

Hettinger v. Paine Justifying Intellectual Property Rights

I. Hettinger's Critique of Intellectual Property

Overview: Hettinger criticizes a number of mainstream attempts to justify intellectual property and argues that the non-exclusive nature of intellectual works grounds a case against ownership. "Why should one person have the exclusive right to use and possess something which all people could possess and use concurrently?" The well-known Lockean labor and desert arguments, as well as arguments based on privacy and sovereignty, are found to be problematic and are ultimately rejected as justifications of intellectual property. Hettinger also examines the utilitarian argument based on providing incentives which he considers to be only partially successful. He concludes with the claim that justifying intellectual property is a daunting task and we should think more imaginatively about alternative methods of stimulating intellectual labor short of granting full blown property rights.

A. Prima Facie Case Against Intellectual Property Rights:

The non-exclusive nature (non-rivalrous) of intellectual works grounds a prima facie case against rights to restrict access. Since intellectual works can be "many places at once" and are not "consumed by their use" the burden of justification is on those who want to allow rights. "Why should one person have the exclusive right to possess and use something that all people could possess and use concurrently?"

One reason for the widespread pirating of intellectual works is that many people think that restricting access to these works is unjustified.

Formal Version:

- P1. If a tangible or intangible work can be used and consumed by many individuals concurrently (non-rivalrous), then maximal access and use should be permitted.
- P2. Intellectual works falling under the domains of copyright, patent, and trade secret protection are non-rivalrous.
- C3. So it follows that there is an immediate prima facie case against intellectual property rights or for allowing access to intellectual works.

B. Freedom of Thought and Expression Argument:

Permitting intellectual property rights runs headlong into our commitment to freedom of thought and speech. "Private intellectual restricts methods of acquiring ideas (as do trade secrets), it restricts the use of ideas (as do patents), and it restricts the expression of ideas (as do copyrights) — restrictions undesirable for a number of reasons.

Trade Secrets are the worst, unlike copyrights and patents, they do not require disclosure (the ideas can be restricted indefinitely).

C. The Lockean Labor Mixing Argument:

Root Idea Of Labor Arguments: "The root idea of the labor theory is that people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry." (Becker, page 32) The idea is that the person who clears ten acres of land, builds a house and a barn, cultivate crops and nurtures livestock, obtains full ownership rights by engaging in these activities. After years of such activity we would be outraged if someone came along tossed the possessor out on her ear and claimed that this farm was now his. A labor argument represented by this conical example shows the force of the root idea.

Argument

1. Each person has a property right in her own body and the labor of her own body (II-27).
2. A person acquires property rights in those things which are formerly unowned and with which she mixes something that she owns (labor).

Therefore:

3. A person acquires a property right in those things that were formerly unowned and with which she has mixed her labor.

Rigorous Version:

1. Everyone has a property in his own person.
2. By extension everyone owns the labor of his body.
3. By removing a thing from its natural state a person has mixed his labor with it and joined something to it.
4. By mixing what is yours (your labor) with what is available for appropriation you make another's taking that thing unlawful.
5. By taking the improved thing, a person also takes your labor - and only you have a right to your labor.
6. These property rights hold when the conditions on original acquisition are satisfied - charity limitation, non-waste proviso, and a 'worsening proviso'.

Therefore: property rights in external objects are justified given 1-6.

1. The Labor Limitation (II-27): One may acquire as much as one mixes one's own labor with. It is a fact that humans can only labor so much - this fact will limit acquisitive behavior.
2. The Spoilage Limitation (II-31, 37, etc.): One may acquire only as much as one can use without spoilage.

3. The Sufficiency Limitation (II-27, 33, etc.) generally called The Lockean Proviso: One's acquisition must leave enough and as good in common for others.
4. The Charity Right (I-42 of the First Treatise): When an individual is starving or lacking any necessity of life she has a right to the surplus of others.

D. Problems for the Mixing Argument (Hettinger, p. 21-22)

1. Why should a person gain what she mixes her labor with instead of losing her labor (tomato juice example).
 - a. Lockean Reply: Property should be gained because the laborer has brought value (in most cases) into the world — value that she did not have to create. Locke thinks that 99% of all value is created by labor — one owns the values that one creates.
 - i. Problems: All that this reply shows is that laborers are entitled to the values that they create. In most cases though, the value and the object labored on can be separated (e.g. land/crops).
 - ii. Locke is wrong about labor creating 99% of all value — what about an apple, or crude oil? These goods are valuable independent of labor.

How would the Lockean reply?

- iii. Also, the value of many products is dependent social forces like competitive markets where individual buying preferences drive up (and down) prices, collective wisdom that underlies most/all creation, etc. The value of some good is dependent upon a whole range of things outside the control of the inventor. Thus, it is not even clear that laborers should obtain rights to control the value that they produce.

How would the Lockean reply (social nature of intellectual works)?

E. The Desert Based Labor Argument:

The desert based argument modifies the original argument by adding in the notion of *what one deserves for laboring*. Lets face it, labor is not much fun and those who labor and create things of value *deserve* rights to control what they produce.

1. Problems for the Desert Argument:

- a. Maybe property rights are not deserved, maybe gratitude or a handshake is what is owed.
- b. How hard one works/tries is dependent on accidents of birth and nature. If you have good genes and a good childhood, then you are likely to lead a productive life. But you didn't deserve the genes or the good schools, so in the end, you don't deserve rights to control what you produce.

F. Problems for the Lockean Provisos:

1. The "enough and as good" proviso: this limitation on acquisition, generally understood as a "no harm, no foul" restriction, is violated by exclusive patent protection. Surely, the second inventor is worsened by not being able to market his products or use his machine.
2. Restricting access to intellectual works and ideas is wasteful — thus, patents, copyrights, and trade secrets violate Locke's non-waste requirement.

G. Sovereignty, Security, and Privacy Arguments for Intellectual Property Rights:

Overview: A good starting point for justifying rights to intellectual works and ideas comes from the plausible intuition that we each have rights to control the contents of our own minds. Our own private thoughts, ideas, plans, feeling, and goals, are ours to keep private or to tell others. Ultimately, rights to control intellectual works of all sorts derive from this basic right to control the initial disclosure on ones own thoughts.

Sovereignty, security, and privacy are each important human values — property rights over physical and intellectual goods are necessary for each of these values. "Some sovereignty over a range of personal possessions is essential to dignity." This would seem to hold true of security and privacy as well.

1. Problems:

- a. Copyrights and patents are neither necessary nor important for achieving these values.
- b. It is debatable if copyrights and patents lead to security.
- c. Copyrights and patents are not essential to privacy.
- d. Trade secrets may be damaging to personal sovereignty (limits job opportunities).

H. Utilitarian Justification:

Overview: Society seeks to maximize overall utility by ensuring that new products and intellectual works are created and discovered. Limited rights are granted as incentive for the production of such goods. According to this view, there is no natural right to control intellectual works like novels, computer programs, and music. Rights to control are granted only because this policy acts as incentive for authors and inventors to burn the midnight oil.

Formal Argument:

- P1. Society ought to adopt a system or institution if and only if it leads to or, given our best estimates, is expected to lead to the maximization of overall social utility.
- P2. A system or institution that confers limited rights to authors and inventors over what they produce is necessary (or nearly so) as incentive for the production of intellectual works.
- P3. Promoting the creation and dissemination of intellectual works is necessary (or nearly so) for an optimal amount of social progress.
- C4. It follows that a system of intellectual property should be adopted.

I. Problems for the Utilitarian Justification:

- A. What if we could get authors and inventors to produce the same amount of intellectual works without granting property rights? (attacks P2)
 - 1. Government could support of this work and public ownership of the results could better maximize social utility. This would allow for more access while maintaining the same level of intellectual works being produced — i.e. on utilitarian grounds it would be better.
 - 2. Trade secrets are very problematic because there is no trade-off between incentives and access — the owner of a trade secret may never reveal his secret. If this is so, what is the social benefit that results from enforcing trade secrets?
- B. Independent of Hettinger's internal critique (i.e. why good utilitarians would be suspicious of Anglo-American copyright, patent, and trade secret institutions) we may ask why should the government be involved in setting policies that maximize overall social utility? Don't authors and inventors have natural rights to control that which they produce? Isn't the primary function of the government to protect the rights of individuals?
 - 1. Why are my rights to control a copy of *The Sun Also Rises* somehow less subject to the demands of social utility than Hemingway's rights to control his work — why are physical property rights deontic-based and intellectual property rights based on utility. There seems to be a global inconsistency here, because either some kind of consequentialism is correct or some deontological theory is correct (they both cannot be true at the same time) — yet our national policies are affirming this.

What do you think about this issue?

II. Paine's Critique of Hettinger

Overview: Paine develops a defense of intellectual property, and in particular trade secrets, that focuses on the privacy and sovereignty of individuals. She argues that in general individuals have initial disclosure rights with respect to the ideas, opinions, plans, and knowledge found within their own minds. These rights are grounded in respect for individual privacy and autonomy. While Paine acknowledges that this kind of justification has limits and may not work at all beyond trade secrets, she argues that some kinds of intellectual property may be justified along these lines.

A. The Right to Control Disclosure:

Paine argues that each person has the right to control her own personal thoughts, and feelings — the world at large has no right to these ideas.

"The right to control the initial disclosure of one's ideas is grounded in respect for the individual." Seems to be upholding a deontological position — individuals are worthy of a deep moral respect and may not be treated in certain ways. Individuals may not be sacrificed for social utility. More minimally, within the bounds of individual rights to sovereignty and privacy utility may be promoted — but only within these constraints.

B. Reassessing Hettinger's Criticisms of Trade Secret Law

1. **Restrictions on Acquiring Ideas:** Hettinger claims that trade secrets are problematic because they restrict certain methods of acquiring ideas. Paine's reply is — 'yea, trade secrets protect against misrepresentation, theft, bribery, breach of confidence, and industrial espionage.' These methods for acquiring ideas should be prohibited.
2. **Competitive Effects:** Hettinger complains that trade secrets stifle competition. Paine retorts that this empirical claim is hard to assess. Clearly, trade secret law encourages fair competition in some cases (Cookie Co. case).
3. **Restrictions on Employee Mobility:** Hettinger charges trades secrets with restricting employee mobility. For example, when an mid-level manager leaves IBM she may not be able to find a job with a competitor. The competitors may be scared off because she signed a confidentiality agreement with IBM and to avoid lawsuits they may choose to hire someone else.

Paine replies that the courts are putting restrictions on what the content of such agreements can be — thus limiting the kind of control companies have over ex-employees.