

REVISITING LOCKE: IMPLICATIONS OF HIS COMMONS PHILOSOPHY FOR INTELLECTUAL PROPERTY

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ABSTRACT

This article undertakes a detailed examination of the property rights philosophy of John Locke, scrutinising its conceptual implications for contemporary intellectual property debates. The analysis is structured as a two-pronged inquiry. First, it critically analyses the inherent tensions in extending Locke’s seminal labour theory justification of physical property to construct analogous intellectual property rights. It illuminates material discrepancies arising from divergent assumptions regarding resource finiteness, the sufficiency proviso stipulating “enough and as good” be left for others, and definitional ambiguities surrounding waste when transposing Locke’s framework from the material to the intangible realm. Second, the article explores Locke’s under-examined conception of the commons, investigating potential synergies or conflicts between this notion and his seminal justification for private property via labour.

The analysis reveals pronounced difficulties in directly deploying Locke’s principles to substantiate modern intellectual property rights. The non-rival nature of ideas fundamentally controverts Locke’s presumption of scarcity underlying privatisation claims. Interpretive complexities also emerge regarding the application of the sufficiency proviso and waste definitions amid intangible goods. Concurrently, a re-appraisal of the overlooked dimensions of Locke’s broader philosophy unveils a more nuanced position, cautioning against excessive enclosure. While Locke endorsed private property in finite physical resources, his overriding emphasis on intellectual freedom intimates wariness about the boundless privatisation of knowledge. Ultimately, revisiting Locke’s incomplete theories can enrich current debates on balancing incentives and access when delineating intellectual property protections versus an open public domain.

I. INTRODUCTION

John Locke’s legacy is a towering obelisk in the vast marketplace of ideas, casting long shadows over our current discussions on intellectual property. As the foundation of contemporary

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libertarianism, his “labour theory” established the foundation for private ownership by associating it with individual effort.¹ But beneath the surface of this sturdy structure is a secret chamber that holds Locke’s ideas about the vast commons of knowledge. This piece explores this uncharted domain, where ownership lines become hazy and the concept of “enough and as good” itself turns into a complex riddle. Through the lens of Locke’s justification of intellectual property rights, the article will dissect the tensions between individual incentivization and collective access, ultimately questioning whether his seminal ideas can illuminate the path towards a just and equitable sharing of intellectual abundance- the explosion of ideas, innovations and creative works made possible by the era of digital technology and interconnectivity, in the 21st century. However, the lines drawn by Locke’s theory encounter a more intricate terrain when translated into the field of intellectual property law. This intricate terrain arises because Locke’s property theory was built on the concept of individual ownership of tangible objects.² These objects can be depleted or excluded from use by others. Intellectual property, on the other hand, is intangible. It consists of ideas, creations, and concepts that can be shared and used by multiple people simultaneously. This non-rivalrous nature of intellectual property clashes with Locke’s notion of exclusive ownership.³ Intellectual property laws like patents, copyrights, and trademarks allow rightsholders to exclude others and control the use of their intellectual property, at least temporarily. This gatekeeper function incentivises creation by granting exclusive rights to creators. However, it also restricts the free flow of knowledge and creativity to the broader public. The ‘gatekeeper’ role of intellectual property law throws into stark relief the inherent friction between the individual incentives Locke championed and the collective access he envisioned with his “enough and as good” proviso.

The core of intellectual property law is a delicate balancing act between encouraging innovation and ensuring knowledge is accessible to the public.⁴ This conflict permeates political and economic ideas, but surprisingly, Locke’s theory of property itself may offer a remedy for over-enclosure- a situation where intellectual property rights are granted too broadly or for too long, creating excessive constraints on the use and dissemination of knowledge. His ‘enough and as good’ proviso, requiring individuals to leave sufficient resources for others, suggests a recognition of the commons’ importance even when considered in the context of private ownership.⁵ Locke’s

¹ T. I. Mulcahy, *Locke’s Theory of Property*, 59 THE IRISH MONTHLY 319 (1931).

² JOHN LOCKE & IAN SHAPIRO, TWO TREATISES OF GOVERNMENT: AND A LETTER CONCERNING TOLERATION 111 (2003). In Paragraph 25 of the Second Treatise, Locke says that God gave the world to Adam and his posterity in common... I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and it is clear that he is speaking about earthly property.

³ INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE, 37 (Axel Gosseries et. al. eds., 2008).

⁴ MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 36 (2016).

⁵ LOCKE, *supra* note 2.

justification for private property was based on individuals mixing their labour with resources from the commons or “state of nature.”⁶ However, he recognised that this appropriation had to be limited so that the commons were not depleted or spoiled for others.⁷ This limit took the form of the ‘enough and as good’ proviso. The proviso stated that individuals could only acquire private property from the commons if there was enough and as good left in common for others.⁸ In other words, the acquisition was only legitimate if it still left sufficient resources in the commons for others to also appropriate and make use of. This proviso suggests Locke saw the importance of preserving the commons as a shared resource pool, even as he justified appropriating portions of it as private property through labour. Can Locke’s principle be leveraged to establish a framework for intellectual property law that fosters creativity and innovation while ensuring the knowledge commons remains vibrant and accessible for all?

John Locke’s labour theory of property stands as a foundational pillar in this debate. He argued that individuals could “appropriate” resources from the shared commons and claim them as their own by investing their labour into them.⁹ This act of “mixing” one’s labour with unowned resources, Locke contended, imbued those resources with the same rights as one’s own person, essentially extending an individual’s selfhood onto the external world.¹⁰ While this theory championed individual enterprise and spurred economic growth, it also planted the seeds for the enclosure of knowledge and creativity within the realm of private property.

Modern intellectual property [“IP”] law, which has evolved significantly since the mid-20th century, is deeply influenced by Locke’s labour theory justifying private property rights.¹¹ Creators and inventors are granted time-limited exclusive rights over their original works and novel inventions in domains such as copyright and patent law. While granting these temporary monopolies undoubtedly fuels innovation by incentivising creators, it can also restrict access¹² for those unable to afford the premium pricing during the patent/copyright term. This acts as an economic gate, excluding many from the benefits. Additionally, these exclusive rights can potentially stifle the

⁶ See *id.* ¶ 30.

⁷ See *id.* ¶ 31.

⁸ LOCKE, *supra* note 2.

⁹ *Id.* at 111

¹⁰ *Id.* Although the idea of “selfhood” isn’t stated explicitly, the notion that labour confers ownership rights akin to those of one’s own body is consistent with the idea of extending oneself via labour.

¹¹ Hughes Justin, *The Philosophy of Intellectual Property*, 77 GEORGETOWN L. J. 287(1988); Steven J. Horowitz, *Rethinking Copyright and Fair Use*, 10 DEAKIN L. REV. 209(2005); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 THE YALE L. J. 1540 (1993).

¹² Karen Walsh et al., *Intellectual Property Rights and Access in Crisis*, 52 IIC INT’L REV. INTELL. PROP. AND COMPETITION L. 379 (2021).

cross-pollination of ideas that drive further innovation downstream.¹³ The challenge, therefore, lies in finding the optimal balance between incentivizing creation through strong IP protections and ensuring wider societal benefit through measures that promote knowledge dissemination and collaboration. The case of access to medicines exemplifies the inherent tension within intellectual property law. Patent rights, while crucial for incentivizing pharmaceutical research and development, can also lead to exorbitant drug prices, placing life-saving treatments beyond the reach of many populations. Furthermore, the strengthened pharmaceutical monopolies established by TRIPs-plus intellectual property regulations are demonstrably linked to increases in drug prices, delays in medication availability, and heightened costs for both consumers and governments.¹⁴

Many contemporary analyses of Locke's influence on property rights tend to focus solely on his justification of private ownership through labour, while overlooking his articulation of the importance of preserving the commons.¹⁵ According to Moulds, the popular perception of John Locke as a proponent of rugged individualism and laissez-faire capitalism is a misinterpretation of his academic writings.¹⁶ He contends that these perceptions stem from a fragmented and decontextualised examination of Locke's body of work. A comprehensive examination of Locke's writings reveals a different picture. While he does indeed affirm the principle of individual ownership through labour, he simultaneously recognizes the existence of "enough and as good" resources in the natural state for all individuals to claim without infringing upon others' rights.¹⁷ This crucial caveat, known as the Lockean Proviso,¹⁸ introduces a vital element of moderation into his property theory. It suggests that appropriation, even through labour, is not absolute and must not unduly encroach upon the common good.¹⁹

The Lockean labour philosophy is time and again used to rationalize the strong private rights over property acquired through labour. The idea that an individual has the natural right to be the private owner of the fruits of his labour has indeed been used to justify the concept of private property. John Locke in his writings recognises both physical labour and intellectual labour.²⁰ Lockean labour theory is hence used to justify the natural right over the fruits of intellectual labour too.

¹³ Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 MOD. L. REV. 6 (2013).

¹⁴ Brigitte Tenni et al., *What Is the Impact of Intellectual Property Rules on Access to Medicines? A Systematic Review*, 18 GLOBAL HEALTH 40 (2022).

¹⁵ See C. B. Macpherson, *Locke on Capitalist Appropriation*, 4 WESTERN POL. Q. 556 (1951).

¹⁶ Henry Moulds, *John Locke and Rugged Individualism*, 24 AM. J. ECON. AND SOC. 97 (1965).

¹⁷ Alexander Northover, "Enough and as Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine, 65 EMORY L. J. 1363 (2016).

¹⁸ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (2012).

¹⁹ LOCKE, *supra* note 2.

²⁰ JOHN LOCKE, POLITICAL ESSAYS (Mark Goldie ed., 1997).

Locke's Second Treatise of Government lays the groundwork for a theory of property grounded in the application of one's labour to the natural world.²¹ While the text itself predominantly focuses on physical property, its core justifications for private ownership based on labour-mix have prompted interpretations into the realm of intellectual property. Consequently, this paper undertakes a twofold analysis: The first part analyses conceptual tensions in extending Locke's labour theory, justifying physical property to intellectual property rights. It scrutinizes discrepancies stemming from divergent assumptions around resource finiteness, the "enough and as good" proviso, and waste definitions when transposing Locke's material property logic to the intangible knowledge realm. This examination is merited because John Locke's labour theory justifies ownership of physical property by mixing labour. However, intellectual property deals with intangible knowledge, not something finite or easily divided. This raises questions about whether Locke's ideas, designed for physical resources, can be fairly applied to intellectual property rights. The second part examines Locke's conception of the commons, exploring his position on preserving shared resources alongside the establishment of private property. This section will investigate potential tensions or synergies between these seemingly disparate notions within his framework. This examination is warranted because Locke's theory allows individuals to claim private property through labour but also emphasizes leaving "enough and as good" resources for others. This part investigates into whether Locke saw a potential conflict between individual ownership and the need to maintain shared resources, like the commons. Examining this tension helps us understand the limitations and internal consistency of Locke's property rights framework.

II. SITUATING INTELLECTUAL PROPERTY WITHIN LOCKE'S BROADER PROPERTY THEORY

In Chapter V of his Second Treatise on Government, John Locke presents a nuanced view of property rights, grounded in the notion of a shared earth and the individual's right to self-ownership.²² He argues that, initially, the earth was "given to humankind in common," with no inherent private dominion over its resources. This state of commonality, however, was not devoid of structure. God, according to Locke, endowed humanity with the "nous," the faculty of reason and understanding, to utilize these resources in a manner that enhanced their lives.²³

²¹ Kyle Swan & Jacob Vargas, *Property Rights, Lockean*, in THE SAGE ENCYCLOPAEDIA OF BUSINESS ETHICS AND SOCIETY 2787 (Robert W. Kolb ed., 2d ed. 2018).

²² LOCKE, *supra* note 2.

²³ *Id.*

Locke introduces the concept of labour as the key differentiator between commons and private property. In paragraph 27 of the Second Treatise²⁴, he asserts that “the work of one’s hands” becomes one’s own.²⁵ This, he elaborates, stems from the fundamental principle that “labour being the unquestionable property of the labourer,” any object mixed with one’s labour becomes an extension of oneself.²⁶ Through the act of labour, an individual extracts something from the original state of nature and imbues it with their own effort and ingenuity, thereby creating a distinct relationship with the object. This act of mixing labour serves as the cornerstone of Locke’s justification for private property, establishing a clear boundary between the shared commons and the realm of individual ownership.²⁷

It is crucial to note that Locke’s labour theory is not without limitations. Critics have pointed out the potential for exploitation and inequality inherent in prioritizing individual labour, particularly in contexts where access to resources and the ability to engage in productive labour are unevenly distributed.²⁸ Additionally, the ambiguity surrounding the extent and nature of “mixing labour” with resources has fuelled ongoing debates about the scope and application of Locke’s theory in contemporary contexts. Nevertheless, Locke’s articulation of the labour theory of property remains a significant contribution to the discourse surrounding property rights, offering a framework for understanding the relationship between individual agency, resource utilization, and the creation of private ownership. By recognizing the initial state of commonality and emphasizing the role of individual effort, Locke’s theory provides a nuanced and historically relevant perspective on the complex issue of property rights. But how? Lockean theory, by recognising the initial state of “commonality” in which resources belong to everyone, avoids a simplistic view that assumes absolute ownership and ignores the possibility of a shared origin. By emphasising “mixing labour” with resources, Locke emphasises the importance of individual effort in creating value and justifying ownership. Taking into account both the initial state and individual contribution, this adds another level of complexity to discussions about property rights. With regard to historical relevance, Locke’s ideas emerged during a period of significant social and economic change, and his ideas helped shape concepts of property rights during the rise of capitalism.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Campbell Jones, *The Meanings of Work in John Locke*, 54 in HIST. ECON. RATIONALITIES 51 (Jakob Bek-Thomsen et al. eds., 2017); NOZICK, *supra* note 18.

The absence of explicit references to intellectual property in John Locke's Second Treatise of Government has ignited a longstanding debate about his potential views on the matter. While Peter Drahos contends that Locke likely didn't have IP in mind during its drafting²⁹, Lior Zemer argues for a more nuanced interpretation, citing Locke's essay "Labour" (published five years later) as evidence of his awareness of intellectual property concepts.³⁰

Zemer's argument hinges on the notion that reading Locke's writings in conjunction, particularly "Labour" with its emphasis on both physical and intellectual labour, offers a more comprehensive understanding of his potential stance on IP.³¹ This holistic approach, Zemer suggests, is particularly crucial in light of the dearth of explicit references to IP in Chapter V. Scholars tend to focus solely on the "labour-mixing" allegory as the core of Locke's property theory³², potentially overlooking the implications for intellectual endeavours.

Therefore, Zemer proposes that transposing the labour theory from the physical property to the realm of intellectual property provides a potentially more fruitful avenue for understanding Locke's views on the subject. This approach allows for a nuanced interpretation, acknowledging the limitations of relying solely on the Second Treatise while incorporating insights from other relevant texts and exploring the applicability of Locke's core principles to the intangible realm of ideas and knowledge.

A. Discrepancies in Applying Locke's Theory to IP

While John Locke's labour theory of property provides a foundational justification for private ownership, its direct application to intellectual property rights encounters significant conceptual hurdles.³³ Examining this discrepancy necessitates scrutinizing three key points of divergence:

Resource Finiteness: Locke's theory presumes a finite pool of physical resources from which individuals can "appropriate" property by applying their labour. This inherent scarcity underpins the natural right to claim ownership, ensuring there's "enough and as good" left for others. However, intellectual property, encompassing ideas and knowledge, exists in an inherently non-

²⁹ PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1st ed. 2016).

³⁰ Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2005).

³¹ *Id.*

³² DRAHOS, *supra* note 29; Johannes Rohbeck, *Property and Labour in the Social Philosophy of John Locke*, 5 HIST. EUR. IDEAS 65 (1984); J. P. Day, *Locke on Property*, 16 THE PHIL. Q. 207 (1966); Iain Hampsher-Monk, *John Locke's ambiguous Theory of Property*, in DER EIGENTUMSBEGRIFF IM ENGLISCHEN POLITISCHEN DENKEN 99 (Günther Lottes ed., 1995); Carys Craig, *Locke, Labour, and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1 (2002).

³³ Justin, *supra* note 11; Gordon Hull, *Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property*, 23 PUB. AFF. Q. 67 (2009).

finite realm.³⁴ Replication doesn't diminish the original, thus challenging the premise of scarcity and potentially invalidating the Lockean justification for exclusive IP rights.

“Enough and as Good”: In the commons of physical resources, Locke's “enough and as good” proviso mitigates potential harm to others' access. Locke grounds private property rights in labour in his Second Treatise, where he permits individuals to appropriate resources from the commons through their labour, subject to the important restriction that such appropriation must be limited to what can be used before spoiling so that “enough and as good” remains for others.³⁵ It can be argued that the “enough and as good” proviso in Locke's theory acts as a safeguard, preventing the appropriation of resources from the commons to such an extent that it hinders others' ability to acquire their own and secure their livelihood, thus ensuring private property doesn't come at the public good's expense. It is readily applicable to finite resources like land, where leaving some ensures others can, too, which becomes far more abstract for intellectual property.

With IP, determining what constitutes “enough and as good” for all stakeholders becomes immensely complex. Ideas and knowledge can hold vastly different values for different individuals and communities³⁶, making it difficult to ensure equitable access when exclusive rights are granted. This challenge further undermines the applicability of Locke's proviso to the realm of intellectual property.

Defining “Waste”: Locke's theory also hinges on the notion that resources shouldn't be allowed to go to waste. While waste in the physical realm is readily identifiable, applying this concept to IP becomes problematic. Ideas and knowledge can morph and be utilized in unforeseen ways, making it difficult to determine when they are being unproductive or underutilized. For instance, when the airplane was first designed, it was unable to achieve steady flight. This failed flight attempt may have appeared at the time to be a “wasted” idea to some. Nevertheless, those initial attempts ultimately resulted in the breakthroughs that enabled powered flight. Similarly, the first umbrellas were intended for shading rather than rain protection³⁷, but this concept evolved into something more widely used over time.

³⁴ Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHICAGO-KENT L. REV. 616 (1993); Tony Ciro, *The Scarcity of Intellectual Property*, 10 J. INFO., L. AND TECH. 21 (2005).

³⁵ LOCKE, *supra* note 2.

³⁶ Kyle Whyte, *What Do Indigenous Knowledges Do for Indigenous Peoples*, in TRADITIONAL ECOLOGICAL KNOWLEDGE: LEARNING FROM INDIGENOUS PRACTICES FOR ENVIRONMENTAL SUSTAINABILITY 57 (Melissa K. Nelson & Daniel Shilling eds., 1st ed. 2018).

³⁷ *HISTORY AND TYPES OF UMBRELLA*, THE COTTON, <https://www.thecottonlondon.com/blogs/the-cotton-london-blog/history-and-types-of-umbrella> (last visited Apr. 8, 2024).

Furthermore, different individuals and communities may utilize the same knowledge to varying degrees, further complicating the notion of “waste” within the context of Intellectual Property. For instance, traditional indigenous knowledge about medicinal herbs may be seen as unproductive by some modern communities, while being vital for the healthcare of other populations.³⁸ What comprises productive use or wasteful idleness is extremely subjective.

These fundamental discrepancies between the physical and intellectual realms highlight the limitations of directly applying Locke’s labour theory to justify intellectual property rights.

John Locke’s “enough and as good” proviso, a cornerstone of his labour theory of property, posits that appropriation from the commons should leave sufficient resources of equal quality for others. The central challenge lies in the inherent difference between the two realms. Unlike physical resources, intangible works can be replicated infinitely without diminishing the original.³⁹ The “taper” analogy used by Jefferson offers a critical perspective to the debate over intellectual property rights. While scarcity (limited resources) is a major component of traditional justifications for property rights, Jefferson draws attention to an important distinction. Like dividing a pie, sharing physical resources diminishes the original. But exchanging ideas doesn’t diminish the original idea—it’s like lighting another candle.⁴⁰ This renders the traditional scarcity-based justification⁴¹ for enclosure less applicable, creating a potential tension between private monopolies and public access in the realm of intellectual property.

IP monopolies, as exemplified by copyrights and patents, risk enclosing the “cultural and inventive commons,” effectively restricting access and use of crucial knowledge and information resources for their corresponding period of protection.⁴² This phenomenon has the potential to impede innovation and collaboration, thereby inhibiting broader societal progress. The term “broader societal progress” in relation to intellectual property and its influence on society’s advancement can be described as the progress of knowledge, technology, and well-being that benefits most, if not all, members of the community. Scientific advancements are not the only factor in societal

³⁸ Abraham Lama, *Peru: Traditional Knowledge Enhances Modern Medicine*, THIRD WORLD NETWORK BERHAD (Mar. 2, 2000), <https://www.twn.my/title/enhance.htm>.

³⁹ See THOMAS JEFFERSON, *JEFFERSON: POLITICAL WRITINGS* 580 (Joyce Appleby & Terence Ball eds., 1999); Norman Stephan Kinsella, *Against Intellectual Property*, 15 JOURNAL OF LIBERTARIAN STUDIES, 22 (2001).

⁴⁰ JEFFERSON, *supra* note 39.

⁴¹ HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM* 18 (2d ed. 2016).

⁴² Helen Gubby, *Is the Patent System a Barrier to Inclusive Prosperity? The Biomedical Perspective*, 11 GLOBAL POL’Y 46 (2020); Reed F. Beall et al., *Is Patent “Evergreening” Restricting Access to Medicine/Device Combination Products?*, 11 PLOS ONE (2016); Gaurav Dwivedi et al., *Evergreening: A Deceptive Device in Patent Rights*, 32 TECH. IN SOC’Y 324 (2010).

progress. It also includes making certain that developments result in tangible benefits for the general public, i.e. it's affordable for them. Consider the scenario of restricting access to fundamental discoveries through patents, which could hamper the ability of various stakeholders such as researchers, inventors, creators, and the public to effectively build upon existing knowledge and innovations.

Alternative models to conventional IP regimes have evolved to manage this tension. For example, open-access models encourage unrestricted knowledge sharing, collaboration, and building upon previously published works.⁴³ Widespread access and faster innovation may prove to be more advantageous than the potential negative effects on creator incentives. Shorter IP terms, on the other hand, provide a middle ground by giving authors momentary exclusivity and progressively returning their works to the public domain, encouraging additional use and modification. Studies haven't shown a major benefit to public welfare from extending patent terms beyond a decade.⁴⁴ F.M. Scherer suggested a more adaptable system for patents. Instead of a fixed term length, patents would initially be granted for a shorter period.⁴⁵ However, there would be an option to extend this term if deemed necessary on a case-by-case basis.⁴⁶ Economists like Gary Becker have argued that shortening patent terms from 20 years to 10 wouldn't significantly stifle innovation.⁴⁷ In fact, it could have positive effects. A shorter monopoly period reduces the economic burden on the market and weakens the head start inventors have for developing follow-on patents.⁴⁸ This potentially opens the door for faster innovation cycles as competitors enter the market sooner. Furthermore, research suggests that the benefits of long patents are limited in the later years.⁴⁹ With products often becoming outdated by the time they reach consumers, the final years of a long patent offer a minimal incentive for further innovation.⁵⁰ Instead, these later stages might primarily benefit those focused on patent litigation, imposing legal burdens on competitors selling successful products.⁵¹ In essence, shorter patent terms could reduce the economic drag of

⁴³ GAËLLE KRIKORIAN & AMY KAPCZYNSKI, ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (2010).

⁴⁴ William D. Nordhaus, *The Optimum Life of a Patent: Reply*, 62 AM. ECON. REV. 428 (1972); Simon Lester & Huan Zhu, *Rethinking the Length of Patent Terms*, 34 AM. U. INT'L L. REV. 787 (2019).

⁴⁵ F M Scherer, *Nordhaus' Theory of Optimal Patent Life: A Geometric Reinterpretation*, 62 AM. ECON. REV. 422 (1972).

⁴⁶ *Id.*

⁴⁷ Gary Becker, *On Reforming the Patent System -Becker*, THE BECKER-POSNER BLOG (July 21, 2013), <https://www.becker-posner-blog.com/2013/07/on-reforming-the-patent-system-becker.html>.

⁴⁸ *Id.*

⁴⁹ Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. PENN. L. REV. 1309, 1359 (2013).

⁵⁰ *Id.*

⁵¹ *Id.*

monopolies, encourage faster innovation cycles, and limit the strategic use of patents for litigation purposes.

With regards to copyright, traditionally, longer copyrights were seen as best for protecting works and author earnings, a view bolstered by longer lifespans and the rise of cultural “soft power.”⁵² Despite industry desires, most creative works have a short commercial lifespan. Studies show that music generates minimal revenue past the second year, with books and films following a similar pattern.⁵³ The vast majority of creative works are commercially inactive within a few years of release. These patterns suggest that longer intellectual property terms might not be the most effective way to incentivize creators or benefit society as a whole. As their terms lengthen, copyrights and patents appear to have diminishing returns.

Ultimately, applying Locke’s “enough and as good” principle to the information age requires nuanced consideration of the unique characteristics of intangible resources. Balancing the legitimate interests of creators with the broader societal benefits of accessible knowledge and information remains a crucial challenge. For e.g., Patents on life-saving drugs can incentivize research and development of new treatments. However, overly restrictive patents can also lead to high drug prices, potentially limiting access to these treatments for some populations.⁵⁴ Academic researchers need to be able to cite and build upon prior published work. However, if academic publications remained locked behind paywalls indefinitely, it could stifle the spread of knowledge and collaborative research.⁵⁵ Exploring alternative IP models and their potential to ensure both individual incentive and societal progress becomes an essential endeavour in the digital age. The digital age presents a double-edged sword for intellectual property. On one hand, information sharing is instantaneous⁵⁶, fostering collaboration and accelerating innovation. This widespread dissemination of knowledge benefits society as a whole. On the other hand, creators face challenges. Their work can be easily copied and distributed globally⁵⁷, potentially leading to lost income and hindering their ability to sustain themselves. The internet creates a global audience,

⁵² Jimmyn Parc & Patrick Messerlin, *The True Impact of Shorter and Longer Copyright Durations: From Authors’ Earnings to Cultural Creativity and Diversity*, 27 INT’ J. CULTURAL POL’Y 612 (2021).

⁵³ PRODUCTIVITY COMMISSION, INTELLECTUAL PROPERTY ARRANGEMENTS, INQUIRY REPORT NO. 78 130 (2016).

⁵⁴ Gubby, *supra* note 42.

⁵⁵ Suzanne Day et al., *Open to the Public: Paywalls and the Public Rationale for Open Access Medical Research Publishing*, 6 RES INVOLV ENGAGEM 8 (2020).

⁵⁶ Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L. J. 1523 (2011).

⁵⁷ Maryberth Peters, *The Challenge of Copyright in the Digital Age*, 9 REVISTA LA PROPIEDAD INMATERIAL 59 (2006).

but enforcing IP rights across different jurisdictions can be difficult.⁵⁸ Additionally, new models like open-source software prioritize collaboration over traditional copyright protections, necessitating alternative ways to incentivize creators in the digital age.

B. Locke's Critique of Licensing Act and Relevance Today

John Locke's "Liberty of the Press" stands as a powerful indictment of the Licensing Act of 1662, a piece of legislation that granted the Stationers' Company monopolistic control over printing and publishing in England. While the Act ostensibly aimed to curb seditious publications, Locke's critique delves deeper, revealing a nuanced concern for the broader consequences of such restrictions on knowledge dissemination and intellectual progress.

At the heart of Locke's censure lies a profound scepticism towards the monopolistic powers entrusted to the Stationers' Company.⁵⁹ He argues that this concentration of authority not only stifles diverse voices and perspectives but also impedes the very diffusion of knowledge itself. The Company's ability to control which works get printed and disseminated, coupled with its exorbitant fees, severely limits the public's access to vital information and classic texts.⁶⁰ This concern transcends mere censorship, highlighting the broader consequences of concentrated power on the free flow of ideas and intellectual engagement.

Locke's scepticism further extends to the Act requiring two copies of every printed book to be deposited with universities.⁶¹ He suspects the Stationers' Company, which oversees printers and publishers, only cares about clauses that strengthen their monopoly.⁶² He expresses doubt that the Stationers' Company would faithfully comply, casting a shadow over even those measures intended to promote learning. Locke's scepticism toward the Stationers' Company suggests a potential distrust of monopolies.

Beyond immediate access, Locke raises a critical point about the long-term effects of monopolistic control on intellectual advancement.⁶³ He argues that such systems inevitably stifle innovation and creativity, creating an environment where "learning" itself becomes subordinate to the whims of

⁵⁸ GIPC, *Intellectual Property Challenges in the Digital Age - GIPC*, <https://www.globalipconvention.com/blog/intellectual-property-challenges-in-the-digital-age>.

⁵⁹ Justin Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 CARDOZO ARTS & ENT. L. J. 555 (2010).

⁶⁰ DRAHOS, *supra* note 29.

⁶¹ LOCKE, *supra* note 20.

⁶² *Id* at 336.

⁶³ *Id*.

a privileged few. This concern resonates deeply with modern debates on intellectual property rights, where balancing creator incentives with the wider public's access to knowledge remains a crucial challenge.

Locke's critique of the Licensing Act is not merely a historical curio. It offers valuable insights into the enduring tension between centralized control and intellectual freedom. His unwavering commitment to accessibility, his distrust towards concentrated power, and his emphasis on the detrimental effects of monopolistic control on learning remain as relevant as ever in our information age.⁶⁴ Understanding Locke's nuanced critique allows us to navigate the contemporary landscape of intellectual property rights with greater clarity and purpose, continuously striving to create an environment where knowledge flourishes and learning thrives without hindrance.

Locke's critique of the 17th-century Licensing Act resonates with contemporary IPR debates concerning copyright expansionism. His concerns about monopoly, censorship, and public access to knowledge apply to extended copyright terms⁶⁵, dynamic blocking injunctions⁶⁶ issued without ensuring fair balance, and algorithmic enforcement that disregards fair use.⁶⁷

Dynamic blocking can have an overly broad impact, unintentionally preventing access to legitimate content. A website containing a single infringing image may result in the entire site being blocked, preventing access to valuable information or expression. The wide scope of these injunctions can also create a chilling effect on free speech. Fear of being blocked may lead individuals and platforms to self-censor their content, even if it is legal.

Algorithmic copyright enforcement by platforms like YouTube's ContentID system attempts to detect and block uploads of copyrighted content automatically. However, these algorithms can be overly broad, failing to account for fair use exceptions that allow limited use of copyrighted works. When algorithmic enforcement indiscriminately blocks even lawful fair uses, it effectively censors legal speech and expression. It creates a modernised form of censorship and private monopolistic control over knowledge distribution that Locke criticised under the Licensing Act system.

⁶⁴ *Id.* ; Lewis Hyde, *Frames from the Framers: How America's Revolutionaries Imagined Intellectual Property*, SSRN J., 11 (2005).

⁶⁵ Neil Weinstock Netanel, *Copyright's Ungainly Expansion*, in *COPYRIGHT'S PARADOX* 54 (1 ed. 2008).

⁶⁶ Arul George Scaria, *Sci-Hub Case: The Court Should Protect Science from Greedy Academic Publishers*, *THE WIRE* (Dec. 22, 2020), <https://thewire.in/law/sci-hub-elsevier-delhi-high-court-access-medical-literature-scientific-publishing-access-inequity>.

⁶⁷ Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 *STANFORD TECH. L. REV.* 473 (2016).

C. Locke's Legacy in IP Debates

John Locke's writings reveal complex and nuanced perspectives on property rights and intellectual freedom that resonate through the ages. Locke's concept that property rights stem from mixing one's labour with the natural world has been influential in shaping ideas about fair ownership and resource allocation.⁶⁸ Locke's views on the temporary nature of monopolies can be seen as laying the groundwork for discussions about the optimal length of copyright terms.⁶⁹ While his labour theory provides a foundational justification for private property, applying it to the intangible realm of ideas and knowledge poses profound conceptual challenges. Fundamental discrepancies around resource finiteness, the "enough and as good" proviso, and defining waste highlight the limitations of directly transposing Locke's framework to intellectual property rights.

Similarly, Locke's vigorous critique of the Licensing Act underscores his commitment to unrestrained access to knowledge. His scepticism of monopolistic power, based on its tendency to stifle discourse and learning, parallels modern debates on balancing incentives and access in intellectual property law.

Locke thus appears to envision property rights as justifiable for tangible finite resources but potentially problematic for enclosing intangible knowledge meant for common benefit. While extrapolating definitive pronouncements from Locke's fragmented writings on these issues is an inherently speculative endeavour, examining his foundational ideas through the lens of intellectual property provides a valuable perspective. Locke's seminal thinking, with its scepticism of monopolies, provides a philosophical anchor for contemporary IP debates by underscoring that knowledge is a unique resource warranting prudent governance.

Furthermore, Locke's notions of restraining waste and leaving "enough and as good" suggest some inherent limits on exclusionary rights even over one's own creations, an idea with potential ramifications for IP law. His occupation with the preservation of a thriving commons hints at the need for balance between privatisation and open access. John Locke's ideas on property rights offer a starting point for justifying individual ownership.⁷⁰ However, his framework isn't without constraints. He emphasized limitations on enclosure, ensuring that enough resources remain unclaimed for the benefit of others.⁷¹ Similarly, he argued for checks on monopolies that control

⁶⁸ John Christman, *Can Ownership Be Justified by Natural Rights?*, 15 PHIL. & PUB. AFF. 156 (1986).

⁶⁹ Hyde, *supra* note 64.

⁷⁰ LOCKE, *supra* note 2.

⁷¹ *Id.*

knowledge and ideas vital to the common good.⁷² While Locke provided such caveats, the influential 20th century political theorist C.B. Macpherson, in his seminal work “The Political Theory of Possessive Individualism,” critiqued Locke for laying philosophical foundations that could enable and justify capitalist accumulation and appropriation of property in an unconstrained manner.⁷³ Macpherson’s analysis highlights the seemingly limitless potential for individual claims, but it ignores the subtleties and possible uses of these restrictions, especially when it comes to tangible and intangible goods. The balanced perspective of John Locke, acknowledging both individual rights and societal needs, remains relevant in contemporary discussions. Overall, revisiting Locke’s principles can enrich IP policy discussions on constructing a just equilibrium between incentives and dissemination.

III. LOCATING LOCKE’S COMMONS: EXAMINING TENSIONS AND SYNERGIES WITH PRIVATE PROPERTY

The concept of the commons plays a central role in John Locke’s comprehensive theory of property in his landmark “Second Treatise of Government.” He analyses the idea in great detail, outlining the conditions that allow people to rightfully take resources from this common area. Locke establishes necessary limitations in order to maintain equilibrium between private property and public welfare, even as he recognises a basic right to such appropriation. While the concept of the commons provides the fertile ground for Locke’s theory, his argument for private appropriation through labour sparks debate. We must now turn to the historical context and intellectual backdrop that shaped Locke’s response to challenges like Filmer’s absolutist dominion. Examining the historical context is crucial for fully understanding and analysing Locke’s political philosophy, including his conception of the commons and private property rights. His ideas did not emerge in a vacuum but were shaped by and responded to the specific intellectual and political debates of his era. Appreciating this backdrop illuminates the motivations, assumptions, and potential implications underlying Locke’s influential theories.

John Locke’s “Two Treatises of Government” stands as a critical interrogation of absolute monarchical rule⁷⁴, specifically aimed at Sir Robert Filmer’s political tracts advocating for supreme royal authority.⁷⁵ Sir Robert Filmer was a prominent 17th-century thinker who forcefully advocated

⁷² LOCKE, *supra* note 20.

⁷³ C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (Wynford ed. 2011).

⁷⁴ JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* (Re-issued in digital print ed. 2006).

⁷⁵ E. Clinton Gardner, *John Locke: Justice and the Social Compact*, 9 J. L. AND RELIGION 347 (1992).

for the doctrine of absolute monarchy and patriarchal power. In his works like *Patriarcha*, Filmer argued that kings derived their authority directly from God through an unbroken dynastic line descending from Adam.⁷⁶ He conceived of governance as the private household rule of fathers over families, writ large. Filmer's ideology provided philosophical underpinnings for absolute royal sovereignty over subjects, rejecting notions of natural rights or consent of the governed. His theories stood in stark contrast to Locke's arguments for limited government based on individual rights and social contracts.

While refuting Filmer's arguments forms a central thread of Locke's work, James Tully suggests that the "Two Treatises" simultaneously served as a platform for constructing his own philosophical system. Notably, Tully emphasizes that Locke also sought to address existing critiques of natural law theory within this framework.⁷⁷ Tully's insightful reading of Locke's 'Two Treatises' sheds light on his dual objectives - refuting Filmer and constructing his own philosophical edifice. This layered context is vital for understanding how Locke confronts the critique of natural law, a central plank of his property rights justification. With Filmer's absolutist claims dismantled, Locke embarks on a delicate balancing act - reconciling the concept of the commons with the reality of private appropriation and property rights. Examining his invocation of natural law within this framework is crucial for comprehending the justification underpinning his labour theory.

In response to Robert Filmer's challenge to natural law, John Locke sought to reconcile the concept of commons with the existence of private appropriation and property rights within a natural law framework.⁷⁸ While Filmer championed an absolutist dominion over the world vested in Adam from creation,⁷⁹ Locke countered by asserting that the earth was originally gifted to humanity in common.⁸⁰ This "common," as Locke envisioned it, encompassed undeveloped tangible resources readily accessible to all individuals, arising spontaneously from nature's bounty.⁸¹ Critically, Locke posits that individuals possess an inherent property right in their own persons, with the fruits of their labour consequently belonging to them.⁸² This principle of labour-based appropriation forms the cornerstone of Locke's justification for private property. Notably, he

⁷⁶ SIR ROBERT FILMER, *PATRIARCHA; OF THE NATURAL POWER OF KINGS*. (1680).

⁷⁷ TULLY, *supra* note 74.

⁷⁸ DRAHOS, *supra* note 29.

⁷⁹ ROBERT FILMER & J. P. SOMMERVILLE, *PATRIARCHA AND OTHER WRITINGS* (1991).

⁸⁰ LOCKE, *supra* note 2.

⁸¹ Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 *THE YALE L. J.* 1179 (2003).

⁸² *Id.*

asserts that the commoners' explicit consent is not a necessary precondition for appropriating resources through personal labour, provided they remove something from its natural state.⁸³ Further legitimizing this process, Locke argues that God's intention for the Earth was for humanity's advancement, not for the commons to remain uncultivated.⁸⁴ Thus, by exerting labour upon previously unappropriated resources, individuals improve them and fulfil a divine purpose, thereby establishing a legitimate claim to private ownership. Locke's labour theory of property, which justified private dominion over common resources through productive exertion, emerged partly from concerns about resources lying waste rather than advancing human progress. However, while upholding the individual's right to appropriate nature by mixing labour, Locke incorporated restraints like the "enough and as good" proviso to preclude boundless acquisition. As contemporary debates wrestle with intellectual property protections balancing incentives and access, Locke's caveats limiting enclosure become highly relevant. The non-rival nature of intangible knowledge problematizes the direct application of Locke's scarcity-premised justification for privatization through labour. Therefore, scholarly analysis should closely re-examine Lockean notions of restraint like "enough and as good" when evaluating his theoretical boundaries vis-à-vis intellectual property monopolies potentially exceeding those limits. This illuminates vital perspectives on reconciling Locke's thinking with appropriation trends in the digital knowledge commons.

A. Beyond Materialism: The Social Core of Locke's Property Thought

The labour theory of property is often presented as a neat dichotomy. This binary, however, obscures the subtle interplay between two seemingly independent propositions: the inherent right to the fruits of one's labour and the limitations imposed by the existence of a shared commons.⁸⁵ The first proposition, enshrined in Locke's Second Treatise⁸⁶, asserts an individual's absolute ownership of their embodied labour. This "unquestionable property," forms the bedrock of any claim to ownership. It is an inalienable right, an extension of one's very being onto the external world. This right, however, is not an isolated one. A vital qualifier is introduced in the second proposition: there is a "common." In Locke's perfect state of nature, this common resource pool appears limitless, but it acts as a refutation of personal assertions.⁸⁷ All resources must be used responsibly and not interfere with the "enough, and as good, left in common for others."⁸⁸

⁸³ LOCKE, *supra* note 2.

⁸⁴ *Id.*

⁸⁵ Zemer, *supra* note 30.

⁸⁶ *Id.* at ch. 5., § 27.

⁸⁷ Wendy J Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 U. CHICAGO L. REV. 78 (2004).

⁸⁸ Jeffery M Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MISSOURI L. REV. 541 (2007).

Herein lies Locke's theory's true brilliance and intricacy. It goes beyond just putting a rubber stamp on personal materialism. Rather, it acknowledges the profound conflict that exists between individuality and the greater good. It can be argued that a previous, unwritten social contract that upholds everyone's ongoing access to the common wealth is necessary for an individual to be entitled to the products of their labour.⁸⁹ This interpretation suggests a broader implication of Locke's theory, emphasizing the importance of a shared understanding or agreement within society for the legitimacy of property claims based on labor. While Locke does not explicitly elaborate these points, one could interpret his labor theory as implying that the principles of justice and reciprocity are central to his thought. The notion of not appropriating from the commons in a way that undermines others' access suggests an underlying social contract preserving individual rights through mutual consideration of the greater good. To view Locke's theory purely through a capitalist lens of maximizing individual productivity would arguably miss these broader ethical underpinnings his philosophy considers. However, this is an extrapolation of the potential implications of Locke's ideas, rather than his stated intent.

Locke's theory has stood the test of time because it captures this fine balance between individual interests and the greater good. It acknowledges the innate value of individual effort while reminding us that all rights exist within a social context. To fully unpack the Lockean labour theory, then, is not to parse independent propositions, but to grasp the intricate interweaving of these foundational elements. It is to appreciate the delicate equilibrium between the right to reap the fruits of one's labour and the responsibility to ensure that enough remains for all.

B. The Sufficiency Proviso: A Closer Look at Locke's Constraint on Appropriation

The sufficiency proviso posits that appropriation through labour is legitimate only as long as "enough, and as good, left in common for others." This restriction seeks to strike a balance between individual rights and collective welfare. By limiting individual claims based on the needs of others, Locke attempts to prevent the tragedy of the commons⁹⁰, where unrestrained appropriation depletes resources and leaves everyone worse off.

However, the practical application of this principle unveils potential complications, particularly when applied to tangible resources. In his famous Chapter on Property, Locke might have foreseen

⁸⁹ Condition 1: Labour for Ownership: People can claim ownership of resources they've invested effort in (mixed their labour with). Condition 2: Enough for All: Claimed resources shouldn't deprive others of "enough, and as good" resources in their natural state. Condition 3: Community Recognition: The community respects ownership claims that meet the first two conditions, promoting social order.

⁹⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

the interpretive challenges embedded within his proviso. The vagueness of terms like “enough” and “good” opens the door to subjective interpretations, potentially leading to conflicting claims and exploitation. Furthermore, a strict adherence to the proviso in the context of tangible property appears paradoxical. In a finite world, any significant appropriation, by definition, reduces the common pool. Applying the proviso in its purest form would effectively create a scenario where almost no tangible property could be legitimately claimed, as anything appropriated would necessarily diminish what’s left for others. This potential for paralysis highlights a fundamental tension within the proviso. While the intention to prevent undue appropriation is commendable, the practical application in the realm of tangible resources seems fraught with challenges. The ambiguity of key terms and the inherent tension between individual claims and the needs of the collective raise questions about the efficacy of the proviso as a universal solution.

As a result, it’s important to appreciate the good intentions behind the sufficiency proviso⁹¹ while also being aware of its inherent limitations and potential for misunderstanding. Locke’s labor theory of property presents difficulties when considering limited real resources; this must be acknowledged for an effective comprehension of the theory. For example, in the context of intellectual property, a pharmaceutical company conducts extensive research and development to create a life-saving drug, which justifies a patent for exclusive rights. However, the high cost may preclude a sizable portion of the population from accessing it. While the company invests heavily, one could argue that public funding frequently contributes to basic science discoveries. The “enough and as good” tenet for essential healthcare is broken by high costs, which prevent many people from receiving it. Another example is when a company receives a patent on a broad technological concept, stifling innovation by others who might develop alternative solutions using similar principles. By prohibiting others from working in a particular field, patents that are too broad impede innovation. The “enough and as good” principle could advocate for narrower patents that allow for alternative inventions and advancements.

It is imperative to conduct additional research on alternative interpretations and potential modifications to the proviso to guarantee its continued relevance and efficacy as a safeguard against unbridled appropriation within Locke’s theoretical framework.

⁹¹ Rebecca P. Judge, *Restoring the Commons: Toward a New Interpretation of Locke’s Theory of Property*, 78 LAND ECON. 331 (2002).

C. Beyond Abundance: Locke's Spoilage Proviso and the Limits of Appropriation

While John Locke's labour theory of property grants individuals the fruits of their toil, it also introduces a crucial caveat: the spoilage proviso.⁹² This stipulation goes beyond the familiar "enough and as good left in common" to impose an internal limit on individual claims. It argues that God's bountiful provision does not translate into unchecked appropriation; rather, individual enjoyment finds its natural boundary at the threshold of waste.

The proviso makes the claim that appropriation and use are directly related. A person can only possess something that can be "made use of to any advantage of life before it spoils." This idea, though it seems straightforward, has important ramifications. It places more emphasis on responsible use than on simple acquisition as the basis of legitimate ownership. When appropriation is used only for speculation or hoarding, it surpasses the "share" that God's design allots for a waste-free life and becomes morally unacceptable. Copyright term extensions like the Sonny-Bonno Act of the United States of America are a prime example.⁹³ Such extensions potentially restrict access to older creative works. This may limit cross-cultural dialogue and the capacity of subsequent generations to expand on the works of their predecessors. Excessive length in copyright terms may be considered spoilage. They keep works from going into the public domain and serve as a source for additional creativity and advancement of culture. Another instance is the practice known as "evergreening,"⁹⁴ in which a pharmaceutical company secures a patent on a medication and then, as it approaches expiration, makes small changes to obtain a new patent. By "evergreening," they maintain their monopoly without bringing forth much innovation, which could delay the release of less expensive generic versions. One could consider evergreening to be a type of spoilage. The business hoards exclusivity through the patent system beyond what is required for a justifiable return on their initial R&D investment. For some, this might mean having less access to necessary medications.

The emphasis on entitlement based on use subverts the purely capitalist story of maximizing personal profit. Locke is interested in responsible resource stewardship rather than just productivity. When appropriation goes beyond what is necessary, it is an insult to the divine design

⁹² LOCKE, *supra* note 2.

⁹³ Victoria Grzelak, *Mickey Mouse & Sonny Bono Go To Court: The Copyright Term Extension Act and Its Effect on Current and Future Rights*, 2 J. MARSHALL REV. INTEL. PROP. L. 95 (2002), 2 UIC REVIEW OF INTELLECTUAL PROPERTY LAW (2002).

⁹⁴ Andrew W Hitchings et. al., *Making Medicines Evergreen*, 345 BRITISH MEDICAL J. 18 (2012).

ingrained in nature as well as an infringement on the commons. It is morally wrong to over-appropriate since it violates the very bounty bestowed upon humanity to waste.⁹⁵

Locke goes beyond the easy distinction between the rights of the individual and the interests of the group by centring the conversation on responsible use and waste avoidance. He forces us to see how our claims are interrelated in a limited world where over-appropriation threatens both our common natural inheritance and individual morality. Traditionally, creator and inventor rights have been a major topic of discussion when it comes to Intellectual Property Rights. It can be argued that, in response, Locke emphasises that it is the duty of right holders to prevent waste and make sure their actions do not damage the “commons”. “Waste” can appear in a variety of ways in the digital age. The possible stifling of innovation and access to knowledge is just as important as the lack of physical resources.

To sum up, the spoilage proviso is more than just a minor disclaimer for Locke’s labour theory of property. It’s a basic idea that balances the quest for personal freedoms with a sense of social responsibility and environmental conservation. It serves as a reminder that genuine wealth comes from using resources wisely to advance our communities and ourselves rather than from hoarding.⁹⁶ In the context of intellectual property, for patents, the proviso could be invoked against overly broad patents that effectively remove too much knowledge from the public commons, leaving little “as good” for others to build upon freely. Patents on broad fundamental discoveries may violate the spirit of not appropriating more from the intellectual commons than one can usefully apply. In copyright, the proviso aligns with arguments for sensible limits and exceptions like fair use. If copyrights enabled total exclusivity with no ability to reuse works productively, it could violate leaving “as much and as good” for others. We can negotiate the tricky territory of ownership and use by understanding the constraints placed on us by the spoilage proviso. This will help to ensure that the bounty bestowed upon us is enjoyed fairly and sustainably.

D. Beyond Tangible Walls: Reimagining the Lockean Commons in the Realm of Ideas

Though originally developed for material resources, John Locke’s concept of the commons provides fascinating analogies for comprehending the world of intangible goods, especially intellectual property. However, the very non-rivalrous character of ideas and inventions demands

⁹⁵ Edwin C Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 44 (1989).

⁹⁶ Susan P. Liebell, *The Text and Context of “Enough and as Good”: John Locke as the Foundation of an Environmental Liberalism*, 43 POLITY 210 (2011),

a careful application of Lockean principles. Just as the tangible commons offered Locke a metaphor for the shared resource pool, the intangible commons serve as an apt analogy for the vast reservoir of knowledge, ideas, and creative potential that nourishes the collective good.⁹⁷

The essential distinction between the tangible and intangible commons is at the centre of this application. In contrast to farmland, where the appropriation of one reduces the amount available for others, the source of ideas is unaffected by use. Because of its non-rivalrous nature, individual works can be expanded upon and reimagined by countless others without depleting the source material, offering a unique potential for creativity and innovation.

While Locke did not directly consider intellectual property, one could argue that his “sufficiency proviso” implies a caution against increasing IP protections to the point of unduly limiting access to the public domain as a fertile ground for future creative works and innovation. From this philosophical vantage point, overly broad copyrights or restrictive fair use standards risk violating the spirit of preserving the intellectual commons.

The “spoilage proviso” by Locke offers still another level of complexity. Reminding us that unrealized potential eventually depresses the community, it makes an argument against the inefficient use of resources.⁹⁸ Seemingly perpetual rights⁹⁹ in the context of intellectual property can be viewed as a kind of spoiling, especially for works that have weak commercial potential. They impede the dynamic flow of knowledge and innovation by locking up valuable ideas without producing benefits for society. On the other hand, the act of taking ideas without planning to implement them—a situation occasionally noticed in patent applications—may also be considered a breach of the spoiling principle, as it amounts to hoarding potential without benefiting society as a whole.¹⁰⁰ Patents may be subject to “local working” requirements under laws such as Article 5A of the Paris Convention, which states that the patented invention must be used or worked in the region in order to retain exclusive rights. Third parties may be granted compulsory licenses if they are not utilised. Thus, getting a patent without using the invention would not always be considered perpetual hoarding because the patent could be revoked or made available to others

⁹⁷ Damstedt, *supra* note 81.

⁹⁸ Horowitz, *supra* note 11.

⁹⁹ See PRODUCTIVITY COMMISSION, INTELLECTUAL PROPERTY ARRANGEMENTS, INQUIRY REPORT NO. 78 130 (2016). Studies show that most of the copyrighted works have minimal revenue past the second year. Their commercial potential is weak thereafter, but they continue to be protected by copyright for many more decades, impeding their passage into the public domain after the exhaustion of their commercial potential.

¹⁰⁰ Zemer, *supra* note 30.

for beneficial social use. However, there is the worry that broad basic patents on foundational research may impede and discourage subsequent research, decreasing the incentive to innovate.¹⁰¹

E. Lockean Commons and the Public Domain: Similarities and Nuances

While a surface-level comparison might draw parallels between the Lockean commons and the concept of public domain in intellectual property, closer examination reveals both similarities and crucial distinctions between the two concepts.

Some notable similarities warrant comparison. Both Locke's conception of the commons and the concept of the public domain acknowledge the importance of ensuring that certain resources are available for everyone to use. They both acknowledge that there are limits to property rights and that there are certain resources that should be accessible to all individuals for the public good.¹⁰² The importance of accessibility to common resources is emphasised by both the public domain and Lockean commons. Through their labor, people have a right to appropriate common resources, according to Locke, but this appropriation cannot deny others access to the same resources.¹⁰³ The public domain guarantees unrestricted access to creative works and knowledge for all individuals, free from the limitations imposed by copyright or other types of intellectual property rights.¹⁰⁴ However, there are also important differences stemming primarily from the tangible versus intangible distinction. The Lockean commons consists of physical, tangible resources like land and forests, while the public domain encompasses intangible creative works and inventions. This difference affects notions of property rights and use limitations. While Locke emphasized responsible use and preservation to prevent physical spoilage of resources, this concept manifests differently for non-rival intangibles. Similarly, his sufficiency proviso focused on leaving enough physical resources for others, which is less directly applicable to the non-scarce public domain. Nonetheless, parallel principles like fair use and IP limitations serve a similar function.

Fair use allows limited reproduction of copyrighted works for purposes like commentary, criticism, teaching, news reporting, etc., without acquiring permission.¹⁰⁵ This carves out space in the intellectual commons for socially productive reuse of protected works. Much like the Lockean

¹⁰¹ Claude Henry & Joseph E. Stiglitz, *Intellectual Property, Dissemination of Innovation and Sustainable Development*, 1 GLOBAL POLICY 237 (2010); Gubby, *supra* note 42.

¹⁰² JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008).

¹⁰³ *Id.* at 88.

¹⁰⁴ Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE LAW JOURNAL 783 (2006).

¹⁰⁵ *What Is Fair Use?*, COPYRIGHT ALLIANCE (Sep. 7, 2016), <https://copyrightalliance.org/faqs/what-is-fair-use/>.

proviso aims to prevent total private appropriation of finite resources from the commons, fair use prevents total intellectual property control over creative works. It preserves an “enough and as good” portion of the public domain where second-comers can access and build upon prior knowledge/expression. By enabling transformative uses that don’t substitute for the original market, fair use attempts to balance private incentives with maintaining a vibrant intellectual commons, akin to Locke’s philosophical balance.

Limited copyright and patent terms, alongside concepts like compulsory licensing, prevent the complete enclosure of knowledge and inventions. Similar to Locke’s “sufficiency proviso,” these limitations ensure resources remain available for broader societal use after an initial period of exclusivity. These types of IP doctrines and boundaries mirror Locke’s aims of preventing total enclosure of the commons and enabling productive societal use of resources despite differences in tangible v. intangible resources. Overall, while similarities exist, the tangible-intangible distinction generates notable divergences between the Lockean commons and the IP public domain.

IV. CONCLUSION

Because of what appears to be a lax interpretation of Locke’s caveats in his labour theory of property, C.B. Macpherson has interpreted John Locke as an unrestrained advocate of capitalist appropriation.¹⁰⁶ Macpherson is certainly right when he worries about unchecked appropriation. While Macpherson raises valid concerns about the potential for Locke’s labour theory to justify unchecked private appropriation, this critique seems to overlook the nuanced limitations and caveats that Locke himself built into his framework through the “sufficiency” and “no spoilage” provisos, as discussed previously. Threats to societal equity and access arise from people’s ability to amass enormous wealth beyond their immediate needs, especially in the case of intangible goods like intellectual property. However, ignoring Locke’s framework because of alleged gaps in the provisos ignores a more complex interpretation of his ideas.

First of all, the “sufficiency proviso,” which stipulates that “enough, and as good, left in common for others,” places a vital restraint on the practice of total appropriation. Although its language is ambiguous and subject to interpretation, this might be seen as a purposeful call to modify the principle to fit changing social environments. A flexible interpretation that takes into account modern ideas of justice and environmental sustainability might successfully prevent excessive accumulation in the real world as well as the virtual one. The “enough and as good” sufficiency

¹⁰⁶ MACPHERSON, *supra* note 73.

proviso is ambiguous in terms of what exactly constitutes leaving enough and as good quality resources in the commons for others to access. This ambiguity arises from Locke not providing specific quantitative thresholds or criteria. However, the lack of rigid definitional parameters could be viewed as an intentional flexibility by Locke. It allows the core philosophical principle of preserving the commons to be reinterpreted and applied as societal conceptions of resource use, sustainability, and distributive justice evolve over time.

Secondly, an additional layer of restriction is added by the “spoilage proviso,” which emphasizes the inefficient adoption of resources. One could argue that this principle is broken by extended intellectual property rights on unutilized works, which would impede the advancement of knowledge and creativity. And last, if one ignores Locke’s larger body of work and just uses his Second Treatise, one runs the risk of misinterpreting his viewpoint as a whole. His later writings, such as “Further Considerations Concerning the Raising of the Value of Money,”¹⁰⁷ demonstrate his increasing concern for potential abuses of property rights and social inequality. This implies that Locke understood the necessity of protections against disproportionate appropriation and its negative effects even within the framework of individual labour rights.

John Locke’s vision of a shared “commons”, a resource pool accessible to all, underpins his labour theory of property. While this framework holds significant sway in tangible realms, its application to the ethereal world of intellectual property proves far less straightforward. The crux of this challenge lies in the fundamental ontological difference between tangible and intangible goods.¹⁰⁸ Breaking down the constituent raw materials of a tangible good is comparatively easy in the physical realm. The wood, metal, and fabric that go into making a chair are easily traced. But with intellectual products, it becomes much harder, if not impossible, to identify and isolate the “building blocks” of a creative work.

Lockean principles must be applied carefully when applying them to the intellectual property domain because of these difficulties. Rather than following the tangible commons model to the letter, we need to create a framework that recognizes the distinct ontology of intellectual goods. Examples recognising the distinct ontology of intellectual goods compared to physical property could include the non-rivalrous nature of intellectual works allowing for parallel reuse/consumption, the challenge of achieving full control/exclusion due to the incorporeal

¹⁰⁷ John Locke, *Further Considerations Concerning Raising the Value of Money* – 1695, https://avalon.law.yale.edu/17th_century/locke01.asp (last visited Dec 21, 2023).

¹⁰⁸ Horowitz, *supra* note 11.

nature of ideas, and the existence of temporal limitations on IP rights rather than permanent property status. To ensure a dynamic flow of ideas, this might entail, for example, recognizing the need for temporary exclusivity to encourage creative investment while simultaneously prioritizing open access and fair use doctrines.

While Locke's labour theory of property might not seamlessly translate to the intricacies of intellectual property, his core principles offer valuable insights for navigating the contemporary debate on public domain preservation.¹⁰⁹ While challenging to directly map Locke's material provisos onto the metaphysically distinct realm of IP, his writings still offer a moral framework prioritising a vibrant commons to foster creativity, innovation and societal progress over pure privatisation. Therefore, while concerns about unbridled appropriation are valid, reducing Locke to a mere proponent of unfettered capitalism is a mischaracterization. The sufficiency and spoilage provisos, though potentially malleable in the IP realm, hint at Locke's concern for a thriving commons. This is further underscored by his opposition to perpetual monopolies, exemplified by his critique of the Licensing Act of 1662.

Despite the ongoing scholarly debates surrounding Lockean interpretations, his commitment to the commons remains relevant in today's IP landscape, characterised by increasing anxieties about Intellectual Property Rights expansionism.¹¹⁰ Some examples of expansionist IP trends include copyright term extensions, patents on human genes, overaggressive trademark policing, and efforts to bypass fair use by implementing technological protection measures (TPMs).

By revisiting Locke's ideas, we can engage in a nuanced discussion about striking a balance between individual incentives and the preservation of a robust public domain, crucial for fostering continued innovation and creativity. In an era of Intellectual Property Rights expansionism, it can be especially beneficial to examine Lockean concepts through the prism of the public domain to better understand the delicate balance between individual rights and the common good.

¹⁰⁹ Zemer, *supra* note 30.

¹¹⁰ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. AND CONTEMPORARY PROBLEMS 33 (2003).