead to such an outcome. Thus, everyone is born with the natural right of self-ownership – the exclusive and inalienable title in themselves and their body (inferred however from the principle of self-preservation which is both self-evident and set by God)¹⁴.

The external world is originally given to mankind in common¹⁵. Initially every individual is at liberty to use the riches of nature as men are born free and equal, with no political power over them. This is nothing more than a moral power, though, as there are no legal titles, and one needs to acquire them in order to rightfully consume resources and sustain life. As the reasoning goes: everyone eats, and drinks, i.e. uses goods. This avail must at some point entail exclusivity and individuality. As Locke put it: «The Fruit, or Venison, which nourishes the wild Indian, who knows no enclosure, and is still a Tenant in

¹³ In this reasoning I dwell on the Aristotelian tradition of the retorsive argumentation (elegtikōs apodeixai, Eng. "refutative demonstration").

¹⁴ The principle of self-preservation may manifest itself as the liberty right (when a certain good is to be appropriated), the moral power (when actions essential to survival are to be considered), or the obligation (in the context of a duty to God the Creator and a commitment to others in need). Moreover, there are two aspects of the right of self-preservation: direct (the right not to be harmed) and indirect (the right to not to be impeded from actively preserving oneself). See e.g. A.J. SIMMONS, *The Lockean*, pp. 72-74; G. SREENIVASAN, *The Limits*, pp. 23-24.

¹⁵ Various interpretations of this common may be formulated: negative community, joint positive community, inclusive positive community, divisible positive community (see generally A.J. SIMMONS, *The Lockean*, pp. 237 ss.; J. WALDRON, *The Right*, pp. 149 ss.).

common, 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»¹⁶.

In other words, an object needs to become a private property to be legally used by a person¹⁷. This rule applies equally to everyone and is universally true.

Again, Locke's natural law goes here side by side with the law of nature. Since the common need to acquire goods in the state of nature is self-evident, and the goods are scarce, a right to property is *a priori* justified by its necessity and made equal by its universality. It applies not only to the basic goods but also to land and all movables, thus leading to the establishment of the system of private property in the state of nature. Property did not and could not originate from a social compact, because mankind would come on the verge of extinction before it would agree on terms of rightful appropriation¹⁸.

It deserves consideration that appropriation is linked here to the scarcity of goods¹⁹. If the world were a blissful place with an infinite amount of resources, one could gather and use as much as it would please them, without a concern for depletion or others being deprived. However, that is not the case. There is only a limited number of goods that needs to be privatized. Apples and acorns to which Locke referred to are ultimately scarce, even though in summer season they may exist in plenty. Furthermore, they may not be eaten by everyone at the same time (they are rivalrous) and when brought home by the one who picked them, others are excluded from their use (goods are excludable). Hence, even though the world is vast and there are many resources, common ownership is out of the question. One simply has to appropriate resources in order to use them for their own and proper sake – and the idea of just property supposedly allows people to coexist without constant conflicts over every use of resources.

Clearly then, Locke spoke of appropriation of goods which are feasible for privatization in the state of nature, i.e. which are *naturally* scarce, excludable, and rivalrous. At the same time, his theory is silent on resources which are not excludable and therefore naturally unable to be privatized. Besides, there is no need to appropriate goods which are infinite and unrivalrous, as in the state of nature everyone may freely use them without care for their deficiency (both *de facto* and *de iure*). Consequently, according to the logic of the *Second Treatise*

¹⁶ J. LOCKE, *Second Treatise*, p. 287 (§ 26).

¹⁷ *Ivi*, pp. 286-287 (§ 26).

¹⁸ *Ivi*, pp. 288-289 (§§ 28-29).

¹⁹ Scarcity is understood here as the limited availability of a resource recognized as a good (being in demand). These limits are the result of a resource being exhaustible: finite (either theoretically determinate or in shortage due to demand) and rivalrous (unable to be used by the vast number of people without a threat of its depletion or loss of characteristics). The condition of scarcity leads to competition and potential conflicts over their control and use, hence liberalism's need for property (similarly in economics and law and economics, see e.g. B. BOUCKAERT, *What Is Property?*, «Harvard Journal of Law & Public Policy», 13/1990, pp. 779 ss., 797 ss.; P.A. SAMUELSON, *The Pure Theory of Public Expenditure*, «Review of Economic Statistics», 36, 4/1954, pp. 387-389).



property does not apply to intangibles, i.e. goods such as copyrightable works or patentable inventions, which lack qualities of scarcity, excludability, and rivalrousness.

For it should be out of the forum of controversy that intangibles are naturally not scarce. Their ideal (abstract, immaterial) character makes them an infinite resource. Moreover, they may be used by an unlimited number of people at the same time and they do not wear out (they are not rivalrous). There is simply no need to be the only one in control of them to successfully employ them (their use is not a zero-sum game), although it would be hard or yet impossible to enclose intangibles which are already publicly known (they are not excludable). Their immaterial nature determines that they lack a physical referent and material borders²⁰. Consequently, once a creator chooses to reveal their intellectual work, the exclusive control over an abstract is lost (*oratio publicata res libera est*). From that moment the others are also able to keep them in a recess of their mind, apply them and disclose further. The only way to restrain others from free exploitation of intangibles is to coerce them not to do so, either by force or through legal decree, though the former would entail an infringement upon the right of self-ownership, whereas the latter would require a socially accepted government which is missing in the state of nature. Hence, from the economic standpoint intangibles are free (common) resources characterized by non-appropriability²¹.

That being so, one reservation ought to be made at this point. Abstract objects are not *naturally* scarce; however, they could be made *artificially* scarce through legislation. In fact, this process takes place in every regime of intellectual property law²². Statutory provisions and social consent establish an identity of an abstract object to be privatized (whether it is a copyrightable work or patentable invention), set its borders (what is a copyrightable work, why it is one and not the other) and describe a bundle of rights comprised in a title (to what extent may a right holder prevent others from using an artwork). Thereby,

²⁰ Since intangibles have no fixed, physically objective and factual identity, there may be doubts as to what they really are (e.g. disputes over true meaning of instrumental music or even songs; different readings of books depending on a recipient's substantiation; unclarity of conceptual art etc.). Consequently, there is uncertainty as to where they start and end (hence the disputes over plagiarism or eligibility of legal protection). Intangibles manifest themselves as projections in human minds, not through independent existence in time and space. Therefore, it is the social consent that allows for their identification and their existence is at the very most intersubjective (conventional, not real).

²¹ It does not mean, of course, that they are produced without costs, efforts or that they do not infer the free-rider problem. Nb. making intangibles artificially scarce and privatizing them is not the only way to overcome the free-rider problem and compensate originators for their intellectual work. Theoretically speaking, state intervention may very well result in making ideal goods public and rewarding creators through public benefits. In fact, this process sometimes took place in the communist countries (e.g. in 1960's Cuba).

²² Furthermore, some legal systems (e.g. common-law systems) consequently recognize IP as a kind of property *sensu stricto*, which differs from corporeal rights mainly in its subject.

goods and objects which are not things, and thus naturally impossible to be appropriated start being treated as they were things (i.e. they are reified). Consequently, artificial scarcity, which entails excludability and rivalrousness, makes them fit for privatization.

Again though, this construct requires a political organization and use of a legal force against everyone who does not respect a decreed property²³, whereas Locke's property rests on the law of nature. Privatization as described in the *Second Treatise* takes place in the state of nature. The text, as already mentioned, explicitly rules out a possibility of origination of property through universal consent²⁴. Furthermore, protection of already existing property is one of the main reasons to even enter into any social contract²⁵, and infringing upon property (still resting on the natural law) is a good cause to overthrow a government²⁶. In other words, property is for Locke always pre-political, while IP is, by its very essence, always political²⁷. In addition, a possibility of jurisprudential reification and appropriation of intangibles should not be an argument for its ethical permissibility. As Boudewijn Bouckaert noted: «Artificial scarcity can hardly serve as a justification for the legal framework that causes that scarcity. Such an argument would be completely circular. On the contrary, artificial scarcity itself needs a justification»²⁸.

As we read in the *Second Treatise* there are at least four lawful ways of acquiring goods: appropriation, inheritance, charity, and exchange. Of course, only the first – homesteading of unowned goods in the state of nature – is relevant to the question of the legitimization of IP since it explains the origins and characteristics of any title that may be yet further transferred. The first prerequisite for just appropriation is labor. Apparently Locke believed that an individual is a rightful owner of their talents, efforts, and actions. Through mixing *their* work with an unclaimed object, they project their *suum* onto that object and thus make it *their* property²⁹. One may ponder, if strenuous activity is the only method of initial appropriation (which could lead to reading Locke's theory as a strictly desert ethics) or just a means (vessel) of projecting oneself onto

²³ It is precisely for this reason, why every IP regime is territorial and any attempt at making it universal requires international co-operation, either through specific treaties or organizations such as WTO or WIPO.

²⁴ J. LOCKE, *Second Treatise*, pp. 285 ss., 288 ss. (§§ 22, 28).

²⁵ *Ivi*, pp. 322 ss., 324 ss., 348, 350, 354 ss. (§§ 85, 88, 120, 123, 144).

²⁶ *Ivi*, pp. 357 ss., 360-362, 412-419 (§§ 135, 138-139, 221-231).

²⁷ As Karen Vaughn put it, the reason why the theory of property is central to the structure of Locke's political argument is because «it serves as an explanation for the existence of government and a criterion for evaluating the performance of government» (K.I. VAUGHN, *John Locke's Theory of Property. Problems of Interpretation*, «Literature of Liberty: A Review of Contemporary Liberal Thought», 3, 1/1980, p. 6). Ownership simply cannot be created or abolished by the government if it is to serve as its cause and curtailment. It is prior – both in terms of superiority and antecedence. Cf. M. SELIGER, *The Liberal Politics of John Locke*, Abingdon, Routledge, 2020.

²⁸ B. BOUCKAERT, *What Is Property?*, p. 798.

²⁹ J. LOCKE, *Second Treatise*, p. 299 (§ 45).



material objects³⁰ (the latter seems more convincing as Locke mentioned appropriation through work of servants and animals³¹). Moreover, there are doubts whether Locke's "labor" should be understood as an effort, an action, or – speaking in Robert Nozick's³² terms – taking over control (each of these claims refer to the text). Regardless of these problems though, a physical interaction of some kind with a resource and a precedence (a good ought to be un-owned) seem necessary to establish a title. This real aspect of Locke's theory makes it related to classical legal tradition.

Furthermore, because the world was not given to the mankind to lay in decay and go to waste, but rather to flourish for the pleasure of God and the welfare of the people, one can take only so much as they can use – either consume or permanently work on (e.g. by cultivating land or maintaining a movable in a suitable condition). This is the first of the two famous clauses – the spoilage proviso. The second one, the sufficiency proviso (or the so-called "enough-as-good proviso") limits the scope and/or volume of appropriation by the needs of others. One cannot deprive their fellow men of a right to sustain their lives. It might be debated, whether Locke's insistence on equality oversteps here the negative character of the right to property, as he explicitly claimed that an individual may lawfully homestead only «where there is enough, and as good left in common for others»³³. This statement is problematic, since literally read, it would lead to the conclusion that no goods may be rightfully appropriated in a condition of scarcity (the so-called "strong" or "stringent" proviso) – and that could not be the case, as only those goods that are finite need to be privatized.

Moreover, if the sufficiency proviso is binding, then would it apply to the number of goods or just to the situation of non-appropriators? Are goods interchangeable (is it allowed to close-off a resource)? Should the amount that is supposed to be left for others, suffice for all who are alive during an act of appropriation or for anyone that may come to homestead in the future? These are great questions that could determine the shape of ownership relations in Locke's system and entail formation of completely different regimes. Many scholarly works have been devoted to these problems and various answers have been given³⁴. Most, however, assume that the enough-as-good proviso shall be

³⁰ V.S. HOROWITZ, *Rethinking*, p. 215; B. BOUCKAERT, *What Is Property?*, pp. 813 ss.

³¹ J. LOCKE, *Second Treatise*, pp. 288-289 (§§ 28-29).

³² R. NOZICK, *Anarchy*, pp. 188 ss.

³³ J. LOCKE, *Second Treatise*, p. 288 (§ 27).

³⁴ I.a. R. NOZICK, *Anarchy*, pp. 175 ss.; K. OLIVECRONA, *Appropriation in the State of Nature: Locke on the Origin of Property*, «Journal of the History of Ideas», 35, 2/1974, pp. 211-230; G. SREENIVASAN, *The Limits*; J. TULLY, *A Discourse*; J. WALDRON, *The Right*. Or maybe the language used by Locke is simply imprecise (which could be indicated by the examples of using the word "plenty" in the case of acquisition in Spain and America – J. LOCKE, *Second Treatise*, pp. 292-297, §§ 36, 37, 41), as P. LASLETT implied (*Introduction*, pp. 106 ss.), and the sufficiency clause ought to be ignored. For instance, Jeremy Waldron maintained that the sufficiency proviso is merely a result

“weakened” or validated at further stages of social interaction to enable a lawful appropriation in a condition of scarcity³⁵. Hence, a no-worse approach is implied: appropriation is lawful only if it does not worsen the position of already existing non-appropriators. Furthermore, even homesteading that results in worsening of others may be – claim adherents of such doctrines – compensated by increasing the overall benefit of all, usually through means of free exchange (these models presuppose that social interaction is not a zero-sum game)³⁶.

This approach though, leads to the reading of the proviso through the logic of consequentialism and is therefore contrary to the aprioristic, natural law reasoning chosen by Locke. Admittedly, throughout the *Second Treatise* some utilitarian arguments for the establishment of private ownership are inferred. Nevertheless, the core of the argument is still deontological. Locke spoke the language of absolute rules and not *ad-hoc* interpretations of different situations.

Furthermore, the utilitarian approach towards the sufficiency proviso encounters some serious drawbacks. First, in order to compare the situation of non-appropriators before and after an act of homesteading, a baseline needs to be set and data ought to be acquired, which is very problematic. Second, a net-utility method cannot satisfy the requirements of the methodological individualism (and Locke’s rights are pre-political and individual³⁷). It is simply infeasible to compare ever-changing personal value judgements on macro-levels³⁸. Third, even though people are, according to Locke, bound by the moral obligation of charity, property is held primarily for the reasons of self-preservation, and then for the support, comfort and convenience of the owners – not for the benefit of others³⁹. Finally, only a deontological approach may explain the Lockean right of property in terms of compatibility (non-confliction of titles), determinacy (establishing whether a person owns some particular good) and completeness (generality and abstractness of law).

It is important to note at this point that introduction of money into Locke’s natural system does not affect this argumentation. According to the *Second*

of the execution of the spoliation clause and does not have any normative meaning (J. WALDRON, *The Right*, p. 211).

³⁵ E.g. C.B. Macpherson believed that all prerequisites of just appropriation lose their significance as society flourishes (with the invention of money) (C.B. MACPHERSON, *The Political*, pp. 211 ss.). But perhaps the most famous of such approaches is the one devised by Robert Nozick in Part II of “Anarchy, State and Utopia” (R. NOZICK, *Anarchy*, pp. 175 ww.).

³⁶ E.g. A.D. MOORE, *Toward a Lockean*, pp. 81-106; A.D. MOORE, *A Lockean Theory*, pp. 1069-1113; B. FRIEDMAN, *From Deontology*, pp. 157-185; and, of course, R. NOZICK, *Anarchy*, pp. 175 ss.

³⁷ Cf. W. KENDALL, *John Locke and the Doctrine of Majority Rule*, Urbana, University of Illinois Press, 1918.

³⁸ V. L. VON MISES, *Human Action. A Treatise on Economics. The Scholar’s Edition* (1949), Auburn, Ludwig von Mises Institute, 1998; F.A. VON HAYEK, *The Use of Knowledge in Society*, «American Economic Review», 35, 4/1945, pp. 519-530.

³⁹ Similar statements were made by J. WALDRON (*The Right*, pp. 157 ss.) and C.B. MACPHERSON (*The Political*, pp. 211 ss.).



Treatise money allows people in the state of nature to gather possessions without violating the spoilage proviso. It is devised as a substitution for appropriated resources, a mean to accommodate wealth and exchange goods⁴⁰. Thus, it is rather a commodity money, as used in the times of Locke, and not a contemporary fiat money (a currency with no intrinsic value), which would imply the so-called “artificial scarcity” (fiat money’s scarcity depends on government’s regulations and fiscal discipline, not on the natural phenomenon). Hence, even though the introduction of money totally alters the dynamics of Locke’s economy (and future politics), it is not greatly relevant to the case of IP, which is always, by its very nature, fiduciary (based on the social consent and legal intervention of a state).

Another aspect of Locke’s propertarianism is the nature and strength of property and its existence after the establishment of a positive law. Locke’s ownership is not absolute, even if it is strong. A true proprietor must be capable of exclusive control and unrestrained disposition of a homesteaded object as long as they do not harm others. Moreover, ownership is a real right – it entails a physical control. It is a dominium that no one else has a rightful claim to (it is effective *erga omnes*) and which comprises *ius utendi, fruendi, abutendi et ius disponendi* (it is the fullest of all legal rights)⁴¹.

Interestingly, according to Locke social relations and the economy may flourish without government. Nevertheless, it would be inconvenient to remain in the state of nature, since men are usually unsure as to the precise formulations of the natural law and sometimes even deliberately violate its rules. Thus, in order to preserve one’s life, freedom and property men unite – first as a political society, then under the protection of the state. After a social contract, the right of property is still justified by the natural law; however, it may be determined and detailed through a positive law⁴². By entering the Commonwealth, an individual gives up some of their dominion and becomes subjugated to regulations on property. The *Second Treatise* reads:

It would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property: And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government⁴³.

⁴⁰ J. LOCKE, *Second Treatise*, pp. 300 ss. (§§ 47 ss.).

⁴¹ Deontological approach presupposes normative completeness (abstractness and generality of rules), while propertarian paradigm relies heavily on harmony of lawful titles of ownership. These prerequisites are supposedly met when rights are negative (are limited by rights of others and objectively perceived borders) and socially accepted. V.H. BREAKEY, *Natural Intellectual Property Rights and the Public Domain*, «The Modern Law Review», 73, 2/2010, p. 218; S.J. HOROWITZ, *Competing Lockean Claims to Virtual Property*, «Harvard Journal of Law & Technology», 20, 2/2007, pp. 443-458.

⁴² J. LOCKE, *Second Treatise*, pp. 348 ss. (§§ 120 ss.).

⁴³ *Ibidem*.

It may appear that the Locke's liberalism assumes a somewhat Hobbesian approach in this passage and it perhaps could be even taken as an argument for the legal constructivism and legitimization of IP, thus ending the debate. It does not matter, one could assume, that copyright or patent law are problematic within the framework of the natural law, because with the introduction of a civic society and a legislature, a positive law determines a subject, a scope and a character of titles in intangibles. Intellectual property could be implemented through the institution of quasi-property (applying the corporeal right model to an ideal object) balancing legitimate interests and solving potential conflicts between holders of rights to tangibles and intangibles⁴⁴. Nothing could be further from the truth, though.

As already suggested, Locke's theory provides no justification for constructivist (fiduciary) property rights. First, the very reason for establishing a society and appointment of a government is the protection of property, i.e. existing property. As Locke wrote, «The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property»⁴⁵. Thus, regulation of property at the later stages of a social construct is not the same as its constitution. A positive law may supplement the natural order of things or conciliate legitimate claims of owners, but not abrogate titles assumed upon the natural law. If preservation and protection of rights are the ultimate goals of a state, then surely no titles are being given up or limited in their essence.

Second, positive laws are not capable of establishing property titles *ab initio*. Objects that are yet unowned are to be appropriated as they were in a state of nature (since they are literally outside of social relations). Locke clearly rejected the universal compact theory of property (as held by Hugo Grotius or Samuel von Pufendorf), thus the only legitimate origin of property is the natural law. Third, even if a government attained a power to abrogate and grant property titles, one cannot ignore the fact that Locke clearly subdued all positive laws to the natural law. As we read in the rather unambiguous passage of the *Second Treatise*: «The Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer»⁴⁶. Therefore, even if the shift from the state of nature to the commonwealth entails a move from «private property as a concept to a particular conception of private property»⁴⁷, it still does not overrule

⁴⁴ See generally: Lockean theories of IP devised by SS.J. HOROWITZ (*Rethinking*, pp. 217 ss.) and J. HUGHES (*The Philosophy*, pp. 287-366). A similar point was made by W.J. GORDON (*A Property Right in Self-Expression: Equality and Individualism in the Neutral of Intellectual Property*, «Yale Law Journal», 102, 7/1993, pp. 1554-1555), J. WALDRON (*The Right*, pp. 138 ss.) and Barbara Friedman (B. FRIEDMAN, *From Deontology*, pp. 157-185).

⁴⁵ J. LOCKE, *Second Treatise*, pp. 350-351 (§ 124). See also: §§ 85, 88, 94, 120, 123.

⁴⁶ *Ivi*, pp. 357-358 (§ 135).

⁴⁷ J. WALDRON, *The Right*, p. 164.



the supremacy of the natural law. The question of legitimization of property (including IP) within Locke's doctrine rests ultimately on the criterion of compliance with the natural law.

Nevertheless, reading Locke's theory as neutrally as possible and avoiding inferring any conclusions that may be contested (and, as already mentioned, there are majoritarian and democratic, hence, positivist-constructivist interpretations of the *Second Treatise*), require a somewhat weaker position. Let us not assume that only the natural law grounds for IP would legitimize it within Locke's system, but rather seek for the natural law arguments against it, which would in turn decisively settle the matter.

3. Propertarianism set against IP

The main obstacle to formulation of the natural law theory of incorporeal rights was presented above. It is implied by the very essence of intangibles. Since abstract objects do not have a physical manifestation (they may be embodied only into their exemplars), it is impossible to establish a real possession over them and, consequently, demonstrate it in an objectively perceivable manner. In other words, the only way to appropriate a work or an invention is through a declaration. However, there is no reliable and undisputable manner of fixing anteriority to intangibles in the state of nature (this is important since only unowned goods may be appropriated), because communicating an idea to the public automatically frees it from one's exclusive control. This would lead to the unavoidable and unsolvable disputes over precedence of acquisition of abstract objects, thus depriving a social order of the supposed harmony of propertarian relations, for who is to judge whether an individual actually conceived a given conception before others. Mankind knows no fair technique of reading people's minds. Thus, IP needs decreed and constrained fiduciary relations, *ergo* may exist only outside the state of nature, which lacks a general authority that could constitute and execute titles in intangibles.

For these reasons, the deontological approach of Locke implies that property is corporeal. Or, as Peter Laslett observed, it is the right devised «to provide the tangible subject of an individual's powers and attitudes»⁴⁸. This shall not create any problems to the (corporeal) theory of property and its self-preservation presupposition, though, since ideal goods are not only nonexcludable, but also unrivalrous. Their non-scarcity entails that they may serve people without any need for their privatization. For example, even though a limited number of apple-pies can be made from apples that the nature has to offer, everyone may

⁴⁸ P. LASLETT, *Introduction*, p. 103.

enjoy a recipe for the pastry without a concern for its exhaustion or anyone's deprivation (and for this very reason, conceptions, ideas or information are called the "ideal objects").

Furthermore, the rejection of IP does not detach Locke's propertarianism from the principles of compatibility, determinacy, and completeness. The negative property titles could co-exist in harmony and even the interests of creative workers could be secured, of course only to some extent, as no one would be obligated to disclose products of their mind, perform, or give away copies of artworks and models of inventions. Quite the opposite, under the natural law it would be possible for artists or inventors to profit from their intellectual effort, e.g. through paid distribution of exemplars and prototypes; artistic performances or technical support etc.⁴⁹. The baker who produces an apple-pie would still be its legitimate owner, just as a writer would have a full property in all exemplars of untraded manuscripts. Without IP the doctrine remains completely workable, while survival and welfare of mankind does not call for privatization of intangibles⁵⁰.

On the contrary, allowing to appropriate intangibles would inevitably lead to conflicts between owners of ideal goods and owners of their embodiments. This is especially true in the case of copyrighted works and patented inventions since they are neither corresponding, nor parallel to titles in their exemplars and devices. Unlike corporeal property then, they cannot be negative. They are inevitably positive as they limit the legitimate owners of embodiments in their freedom to use their possessions (e.g. an owner of a copyrighted CD may not rightfully copy it and sell it on the free market). Thus, the very essence of a propertarian *dominium* is undermined by IP, bringing to mind rather an instance of a *dominium utile* than a *dominium directum*⁵¹. And, if a very sophisticated IP regime is to be construed (e.g. contemporary American patent law acknowledging eligibility of human genes), one could even argue that personal

⁴⁹ The market value of intangibles per se could be small but having a right to fruits of one's labour, as Locke proclaimed, is not the same as having a right to have one's labour highly valued. Importantly though, unrestricted use of intangibles does not affect only intangibles' use value. Their market value on the other hand is very much impacted since people tend to not pay for free resources. Three points shall be made here.

⁵⁰ Observations presented above were set against the Lockean IP doctrines in extenso by D. ATTAS (*Lockean*, pp. 29-56). For more general observations on the non-scarcity of ideal goods: B. BOUCKAERT, *What Is Property?*, pp. 801 ss.; N.S. KINSELLA, *Law and Intellectual Property in a Stateless Society*, «Libertarian Papers», 5, 1/2013, pp. 32 ss.; N.S. KINSELLA, *Against Intellectual Property*, Auburn, Ludwig von Mises Institute, 2008; T.W. PALMER, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in A.D THIERER – C.W. CREWS (eds), *Copy Fights; The Future of Intellectual Property in the Information Age*, Washington, Cato Institute, 2002, pp. 43-93.

⁵¹ *Dominium utile* and *dominium directum* were feudal forms of property, the former being subordinate and consisting of a right to use, the latter being superior, vested in a sovereign. Clearly, Locke's theory presents completely different arrangement of social relations: with one, (formally) equal to every right of ownership.



suum (and thus the right of self-ownership) may be violated. These conclusions pose a great problem of inconsistency to Locke's doctrine.

Nonetheless, an advocate of the desert reading of the *Second Treatise* or of the personalist conception of IP could argue that appropriation of intangibles is ethically justified, even if there are no natural prerequisites for appropriation, because existence of intellectual work should be recognized and its performers *deserve* a title in their products⁵². For this reason, the refutation of Locke-based theories of IP that would cut through different interpretations needs a decisive argument.

Let us then examine Locke's labor theory set against IP further. Even if the doctrine is to legitimize titles in intangibles on the grounds of a desert ethics, the appropriation would be justified by the work of an originator. This approach would of course indicate that homesteading of ideal goods is performed *mutatis mutandis* just as in the case of things. In this context two important problems instantly come to mind: can the labor depicted in the *Second Treatise* be mental; and onto what would the labor can be projected, since abstract objects do not have any manifestation before they are devised⁵³.

Locke described labor as physical, i.e. as «the labour of his body, and the work of his hands»⁵⁴ – first and foremost conducted personally by an individual who owns their body⁵⁵. Now, strictly speaking one's body is a scarce physical resource that cannot be co-controlled. There is nothing intellectual or psychological in the body itself. And so, throughout the *Second Treatise* work is depicted as a form of strenuous and physical action exemplified by planting a land with tobacco or sugar, sowing with wheat or barley⁵⁶. However, Locke provided for another way of privatization, enabled by toil of others, who perform in someone's name (servants, animals, employees)⁵⁷.

Apparently it did not matter so much whether the act of appropriation was physical or psychological, but whether it could be manifested physically in the state of nature⁵⁸. And since creative or innovative activity can be manifested in this manner, it is possible that creative or innovative work may result in privatization of corporeal products, but only in corporeal products (e.g. a sculptor could become a rightful owner of a produced figure). This rationale does not

⁵² S.R. MUNZER, *A Theory of Property*, Cambridge University Press, New York 1992, pp. 254 ss.; R.A. SPINELLO, *The Future*, pp. 1-16.

⁵³ The question of compensation for costs and efforts procured during intellectual work is on the other hand less relevant, since the fact that one needs energy from food or water to gather acorns or apples did not constitute to Locke an argument in favor of their exclusive acquisition either (v. J. LOCKE, *Second Treatise*, pp. 288 ss. (§§ 28 et seq.).

⁵⁴ *Ivi*, pp. 287-288 (§§ 27-28).

⁵⁵ *Ibidem*.

⁵⁶ *Ivi*, §§ 27, 28, 37, 40, 42, 43.

⁵⁷ *Ivi*, pp. 287-289 (§§ 27-29).

⁵⁸ Otherwise, one could not present oneself as an exclusive possessor.

lead to the establishment of IP as a labor which is intellectual *per se* does not result in production of any objectively manifested product. Intangibles (e.g. a creative pattern embodied in a stone of marble) are abstract, not physical. Unless an artist writes their book, or an inventor construes their device (i.e. engage in a physical process), the rest of mankind may never know that they have composed or contrived anything. And even if the public gets to know the achievement, without material *corpus mechanicum* (and sometimes despite its existence) it may still be too vague to recognize its creative identity. One could say then that Locke's IP could rely on physical expression of ideas (as they actually do in contemporary law), but again – that would justify privatization of those expressions only.

This labor argument may be easily turned, though. Work *per se* is an action, not its product. Thus, labor is intangible, whereas its product or resources used in the process are usually tangible. *Prima facie* this point seems to be valid in the case of IP validation, but only until a point when one considers intangibles' lack of identity. They have no borders and no identity (no particular referent), which makes them similar to a category or a kind of things, rather than a particular thing. Consequently, in Locke's system an IP right holder would cut off others from a resource, preventing independent inventors and parallel creators from just appropriation of products of their labor (e.g. one's own copies of someone else's paintings)⁵⁹. Hence, arguing that labor is intangible leads rather to pronouncing the categorical mistake (inferring a title in tangibles from a title in intangible) and rejection of the mixing theory as redundant, then to validation of IP⁶⁰.

The case of projection of one's labor onto the world gets even more complicated, if an adherent of Lockean IP chooses to argue that abstract goods are created *ex nihilo*. According to this reasoning, intangibles are created solely through efforts of an originator, without physical mixing and removal of any resources from the commons. Consequently, there are no prerequisites or constraints on appropriation. But then again, one could argue that creative or innovative conceptions are not taken from the thin air. Even if no material resource is directly necessary to construe them, there exists a sort of common cultural and technical heritage that any author or inventor relies on. And although theoretically possible, in practice usually no one acts independently⁶¹. Hence, the labor theory alone does not support a legitimate and decisive theory

⁵⁹ J. WALDRON, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, «Chicago-Kent Law Review», 68, 2/1992, pp. 864 ss.

⁶⁰ J. WALDRON, *The Right*, pp. 185-187; R. NOZICK, *Anarchy*, pp. 174 ss.; J.A. SIMMONS, *The Lockean*, pp. 266 ss.; G. SREENIVASAN, *The Limits*, pp. 60 ss.

⁶¹ Similar views were expressed i.a. by J. HUGHES, *The Philosophy*, p. 300 and C.J. CRAIG, *Locke*, pp. 9 ss.



of IP⁶². As observed by Peter Drahos, labor is «either too indeterminate or too incomplete» to form the foundation of a doctrine of IP⁶³.

With this in mind, another key feature of the presented doctrine needs to be considered. Since the provisos are obvious limitations to appropriation (at least until the introduction of money), perhaps they can imply the complete exclusion of incorporeal rights from the Locke-inspired system, as claiming titles in IP could lead to cutting-off others. Alternatively, the provisos could serve as a mean of moderation in the conflict between holders of rights to tangibles and intangibles.

A few dilemmas arise in this context, namely whether the provisos are valid, and if so, whether they apply to ideal goods? Consequently, do they regulate – *ceteris paribus* – all the categories of abstract objects or do they differentiate between them⁶⁴? And of course, if the clauses are not binding at all and they are just a misinterpretation or an overestimation of Locke's inaccuracies, they cannot support any stance on the subject of IP. Furthermore, it could be maintained that the provisos are irrelevant to the question, since the abstract nature of intangibles is the exact reason, why they are unfit for privatization or why there is no need for it. That said, an introduction of IP laws produces an artificial scarcity of creative works and inventions, making the clauses applicable. Just as in the case of a desert theory, prerequisites for legitimate acquisition of goods set by the provisos may serve as twofold arguments – for and against Locke's doctrine of IP⁶⁵.

Let us assume though, that adherents of Locke's or Lockean IP are correct to use the provisos in their argumentation and consider their case further. First, one may claim that since abstract objects do not have any material form, they cannot go to waste and, *ergo* the spoilage clause does not apply to creative works and inventions⁶⁶. It is perfectly possible for ideal goods to remain intact and not exert for thousands of years. This observation is especially apt in reference to the para-Platonist conception of transcendent ideas, existing independently from the human mind. On the other hand, one may understand the term “spoil” not as “to become damaged or unfit for use”, but as “detained from use”. In this case, it would be an obvious and direct violation of the spoilage proviso to assert the exclusive title in non-scarce goods (as it restricts the free

⁶² The middle course approach was proposed by Lior Zemer, according to whom «Locke's property philosophy guarantees authorial rights, but it also acknowledges the collective role of the public in the creative process» (L. ZEMER, *The Making of a New Copyright Lockean*, «Harvard Journal of Law & Public Policy», 29, 3/2006, p. 893).

⁶³ P. DRAHOS, *A Philosophy*, p. 47.

⁶⁴ V.J. HUGHES, *The Philosophy*, pp. 287-366.

⁶⁵ P. DRAHOS, *A Philosophy*, pp. 48 ss.

⁶⁶ W.J. GORDON, *A Property*, pp. 1533-1609; J. HUGHES, *The Philosophy*, pp. 287-366.

float and use of works and inventions) or make it artificially scarce, preventing the public from their free use⁶⁷. Once again, Lockean criteria of legitimization of initial acquisition seem two-fold.

The similar ambivalence may be observed in the case of the sufficiency clause. For the abstract objects may either be perceived as created *ex nihilo*, and thus nothing is taken from the common stock and no consideration for the similar taking of others is due⁶⁸; or they can be removed from the commons in compliance with a «weak proviso»⁶⁹; or contrary to both mentioned – their appropriation would in fact be a form of privatization of collectively achieved knowledge and culture (through substantiation and formulation)⁷⁰. One can even argue that no matter if ideal goods are created or extracted from some common domain, a privatized (e.g. copyrighted or patented) good is closed-off and a chance of its replacement through independent parallel acquisition of not the same but identical good is illegitimate. If you appropriate one apple, you may not worsen the situation of other people wishing to do the same and bake an apple-pie, but if you copyright an apple-pie recipe, you totally exclude others from this particular act of cookery⁷¹. An interesting theory was formulated in this regard by David Schmidtz, who argued that the sufficiency proviso is valid, and privatization of all goods is necessary in order to avoid the so-called «tragedy of the commons»⁷². On the other side of the debate stands i.a. Wendy J. Gordon⁷³, Carys J. Craig⁷⁴ and Jeremy Waldron⁷⁵.

As the multitude of apt academic interpretations demonstrate, a decisive answer whether the provisos are applicable to IP seems impossible. All things considered, some conclusions may be drawn, though. Because in the state of nature there is no normative differentiation between abstract objects (what is the difference between a copyrighted work and a patentable invention, if there is no legislation to define a copyright and a patent⁷⁶?), all intangibles enjoy the same status. Therefore, if the clauses may be employed, they are effective in all

⁶⁷ B.G. DAMSTEDT, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, «Yale Law Journal», 112, 5/2003, pp. 1179-1221; P. DRAHOS, *A Philosophy*, pp. 49 ss.; G. HULL, *Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property*, «Public Affairs Quarterly», 23, 1/2009, pp. 67-93; J. HUGHES, *The Philosophy*, pp. 327 ss.

⁶⁸ E.g. R. NOZICK, *Anarchy*, pp. 181-182.

⁶⁹ J. HUGHES, *The Philosophy*, pp. 287-366; W.J. GORDON, *A Property*, pp. 1533-1609; A.D. MOORE, *Toward a Lockean*, pp. 81-106; A.D. MOORE, *A Lockean Theory*, pp. 1069-1113.

⁷⁰ C.J. CRAIG, *Locke*, pp. 23-24; P. DRAHOS, *A Philosophy*, pp. 55 ss.; W.J. GORDON, *A Property*, pp. 1533-1609.

⁷¹ D. MCGOWAN, *Copyright*, pp. 50 ss.; J. WALDRON, *The Right*, pp. 390 ss.; D.A. ATTAS, *Lockean*, pp. 48-49.

⁷² D. SCHMIDTZ, *When is Original Appropriation Required?*, «The Monist», 73, 4/1990, pp. 504-518.

⁷³ W.J. GORDON, *A Property*, p. 1564.

⁷⁴ C.J. CRAIG, *Locke*, pp. 26-27.

⁷⁵ J. WALDRON, *From Authors*, pp. 846 ss.

⁷⁶ The differentiation between the regimes of protection is conventional and depends on a decision of a legislative. E.g. not long ago software was protected in the USA through both copyright and patent law, while currently it is only patentable, whereas in the EU only copyrightable.



similar instances. One cannot rationally claim that the enough-and-as-good rule prohibits appropriation of some intellectual goods but not others, if the theory is to meet the deontological criterion of completeness. Hence, the provisos lead to the all-or-nothing answer: either they restrict every intangible from being appropriated, or they do not limit the act of privatization at all.

Perhaps then, in the end we should return to the political and attempt to validate IP through a positive law. After all, the easiest way to resolve a problem of legitimacy of any institution is to regulate social relations. In this case a legislative would simply establish a fiduciary property, specifying a subject, an object, and a substance of IP. Even if one was to agree with these majoritarian and democratic (*resp.* positivist and constructivist) interpretations⁷⁷, the nature of intangibles, as already presented, would make it problematic to accommodate them in the proprietarian system depicted by Locke. Can the theory so incoherent and susceptible to different interpretations work as the philosophical bedrock for a functional IP legal system? Most likely it cannot. But even if it could not, it does not yet mean that Locke's ethics of private property works against IP and all Lockean (Locke-inspired) theories of IP are to be refuted, which is the thesis of this paper.

4. Refutation of Lockean IP

The argument goes as follows. Self-ownership and ownership originate from the presupposed notion of self-preservation – the most fundamental rule of the natural law. Since one has physical needs, they need to appropriate. Now, either mankind does not need IP to survive (e.g. it is possible to sustain a living with bananas but not with Woody Allen's film "Bananas"), or on the contrary – certain abstract objects such as ideas and methods ought to be employed in order to successfully face hardships of the physical world (e.g. a textbook on cultivation of banana trees might come in handy). It seems rather obvious that the latter is the case, for every voluntary behavior of men is preceded by a conception of some sort. As Ludwig von Mises put it, «Action is preceded by thinking. Thinking is to deliberate beforehand over future action and to reflect afterward upon past action. Thinking and acting are inseparable»⁷⁸. *Homo faber* is always *homo cogitans*. Thus, to bake an apple-pie one needs not only fruits, eggs, flour, and an oven, but also a recipe, a technique of using an oven and even a certain knowledge of what color of apples is the most suitable for consumption. Even the simplest act of picking an apple from a tree must be devised

⁷⁷ See e.g. W. KENDALL, *John Locke*, pp. 113 ss.

⁷⁸ L. VON MISES, *Human Action*, p. 176.

before it is performed. In other words, intellectual goods are used by mankind even in the state of nature.

It has already been indicated in this text that appropriation of ideal objects is not essential for their use and not feasible without a government but let us now ignore those objections and ponder over the consequence of assertion of IP for Locke's theory of property. I maintain that the doctrine would have to accommodate claims so conflicting that it would become inoperable, thus leading to the extinction of mankind. If homesteading of abstract objects is admissible in the state of nature, then the first individual – Adam that Locke wrote so much about in the *First Treatise*⁷⁹ – would have had a chance to appropriate the act of appropriation itself, thus leaving others on their mercy or unable to acquire resources necessary to sustain a life.

At first this concept might seem rather idiosyncratic, as it is generally understood that only a certain product of human mind can constitute a legally protected IP. However, in the state of nature only the natural law is effective. The social compact is not yet established and there is no positive law. Thus, no statutory regulation differentiates between objects of protection and sets premises for eligibility or substantially limits privatization. And there is no doubt that the process of appropriation is an intangible good itself. It has a potential value, it is a concept formulated by human mind, and it constitutes a pattern or a method that may be employed in the physical realm⁸⁰.

Consequently, one could not appropriate anything without acquiring the abstract good of appropriation method first. Claiming the exclusive title in this process would mean that only one individual – the first one to declare – is free to attain further, i.e. sustain their life. Such a corollary is clearly conflicting with the right of self-ownership and the most fundamental principle of the natural law that never cease to be binding (even after the establishment of a state) – self-preservation⁸¹. The passage that perhaps best illustrates this observation is the famous § 23 of the *Second Treatise*: «For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any

⁷⁹ J. LOCKE, *First Treatise*.

⁸⁰ One cannot just assume that homesteading is a notion implied in human mind ab initio. Even if a given rule were self-evident, it would still need to be contemplated and realized (as other norm of the natural law according to Locke). This contention is further supported by Locke's epistemology and his famous notion of tabula rasa (V. J. LOCKE, *An Essay Concerning Human Understanding*, Book II, in J. LOCKE, *The Works of John Locke* in Nine Volumes, vol. 1, London, C. Baldwin, 1824, pp. 77 ss., retrieved from: http://lf-oll.s3.amazonaws.com/titles/761/0128-01_Bk.pdf, December 20 2020).

⁸¹ An adherent of Lockean theory of IP might choose to argue that homesteading the act of appropriation would be constrained by the sufficiency proviso, while other acts of acquisition would not. However, the enough-and-as-good clause set against patents or copyright is an all-or-nothing rule. It either forbids every privatization of an abstract object (and thus the thesis of this paper is proven nonetheless) or it does not abide, and the argumentum ad absurdum presented above applies.



one, nor put himself under the Absolute, Arbitrary Power of another, to take away his own Life, cannot give another power over it»⁸².

5. From property to politics

Although centuries have passed since the publication of the *Two Treatises of Government*, the book is still important to our political and legal culture. It is precisely Locke's philosophy what made us believe that we need some more grounded reasons to accept IP law than a mere decree of the government. It is also his doctrine what made a way for reification and consequent privatization of intellectual work.

Paradoxically, any attempt to derive IP from the deontological ethics of the *Second Treatise* entails great interpretational problems or inconsistencies. First, intangibles seem not fit for appropriation in the state of nature, because they cannot be physically possessed and taken into exclusive control. Second, intangibles are non-scarce (they are non-excludable and non-rivalrous). They may be used in the common stock to a simultaneous and unrestricted avail of unlimited number of people without any caution for their depletion or deprivation. Thus, there is no need for their privatization. Third, universally effective incorporeal rights may be in violation of legitimate titles of others – either in their tangibles or self-ownership. If property is to be exclusive and absolute, borderless abstract objects cannot be introduced into the liberal system without subduing at least some of already existing rights. Consequently, IP requires a government which would decree and exercise specific laws, enabling artificial scarcity of intangibles and balancing interests of various right holders – i.e. is contrary to the pre-political nature of Locke's property. Last but not least, appropriation of ideal objects could lead to acquisition of a title in the method of appropriation itself and this would blatantly violate the principle of self-preservation. Hence, IP is contrary to the very essence of the doctrine presented in the *Second Treatise*⁸³.

It is surprising then that Locke himself supported early copyright legislation. As is well known, Locke earned a rather significant influence in the post-revolutionary Britain of the 1690s and was often asked to express his views on proposed acts of the Parliament. That being so, he authored a memorandum concerning the renewal of the 1662 Licensing Act – the statute which privileged the Stationers' Company with a publishing monopoly and thereby secured

⁸² J. LOCKE, *Second Treatise*, p. 284 (§ 23).

⁸³ Therefore, I do not agree with the statement that neither Locke's nor the Lockean stance on IP is implied by the reading of the *Second Treatise* (W. FISHER, *Theories*, p. 185).

Crown's control over the dissolution of politically dangerous ideas⁸⁴. Locke took part in a debate concerning the statute, inferring ideas of free speech and enterprise. He expressed his critique cautiously but firmly in a form of a letter entitled "Liberty of the Press"⁸⁵.

Locke attacked the violation of individuals' rights, as well as the utility disadvantage it entailed. However, the main argument therein concentrated on the effects of the monopoly (the censorship, restrictions on business and limits on diffusion of knowledge it produced), not on the existence of copyright *per se*. Locke simply opposed the law that forbade him to freely publish the classical masterpieces of Tully or Livy (he was personally interested in his own publication of Aesop) and claimed it unjust to entrust the Stationers' Company with the perpetual monopoly over printing and distribution of works (leading *i.a.* to the shortages and low quality of editions or seizure of any imported books in English as they were "pirated"). In his opinion the author's rights to copy should expire after a period of fifty or seventy years after which works should enter the commons⁸⁶. As we read: «It is very absurd and ridiculous that any one now living should pretend to have a propriety in, or a power to dispose of the propriety of any copy of writings of authors who lived before printing was known or used in Europe»⁸⁷.

Considering this, one could assume that the position articulated in the memorandum is self-explanatory and only needs to be reconciled with the theory of property described in the *Second Treatise*. Locke explicitly spoke in favor of writers' rights in their literary works, provided they were temporary. Interestingly, he even called those rights a "property"⁸⁸. This poses a great problem, though, for either Locke believed copyright was justified on the grounds of the natural law or he admitted granting and revoking property titles purely on the grounds of a positive law (as he wrote: «it may be reasonable to limit their property to a certain number of years after the death of the author or the first printing»⁸⁹). Both stances are contrary to the fundamentals of his philosophy. The former goes blatantly against the statement that a civil compact and a government are established in order to protect property: to guard and to regulate it but certainly not to threaten it. This argument has been already presented.

⁸⁴ J. LOCKE, *An Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating Printing and Printing-Presses* (1695), in P. KING (ed), *The Life of John Locke, with Extracts from His Correspondence, Journals and Common-Place Books*, vol. 1, London, Henry Colburn and Richard Bentley, 1830, pp. 375-387.

⁸⁵ J. LOCKE, *Liberty of the Press* (1695), in M. GOLDIE (ed), *Locke. Political Essays*, Cambridge, Cambridge University Press, 2002, pp. 329-339.

⁸⁶ Nb. Locke was one of the first to suggest it.

⁸⁷ J. LOCKE, *An Act for Preventing*, p. 387.

⁸⁸ J. LOCKE, *Liberty of the Press*, p. 337.

⁸⁹ *Ibidem*.



Whereas the latter is inconsistent with the theory property because a temporary right is not a property in the same sense as ownership is. First, the property described in the *Second Treatise* is not limited by time. It is, as corporeal property is, perpetual. Therefore, completely different from what copyright is and from what Locke wanted it to be. Second, copyright – as it has already been argued – requires state intervention, while Locke’s property was supposed to rely on the natural law (and thus be pre-political). Third, introducing copyright into Locke’s system leads to inevitable conflicts between holders of rights to works and their exemplars. As the philosopher himself noted on the subject of fighting the copyright piracy:

How the gentlemen, much more how the peers, of England come thus to prostitute their houses to the visitation and inspection of anybody, much less a Messenger, upon pretence of searching for books, I cannot imagine. [...] They are still subject to be searched, every corner and coffer in them, under pretence of unlicensed books, a mark of slaver which I think their ancestors would never have submitted to. Thus to lay their houses which are their castles open not to the pursuit of the law against a malefactor convicted of misdemeanour or accused upon oath, but to the suspicion of having unlicensed books, which is whenever it is thought fit to search his house and see what is in it⁹⁰.

Clearly, Locke was aware of the conflicts produced by copyright and yet agreed to its existence (even though he was an important figure in the struggle to end the monopoly licensing of Stationers’ Company).

How to interpret these inconsistencies? Of course, it is possible that he made a mistake (there are sources confirming Locke understood copyright as privilege, not as property⁹¹), spoke vaguely (as he is not the writer known for the precision of his language), or consciously demonstrated opposed judgements on current political issues and ethics⁹². Yet another factor which could contribute to Locke’s “enerally yes, but in this case no” argumentation could be his famous cautiousness, deterring him from formulating explicit and radical statements in the case of legislation. Perhaps he was trying the reformist approach, knowing that the complete critique would be unheard and counterproductive.

Unfortunately, the complete motives for supporting liberalization of copyright but not its abolishment are unknown⁹³. Frankly though, the statement in

⁹⁰ *Ivi*, pp. 335-336.

⁹¹ V.R. DEAZLEY, *Rethinking Copyright. History, Theory, Language*, Cheltenham-Northampton, Edward Elgar, 2006, p. 144.

⁹² Similarly: S.V. SHIFFRIN, *Lockean Arguments*, p. 155; M. ROSE, *Authors and Owners. The Invention of Copyright*, Cambridge-London, Harvard University Press, 1994, p. 33.

⁹³ For more on the historic context, content and possible interpretations of this publication see: J. HUGHES, *Locke’s 1694 Memorandum (and More Incomplete Copyright Historiographies)*, in «Cardozo Legal Studies», 27, 555/2006, pp. 1-24; F.S. SIEBERT, *Freedom of the Press in England 1476-1776. The Rise and Decline of Government Control*, Urbana, University of Illinois Press, 1965, pp. 238 ss.; R. DEAZLEY, *On the Origin of the Right to Copy. Charting the Movement of*

the “Liberty of the Press” does not have to be taken for granted. It is possible to treat Locke’s philosophy seriously and fairly while ignoring his post-revolutionary involvement in legislation. After all, it was the proprietarianism of the *Second Treatise* which affected the world, not the “Liberty of the Press”.

This leads us to the last point. Both Locke’s stance in the memorandum and use of his theory of property to legitimize IP ought to be understood as political for they direct the logic of liberal capitalism towards intangibles. Around 18th century a practice of granting monopolies over specific works to guilds such as Stationers’ Company started being challenged by the less privileged⁹⁴. Thus, when the threat of losing the commercial advantage emerged, the publishers argued for (transferable!) rights of authors to their work, often invoking liberal theory of property⁹⁵. Consequently, the development of the market and the decay of the post-feudal system of patronage fueled the so-called “literary property debate” and the first legislation in England (later a similar processes took place in post-revolutionary France, then Germany, and then in the rest of Europe, though various doctrines were invoked – the debate over the nature of IP carried on in the 19th century). Although rejected at the beginning, eventually copyright started being rationalized through natural right to property, often included as a kind of property in the actual law and sometimes even modelled after ownership⁹⁶. These claims of ownership corresponded with a philosophy

Copyright Law in Eighteenth-Century Britain (1695-1775), Oxford and Portland, Hart Publishing, 2004, pp. 3 ss.; M. ROSE, *Authors*, pp. 32 ss.

⁹⁴ Nb. patents never really broke up with this tradition in terms of construction of right (patents are granted by an office for a specific period of time) and even the name “copyright” derives from those times (a monopoly granted to publishers was “a right to copy”; similarly with the term “royalty” which originally meant a fee paid in return for being given a monopoly). Interestingly, some scholars point out that regardless of juristic forms and ethical rationale, IP is (and always has been) in its essence a state-given monopoly, a kind of a privilege (see e.g. M. BOLDRIN – D.K. LEVINE, *Against Intellectual Monopoly*, Cambridge–New York, Cambridge University Press, 2008; C. COLSTON – J. GALLOWAY (eds), *Modern Intellectual Property Law*, London–New York, Routledge, 2010, p. 35. Cf. J.E. PENNER, *The Idea of Property in Law*, New York, Clarendon Press, 2003, p. 120; M. SPENCE, *Intellectual Property*, Oxford–New York, Oxford University Press, 2007, pp. 73–74.).

⁹⁵ M. ROSE, *Authors*, pp. 5–6.

⁹⁶ V. *Statute of Anne* vel. Copyright Act of 1710 vel. *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned* (8 Ann. c. 21). *Statute of Anne* was the first modern IP legislation, distinguishing between the right in copy (property of an exemplar) and the right to copy (IP of a work). Copyright was exclusive and transferable, entailed a right of first publication, required registration (it was codified according to the monopoly model of IP) and lasted for a fixed period of time. However, the act did not yet speak of “intellectual property” and certainly did not equate between copyright and ownership. This change happened through the case law, judgement in *Millar v. Taylor* (1774, 4 Burr. 2408, 98 Eng. Rep. 257) being perhaps the most important (even though it was later overturned by *Donaldson v. Beckett*) and further systemic transformations (including the shift from corporeal ownership towards a capital. Late 18th century legislation in France on the other hand derived copyright from the natural right of property from the very beginning. See: Loi du 13 janvier 1791, relative aux théâtres et au droit de représentation et d’exécution des oeuvres dramatiques et musicales; Loi du 19 juillet 1791, relative aux théâtres et au droit de representation et d’exécution des oeuvres dramatiques et musicales; Loi du 19 juillet 1793, relative à la propriété littéraire et artistique; Décret-loi du 1er germinal an XIII, relatif à la propriété des oeuvres posthumes; Loi du 15 prairial an III (15 juin 1795), relative aux autorités chargées de constater les délits de contrefaçon. On the history of IP and copyright see generally: M. ROSE, *Authors*; B. ATKINSON – B. FITZGERALD, *A Short History of Copyright. The Genie of Information*, Heidelberg, Springer, 2014; B.



of the newly awakened middle class – from now on it was not a grant of a suzerain, but the enterprise (and in case of authors: inalienable right to one's work) which determined a social status⁹⁷.

The attempt at reification and, consequently, privatization of ideal goods is hardly surprising. After all, Enlightenment allowed for the progress at unprecedented pace due to the scientific and creative leap forward. With every decade it had become more and more obvious that intellectual resources are of a great value in the upcoming race of nations and classes. True, the previous system did not distinguish the creators and enabled censorship, but it was rather simple recognition of the source of wealth, what led to the formation of proprietarian theories of IP. Putting it frankly and shortly then, it was all about the economic interest, not the new social consciousness. As pointed out by Kenneth E. Himma, the expectation to acquire a title in one's own work and to benefit from it constitutes a far more powerful reasoning than completeness and universality of a theory of rights or philosophical feasibility of appropriation⁹⁸. The language of liberalism and ownership simply strengthened the material claims and helped to legitimize the expansion of materialistic individualism onto human creativity (e.g. an infringement may be presented as "stealing")⁹⁹. It served to validate rights which, just as property, require everyone to respect a holders' exclusive control and predominance, i.e. which limit everyone's but holders' freedom. And what better and more influential theory of property to use for a proprietarian revolution than Locke's¹⁰⁰?

Despite the influence of Locke's thought and the impact of political liberalism on the Western law and economy, the *Second Treatise* deserves a careful

SHERMAN – L. BENTLY, *The Making of Modern Intellectual Property Law. The British Experience, 1760–1911*, Cambridge–New York–Port Melbourne, Cambridge University Press, 2003; P. GOLDSTEIN, *Copyright's Highway. From Gutenberg to the Celestial Jukebox*, Stanford, Stanford University Press, 2003; R. DEAZLEY, *On the Origin*; M. WOODMANSEE, *The Genius and the Copyright. Economic and Legal Conditions of the Emergence of the "Author"*, «Eighteenth-Century Studies», 17, 4/1984, pp. 425–448.

⁹⁷ In case of bourgeoisie the ideas of enterprise and capital being equally important to physical labor were already implemented into the discourse by Locke and later champions of classical liberalism. Authors on the other hand needed to construe the concept of "authorship", which required a "campaign" on cultural and legislative levels (v. P. JASZI, *Toward a Theory of Copyright. The Metamorphoses of "Authorship"*, «Duke Law Journal», 40/1991, pp. 455–498; M. WOODMANSEE, *The Genius and the Copyright*, pp. 425–448.

⁹⁸ K.E. HIMMA, *The Justification of Intellectual Property Rights. Contemporary Philosophical Disputes*, «Journal of the American Society for Information Science and Technology», 59, 7/2008, pp. 1143 ss.

⁹⁹ This contention finds its confirmation i.a. in the works of Alexandra George, Mark Rose, Fritz Machlup and Edith Penrose (A. GEORGE, *Constructing Intellectual Property*, New York, Cambridge University Press, 2012, pp. 31 ss.; M. ROSE, *Authors*, pp. 34 ss.; F. MACHLUP, *Edith Penrose, The Patent Controversy in the Nineteenth Century*, «The Journal of Economic History», 1, 10/1950, pp. 1–29).

¹⁰⁰ It is precisely Locke's idea of justice and labor theory of property what led to the formation of the historic "sweat of the brow" doctrine in the English copyright law. According to this, long abandoned, theory a creative effort justifies acquisition of a title in one's intellectual work.

interpretation. And the conclusion is unambiguous. Since personal preservation is the core and bedrock of Locke's political philosophy, any attempt to justify IP on its grounds is inconsistent. It detaches the doctrine from its compatibility, determinacy, and completeness, makes it inoperable and self-contradictory. Having said that, I do not claim that copyright and patent law ought to be abolished on the grounds of their inconsistency with Locke's theory of property or liberal origin. I only point out to the fact that their possible justification should be looked for elsewhere.