Towards a Lockean Philosophy of Free Culture *

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DRAFT: August 2006

'Good artists copy, great artists steal'
– Pablo Picasso

'Copying is theft'
– motto of the Software and
Information Industry Association

Abstract: In this essay I will argue that Locke's theory of property doesn't support copyright as a natural right. Copyright must be justified instrumentally in terms of its contribution to our natural attributes and goals. These can be encapsulated in the concept of beneficial use, which I will briefly explore in terms of consuming, producing, sharing and learning. I will then conclude by arguing that such a Lockean theory of copyright provides an ideal basis for the free culture movement's critique of copyright, and their preferred system of property – a positive intellectual common.

*Thanks to Andrew Williams and Rob Myers for comments and discussions. This document was formatted with LaTeX.

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1 Introduction

Why does Lawrence Lessig, a wealthy and influential American lawyer and professor, want to fire lots of lawyers (2004, pp.304–306)? What makes thousands of programmers think they have a moral case against Microsoft? Why would people boycott Apple's iTunes music store? The main issue that ties these questions together is copyright, a system of private property barely a few hundred years old yet one of the most controversial issues of the so–called 'information age'. This essay will mobilise the philosophical resources of John Locke to provide a philosophical basis for those who attack copyright in the name of cultural and creative freedom.

The free culture movement has grown out of a number of traditions in the arts and computer science. The warcry of the most dogmatic free culture activists is that 'all information should be free' (Levy 2001, p.40). Positions on policies and ethical questions vary so widely that a complete description of the movement is far beyond the means of this introduction. Suffice to say that the free culture movement is a loose coalition of individuals and organisations who agree on one thing: copyright today is too restrictive, and associated technologies that reinforce the restrictions are harmful and immoral.

The movement has pushed a number of responses to 'all rights reserved' copyright[1] forward. The most influential is a set of copyright licenses – called 'copyleft' – that attempt to subvert copyright. In short, an author releases their work under a copyleft license that guarantees various rights or freedoms to users. So this essay, for example, is released under a copyleft license that says you may possess, use, copy, share, quote, modify, remix and otherwise do with it as you like, so long as you attribute me and release any derivative works[2], under the

[1] I will explain what this means in the following subsection

[2] Derivative is legal jargon for a work that is based upon another, taking enough of the original to trigger a copyright infringement. Examples include sampling some music and adapting a play.

same license. The basic claim is that such a licensing agreement provides everyone with more freedom. But there are tensions within the movement over what exactly that means.

Creative Commons, in many ways a figurehead of the movement, is an organisation that produces a number of licenses that provide the user with a range of freedoms and restrictions. For example, some licenses prohibit commercial use without permission from the author. But is such a license 'free' (enough or at all)? This 'freedom question' may sound odd, and needs a great deal of explanation before we can begin to answer it, but it is common currency in the free culture world, and it is important for a movement that is in favour of creative freedom to discuss it. Given the diversity of the movement it is no surprise that there are a range of responses to the 'freedom question', some more comprehensive and convincing than others. Each of these responses also provides a basis for critiquing copyright as a whole. The better of those responses can be grouped into three approaches.

The first, and most common, is to provide a definition of a free license against which particular licenses can be checked; examples include the Free Content and Expression Definition (Anonymous 2006) and the Open Knowledge Definition (Pollock 2006). Both succeed in capturing various intuitions and commonly expressed opinions and so play a valuable role in helping the movement understand itself. But when any particular part of them is challenged, for example the claim that a free license '*must not* limit commercial use of the work' (Anonymous 2006), they provide little guidance because there is a lack of conceptual clarity and argumentative force underpinning the criteria. Neither example provides a clear answer to questions like: is creative freedom not increased by a license that requires permission for commercial use, thereby helping artists support themselves financially without placing an unfair restriction on users?

The second approach is to integrate intuitions evident in the above definitions

into a wider theoretical framework (such as Marxism, claisscal liberalism or even a simple incentive-based argument), which can provide a deeper basis for answering criticisms. Toni Prug (2005), David Berry and Giles Moss (2005a, 2005b) have been influential in offering a radical left perspective, criticising the liberal reformist tendencies of Creative Commons as much as the pro-copyright lobby they evidently dislike. Perhaps their most convincing claim is that the lack of such a framework severely limits our ability to understand the issues raised by the free culture movement. But by adopting such a complex and involved framework, these radical left critics overburden their arguments with claims that won't gain much currency in the wider movement. For this reason I want to avoid this approach.

Therefore I will try to navigate a path between these two approaches, sticking to the values and intuitions expressed in the dominant discourses of the free culture movement, but without uncritically accepting claims about concepts such as 'freedom'. With this in mind I will mount a critique of copyright and provide a basis for advocating the alternative, an intellectual common, which the free culture movement favours.

One might ask why I am using Locke's theory of property as my map. The first reason is that he is a classic liberal theorist, and the free culture movement seems broadly liberal. Therefore I hope this essay will be more influential than if I were to choose an obscure Marxian or long-discredited Greek political theorist. The second is that there are several influential Lockean accounts in favour of copyright (Nozick 1974, Hughes 1988, Becker 1993) and many more responding with various approaches to critique or even dismiss copyright altogether , such as (Drahos 1996, Shiffrin 2001, Kimppa 2005, Scanlan 2005), so there is a rich seam of ideas to draw on when constructing my unique free culture perspective on the matter.

In this essay I will make things more complicated by analysing several ap-

proaches to a Lockean theory of copyright. The first reason for this is that it should help clarify my eventual position by covering a range of probable objections. But more importantly it has been suggested that Locke's texts involve so many counterpoised ideas that they are open to almost any interpretation (Monson 1991, pp.23–24). Given this, I don't want to find the interpretation of Locke that most easily defeats copyright as others have done (Drahos 1996, Shiffrin 2001, Kimppa 2005). Valuable as those efforts are, I hope instead to address a range of concerns commonly raised in the mainstream debate on copyright, and provide a Lockean philosophy of free culture that will satisfactorily overcome them.

1.1 What are private and common property, natural rights and civil frameworks?

Before we proceed any further I need to discuss what concepts such as ownership actually entail, otherwise much of what follows will remain unclear. There are three basic systems of property, each of which is organised around a particular idea that gives the various associated rules coherence: private, collective and common property [3].

Private property is a system in which each resource belongs to some individual, meaning in the most abstract sense that each resource is correlated with a particular individual who is in a privileged position. Ownership is peculiar to this system of property, and the rights and responsibilities conferred by ownership can vary. Collective property is organised around the principle of collective interest, so that the allocation of material resources is determined by reference to the collective interests of society as a whole. Common property is a system in which each resource is in principle available for the use of every member alike.

[3] By 'common property' I do not mean anything like the old English common, which was in fact a form of private property in which commoners had use rights against the owner (Drahos 1996, p.56)

No societies have this as their dominant form of property; it persists in special cases such as public parks, and in philosophy as a speculative 'state of nature' before political society is formed (Waldron 1988, pp.38–42).

I won't consider collective property in this essay, so it requires no further explanation, but private property needs to be properly understood. Ownership acts as the organising principle of private property, the main basis on which laymen can learn and know how to apply the rules of the system. If I say 'I own x' then it should be clear what rights I have and how you might violate them. But there is more to ownership than a simple correlation between owner and owned. Honoré sets out a list of the common features, rather than necessary or jointly sufficient conditions, of ownership:

1. A right to the possession of X;
2. A right to use X;
3. A right to manage X (that is, determine the basis on which X is used by others if it is so used);
4. A right to the income that can be derived from permitting others to make use of X;
5. A right to the capital value of X;
6. A right to security against the expropriation of X;
7. A power to transmit X by sale, or gift, or bequest to another;
8. The lack of any term on the possession of these rights etc.;
9. A duty to refrain from using X in a way that harms others;
10. A liability that certain judgements against him may be executed on X;

11. Some sort of expectation that, when rights that other people have in X come to the end of their term or lapse for any reason, those rights will, as it were, "naturally" return to him.

Ownership is a stable concept, in the sense that it can be applied by lawyers and laymen alike. But its content is contested, so there are multiple conceptions that may draw from the above list and other related rights, powers, liberties, duties, and so on (Waldron 1988, pp.47–53). When considering copyright I shall return to this list to discuss the rights that copyright ownership does (under the current system) and should (under my ideal system) entail.

Common property is also more complex than I indicated. A common property system is one in which 'each resource is in principle available for the use of every member alike' (Waldron 1988, p.45). But there are two versions of that claim, one negative and one positive.

In a positive community the common resources belong to all the members of the community, and are managed by common consent. This inclusive right ('property *in* x') means that (a) we all hold the rights listed by Honoré equally; (b) we may use but not abuse the common, so we cannot for example take a portion of the common merely to destroy it; (c) we may not exclude others from the common, except when we justifiably appropriate a resource and claim private property rights over it. Such a justification would need to override the considerations in favour of common ownership. This common ownership right is derived from and based upon the natural law of preservation, which bestows us with a natural right to self-preservation and a natural right to intervene when another's preservation is threatened (Tully 1980, pp.61–62).

In a negative community nobody owns the common resources, except perhaps God, and so the common stock is open to unlimited appropriation. We are a community only in the sense that we have each have an equal right to appropri-

ate the common stock (Drahos 1996, pp.44–46, 57–58). Thus we begin with no rights with respect to a resource, x, except the right to appropriate it for ourself, and through some appropriate process we come to have private ownership rights over x ('property *of* x'). Justifications for ownership needn't be as strong as those in a positive community.

There is a further important distinction to be made, this time between natural and civil rights. Natural rights are inalienable and must be protected by the state, whereas civil rights are decided upon by the state and can be changed to serve some collective goal. If ownership of intellectual products were a natural right then copyright would be inalienable. If not then it can be justified on instrumental grounds, i.e. as an instrument or tool to achieve certain collective goals such as achieving optimal production or promoting general happiness, and these would be implemented in a particular civil framework.

1.2 A rough guide to copyright

With the basics of property now understood I will proceed by explaining copyright and various associated concepts, which will otherwise lead to further common misunderstandings. Much of this section will describe concepts as found in copyright law today, rather than trying to frame the discussion already in Lockean terms. This will help elucidate the areas of congruence and divergence between Locke's theory of property and current copyright law, which I shall address later on, and will then be helpful both in developing a general Lockean justification for copyright and in examining its applicability to current copyright law.

This section should also clarify why I am focusing specifically on copyright, rather than the family of property rights usually grouped together under the heading of 'intellectual property', which includes patents, trademarks and trade

secrets. Whilst these property systems are commonly referred to collectively as 'intellectual property' it's important to bear in mind that in UK law each is a particular form of legal protection for a particular subject matter, with their own statutory or common law regimes. There are few rules defining the relationships between subject areas, and those that exist are 'of diabolical complexity and obscurity' (Waelde 2006). Both in deference to the precedent of UK law, and because the law happens to have been shaped around important theoretical differences, I shall focus exclusively on copyright. My overall argument may well have implications for patents, trademarks and trade secrets but they are beyond the scope of this essay.

In brief, copyright is a private property right given to creators of certain intellectual works for a limited term. Copyright today confers near-full ownership rights upon the creator (all of the rights in Honoré's list except the lack of any term on possession of the other rights, hence the phrase 'all rights reserved'), with various exceptions shaped to serve the public good. Once copyright expires the work enters the public domain.

We should begin with the public domain, an intellectual common. Returning to the previous section, if the intellectual common were conveived as a positive community, as Drahos (1996) does, for example, then it would be difficult to mount any justifications for ownership of intellectual resources. Because I wish to argue against a stronger, charitable reconstruction of Lockean arguments for copyright I will assume that the intellectual common is a negative common.

The intellectual common contains certain kinds of ideas and intellectual products by convention, usually because to include them in a different system of property (collective or private ownership) would be impractical or undesirable. These are everyday and extraordinary intellectual products that we naturally share in common, and intellectual products whose copyright has expired

The first two kinds are those that, as Hughes (1988) explains, we think cannot be owned, either privately or collectively. I don't intend to defend these claims here, though I will touch on them later in the essay. Everyday intellectual products are too generally useful, and would require too great a redistribution of wealth, to be subject to ownership; examples include thinking to wash one's car and having a trivial conversation with friends (though one could get a copyright in a 'fixed' form of the conversation such as a recording or transcript). Extraordinary ideas are especially important to society and appear to be basic truths rather than products of a human mind[4]; the two subclasses are natural facts such as the theory of electromagnetism and those that are in 'widespread public use' such as architectural columns. Since copyright is a limited term private property right, when the term expires those intellectual products become the third kind to enter the common.

The intellectual common is practically inexhaustible; my extracting something doesn't prevent others from extracting something different of a similar quality and quantity (Hughes 1988). It is inexhaustible in another sense, in that that my (non-exclusive) use of an idea in no way depletes from the common, nor prevents others from using that same idea. Intellectual products are non-rivalrous, meaning that any given one can be consumed by one individual without preventing simultaneous consumption by others; my watching a TV programme doesn't prevent you from doing the same. Only physical copies introduce a scarcity of distribution.

Copyright only protects expressions, not the ideas behind them (Cornish & Llewlyn 2003, p.388). For example, I will get ownership rights on this essay but not on the ideas it contains, which means that my property rights are violated if you make copies of the essay or pass it off as your own but I can't stop you from developing my ideas in your own work. The idea-expression dichotomy

[4]This may seem like a false dichotomy, since discoveries will be the product of human labour. The point is that the discoverable information in some sense existed in a negative common before the labour, unlike, say, a complete novel.

achieves a definitional balance that permits the free communication of everyday and extraordinary ideas while still protecting a creator's expression. It is this dichotomy, unique to copyright amongst intellectual property rights, that shapes the distinctive relationship between copyright and the intellectual common.

Because copyright only covers the expression, it cannot give the creator any private property rights over the intellectual products used to create it (this is a point ignored by most other theorists). If I were to mix a public domain recording of Beethoven into a piece of music I compose I would own the result but not the Beethoven recording nor the ideas that informed my composition. Contrast this with physical resources, where use of a resource held in common requires that I make exclusive use of it, if only for a short period of time; I cannot grow vegetables in a small allotment used by fifty other people. The only sense in which copyright diminishes the intellectual common is in reducing the number of possible expressions of some commonly held intellectual products. But given that each new work may develop new ideas that will enter the intellectual common automatically and has the capacity to inspire further ideas, it seems safe to say that copyright doesn't diminish the intellectual common and may in fact contribute to it even before the term expires. To claim otherwise is a common mistake that Scanlan (2005, pp.89–90), for example, makes.

This clearly distinguishes copyright from patents, trademarks and trade secrets, which confer ownership rights over portions of the intellectual common. In the context of Locke's theory of property, which I will turn to in the next section (2), these forms of property require that the owners appropriate portions of the common as well as being able to own the products of their own labour. Another difference is that trademarks have a term of ten years but they can be renewed ad infinitum so long as the owner uses them (Cornish & Llewlyn 2003, pp.647,688), so there is no limited term in contrast to copyright.

The complexity of copyright law

There are many different kinds of copyright. The basic kind afforded to 'natural authors' (the people who originally create works) currently lasts for their lifetime plus seventy years in the UK, and covers all kinds of use (commercial and non-commercial, transformative and non-transformative[5]). Musicians get a further mechanical copyright over recordings, which in the UK lasts for fifty years, so even though Beethoven's compositions are in the public domain an orchestra can own their rendition. Another kind of copyright is that which publishers can get – typographical copyrights over particular editions of works that last a mere 25 years (Cornish & Llewlyn 2003, 386).

Variance between jurisdictions adds a further layer of complication. For example, in both the US and UK the basic copyright for 'natural authors' lasts for their lifetime plus seventy years. But copyright on music recordings lasts 50 years in the UK, whilst in the US they last 95 years and are subject to a compulsory licensing scheme (U.S.C. 2003, §115). In the US there is a rich doctrine of 'fair use', which allows limited use of copyrighted material without requiring permission from the rights holders, covering all kinds of commentary, criticism and parody (Nolo 2003). In the UK we have a similar doctrine called 'fair dealing' which is far more restricted, covering research and private study, news reporting, criticism, review, various exceptions specific to the visual depiction of public works, free public broadcasts, recordings of broadcasts for personal use, and many other uses with limited economic impact (Cornish & Llewlyn 2003, pp.440–448). In China the fair use and statutory license provisions include all free public performances and translations of published works by Chinese authors into minority languages (Guanhong 2004). Each exception is shaped to serve the public interest.

[5]Remixing some music or making a collage from a newspaper transforms the original, whilst simply copying a song from CD to computer or making a photocopy of a newspaper article are non-transformative

In much of Europe (including the UK), copyright is *further* complicated by the doctrine of moral rights, designed to protect the creator's reputation. They are inalienable, meaning that they cannot be transferred even when the copyright is sold or given away, and cover paternity (the right to be attributed as the creator), integrity (the right to prevent or object to derogatory use), false attribution (the right to prevent it) and disclosure (the right to determine if and when the work is made public) (Cornish & Llewlyn 2003, pp.452–467).

It is no wonder that copyright violations are widespread amongst consumers and creators; 'current legislation is too complex and, in parts, out of step with modern technology and expectations' (Holloway & Charman 2006).

There are two lessons to take from this: First, the differences and complexities deemed necessary by legislatures around the world indicate the rich and varied philosophical and empirical arguments upon which civil frameworks are based. We shouldn't be too quick to reduce the question of copyright to a simple theoretical framework without paying attention to its history and present reality. Second, the concept of private property must tell us enough about copyright to act as an organising principle, allowing laymen to go about their everyday business without detailed legal knowledge and without unknowingly violating others' property rights (Waldron 1988, pp.42–43). Such an organising principle should provide a coherent theoretical basis without losing the richness of current legal and political doctrine. In other words, I am seeking to develop a theory of property that balances attention to the history and present reality of copyright with the need for simplicity and coherence.

Changes since Locke's time

A near-universal omission from discussions of Locke and copyright is any indication of the changes in copyright law, related laws and technologies since the time he wrote his Two Treatises on Government. This is important because we

might otherwise mistake a general defense of copyright in Lockean terms for a defense of copyright as it exists today in the UK (for example), and even a defense of all the related laws and technologies that extend the power of copyright holders. To understand copyright we must look at its duration (the length of the term before it expires), its scope (the kinds of use it covers), its reach (who it concerns) and its force (what enforcement measures and sanctions owners have), an approach that I borrow from Lessig (2004).

In 1710, twenty years after Locke publishes his Treatises, the Statute of Queen Anne first formalised copyright in a form recognisable today. The duration of copyright was set at fourteen years plus an optional extension of another fourteen years. The scope was narrow, only covering commercial publishing to provide incentive for publishers to take on the costs of printing, and therefore its reach was confined to the publishing business (Cornish & Llewlyn 2003, pp.346–348). Aside from the basic sanctions associated with property law, the only additional force behind copyright was the prohibitive cost and complexity of the printing process and equipment.

Today the duration, scope, reach and force of copyright have been vastly extended. As I have already mentioned, the basic copyright for natural authors now lasts for the life of the author plus seventy years. The scope includes all kinds of commercial and non-commercial, transformative and non-transformative uses. Whereas Locke would have been able to make copies of books for friends and write music derived from Haydn's latest compositions, today we enjoy no such rights. Because of changes in the scope of copyright law, and in the way in which we consume copyrighted products, the reach is now universal. Whereas only publishers could make copies of books commercially in Locke's time, today simply loading a web page on your computer could be construed as a copy and thereby trigger copyright law. Finally the force of copyright has been extended not only by a number of enforcement regulations that prescribe increasingly harsh penalities, but also by technology that allows copy-

right holders to extend their ownership and prevent many kinds of use allowed by copyright; any attempt to circumvent these so-called 'digital rights management' technologies triggers copyright or associated laws designed to defend it (Lessig 2004, pp.133–171).

Later in the essay I will describe the bare minumim that a copyright system could entail, which will highlight just how extensive copyright is today. I will then show that Locke's political philosophy does not necessarily support the current copyright system, and that his theory of property offers useful guidance in evaluating the duration, scope, reach and force of any given copyright system.

2 A sketch of a Lockean argument for copyright

Locke's theory of property is a popular starting point for advocates of copyright. In brief they claim that we own our labour and the products we create, that copyright doesn't violate any of Locke's provisos, that the state should protect these natural ownership rights, and that copyright may have the additonal benefit of incentivising further production. In this section I shall walk through what I consider to be the strongest form of this argument.

Locke begins with God's grant – the earth – which is common property and therefore a symbol and manifestation of our initial equality. Locke's text could be interpreted with a positive conception of the common, but for the reasons already stated in 1.1 I shall proceed by assuming that God granted us the earth as a negative common, available for our appropriation. Since copyright doesn't involve any appropriation of the intellectual common (as I argued in section 1.2), we can already comfortably dispense with any analogous worries people might have about the appropriation of the physical common. A copyright system that doesn't prevent us from contributing to the intellectual common and that makes it more accessible will be all the better.

The question at hand, then, is why we should own the products that we create. Locke says that we have the 'utmost property' in our creations (I §39)[6], that labour is 'the unquestionable property of the labourer' and that 'every man has a Property in his own Person' (II §27).

Like our need for and right to self preservation, self-ownership of this kind is a law of nature for Locke. To find natural laws we must determine the 'purposes man's natural attributes embody' to understand 'what ends man... can be seen to be designed to serve'. They are discovered not by reference to any particular desire we may have, but only those that are rational, meaning that

[6] From this point onwards I shall refer to Locke's Two Treatises of Government (2003) as I and II respectively.

they are coincident with God's objective desires for man. By taking into account the entire human community in this way, which begins in a state of equality, our activities are harmonised without abridging our natural rights and equality (Tully 1980, pp.43–48). It is in this light that we are to understand ownership of our products ('property *of* x') as being a *natural* right, because it serves the ends God has in mind for mankind.

Locke's state is set-up to protect our natural rights, which we bring with us into political society. Property being such a natural right, it is not a matter of convention or convenience but the kind of arrangement that the state is duty-bound to protect. Whilst property rights may serve some public good, that isn't what motivates Locke's theory of property, and so the state cannot reorder or abrogate them to serve some collective goal (Waldron 1988, pp.137–138).

We shouldn't, however, take this to mean that instrumental arguments are invalid for Locke, as some such as Kimppa (2005, pp.75,77–78) have suggested. Locke says that 'God gives us all things richly to enjoy' (I §40); that we have a 'liberal allowance of the conveniences of life to promote the great design of God, *increase and multiply*' (I §41); that 'God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience' (II §26); 'God has given us all things richly... to enjoy. As much as any one can make use to any advantage of life before it spoils' (II §31); and finally that 'God gave the World to Men in Common... for their benefit, and the *greatest* Conveniences of Life *they were capable* to draw from it' (II §34, my emphasis).

In other words it is the case both that the state has a duty to protect ownership of our creations, and that the civil framework that achieves this may be more commendable for promoting God's ends. The only constraint on instrumental arguments is that they may not violate our natural rights. As Locke says, 'Law, in its true notion, is not so much the limitation as the direction of a free and

intelligent agent to his proper interest... the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom' (II §57).

Thus the claim that copyright provides an incentive for people to create intellectual products fits into Locke's theory of property. Not only is ownership of our creations a natural right that the state must protect, but in so doing the state can enlarge our freedom.

2.1 Locke's provisos

Locke placed certain provisos on the system of private property, which ensure that the consequences of the system don't conflict with God's ends. Interpretations of these vary, so in the interest of charitable reconstruction I will develop an interpretation that is friendly to copyright, which will be broadly similar to Waldron's (1988).

The first proviso is that we may only appropriate portions of the common 'where there is enough, and as good, left in common for others' (II §27). This ensures that nobody harms anybody else by appropriating a portion, since everybody is still able to appropriate that which they need to survive and to enjoy richly the conveniences of life. One can think of it as an equal opportunity provision, according to which we needn't compete over scarce resources when allocating them across a community (Hughes 1988). There are two claims that help justify this proviso.

To begin with, a labourer claiming ownership of his products 'does not lessen, but increase the common stock of mankind' (II §37). Locke makes this claim in the context of physical property, where he thinks that people who own land will use it ten times as efficiently as land held in common. In section 1.2 I argued that copyright doesn't reduce the common stock, and my copyrighted intellectual products will in fact increase the common stock. This is because (a)

the intellectual common is never appropriated, only used by new privately owned products, and (b) copyright only covers the expression and not the underlying ideas, and so my product has the capacity to inspire further work.

The further justification is that God created the world with plenty for each of us (II §41), and so the proviso only prevents individuals from needlessly claiming ownership over, for example, the entire continent of North America. This is problematic for physical property since physical resources are scarce but, unless our imaginations all freeze up, clearly not an issue for copyright. The means of production are still scarce, of course, so although this doesn't directly address Locke's proviso it ought to be kept in mind since talk of non-rivalrous resources can trick us into thinking that the information economy suffers no scarcity.

One might advance a strong interpretation of the proviso, according to which *any* private ownership will restrict others' ability to make intellectual products. My opportunities to create aren't as good as yours, because now I am limited not only by my abiity and competence but also by your restrictions. One might reasonably respond: so what? Where do we set the baseline against which we judge whether or not my act leaves you less or more than enough? Such a strong interpretation leads us to the absurd conclusion that we may never make use of nor own anything, since such an act will always deprive others of some potential use.

The only plausible interpretation is that we should at least be able to appropriate *something* in a quantity and quality that is enough and as good. But Waldron questions even this weak interpretation, contesting that Locke wouldn't support a general right to acquire, only a special right to acquire a particular thing, and so Locke could only have meant the 'enough and as good' proviso as an indication of his intent rather than a necessary condition upon ownership (Waldron 1988, pp.209–218). In other words, Locke is simply suggesting that private property shouldn't conflict with God's desire that we subsist and make

rich use of the world. In the case of copyright, since the intellectual common is never appropriated and copyright arguably increases the common stock, the proviso doesn't seem violated. So long as the exceptions are maintained (see section 1.2) and the term of copyright is limited, there should be enough opportunity for others to produce and use intellectual products as well as the owner of a fresh intellectual product.

The second related proviso is that Locke's theory of property cannot comprehend wasteful or negligent destruction, since this would frustrate God's aim for us to enjoy all things richly and to take the greatest conveniences of life we are capable of drawing from the common (II §37–38). It's possible for somebody to simply never use nor distribute their intellectual products, and even destroy the only copies, but that isn't the fault of any copyright system. Given that copyrights expire, assuming a work is distributed then there can be little worry about waste caused by ownership.

Others disagree, and even go so far as to claim that if one unit (or copy) of an intellectual product is wasted then the proviso comes into force and will endorse exceptions similar to fair use and fair dealing (Damstedt 2003, pp.1193–1198). Kimppa (2005, pp.74–75) argues that the waste and spoilage proviso clearly rules out full ownership rights because it would be wasteful for only one person to use a product when all could use it simultaneously.

But each of these interpretations is too strong. If Locke intended to put such a great emphasis on the possible use of a work, such that unleashing anything less than the full potential is wastage, then it would be difficult to justify any kind of private property rights.

2.2 A strong Lockean case?

In conclusion, then, it seems that we can make a plausible case for copyright using Locke's theory of property. It seems congruent with the initial aim of God's grant, with Locke's theory of natural laws and rights, and it doesn't necessarily violate his provisos. In the following section I shall show why this account is flawed, and why Locke may support *some* systems of copyright but certainly not copyright as a natural right.

3 Arguments against full ownership rights

Though I have presented a single, hopefully coherent Lockean argument for copyright in the previous section, there are in fact several approaches one could take, each raising problems for copyright advocates. In this section I will begin with Seana Shiffrin's critique of the claim that ownership is required to make beneficial use of intellectual products and the intellectual common. She tries to rule copyright as a natural right out altogether and in the process provides a strong defence for a positive intellectual common. Building upon problems with her argument I will tackle the second approach, which begins with Locke's arguments about self-ownership and links them with influential personality accounts. Having demonstrated why I think those arguments fail, I will tackle the desert and fairness approach before concluding that there can be no clear, strong Lockean argument for copyright without a thorough discussion of beneficial use.

3.1 On the necessity of ownership for beneficial use

Seana Shiffrin offers an interpretation of Locke that overrides any considerations in favour of copyright that I have so far elaborated. She claims that 'to justify a person's appropriation of a thing, two conditions must be met: First, things of that sort must be susceptible to justified private ownership. Second, the person must satisfy the conditions necessary to appropriate that specific thing'. Shiffrin contends that many attempts at Lockean justifications of intellectual property ignore the first condition, and that taking it into account 'Locke's view does not endorse Lockean appropriation of most intellectual products' (Shiffrin 2001, p143).

To understand the first condition we have to go back to the basics of Locke's property theory. Locke emphasises that all resourecs in the state of nature are held in common by all humankind. We have a right to subsistence and a grant

from God to make beneficial use of the world. Shiffrin interprets Locke as saying that some resources cannot be used if held in common, and in these cases we are justified in appropriating those items for our own exclusive use. This much is congruent 'with the underlying motivation of the common grant' (Shiffrin 2001, pp.145–147).

We can begin to expose the problem by asking why Locke would emphasise subsistence when he has already required that individuals make beneficial use of a thing to justify their appropriating it. Isn't the subsistence claim redundant? Shiffrin offers an interpretation according to which subsistence constitutes one of many kinds of beneficial use, the most basic. Other kinds of beneficial use arise when we mix our labour with something from the common, thus preventing the waste of and realising the full productive potential of the common (Shiffrin 2001, pp.150–154). Perhaps in emphasising subsistence Locke strengthens his claim that land is the kind of thing that *requires* appropriation for this most basic form of beneficial use, even if we may be able to make other kinds of beneficial use without appropriation?

That is the important step that Shiffrin emphasises: It is the nature of the thing to be used rather than the contingent decisions and psychological features of the labourer that determines if beneficial use *requires* ownership. Private property is *only* justified if it is necessary to achieve beneficial use of that kind of resource. I will return to the concept of beneficial use properly in section 4, but it is worth noting that Shiffrin leaves it underdetermined.

There is some textual evidence for her claims. On the question of beneficial use sometimes requiring a particular system of property, Locke claims that without private property 'the common is of no use' (II §28), and that with common resources 'there must of necessity be a means *to appropriate* them some way or another before they can be of any use, or at all beneficial to any particular Man' (II §26).

The nature of agricultural land, which is undoubtedly wasted (though not worthless) if left uncultivated, gives us a duty to cultivate it, and that in turn requires exclusive use. Shiffrin suggests that this is a necessary condition for a private property system, which would mean that private property couldn't be justified unless the condition is fulfulled. Locke never explicitly states this, but it isn't too great a stretch to interpret the above quotations as necessary justifications rather than incidental remarks. If the common is of some beneficial use to humankind without appropriation, and if we can make beneficial use of our intellectual products without ownership, then then Locke might be committed to endorsing a collective or common property system for intellectual products (Waldron 1988, p.171).

In response, a Lockean advocate of copyright could contend that Locke never meant the above quotations to set down a necessary condition upon ownership. When he wrote that the common is of no use without ownership, and that we must be able to appropriate resources so as to make beneficial use of them, he is providing arguments for private property, not necessary conditions. What he is doing in discussing the use of land is demonstrating why ownership is *beneficial*. It would be absurd for him to claim that we cannot use land *at all* when held in common, or even collectively managed. When writing about the common stock being increased by labour and ownership, Locke says that 'he that incloses land... has a greater plenty of the conveniencies of life from ten acres, than he could have from an hundred left to nature' (II §37). We could offer an interepretation similar to Shiffrin's, according to which it is the nature of the thing to be used that determines which system of property it is that helps us make the most beneficial use of it. Labour theory may not require full use as a condition, but it does dictate that full use will be made of whatever is owned.

With intellectual products beneficial use obviously doesn't require exclusive use. In fact Shiffrin suggests that 'there is a social presumption that ideas and expressions are the object of open dialogue, exchange and discussion. Attempts to

control, suppress, manipulate or monopolise ideas and information run counter to the intellectual spirit of open public discussions that promote learning and appreciation for the truth'. Exceptions to this include unfinished work whose development would be impeded by premature distribution, and those works that we might never want widely distributed such as private letters and diaries (Shiffrin 2001, p.156).

As an aside, which I shall return to later, it should be noted that those exceptions could be adequately dealt with by social conventions and the right to privacy. Though property rights may help punish, for example, the unauthorised distribution of unfinished work, it is unlikely that the fear of punishment will deter those intent on violating the conventions, and perhaps even less likely that the author would bother to chase up and punish the offender. It would certainly be a stretch to claim that intellectual products are a kind of thing that require strong property rights to prevent damaging use, given the damage such control could have over other beneficial use (by forbidding copying, thereby impeding open public discussions, for example).

This argument actually answers the objection just posed. Even if we admit an instrumental element to Locke's argument, Shiffrin claims that we would make the most beneficial use of intellectual products without ownership, therefore we should protect the intellectual common from private and collective ownership.

What does ownership entail?

It is worth revisiting my section (1.1) introducing the concept of ownership. We needn't assume that copyright should entail all of the rights described by Honoré, just because current copyright grants all but the right to have no limited term on their property. The owner of a copyrighted work clearly has a right to possess, use, manage, gain an income from, gain the capital value of and transmit the work. But only one of these rights is problematic for Shiffrin –

the right to manage the work, which includes excluding others from gaining the other rights (posession, use, gaining income, gaining the capital value and transmitting) without permission. Without the right to manage and exclude, each of the other rights would sensibly default to the common, being available in principle to each member of society without any ownership. Being non-rivalrous this means that we can all beneficially possess, use, gain an income from, secure the capital value of and transmit the work without directly harming one another. It is the right to manage that allows owners to control, suppress and monopolise information against Shiffrin's 'social presumption' for open dialogue, exchange and discussion.

So Shiffrin's claim is as follows: The only reason for which ownership might be required is if we think that the right to manage a work will lead, qualitatively and/or quantitatively, to more beneficial use, in line which Locke's claims about the efficient use of land. Shiffrin claims that a creator's distinctive use of an intellectual product or idea has value and doesn't necessarily depend upon appropriating it (i.e. taking exclusive ownership), an act that has no inherent value (Shiffrin 2001, p.160). These are commonly conflated, or it is supposed that ownership must precede beneficial use.

Besides, if copyright were to be justified as a natural right then it should be the nature of intellectual products that requires or always significantly benefits from ownership. I will return to this issue in section 5.

Beneficial use and the intellectual common

Shiffrin doesn't just want us to accept that there isn't a clear Lockean case for copyright, however. She also offers an interepretation of Locke that militates against copyright and defends the value of an expansive intellectual common, in which our intellectual products automatically become part of the common 'when their nature does not require exclusive use, to symbolise the equal moral status

of individuals' (Shiffrin 2001, p.164). Even though our intellectual products are (in Locke's language) our 'unquestionable' and 'utmost' property (as discussed in section 2) they become common property the moment they are distributed, effectively releasing them from ownership.

Whether or not this is the most accurate interpretation of Locke's thought it has a few attractive features. Shiffrin notes that 'exclusive use [of an intellectual product] is generally unnecessary for its proper use and ... its full exploitation commonly depends upon nonexclusive use'. It may be the case that appropriation is required during the creation of an expression, but once produced exclusivity interferes with beneficial use, so making intellectual products common property meets Locke's 'impetus to make full, robust use' of available resources and finished products (Shiffrin 2001, p.164).

Second, Shiffrin claims that 'their becoming part of the common jibes with the motivation of Locke's account of property – that things be shared, equally, unless there is a strong reason to do otherwise' (Shiffrin 2001, p.164). Her basis is the initial state of equality manifested in and symbolised by the earth being held in common. If we accept her interpretation of Locke's arguments for property, according to which he only justifies private property only because its nature requires ownership for full use, then we might accept a presumption in favour of the common.

Thus, whether or not the appropriation of ideas leaves enough and as good for others, regardless of its capacity to increase the common stock, by Shiffrin's interpretation intellectual products are still not the kind of thing that can be justifiably appropriated for exclusive use. One might still claim that copyright offers an incentive to make fuller use of the intellectual common and our talents, but to do so one 'may also have to show that these alternative grounds offer sufficiently strong and well-supported reasons to override the value of the tangible symbol of equality manifested by the common [property] presumption'

(2001, p.167).

Two weaknesses in Shiffrin's argument

There is one obvious line of attack on Shiffrin's argument. Whilst she puts a great deal of emphasis on beneficial use she doesn't expand her claims about the benefits of common property in any detail. A more thorough examination of beneficial use may demonstrate that we would in fact benefit from ownership of intellectual products, even if only for a limited period.

The first modification we should make is to account for costs of production, which has a side benefit of more closely resembling dominant arguments for copyright. Copyright advocates claim that the cost of production is significantly higher than the cost of use and distribution, and so in a competitive marketplace it is unlikely that creators will recoup their costs. Thus they will be deterred from making socially valuable intellectual products. Of all the possible ways to help artists recoup the costs and thus to incentivise creative production, they contend that copyright is the least wasteful of social resources (Fisher 2001, p169). Ownership may favour optimal production even if it doesn't favour optimal consumption, and the former consideration may outweigh the latter.

There is a way to include costs of production in a case for natural intellectual property rights. The first is to recognise that derivative or transformative use of an idea can be included in a relatively narrow sense of 'use'. So whilst copying, listening to or discussing a piece of music may not require ownership and may in fact be harmed by it, producing a remix of the music may not be possible without ownership, with its associated financial benefits. This jibes with Locke's approval of labour; God gave the world 'to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome and contentious' (II §34).

In response Shiffrin can simply re-emphasise that it is the nature of the thing to be used rather than the contingent decisions and psychological features of the labourer that determines if beneficial use requires ownership. Given that somebody could, and many do, produce musical remixes without ownership, the introduction of productive use needn't worry her. If we ignored the 'of a kind' requirement, and simply worked on a case by case basis, then we could obviously claim that ownership will sometimes favour optimal production. But Shiffrin's very strong claim is that Locke *only* countenances ownership where it is required to make beneficial use *of that kind of resource*. To run this argument against Shiffrin one would need to engage in significant empirical research, proving that the nature of intellectual products requires us to offer some kind of ownership framework in order to achieve optimal production.

The key to Shiffrin's argument is the concept of beneficial use, which I shall turn to in section 4. Given a sufficiently rich conception of beneficial use, I believe her representation of Locke's theory of property offers useful guidance on different copyright regimes, and provides a counterweight to the presumption in favour of ownership. Before I tackle beneficial use, however, there are other problems to contend with. Shiffrin's argument doesn't rule out all justifications for copyright, rather it casts doubt upon its necessity and challenges advocates to present an argument that overrides the value and symbolism of the intellectual common. In the following two subsections I will look at two such attempts, and argue in section 5 that neither do much to dent Shiffrin's presumption in favour of the common.

3.2 On self-ownership and expressive personalities

Even if ownership of intellectual products isn't necessary for their full productive and consumptive use, it may nonetheless be a natural right that the state should protect. Several arguments for a natural right to ownership of one's products

can be derived from Locke's claims that 'every man has a Property in his own Person. Thus no Body has any Right to but himself' (II §27), and that we have the 'utmost property' in that which we create just as God gave us utmost property over parts of his creation (I §39).

The expressive personality interpretation

One interpretation of these statements is that property is justified as an expression of the self. Using Hegel's theory of property, Justin Hughes (1988) claims that ownership of our intellectual labour, the expression of our personality, is a necessary condition for freedom and self-realisation.

For Hegel property isn't acquired through the application of labour (as with Locke) but by joining one's Will to some object that is external to the self, which leads to the external object embodying one's personality (Hegel 1991, §44,51). Our freedom grows as we are able to objectify our personality in this way at higher levels of self-realisation, with the family being higher than the individual, the state being higher than the family, and world history being the highest sphere of all. To objectify one's personality at the social level requires that others recognise your ownership rights. Individuals can exchange objects they own, which constitutes a reciprocal recognition of ownership between two willing subjects and therefore complete realisation on a social level. By recognising and protecting property rights, the state allows individuals to realise themselves at the level of society and the state, enabling a higher level of freedom (Hughes 1988).

With and without copyright we *effectively* own our expressive works up to the point of distribution, since nobody else is *able* to possess, use, etc. our work (short of espionage). When we distribute the work in a world without copyright we release it to the common, which for Hegel would allow no self-realisation beyond the level of the individual. So by granting individuals copyright over

their expressive works, those individuals are able to realise themselves at the level of the state, which is a greater freedom than being restricted to the private domain of the individual (Hughes 1988).

The obvious dilemna for Hughes is how Hegel's theory of property can be made compatible with, or have relevance for, Locke's theory of property. Both being roots of two very different philosophical traditions, one might presume the task insurmountable. But Hughes simply links Hegel to Locke's 'Property in his own Person', suggesting that one could extend a Lockean theory of property to encompass this expressive sense of personality. By protecting ownership of intellectual products, the state protects this natural right at a higher level. It's just a slight twist on Lockean rhetoric.

The problem with this argument is that it attempts to bolt a different theory of property – one that posits fundamentally different grounds for ownership – onto Locke's theory of property.

Waldron notes that Locke uses 'person', not 'life', 'body' or other simialar words chosen by his contemporaries, and that 'person' has a specific meaning in his wider philosophy. Personality is constituted by the creative activity of a free and conscious agent. It is conceivable that a person owns her labour insofar as the labour is attributable to her, and that she will in some sense own the product of her labour (Waldron 1988, p.177–181). There is a correlation between owner and owned that confers certain legal rights (as discussed in section 1.1). Locke's conception of personality is concerned with legal relationships between individuals, and between individuals and the state. His conception of personality is markedly different from Hegel's, which is concerned with self-realisation through the externalisation of one's will.

The difference is well illustrated by their application to the exchange of objects. For Hegel, exchange of copyrighted works would be acceptable because they are

external to the individual, and so the individual can withdraw her Will from the object and sell it to somebody else (Hegel 1991, §68,69). By contrast it isn't acceptable to exchange all of one's labour, nor oneself, because those are one's 'private personality' and to alienate them would constitue slavery (Hegel 1991, §66,67). Private property and exchange are intimately wedded to Hegel's wider project of achieving freedom through self-realisation.

But this is a different account to that of Locke, for whom exchange is possible because ownership only constitutes a legal arrangement, not an expression of the self or any other emotive arrangement. Locke pays no attention to the externalisation of personalities in objects, certainly not as a means for achieving freedom. When mixing labour with the common or creating an intellectual product the owner merely embodies an abstract, ahistorical self in the object that carries legal but not emotive weight (Rapaczynski 1981, p.307). That is the right-conferring correlation between owner and owned.

In other words, Locke's and Hegel's theories of property begin and end with such different conceptions of personality and ownership that any attempt to mix them would no longer be recognisably Lockean nor Hegelian. Not only that, but the importance of personality and ownership to their wider philosophical projects is completely different. To make them compatible Hughes would need to jettison large areas of each theory. For my purposes, a Lockean theory of copyright simply cannot consider an expressive personality argument persuasive. One could argue that Locke's theory of property requires identification, i.e. we should recognise the correlation between creator and product through a means such as proper attribution, but it would certainly be difficult to mount a Lockean argument for full ownership rights including the right to manage based upon the expression personality interpreation.

Problems for the liberal self-ownership interpretation

A more promising interpretation concerns itself with the liberal conception of self-ownership. Nozick expresses a minimal intuition in line with Locke's quote about having property in one's own person, that nobody may make use of or take posession of my person without permission, and that I owe none of my body nor talents to anybody (Waldron 1988, pp.398–399). Following Waldron's reconstruction of his argument, the active self is a bundle of talents and abilities over which nobody but the owner has any right (except perhaps to prevent those talents from being deployed in certain hamrful ways). The self has capacity not only to act but also to use resources to improve the material conditions of the world, and nobody would act if such an improvement for oneself wasn't guaranteed. If the fruits of their labour were taken away from them then their ownership of their talents and abilities would be worthless (Waldron 1988, p.401).

In short: if you take a copy of my novel and distribute it without my permission, you violate my ownership of myself and those creations that I have the utmost property in (a matter of right). If the state were to allow such a state of affairs to persist, nobody would ever write a novel again (a matter of consequences).

One obvious response to this argument is that intellectual products are different in nature to physical products. Suppose you made ploughs for a living. If I were to steal every plough you ever made I would make your talents and abilities worthless, and diminish you of valuable objects. But if you were a novelist and I were to make a few copies, you would still be able to posess, use, exchange and derive income from your novel, and (assuming I took digital rather than physical copies) I would have made you no worse off, except in the sense that you might have lost a sale or two. Note that I am keeping two matters separate: the direct harm caused by my copying, and the aggregate harm caused by the overall loss in sales caused by the loss of full ownership rights. Such a distinction may

be unsustainable if we were concerned with the consequences on total cultural production.

Another objection to Nozick's argument is that the exercise of our talents and abilities has worth. Even if the fruits of my labour were taken from me, be they ploughs or novels, I might have developed my talents and improved myself in the process. This isn't a consideration that Locke countenances - he thinks labour is painful and arduous, worthy of praise for being pious but not the sort of thing one would normally engage in for pleasure (II §34, 37). But unlike Hughes' Hegelian argument, this is a compatible extention of Locke's theory into an area that he didn't pay much attention to. It would have been odd indeed for Locke, an Englightenment figure, to dismiss the value of my researching and writing this essay, for example.

Another objection can be made by building upon Shiffrin's assertion that distribution of an intellectual product effects a separation from the private self. Though I may own my hair when it is on my body, once it is cut off there is no reason for me to own it unless ownership is essential to self-development or some other goal (Shiffrin 2001, pp.165–166). A different analogy, similar to Nozick's famous case of distributing tomato juice (Nozick 1974, pp.174–175), makes her case clearer. Imagine I spat into the sea, and then wanted to claim ownership over the molecules of my saliva that were distributed across the world over time. To be clear, I wouldn't be asking to own all of the oceans (as in Nozick's analogy), only the molecules that I spat out, so Lockean provisos against wasteful acquisition aren't relevant here. A practical objection to my claim would be that nobody could track those molecules, so I have effectively relinquished any ability to own, and perhaps also therefore my right. But what if it was practical to track each molecule and, at some later point, charge people for using those molecules, for example if they drifted into a water filtering plant? If it were practical should the state have a duty to protect my ownership of those molecules?

When releasing an intellectual product in the age of the internet, it isn't entirely obvious that one's right to self-ownership should extend over every copy of your intellectual products. This is especially the case when those products become mixed into others' derivative works.

Each of these objections weakens the Lockean case for strong property rights based upon self-ownership, but they don't defeat it. Even if I lose nothing of material value when you copy my work, and even if I gain self-realisation and self-development in the process of creation, the fact remains that if you have taken something of mine without permission then you have abridged my self-ownership.

A more comprehensive objection to the self-ownership argument for copyright becomes apparent when we understand that copyright actually causes problems for strong self-ownership arguments. If we have natural private property rights in our creations then the state must protect them, and cannot reorder or abrogate them to serve some collective goal (as argued in section 2). But copyright is a limited term property right, and exceptions are made for everyday and extraordinary ideas, and depending on the jurisdiction a whole range of other uses; both arrangements are designed to serve collective goals rather than to respect natural rights. Extraordinary ideas may be excepted as discoveries rather than creations and everyday ideas by the 'enough and as good' proviso (Drahos 1996, pp.48–51) but the other exceptions are surely incompatible with self-ownership.

Full self-ownership, without these exceptions and without a limited term, would be absurd. It would mean, for example, that somebody would still own the copyright on Plato's Republic, and no philosopher would be allowed to quote from it, nor build upon Plato's ideas in their own work. The limited term and numerous exceptions serve to balance the interests of the creator with those of society. Allowing self-ownership to trump other considerations would lead to an unacceptable concentration of power.

The obvious response would be to claim that exceptions are made on grounds of practicality – whilst we may in fact own every intellectual product we make it would be impractical to chase up ownership rights in the current exception cases. This could either work as legally enshrined exceptions or a hands off approach in the courts; the first move seems too ad-hoc, whilst the latter would lead to unacceptable legal uncertainty. It also fails to deal with the issue of limited terms. Moreover, exceptions can't be easily made on grounds of practicality since there is considerable complexity even in tracing the owner of a copyrighted work and enforcing one's own copyright (Waelde 2006). Some extraordinary ideas could actually be easier to deal with than other copyrightable works. For example it would be relatively easy to determine whether or not a public broadcast was free (a 'fair dealing' exception made in the UK), but very difficult to trace a jazz composition on an old 78 record with no label and contact the copyright owner for permission to use it. An argument made on the grounds of practicality would probably undermine copyright entirely, or at least require a thoroughgoing and constantly updated account of available technological and legal tools.

For a self-ownership argument to support current copyright, and indeed any kind of desirable intellectual property system, it must account for exceptions and a limited term. This means it must allow for abrogation and reordering that serve collective goals, even though Locke forbids this treatment of natural rights (Waldron 1988, pp.137–138); note how the abrogation and reordering of full ownership rights helps meet Locke's wastage proviso (section 2.1). How can these contradictory requirements be reconciled?

Undermining self-ownership completely

The only move open to a copyright advocate is to deny that the free distribution of intellectual products actually abridges self-ownership. In other words, we

can imagine a Lockean state in which there is free, unfettered distribution of intellectual products that are held in common. In such a state copyright could be advanced on grounds other than self-ownership; self-ownership needn't be discounted, but it wouldn't lead to any natural private property rights.

Unlike physical resources, intellectual products can be posessed and used entirely in private, without any chance of others abridging any relevant rights. I can compose a poem in my head and recite it to myself without others ever hearing it, but short of locking it away I can't do this with physical resources. We call the transition from my private sphere into the public sphere the act of distribution. The state undoubtedly has obligations prior to distribution, to protect my right to manage disclosure (when and how the work is distributed). The state may then also have further obigations once the work is distributed, such as those enshrined in copyright law.

When the state designs the civil framework that deal with distribution it has to respect and protect those activities and states of affairs that men naturally engage in; to do otherwise would be coercion (Ryan 1982, p.324). To coerce individuals the state would have to attach consequences apart from the natural, normal and expected course of events to distribution[7], but given that there are no such events prior to distribution and no 'normal' method of distribution, no such unexpected events can take place (Waldron 1988, p.405). Since Locke thinks it necessary to appropriate physical resources to make beneficial use of them it seems consistent to argue that ownership of physical resources is the natural and expected course of events. But my section on Shiffrin's arguments cast significant doubt upon the applicability of this argument to intellectual products, and we might even suggest that the natural and expected course of events with many intellectual products is in fact free distribution.

It is inconceivable that an intellectual product could be distributed outside of

[7] Expected in the weighted sense that I don't expect to be attacked by a stranger one dark night even if I might predict or anticipate the act.

any civil framework. There are different civil frameworks within which creative abilities are nurtured and exercised, and self-ownership is simply the capacity to enter into any given civil framework freely (Waldron 1988, pp.405–406). If the state failed to offer a civil framework that provided and enforced full private property rights over intellectual products that needn't abrogate self-ownership in any way.

To recap, I begin by creating an intellectual product (this essay, for example). So long as it remains my private posession the only obligation the state has is to protect my right to manage its disclosure. That is, nobody can take the essay from my hard drive and publish it without my permission. But that is where the state's obligations end. Let's say I now opt to publish this essay in a collected work, in a society that has no legal framework like copyright in place. When I publish the work I do so voluntarily, exercising my right to manage its discolsure and releasing it into the intellectual common. There is no violation of self-ownership here, nor has the state failed to uphold any of my natural rights.

This interpretation is supported by Locke's clarification of self-ownership, where he says 'that without a Man's own consent [his property] cannot be taken from him' (II §193). The creator chooses to publish in a particular civil framework and so nothing is taken away without consent. Moreover, the non-rivalrous nature of intellectual products means that nothing is 'taken from' the owner except, in certain circumstances, the possibility of payment.

One possible objection to this solution is that it misconstrues the natural, pre-civil context. The strongest form of the above argument relies on the suggestion that the natural course of events with distributing the work involves no protection from any civil framework. However, it is also possible that an individual would seek to manage his creation once distributed, just as the owner of a plot of land may try to defend his exclusive use. In this case it may be true that a civil framework wouldn't directly coerce the creator by failing to protect his

intellectual product, but it does fail in its 'great and chief end... the Preservation of Property' (I §124). It certainly seems odd for Locke to claim that we make use of our plot of land in a wholly private way before the institution of civil society, just as I was claiming the creator may make private use of his intellectual product.

But the objection doesn't provide any reason for thinking that we would naturally seek full ownership rights over our creations, even in a social but pre-political context. Given the non-rivalrous nature of intellectual products, our propensity to naturally share many of our creations freely, the fact that we have only instituted legal frameworks to protect intellectual products relatively recently in our history when compared to physical property, and the fact that those frameworks have generally been shaped with incentives in mind, I would suggest that the nature of intellectual products favours free distribution in the pre-civil context. My account of beneficial use in section 4 will support this claim.

The free culture movement has further reason to doubt the claim that we would naturally seek ownership of our intellectual products. Collaborative work methodologies, supported by new technologies such as wikis and mailing lists, have blurred the boundaries between 'your work' and 'my work'. The free culture and free software movements continue the communalist tradition of positing a third position, 'our work'. These forms of collaboration, especially when spurred on by the communal mentality, entangle contributions to the point where it becomes impossible or meaningless to talk of each individual owning their portion of the final product (Holloway & Charman 2006).

There is a final defense for copyright based upon self-ownership, which echoes Shiffrin's claim about the symbolic value of intellectual products entering the common. It is true that Locke thought the initial state of equality important to his overall political theory, and so we should value symbolic and real man-

ifestations of that equality. But it is also the case that private property and the individual held a central place in his theory, so it would make sense for self-ownership to be protected as a symbol of private property and the rights of the individual. Why should the common trump private property in this respect?

Shiffrin suggests that we should defend the intellectual common against ownership rights because physical resources already manifest the importance of private property and individual rights. By retaining an intellectual common we remind ourselves of our equal status (Shiffrin 2001, p.167).

But we don't need to lose all individual rights just because intellectual products are held in common. As I have pointed out, with free distribution of intellectual products the creator only loses the exclusive right to manage his work; he is still able to use, possess, derive an income from and transmit it. We may add rights uncovered by Honoré such as the right to be attributed as the creator, the right to prevent derogatory use, the right to prevent false attribution and the right of disclosure. Each of these rights, currently enshrined in UK law as moral rights (see section 1.2), could be posited as both natural and as extensions of self-ownership into civil society. Demanding in reasonable circumstances that others attribute your work doesn't have a particularly deleterious effect on free distribution, but it does achieve two things: (a) it protects natural rights in political society; (b) it extends the symbolism of the individual and ownership into the sphere of intellectual products without damaging the valuable aspects of the common property system.

3.3 On labour, desert and fairness

There is one other kind of approach that an advocate could take in constructing a Lockean theory of copyright. It is, broadly speaking, that we deserve to benefit from our labour, that rewards are only fair whilst free distribution is manifestly

unfair. This gains support from two aspects of Locke's theory of property: he thought that labour was pious and good, and that we have no rights to benefit from the labour of others.

According to Locke, God 'gave [the world] to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome and contentious' (II §34). Not only is labour necessary for our survival and a duty to God (I §45, II §32,35) but it also improves land and increases the common stock (II §37). With physical property the value of labour causes problems, because it is only the initial labour of the first individual that confers ownership rights, whilst subsequent employees gain no such rights (Waldron 1988, pp.202–204). Intellectual labour of the kind covered by copyright suffers this problem less, except through plagiarism, though the ownership rights offered by copyright today certainly stifle derivative uses of copyrighted works and therefore discourage certain kinds of labour. But this isn't a particular problem given the infinite scope for new intellectual products to be created. After all Locke doesn't fetishise labour but sees it as a means of improving our material conditions and serving our duty to God.

Why should we be rewarded for our labour, rather than just praised, approved or attributed? The most plausible reason is that, as Locke suggested, labour is onerous and so the promise of compensation will motivate people to produce rather than benefit from another's pains (Waldron 1988, p.204). Even though a lot of intellectual labour is enjoyable or fulfilling, it is still clear that attribution, praise and approval would often be insufficient incentives to create major works that require considerable labour. I should note that UK copyright law actually requires that 'sufficient skill, judgement and labour, or selection, judgement and experience, or labour, skill and capital be expended by the author in creating the work' (Cornish & Llewlyn 2003, p.388).

But it isn't immediately clear why that reward should come in the shape of

full property rights. Would an alternative arrangement, such as small grant scheme administered by the state, not suffice? Locke comes to the rescue again, suggesting that 'he that had as good left for his improvement... ought not to meddle with what was already improved by another's labour: if he did, it is plain he desired the benefit of another's pains, which he had no right to' (II §34). If you have invested time and energy in composing a beautiful book of poetry then I have no right to sell copies myself without seeking permission, since I could just as well have created my own work to sell or found some other way to make money.

One objection to this line of reasoning can be extracted from Shiffrin's preamble to her argument about the necessity of ownership. To downplay the deserved reward of creators, so that she can emphasise the necessity line of Locke's theory, she claims that 'labour plays a subsidiary role'. Rather than being a basic justification for ownership it merely explains why one individual rather than another gains ownership rights (Shiffrin 2001, pp.143–144). She is aware that she is in a minority in offering this interpretation, which doesn't sit comfortably with Locke's praise of labour and his criticism of the idle and covetous. Certainly in the case of copyright it would seem to be entirely redundant to differentiate the creator from others, which is different to the standard Lockean case of an individual seeking to appropriate a portion of the common. Shiffrin admits that other justifications for copyright may override her considerations in favour of the intellectual common, but can only claim (without, apparently, further weight) that her interpretation of the role of labour is more compelling. This seems like a case of convenient interpretation that could happily be ignored by those determined to defend copyright with a Lockean approach.

A more convincing convincing objection can be made on the basis of proportionality. Perhaps some intellectual labour is painful and so should be rewarded, but what of intellectual labour that is pleasant? Contrast, for example, a poem that I wrote one idle summer afternoon and this dissertation which has taken

months of hard work. Should the state extend protection to the poem as well even though it was pleasant to write, in order to protect my dissertation which clearly was in some sense painful to create? To run that argument we would need proof that a sufficiently large proportion of works ever created required difficult and painful process, proof that is clearly missing and, I would intuitively suggest, could never be found.

Perhaps if registration was required for copyright then individuals who thoroughly hated the working process could go and seek protection, whilst those who enjoyed it could make do with the reward inherent in the labour. But this would require some kind of foolproof psychological test at the copyright office, clearly beyond their means. To make it truly fair the office would also need to reward proportional to the pain, a measurement that is fraught with subjective considerations.

In other words, a fairness argument for copyright would need either to make giant leaps in psychometrics or prove that most intellectual labour is for the most part painful.

In furthering this objection I would also point out that, if fairness is to justify the kind of ownership entailed by today's copyright law, it specifically defends the right to manage through exclusive use and licensing which provides the financial reward. A copyright owner, according this story, could object when I take a copy of his work without fairly renumerating him for his troubles. But given that intellectual products are non-rivalrous, and that in many forms (such as web pages) the transaction costs are minimal, one might reasonably respond 'tough luck'! What have I taken from you, except the potential to earn revenues from a licensing arrangement based upon the right to exclusivity? Why, in other words, should the state intervene and construct artificial ownership rights just because some people happen to think it unfair that they don't get any significant financial reward? If I stole a physical copy, such as a book, you would have

recourse outside of copyright law. Could that not be enough?

One could respond that my taking the work indicates value, and in choosing not to pay the producer when I should I am behaving against social norms, which equate cultural value with exchange value. If I take a copyrighted work, I might as well take books that the owner no longer reads. To argue 'tough luck' one would need to explain the relevant difference between those two cases, or accept all kinds of 'theft'.

But this misses the point. The relevant difference is simple - is we accept the instrumental or natural rights justification for private property in physical products, then there is a clear violation of rights when taking the book. But we haven't yet established a basis for private property rights in intellectual products, nor any social norms relating to their exchange value. In breathing air I indicate value, but we don't infer that air must have an exchange value. It is indeed 'tough luck' because, even if the work has tremendous value, we needn't establish a system of private property rights out of some vague concern for fairness.

Interestingly, rewarding labour out of fairness cannot justify the current copyright regime because on these terms it fails. In a study of German musicians, researchers found that 'only a small minority of artists reaches ordinary living standards from copyright income' and that other activities unrelated to copyright such as performances, teaching, non-music professional activity and assistance from family members generally constituted a larger share of their income. In a similar study in the UK, only 5% of artists earned more than £10,000 from copyright whilst 53% earned less than £100 (Kretschmer 2005)[8]. Copyright doesn't seem to substantially reward artists proportional to their labour. No market capitalist would ever suggest it should – it may be that few people

[8]It's not even clear that they rely on copyright for those earnings. I earn money from my freelance journalism, which would constitute an earning from copyright, except that I release my works under copyleft licenses and so don't rely on copyright at all

would ever attach much value to those works that earned little revenue – but the distribution of earnings seems so skewed towards the top end, and the majority get so little, that it doesn't seem as though copyright fairly compensates many people for their contribution.

We can also make a more damning textual objection, namely that the fairness claim mistakes the intent of the pains quotation. Locke isn't saying that it would be *unfair* to benefit from another's pains, merely that one *has no right* to do so. In other words the fact that the labour is painful and pious is neither here nor there; what concerns Locke is that the industrial individual owns his labour, and so others literally have no right to share in the benefits because of that private property right.

If Locke thinks labour is good and should be promoted then we may be able to construct an incentives argument for copyright, but it certainly wouldn't justify natural private property rights. There is nothing about the nature of intellectual products that deserves or demands reward, no sense in which rewards are a natural state of affairs to be protected by the state, and no other textual basis for claiming Locke would support a natural ownership right on those grounds.

3.4 Towards a single Lockean perspective on copyright law

Before I plunge into the next section I should review the dialectic so far, which has ranged over several Lockean approaches to justify copyright. From these I will draw a single Lockean perspective that we can use to frame discussions on copyright, which I will expand on in the following sections to build the basis for a Lockean philosophy of free culture.

Ownership of intellectual products of the kind offered by copyright boils down to the right of management, entailing the right to exclusive use and to license limited uses. Copyright grants the holder *full* ownership, and the right to man-

age allows them to impose exclusivity on the otherwise-commonly held rights of possession, use, gaining an income from and transmitting the product. This exclusivity is the key to providing incentives, since otherwise there is no reason why the other rights shouldn't sensibly default to the common. This is because those rights don't require ownership, and our ability to exercise them is (as I will argue in the coming sections) harmed by ownership.

It is clear that we cannot justify a Lockean natural right to private property of intellectual products that looks anything like copyright. Such a right would need three features: First, it would need to be based upon a basic requirement that precedes civil society, for example our rights to subsistence and self-ownership. Second, it should clearly serve our natural ends and enlarge our freedom, as is the purpose of law. Finally, it couldn't be abrogated nor reordered by the state to serve collective goals.

As Shiffrin argued, ownership isn't required for beneficial use and so is unlikely to be *the* natural state of affairs that the state should protect. Personality-based accounts, popular in the non-academic literature on copyright, are incompatible with Locke's theory of property in their strongest form, and in a weaker, coherent form justify little more than a right to attribution (paternity, in copyright lingo). Copyright must be justified on the basis of self-ownership, desert or fairness.

For self-ownership to follow from our natural state of affairs we should, contrary to my arguments in section 3.2, be said to own our freshly created intellectual products in some way that is meaningfully related to the kind of ownership offered by copyright after the act of distribution. I cast doubt upon that claim. Even if we thought that possible, a Lockean theory based upon self-ownership would require a perpetual and full copyright, something that society wouldn't countenance. The only way to resolve the internal contradictions of a self-ownership argument for copyright is to acknowledge that the civil framework needn't protect full ownership rights. Distribution of an intellectual product

is a voluntary engagement with a particular civil framework. A framework that offered no private property rights wouldn't abridge self-ownership, and its success in Lockean terms could be measured by how well it enlarged our freedom.

Accounts based on labour, desert and fairness all fail. The non-rivalrous nature of intellectual products means that there is little direct harm caused by free distribution. A natural private property right based upon desert or fairness would be too complicated to manage, and the current copyright system fails to reward artists fairly anyway. More damning is my claim that these accounts misinterpret Locke's text, which praises labour and makes claims about it being painful, but never requires that painful labour itself deservedly lead to property rights.

Despite there being no natural private property rights in intellectual products, we can construct an instrumental argument in Lockean terms. So long as it doesn't have too deleterious an effect on our use of the intellectual common (which becomes the natural state of affairs), and so long as it enlarges our freedom, some form of copyright can be justified. To do so, such a civil framework should incentivise further production, encourage us to use our abilities and existing products more richly, and to make more beneficial use of the world.

Thus, in the following section I shall analyse the concept of beneficial use in the hope of providing a single, coherent Lockean framework from which to address the empirical claims about copyright.

4 Beneficial use of intellectual products and abilities

It is tempting to reduce beneficial use to some simple formula. In her arguments against copyright Shiffrin made a few brief references to the 'social presumption that ideas and expressions are the object of open dialogue, exchange and discussion' (Shiffrin 2001, p.156). Couched in these terms it seems clear that *any* form of exclusive control in the hands of creators would be damaging. But from figures in the content industry we hear an entirely different rhetoric, that copyright supports the creative industries who produce cultural artefacts for consumers to enjoy (Leyton 2006, Chance 2005, pp.25–26). How are we to understand beneficial use and the impact of such a conception on Locke's theory of property?

My approach is based upon exploring four dimensions of use: consumption, production, sharing and learning. Rather than looking only at a particular kind of use, as Shiffrin does by discussing open dialogue for example (2001, p.156), I will look at general dimensions of use, which should cover all kinds of use. Rather than militating against consumerism or defending a remix culture, I will try to show that each dimension has its value. There are two problems with these approaches, which I will avoid. First, they tend to make false contrasts, for example by railing against consumerism commentators often fail to acknowledge the benefits of consumption. Second, they tend to turn contrasts into distinct categories, so one can consume *or* produce but not both. The contrasts are important, but not the whole story.

For example, consumption is oriented towards inner space and the past (assimilating existing resources), whilst production is oriented outwards and to the future (expressing oneself in new resources). Sharing and learning can also be opposed to one another, as information is sent outwards and received inwards,

for example. Each dimension can be opposed with another, but they shouldn't be taken to be distinct kinds of use; for example, I don't purely consume one moment and share the next. Each dimension complements the others. To pick a quick exaple, I can produce better paintings if I can consume and learn from existing works of art. If that sounds cryptic then I hope that the following subsections will clarify both this approach and the concept of beneficial use.

Picking up on the requirements of a Lockean civil framework outlined at the end of the last section, we can see how this approach deals with Locke's concerns. It includes productive use, so accounting for labour and the use of our abilities, and consumptive use, so accounting for the effect of ownership on our use of the intellectual common. Sharing and learning both affect our ability to make optimal consumptive and productive use of intellectual products and abilities.

One final note. These four dimensions happen to match the four freedoms that motivate the free software movement (FSF 2004) and their corollary in the free culture movement's definition (Anonymous 2006). By analysing the concept of beneficial use in these terms I hope to produce a conception of some relevance to these movements, even if my underlying philosophical approach differs from theirs.

4.1 Consumption

For John Perry Barlow, ex-lyricist for the Grateful Dead and free culture firebrand, consumption isn't a passive process that can be contrasted with active modes of production (Bowrey 1998, p.21), but it isn't a conception that I will adopt in this essay. Given that I am contrasting consumption with production, in order to show how the two complement one another, I shall treat cultural consumption as a fairly passive process that involves observing and assimilating a resource, hopefully deriving some benefit from it. Little needs to be said

about consumption, though its value will become clearer as I consider producing, learning and sharing.

The first feature of intellectual consumption is that intellectual products are not destructively consumed (Drahos 1996, p.50). My consumption doesn't prevent others from doing the same because intellectual products are non-rivalrous. So consumption shouldn't be contrasted with production as destructive rather than creative (as Berry (2005) has done, for example), but instead as passive rather than active.

I may consume a cultural artefact in a number of ways. For example I might listen to a composition at a live concert or from a CD; I might then copy that CD to a portable music player so I can enjoy it whilst jogging; I might even hear the music, much to the horror of some, in an elevator or another context in which it supposedly cannot be properly enjoyed. In each context the value of the process of consumption will differ, and unless I laid out a comprehensive theory of objective cultural values I can safely assume that there will be a certain subjectivity about the judgement. It may still be the case that, for example, my putting Beethoven's late quartets in elevators, hallways and restrooms of an office building would demonstrate a lack of understanding of the value of the music; there may be appropriate ways to consume particular artefacts (Scanlon 1998, p.100). But it seems unlikely that we could provide an organising principle, similar to that of private property, that we could apply to all intellectual products in order to determine how well we may consume it with a given process or in a given context, no matter how much some creators might like to control our consumption of their work.

The desirability of consuming a given intellectual product will also depend upon the timing. For example, making use of a catapult design isn't nearly as useful to us today as it was in medieval times, just as listening to a pop song has a different meaning when it's a hit to when it is an unfashionable relic or a

fashionable retro track.

The indeterminate value of consumption leads me to my first tentative claim regarding copyright: that the limits an owner may place upon others will have a deleterious affect on their beneficial consumption. Ownership gives creators full control of their work, and with the help of technology they can far overstep the limitations of copyright law in controlling our consumption. The combination of technology and copyright enables book authors and publishers to prevent you from copying and printing their e-books, and blind individuals from having them read aloud by assistance software. Even works in the public domain can have these restrictions imposed by tying the un-owned work in with copyrighted software, so that copying, printing and other kinds of use will affect the text and software equally (Lessig 2004, pp.148–151). Even though the limited term on copyrights limits the waste caused by exclusivity, many intellectual products may in a sense be useless by the time the copyright expires, for example catapult designs and unfashionable music.

The free software movement calls for the freedom to run a computer program for any purpose (FSF 2004), so recognising that by giving owners the unlimited right to dictate the terms of use, the state provides society with no rights of consumption. The free culture movement calls, in effect, for the full range of opportunities to consume each intellectual product.

But we might want to temper these calls in light of other ethical demands. For example, would it be better for copyright owners to exercise Honoré's 'duty to refrain from using X in a way that harms others'? Some suggest that copyleft licenses should forbid uses that reduce other important freedoms, such as free software being used to block web access in China (Gohla 2001). Consumption of intellectual products could lead to dangerous technologies being developed. Richard Stallman, the founder and figurehead of the free software movement, suggests that freedom of consumption should be absolute, leaving legal and

political mechanisms other than copyright to deal with problems such as those above. Have they 'lost all sense of perspective' (Meyer 2001)? The question is too large to answer here, but we should bear in mind that consumption of intellectual products isn't unconditionally good.

Consumption requires both the existence of the resource to be consumed, the capability (can we access it?), the competence (do we have the necessary skills?) and the right to possess and use (am I allowed to keep a copy of this essay and read it?). The creator could make an effort to ensure we have the capability and competence to consume their work, for example by providing training or making the product easier to consume. The creator may also grant a universal right to possess and use, in effect ceding part of their power of management; this much is guaranteed by copyleft licenses.

A Lockean conception of beneficial use must be understood to include this conception of consumption, which accounts for the non-destructive nature of intellectual consumption, the barriers present in any given context, and therefore the completeness of consumption afforded by those contexts. The pertinent questions are then: what effect can civil frameworks have on our capability, competence and right to consume, what might Lockean free culture advocates aim for? We might also consider how these frameworks would tackle harmful consumption, or how they would interact with other civil frameworks that already do so.

4.2 Production

Barlow stands in good company when he criticises a consumerist tendency, even if his terminology is at odds with mine; *beneficial use* shouldn't be construed as a passive process. In fact it is rare that we consume in the way I have described above without actively engaging with the product.

Intellectual production, most simply, is the act of making some new intellectual artefact; we are productive when we write an original novel, but also when we look at a painting in a gallery and interpret its meaning. Without any intellectual production we would have nothing to consume, except perhaps the immediate sensations we gain from our surroundings[9].

Production is valuable for several reasons, then. In the first place it provides us with a stock of products to consume; the more productive society is, the more we can consume. Not only that, but production can enhance our consumption of works. When viewing the painting in the gallery, you may gain far more from the experience if you try to reproduce some of its elements in sketches, if you write a critical interpretation, and if you discuss it with friends. It is for this simple reason that we must reject the stark contrast, commonly made, between the consumer and the producer, or the user and the creator. I do not deny that, with the painting for example, we are more of a consumer and the painter was more of a creator. But we shouldn't take these two concepts to be distinct categories, one of which we may fall into in any given context.

Production is also valuable because it can enlarge our opportunities for further production: we may directly derive a work from another, such as a music remix or a translation; we might make use of the underlying ideas embedded in a product, such as a literary device or programming technique; and the product has the capacity to inspire further ideas in us. For the vast majority of people who have a social life through communities and society at large, our intellectual production will never be wholly original. The romantic myth of the creative genius neglects to account for the fact that our intellectual production will always derive from other works to some extent. The pertinent question, then, is to what extent do civil frameworks reduce opportunities to do so? As I discussed in section 1.2, current copyright law only actually prevents the first

[9] I don't intend to analyse this problematic claim, simply because it would quickly become the subject of another dissertation!

kind of productive use in full, allowing certain exceptions on 'fair use' or 'fair dealing' grounds for direct derivative use. But this potentially barrier blocks off a significant range of productive uses and reinforces the strong distinction between producers and consumers. Beyond a few exceptions, such the compulsory music licensing scheme in the US (U.S.C. 2003, §115), there is no guarantee that you can license productive use of a copyrighted work, and the fee may be too high. In 2004 a young director made a Cannes-shortlisted film on a budget of £124, but the licenses for music and video clips used in the work would have increased distribution costs to the considerable sum of £230,000 (Youngs 2004), far beyond the means of most independent film makers!

I briefly discussed Locke's attitudes towards labour, which he saw as pious and good, an activity that increases the common stock and enables us to make more efficient use of the resources available to us. He criticises the idle and covetous, and his account of labour adds weight to his justification of private property (I §41, II §32,34,35,37).

Given this, we can say that civil frameworks should be criticised wherever they limit opportunities for productive use, relative to such opportunities under other civil frameworks. In doing so they encourage a more passive, idle relationship with the world. Nowhere is this more apparent than with intellectual products, where we naturally engage in productive use all of the time. How could we ever read a book without thinking about it, without interpreting it in a non-trivial way?

I have discussed the potential application of the 'enough and as good' proviso in several places in this essay (sections 2.1, 3.1, 3.2) and emphasised how weak a proviso it is. It doesn't suggest that *any* limits on our potential uses are grounds for dismissing a private property system. The most plausible interpretation is that civil frameworks shouldn't conflict with God's desire that we subsist and make rich use of the world, which can be restated in nontheological terms by

replacing 'God's desire' with 'our desire'. I think it is fair to say that copyright, by preventing derivative use, conflicts with the spirit of the proviso, even if not to the extent that copyright should be deemed invalid.

Finally, although Locke saw production as onerous and painful (II §34,37) we cannot deny that it may also help us develop our talents and abilities, and perhaps even learn more about ourselves in the process. Just because Locke thought it unlikely that people would engage in production without incentives, doesn't mean to say we should ignore the overwhelming evidence available to use today, which suggests that people often engage in productive activities voluntarily. The rewards may include satisfying a need, the intellectual stimulation, the development of skills, and the value of the product that results (Lakhani & Wolf 2005).

Insofar as copyright provides incentives for efficient and high-quality intellectual production it should be praised. But copyright massively limits our ability to engage in derivative production. For the free culture movement, the challenge is not to criminalise those who violate copyright when producing new intellectual products (which is the prevailing approach of big business), but to find ways to incentivise efficient and high-quality intellectual production without needing the strong private property rights offered by copyright (Leyton 2006).

4.3 Sharing

This section could also be called distributing, since it concerns the act of passing a copy of an intellectual product onto others. But the word 'share' has a more interpersonal note to it. Without the sharing of intellectual products there could be only a minimal social dimension to our lives because we'd never be able to communicate, nor consume anything but our own products. Sharing can also be hugely beneficial to communities under strain. As Peter Hewitt, Chief Executive

of the Arts Council of England, has noted, sharing in the arts can help British society deal with the issue of immigration:

1. First, multiplicity of cultural experiences simply enriches our lives;
2. Second, the arts contribute to cohesion, healing, mutual recognition and conviviality between different faiths and ethnicities in communities.
3. Third, the arts provide a medium through which the current debate about identity, and Britishness as a part of that, can be explored. The arts provide a space in which difference, mutual respect and the beauty of otherness can all be considered

He continues to point out that 'the continuous debate about our identity would be hugely impoverished were we not able to look at it through a series of artistic prisms', and claims that the resulting conviviality can improve well-being, whilst also militating against anti-social behaviour (Hewitt 2006, pp.9–10).

We needn't look at the sharing of culture on such a grand scale to see its benefits. Consider how our ability to consume the painting in the art gallery is enriched when we can discuss our interpretation with a friend, or how much more music we can consume and remix when we swap CDs and MP3s.

Sharing has also enabled and facilitated many innovative production processes, for example the collaborative development in the free software communities, whose products run on millions of computers worldwide. Wikipedia, the online encyclopedia that anybody can edit, is a testament to the power of otherwise-disconnected people sharing their knowledge. Sharing is often so central to these projects and communities that it no longer makes sense to talk about 'my work' and 'your work'; instead, they talk about 'our work' (Holloway & Charman 2006), a genuine positive common where intellectual products are automatically assumed to be held in common for the good of the community .

The more citizens are able to share (and therefore also consume and produce), the more healthy our cultural and social lives, the more convivial our communities.

However, it's not clear that completely unrestricted sharing is necessarily better. The copyleft licenses that I briefly mentioned in section 1 include an important restriction: if you make a derivative work, you must share it under the same license. For example, if I were to write some software based upon the copylefted product 'Linux', I would have to release it under the same General Public License (GPL); I wouldn't be able to take full ownership rights in it. This restriction helps the free software community keep their work within a genuine positive common, which is seen as beneficial.

Likewise we may think that the full ownership rights conferred by copyright incentivise production enough to override the deleterious effect on our ability to share (because copyright prohibits any sharing without permission).

4.4 Learning

Consuming, producing and sharing can all be learning experiences, helping us to develop both a more educated mind and a greater range and depth of talents. There is much to be said on the topic of education, but I shall narrow my focus to a few areas where copyright inhibits learning opportunities to develop my conception of learning, which is constitutive of beneficial use.

Copyright does include some exceptions for educational use, usually as 'fair use' and 'fair dealing'. But the worry is that these predetermine when we might learn, supposing to capture the most important contexts when it is relevant or useful to learn. In other contexts, wherever our ability and right to consume, produce and share is curtailed, so is our ability and right to learn. But whether or not a learning in a particular context is relevant or useful is not a matter

of fact, but a matter of judgement, involving personal tastes, values and perceptions, not to mention reference to that context (Barrow 1981, pp.34–35). I will argue that the exceptions that allow learning clumsily attempt to impose matters of fact on this nuanced concept.

To set the scene, a good learning environment should provide everyone with access to resources at any time in their lives. It should empower us to learn from any resource, share what we know with others, and to make contact with like-minded individuals. Access to those with more expertise, and communities from which we can gain additional critical perspectives, can massively improve our ability to learn (Illich 1971, pp.72–78). This is more or less what Shiffrin means when she talks about the social presumption in favour of open dialogue.

Every context is potentially a cultural learning experience. As Magnum photographer David Hurn (2001, p.57) puts it, 'photographers are photographers one hundred percent of the time'. To proscribe circumstances in which we may learn, and then to limit our learning opportunities outside of those circumstances, will inevitably have unforeseen consequences. Hurn continues:

> I always find it fascinating to see a movie, for example, with photographers whom I respect. Inevitably, their later conversations reveal all sorts of useful observations that they have made, sucked out of the plot, dialogue, acting, camera angles, pacing, whatever, which can be applied to their own work. Every event becomes grist to the photographic mill. And scores of learning events are occurring daily. All this new insight is fed back to the subject of the pictures, so it is no wonder that who a photographer is becomes revealed through what he/she photographs.

We come again to the question of degree; in this context, to what degree is the person reproducing the work of another photographer when learning from and

assimilating that work into his own? The degree of reproduction determines whether or not there is a copyright violation, and the likelihood of a successful prosecution. But that doesn't match the extent to which a person has learnt from the original work, and so we cannot say that a close reproduction is any less an indication of learning than a completely transformed interpretation.

Learning can be inhibited by a lack of opportunities, but also by fencing off certain contexts as 'educational' and prohibiting learning in others. I cannot legally take apart some copyrighted computer software to learn how the programmers achieved a clever design, nor can I get hold of the raw materials that were mixed together into a finished music track so that I might learn something about sound engineering. This not only reinforces specialism and denies us the educational value of many objects, but it also devalues schooling by erecting a fence between learning inside and outside of schools. Paul Collard, the National Director of Creative Partnerships, has pointed out that 'the more porous the schools are and the easier it is for pupils to move in and out of their spaces into the real world, the more motivated, interested and committed they become to their learning' (Stagg 2006, pp.xi–xii).

All of these concerns find refuge in Locke's writing on the subject. He thought that children should learn through practice rather than by rules, and that occasions for practice should be made where they don't present themselves naturally. Practice 'will beget Habits in them, which, being once established, operate of themselves easily and naturally' (1964, §66). The business of a tutor 'is not so much to teach him all that is knowable, as to raise in him a love and esteem of knowledge; and to put him in the right way of knowing and improving himself, when he has a mind to it' (1964, §195). Locke goes on to criticise those who are not skillful in more arts than one, and praises those who eschew 'the common, vicious, useless, and dangerous pastimes' in favour of finding 'time enough to acquire dexterity and skill in hundreds of things' (1964, §208).

It bears mentioning that Locke held a very dim view of amateurs, claiming not only that 'ill painting is one of the worst things in the world' but moreover that those without a natural inclination and the skills required would waste their time with such a 'sedentary recreation'; they'd be better off engaging in serious study or sports (1964, §203). But I think we can safely put this view down as being a reflection of the period in which he worked and the society in which he lived, rather than any principle central to his work.

Learning, then, is something we can do in any context, with any intellectual product. We should promote a society that loves knowledge, and learns through practice as a matter of habit. The greater our range of knowledge and talents the better. Copyright limits our learning opportunities in various ways, and could only be said to be of value to our learning environment insofar as it incentivises the production of learning resources.

5 Private or common property?

Beneficial use, as my brief sketch has shown, is a complex and rich concept that would take a considerable amount of work to adequately explore. In section 1.2 I discussed various complexities in copyright law, and differences between jurisdictions, which often seem designed to mitigate the damaging effect that copyright can have on different kinds or dimensions of beneficial use. For example, limited exceptions for educational institutions are common to promote learning, although as I argued in the previous section those exceptions actually undermine those institutions by artificially cutting off students and academics from learning opportunities elsewhere.

Shiffrin (2001, p.156) may have over-simplified the issue by dismissing copyright as an attempt to 'control, suppress, manipulate or monopolise' intellectual products, contrary to 'the social presumption that ideas and expressions are the object of open dialogue, exchange and discussion'. But if there is such a social presumption it is surely that we can consume, produce, share and learn from intellectual products as well or even better when they are held in common? Even in the case of production, once we look beyond the mirage of the romantic auteur and consider how productive use interacts with other dimensions of beneficial use, it is unclear that the incentives offered by copyright are wholly beneficial.

The complexities have another damaging effect. By being so horrendously complex they are difficult for the layman to understand. Organising principles are required to give the system of copyright coherence, and help laymen understand and comply with the law without knowing its full particulars. Some do exist – private property, substantial taking (the basis for judging infringement), identification and derogatory treatment (for moral rights) – but private property is too compromised by the exceptions to be an effective organising principle for them all. Even if a layman learnt that intellectual products were owned by their

creator, he wouldn't know that in the US but not in the UK he could still parody the work without violating that private property right. The UK All Party Parliamentary Internet Group concluded that 'there is a significant mismatch between what consumers believe they ought to be permitted to do with copyrighted material and what the law allows' (All Party Parliamentary Internet Group 2006), which doesn't seem to indicate a strong organising principle.

There are four harmful effects of making private property the organising principle for all intellectual products. The first is that the discourse around copyright is based upon the potent symbolism of the owner, and so when citizens aren't aware of the exceptions they are unlikely to exercise their rights to make more beneficial use of the work. The second is that citizens become confused about their rights, or simply choose to ignore the private property right, and so copyright violations become widespread, throwing the principle into disrepute. Neither of these meet Locke's aims of encouraging beneficial use and respecting the law too well. The third is that it may harm beneficial use where private property is deemed unecessary, such as in folk music (where there is a presumption in favour of sharing and remixing) or collaborative projects like Wikipedia (which are based upon open sharing). The fourth harmful effect is that a strong emphasis on private property, and a legal presumption that all intellectual products are automatically subject to private property rights, will crowd out alernative civil frameworks that may be more appropriate in particular contexts (such as folk music and the internet).

There are further problems with copyright. I concluded section 3.4 by suggesting that a Lockean theory of copyright would require an instrumental justification based upon the concept of beneficial use. But copyright plainly exceeds its purpose, an inevitable effect of the private property right.

For example, the National Theatre in London recently put on a production of Brecht's play *The Life of Galileo* based upon David Hare's script. But the Brecht

estate prohibited them from distributing the script because they 'did not want to swamp the shelves with alternative translations of a play that has attracted many adaptors' (Lawson 2006). Then there is the case of the memoirs of Craig Murray, a former British ambassador to Uzbekistan, which are highly critical of the Foreign Office and the so-called 'war on terror'. Here crown copyright law was deployed 'solely to prevent evidence of a government's misdeeds from entering the public sphere'. The costs of entering a legal battle mean that when copyright litigation is threatened 'only the wealthy and the lawless may hold power to account' (Hogge 2006). Finally, in a typical school class a teacher encouraged the children to take music from copyright-free web repositories for a video project. But one child mixed in music by some of his favourite artists, thinking mistakenly that by mixing short clips with other sounds it was 'fair use' (see section 1.2). He wrote to the record company asking for permission to use the music and was refused (Pitler 2006). Whilst this level of control *could* be construed as a direct incentive for creators, I think it's a stretch to suggest that we cannot find incentives that are less harmful in terms of allowing and indeed encouraging beneficial use.

Private property seems too weak, compromised and abused an organising principle to act as a basis for a Lockean copyright system.

The free culture movement, as Drahos (2006) has shown, advocates a positive intellectual common. Although I argued in section 1.2 that we begin initially with a negative intellectual common, free culture advocates suggest that civil frameworks should be put in place to construct a positive intellectual common rather than a system of private property. This would be a political expression of a community in which every person has an equal right to possess, use, derive an income from and transmit each intellectual product (see Honoré's list in section 1.1).

The free culture movement's interim solution of copyleft licenses is reminiscent

of common land in English law, which is land that is already owned by a person against whom the commoners have rights (Drahos 1996, p.56). With copyleft each person 'owns' their intellectual product, but through a copyleft license they grant a wide range of rights to other commoners that constructs and defends an expression of community.

Copyleft licenses usually enshrine a right to attribution, and don't conflict with the doctrine of moral rights where it exists. So, as I suggested in section 3.2, the symbol of the individual creator is retained without causing the problems associated with copyright. It is a balance that serves both a weak interpretation of personality theory, compatible with Locke, and the instrumental concern that people might not produce any work if they couldn't receive credit. Whilst copyleft licenses currently require and subvert copyright to achieve the positive intellectual common, copyright could be replaced by another civil framework that required attribution, access to learning resources, and so on.

6 Conclusion

Copyright advocates sometimes claim that the private property right can be justified as a natural right. Seen in the light of Locke's theory of property, this would mean that ownership of intellectual products couldn't be abrogated or reordered by the state to serve collective goals. Such a justification of copyright would have both potent symbolism and strong legal force. However, I have looked at three approaches to justifying copyright using Locke's theory of property, and found that neither satisfactorily supports copyright as a natural right.

Copyright isn't *necessary* for us to make beneficial use of intellectual products and our abilities. The nature of intellectual products is such that we can enjoy the right to possess, use and derive an income from them in common *better* than if each product was owned by a single individual. The right to manage the works, which copyright provides owners, may favour optimal production of intellectual products but that, according to Shiffrin, cannot justify a natural private property right in those products.

Personality accounts, which argue for a strong connection between the personality of the creator and their intellectual products, justify at least a general right to attribution. But to support the kind of rights offered by copyright one would need to diverge too far from Locke's theory of property.

Mounting a liberal self-ownership argument, according to which we should extend ownership of our selves onto our intellectual products, fails for two reasons. In the first place they would justify a property right far stronger than copyright, and wouldn't sanction the limited term and numerous exceptions allowed by copyright law, which constitute an abrogation and reordering of a natural right for the purpose of serving collective goals. The only way to overcome this problem brought me to the second reason, which is that the distribution of in-

tellectual products effects a voluntary release into a civil framework that in no way violates the creator's self-ownership. In other words, copyright cannot be a natural right based upon self-ownership.

Finally I looked at justifications based upon labour, desert and fairness, each of which I found wanting. Whilst Locke certainly praised labour and made passing remarks about the unfair appropriation of others' labour, these don't amount to any kind of justification for property rights. Arguments that claim as much in the context of copyright simply misinterpret his words.

This leaves copyright advocates with no Lockean natural rights justification. Instead, copyright must be justified instrumentally, judged according to how well it meets two criteria. In the first place it must be simple enough for ownership to act as an effective organising principle, so that laymen can learn and apply its rules without needing to know the full intricacies of the law. Second it must enlarge our freedom in terms of our natural ends, which can be explored through the concept of beneficial use.

The concept of beneficial use has received some trivial treatment, for example by Shiffrin (2001). Using four constitutive concepts familiar to the free culture movement – consuming, producing, sharing and learning – I suggested ways in which copyright might not favour our beneficial use of intellectual products.

In the penultimate section I brought together various issues raised throughout the text, to suggest a line of argument that the free culture movement might use against copyright. It is a poor organising principle and it is far from clear that it favours optimal use (including consumption, production, sharing and learning). Building and advocating an intellectual common could better enlarge our freedom, act as a clear organising principle and manifest a tangible symbol of a positive community. The duration, scope, reach and force of current copyright legislation can be clearly and forcefully undermined with such a Lockean

philosophy of free culture.

In some ways these conclusions are far from radical. I have accepted that copyright may find a basis in Locke's theory of property, and advanced an incentives-based instrumental argument, which is popular.

But in other ways they are quite radical, and different from other arguments in the field. I have rejected any Lockean basis for a natural private property right in copyrightable intellectual products. I have also rejected the importance and legitimacy of the user/producer dichotomy, and advanced a framework for a richer understanding of beneficial use. This leads us to more nuanced assessments of the value of copyright than, for example, 'it will incentivise more production in the creative industries'.

The free culture movement may, as I mentioned in my introduction, want a clear basis for determining whether or not a copyright license or law is 'free', but I haven't supplied it. Instead I hope to have constructed a powerful discursive basis for challenging copyright and defending the intellectual commons. The free culture movement cannot hide behind simplistic definitions, nor avoid issues relating to cultural freedom that go beyond copyright law. To remix Locke's dictum, the end of free culture is not to abolish or restrain, but to preserve and enlarge creative freedom.

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