A DISCUSSION OF JOHN LOCKE AND INTELLECTUAL PROPERTY

By

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Abstract

The theory of property proposed by John Locke has had a profound influence on the framework and formation of today’s system of property. One specific category of ownership is that of intellectual property. Intellectual property comes in the form of ideas, inventions, and works of art. These creations have different characteristics from other forms of property, which means a system to govern them ought to pay particular attention to these traits. In the United States, an attempt to do this has resulted in a fragmented system of copyrights and patents that favors the rights of individual holders of intellectual property. The discussion focuses on applying John Locke’s property restrictions to the specific concerns associated with intellectual property and examining the argumentative force of his ideas. Many of Locke’s key provisions, such as the enough and as good clause, cannot justify restriction of the appropriation of intellectual property. Instead, his no-waste requirement provides a stronger argument. Without further augmentation drawing from other theories, however, Locke’s view of property cannot fully explain a system of intellectual property. Lastly, the state of intellectual property is evaluated on a more normative basis without specific respect to Locke’s ideas.
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Introduction

Academics and scholars have debated ideas surrounding property for a large portion of human history. One of the most famous thinkers on this subject at the very beginning of the modern era was John Locke. Much of the debate about property centers on his theory of it and his ideas continue to be extremely influential today. Locke wrote during the mid to late 1600’s, long before the time of many others who have thought about property. Many facts of life about living in the present day and the issues surrounding property now, more than three hundred years after Locke’s time, are very different. Take, for example, the story of how the land in Assam, a state in northeast India, allegedly first came into the ownership of the Goswami family in the late 1500’s. The leader of the group went into the middle of an empty field and began to beat a large drum. Four of his associates then walked away from him in each direction. Wherever the point was where they could no longer hear the pounding of his drum was the boundary of the property line. Of course, such a set of events taking place now is entirely unimaginable. The world as it is today looks little like that of the 1600’s. Scholars have taken his words and applied them to the modern context in order to tackle more current issues surrounding property. Locke’s ideas about property can be interpreted and manipulated to have strong argumentative force even when confronted with new problems of today that he was not in consideration of. Despite the differences between Locke’s time and now, many fundamental characteristics about property have not changed. One area of property in particular, however, presents special concerns outside of the traditional Lockean framework and does not fit as smoothly into his theory of property. This area is intellectual property.
Intellectual property, of course, is not an especially new or modern creation. Its basic characteristics and nature is well-established in the discussion of property. This form of property constitutes ideas, inventions, art, and any number of other creations that in some way generate benefit to humanity. The need for a way to structure and organize intellectual property efficiently and fairly is obvious. Without a system of property rights in this area, people would not be able to keep their ideas safe from theft by others, as goes for other forms of private property. Intellectual property also possesses an interesting trait that other kinds of property do not, in that it can come in both physical and nonphysical forms. A person’s design for an invention is an example of physical intellectual property. The blueprints are tangible, and the invention is a physical object once it is created. Compare this to a movie that is put on the internet for streaming. The actors, script, film equipment, etc all exist in a physical sense. The final product of the movie, however, is not a physical commodity. It is digital instead of physical. Even though the owners have the rights to the film, there is no actual good that they can use these rights on. Nonphysical intellectual property also comes about in trademarks, copyrights, and other features of today’s system of intellectual property. It presents a new set of issues into the frame of the private property that did not use to be factors.

Intellectual property, whether physical or not, is treated differently from other kinds of private property. One way it is viewed differently is in regard to the norms regarding it that people in society subscribe to. Norms are characterized by Cristina Bicchieri as “the language a society speaks, the embodiment of its values and collective desires, the secure guide in the uncertain lands we all traverse, the common practices that hold human groups together” (Bicchieri ix). They are guidelines and social standards of etiquette and action that develop inside a society with the attempt of increasing unification within it. Norms are not synonymous
with laws and in many cases people hold norms different from what the law actually requires, which relates back to nonphysical intellectual property. Many of the norms surrounding this kind of ownership contradict the law in many cases contradict the norms people hold about other forms of property. An example of this is the norm surrounding theft of property. Most people hold strong negative feelings towards the theft of another person’s property. It does not matter the value of the possession; people generally think that stealing is wrong and are opposed to it. This norm about stealing, however, does not in many cases extend to intellectual property. Music has changed from being distributed on vinyl to tapes to CDs, and is now spread on the internet. Online piracy of music, movies, and all other sorts of media pervasively occurs despite efforts from organizations such as the Recording Industry Association of America (RIAA). Many people, not just on the margins of society, participate in this activity. The individuals who do so, however, in most cases also hold a strong norm against theft of another’s property. Anti-piracy campaigns use an argument that more or less goes as:

You wouldn’t steal a CD from a record store so why would you download it?

As clichéd as this argument is, its point still stands. Something about intellectual property is different from other forms of ownership. Otherwise, people would not hold the norms that they hold concerning intellectual property. For example, “only 37 percent of music acquired by U.S. consumers in 2009 was paid for” (FAQ, RIAA). This number seems even more staggering when compared with other forms of property. A society where people did not pay for nearly 2/3 of their possessions certainly would have a different norm about stealing. It is hard to imagine the current system of private property being sustained if merely 37% of property was lawfully acquired. There would immediately be a call for the alteration or elimination of a method of property organization that created such undesirable results. Yet in the case of intellectual
property, the existing framework has in some aspects resulted in less than optimal outcomes. Some characteristic of intellectual property that allows for it to be ruled by a different norm about stealing. The question then becomes why does a separate norm apply to it? People in societies all over the world have norms that differ specifically when it comes to this kind of intellectual property. They run the gamut from the United States, where strong legal protection exists but theft of it on the internet and in other areas is rampant to other nations where fewer legal standards are in place and intellectual property of this nature is not very protected. Whatever the reason may be, the way people and societies view intellectual property is very often problematic.

One could possibly object to the claim that people hold a different norm about downloading media off the internet compared to stealing other forms of private property. The objection is that people torrent and illegally download media from the internet because they calculate the risk of getting caught to be sufficiently low enough that stealing is not deterred. People still see the reasoning why illegally downloading movies or music is wrong, but do it anyway. This is questionable on multiple grounds. Firstly, this implies that punishment and the threat of it has a strong correlation to deterring crime, a fact that is very much in dispute. Secondly, imagine a person who has torrented a movie off of the internet. His friend comes over in the evening with a DVD of the same movie. The friend reveals that he stole the movie from a video store. Admitting the crime would be likely to cause a negative reaction of the person who earlier in the day had downloaded the film from the internet. His reaction could range from a pang of surprise to chastising his friend and getting upset. However he responds, it is likely to be stronger than if the friend had torrented the movie and burned it onto a disc. If he downloads media illegally from the internet because the risk of getting caught is low, why would stealing a
movie from a store merit a stronger reaction, if not for because a different norm governs it? Important to note is that a difference in norms between intellectual property and other objects of ownership allows for a person to believe both are wrong, but to different degrees. Theft by downloading off the internet could be seen more like driving slightly over the speed limit. People recognize that the law forbids moving faster than the posted speed sign, but across the board people subscribe to the norm that a few miles over the limit is okay, and even many police officers acknowledge this. Additionally, the norms of speeding differ depending on the location. In some places, 5mph is acceptable while in others as high as 10mph faster than the speed sign will not warrant being pulled over for a speeding ticket. The point is that people subscribe to a different norm about intellectual property, not that they do not believe it to be wrong in any relevant sense of the word.

Intellectual property, whether it is physical or not, involves numerous concerns that do not pertain to other kinds of property such as land. John Locke’s writing addresses and uses examples of physical commodities and in many cases natural resources such as land and water. It does not directly speak to intellectual property, especially nonphysical. He could not have anticipated the way that technology would advance and the new kinds of property that would come into existence. This does not mean Locke’s theory of property has no relevance or application to intellectual property. The principles he speaks of in regards to land or water also can be applied to the category of intellectual property. Doing this raises the question of whether Locke’s theory of property provides and adequate justification and explanation of a system to govern this kind of ownership. His theory of property can be interpreted, modified, and supplemented in a way that does provide an explanation and justification of intellectual property. However, there are many limitations that Locke’s theory faces on this topic. Many of the ideas
Locke advocates and discusses lead to undesirable conclusions when applied to intellectual property or do not have the same argumentative force, and so his theory on its own cannot support a satisfactory system of intellectual property. A separate concern is in regard to how the existing framework of intellectual property performs independent of its relation to Locke’s theory. The modern system has many flaws, many of which are the same issues that Locke’s theory suffers from when applied to intellectual property. These errors ultimately stem from a failure to properly distinguish this form of ownership from other kinds. Theories of how to govern intellectual property are generally ideas of how to deal with other forms of property with slight modifications made to solve some of the problems pertaining to it specifically. Instead, a set of rules to govern intellectual property should be approached from the outset as something distinct from other forms and without making the same assumptions of property that apply to other forms of it. Current systems of intellectual property, whether based on Lockean ideals or not, ultimately result in unsatisfying frameworks because they fail to properly distinguish intellectual property from other forms of ownership and take into account the particular concerns associated with it.
On Locke

It will be useful to first take a look at Locke’s *Second Treatise on Government* to examine the man’s own words on property before embarking on further discussion. Found in Chapter V of the *Second Treatise on Government*, his theory of the justification for property cannot easily be simplified. Much of the influence and staying power in this piece of writing comes from the fact that it can be used to support a variety of positions and read from multiple perspectives. There is not one established interpretation of his doctrine of property, and in fact there is great controversy when it comes to understanding his words. Different people can discuss the same text from Locke and come out of it with two vastly different theories of property. Some view his provisions in very broad way, while others interpret them in a very narrow sense that does not afford a great many rights to property holders. Generally, thinkers view Locke as promoting a labor theory of property. This is a term for theories who claim private property has its original justification in individual labor. A person’s labor is the critical ingredient in creating private property to Locke. Without it, ownership does not occur. He comments that:

“Though the earth, and all inferior creatures, be common to all men, yet every man has a property is his own person: this nobody has any right to but himself. The labor of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his own property” (Locke LOC 2483).
The first part of the passage notes a few things. Firstly, the Earth is owned in common by all people. This means that no person intrinsically has a claim to any piece of property in the world. People, in absence of anything else, own one thing: themselves. Inversely, in the absence of people, everything exists in the commons. Nobody comes into the world with any kind of property. For a long time, the guardians of a child take care of her needs and give her property out of their own store. Only once a person begins to labor upon the world and use her own work does she come to truly acquire property of her own. A person’s self is the most fundamental piece of property she can have in her possession. No person has the right to any other person’s self unless the latter voluntarily gives it up. Parents or government institutions may constrain the actions a person but they cannot actually gain access to a person’s self. Being that this is originally the only thing people can own, all other property people come to acquire stems from self-ownership. By virtue of a person owning herself, she also owns her labor, just like how a person also owns her feet, arms, and internal organs. All of the other parts of a person’s body serve important purposes. Labor does as well, namely to allow a person to manipulate the world around her and appropriate herself property out of the commons. This is a crucial function it serves, and so Locke and others advocating a labor theory of property say a person owns her labor.

Locke’s picture of property really comes together in the second half of this passage. Man owns the labor that he engages in. He also owns the products of his labor. The key ingredient in taking something out of the commons and into a person’s possession is labor. A person changes an item into something that is her own by the process of laboring. Plucking an apple off of a tree, for example, takes the fruit from merely being a means by which a tree spreads its seeds to a source of nourishment to a person. Without the labor of pulling the apple off of the tree, no
person can claim ownership over it. A person’s mixing of her labor changes the nature of the apple. She does not alter the physical form of it, but she changes it to be something useful. To better illustrate this, imagine a situation often alluded to during Locke’s time: a person attempting to appropriate land. Land does not become the property of a person simply because she declares it to be so and she has enclosed the area off with a fence. Her labor must be integrated with the land in a way that changes it and makes it more valuable. Otherwise, she cannot justify her claim of ownership over it. Property under Locke’s view comes from labor. The ability of a person to take something out of the commons simply by her labor is not without limit, however.

The justification of private property that Locke offers creates many implications when applied to the world of intellectual property. For one, what constitutes the commons in this category? Since the products of intellectual property are not tangible in the same way that other property is, the task of determining what the total pool of it looks like becomes more difficult. When a person claims ownership of a piece of intellectual property it is not obviously clear what common stock she is taking out from. Additionally, there is the question of how a person’s labor mixes with an idea to create an instance of nonphysical intellectual property. A composer may come to acquire ownership of a symphony upon writing the notes down the score onto staff paper and performing the piece with an orchestra. Of course, the melodies and structure of the composition existed in her head before they were written down. Does a composer acquire property rights over the piece when she first hums the melody or thinks of a chord progression? No is the reasonable response to this inquiry, as a person certainly must put more of her own effort into a musical idea before she can call it her own. Consider a separate example. A person writes half of a song, but then decides against finishing the piece and throws the music away.
Someone else happens upon the piece of paper and creates a successful track based entirely around the previous half song. Does the original writer have a claim of intellectual property on the later composition? The answer here may be that she had intellectual property rights over the idea, but abandoned ownership when she threw it in the trash. In the vast majority of cases of nonphysical intellectual property, the difference between what constitutes ownership and what does not is difficult to answer. A system of property rights that wishes to properly address this particular area needs to provide a concrete way of answering this question.

Locke does recognize a limit to how much property a person is justified in taking out of the commons. He writes that a person is allowed to own “as much as anyone can make use of to any advantage of life before it spoils, so much lie may be by his labor fix a property in: whatever is beyond this, is more than his share, and belongs to others” (Locke LOC 2513). People acquire property because they wish to receive some sort of use out of it. A person takes the things she owns and consumes them. Consumption does not have to be literal, as in the case of food. The owner of a chair slowly consumes it by act of sitting in it, as the wear and tear will over time cause the seat to deteriorate until it is no longer useful. Since consumption is a process that a person participates in, there is a limit to how much a person can take in and make use of. One person has very little use for two chairs, especially if there are a limited number of chairs in the world and someone is still standing. Locke feels that it is wasteful for a person to take more out of the commons than he can realistically use for himself. Another example is fruit on a tree. A person does herself no good by plucking all of the apples out of a tree if she can only eat a handful before the rest all spoil. Even if she has invested her labor into acquiring all this fruit, her ownership of it is not justified merely by virtue of this fact. Her waste is especially condemned if it involves goods that exist in limited quantities. In the time of Locke, the example of a stream
was often used as an unlimited source of resources. Wasting the water from this source is still deplorable, though less so than wasting a more precious commodity. The general sentiment Locke wished to express is that a person can only remove from the commons as much as she can consume. This leads to the question of how much that amount actually is.

The idea of only owning as much property as one can make use of without spoiling raises a few questions. An obvious one comes up with respect to goods that do not spoil or whose consumption is less easy to quantify. It is easy to confidently say that a person should not take all the apples off of a tree, as most of them will spoil before they can be eaten. An item such as precious gems does not spoil. If they will retain their value over a long period of time, it is hard to say a person is wasting anything by owning all of these rocks. Additionally, it is also less easy to say that this person is not usefully consuming them. The purpose of an apple is obviously to be ingested, but the use a person gains out of a gem is not so straightforward. A person could have use merely in looking at the rocks, and so could feasibly consume an almost unlimited amount of gems without in a strong sense wasting them. The amount of physical property a person can have ownership of is limited partially by enforcement of property rights. A person could create multiple farms over a large land area. On her own, she would be unable to enforce her ownership of all this land. Eventually, others would overtake the land, as she cannot monitor all areas at once. One right property owners enjoy is the ability to restrict the access others have to the property. If a person lacks the ability block the access of others to her possession, then she does not have property rights in a meaningful way. This underlies a deeper point about how much property and of what kind a person is permitted to have. The concept of property is significant only if it is respected by all those participating in the system. If this condition is not satisfied, a framework of property, whatever it is, is of no consequence. A person’s claim to
ownership over a piece of property on the whole means very little if nobody else acknowledges her claim. This does not mean that an individual personally must defend her property from all harm. Systems of governance are in place to assist property holders in expressing their rights. The problem arises when, in addition to the people within a society, the institutions themselves do not even recognize an owner’s claim. Not only are people limited by what they can use without spoiling, but also what they are allowed by others to own. This clause of a person owning only as much as she can reasonably consume cannot by itself limit personal ownership. In order to do that, it requires the assistance of another part of Locke’s theory of property.

A critical aspect of Locke’s picture of property is his enough and as good clause, also known as the Lockean proviso. This passage goes

“Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use…For he that leaves as much as another can make use of, does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left to him to quench his thirst” (Locke LOC 2528)

Many divergences in interpretation of Locke’s theory of property stem from the above passage. What constitutes enough and as good is highly debatable and has been the focus of many philosophical writers since Locke’s time of writing. Man may consume as much as he can without spoiling, but his consumption is also restricted by not preventing others from accessing the same resource. In the previous case of the person who collected precious gems, she would not be justified in taking all of the world’s rocks for her own, even if she could consume them all. Owning all of them would mean none would be around for others to make use of. The person
who grabs all of the gems for herself prevents others from having the opportunity to use labor to acquire their own property. Most readers of Locke easily interpret this passage as ruling out property attribution in a manner such as this. A majority of disputes and debate regarding enough and as good, however, do not deal with a set of circumstances as simple as this. In most situations, the question is not whether a person should be permitted to take all the supply of a commodity or take none. More often, the question is about one plot of land, an additional unit of production, or a slightly larger piece of a pie. These cases are not nearly as cut and dry and different interpretations of Locke’s words have separate provisions in place to decide cases on the margins.

Enough and as good is not an easy idea to pin down. Clearly it prevents a person from appropriating the entire stock of a resource to her own possession. It also generally is ought to allow for a person to take at least a small portion of a good out of the commons for her own purposes. What the idea says about situations other than these two is a large grey area. When a person puts labor into something and takes it out of the commons, who does she have to take into consideration? Depending on whether the group is a person’s community, state, country, or globe, the amount that constitutes enough and as good changes. Additionally, some interpretations of enough and as good demand a person leave enough and as good for future generations. Taking this into account unequivocally requires a person to leave more, and if the scope of the future is extended far enough out into the future, the amount of property a person will be allowed to appropriate for herself out of the commons will approach zero.

One more aspect of Locke’s theory of property is of particular importance to the discussion of intellectual property. Locke says that “he, who appropriates land to himself by his labor, does not lessen, but increase the common stock of mankind” (Locke LOC 2575). The
point Locke makes here is that a person by taking something out of the commons does not necessarily cause there to be less left for others. By taking ownership of a piece of land, a person has reduced the amount of available land to others, but has increased the availability of a wide variety of other resources. In many cases, the whole society is better off when a person takes property out of the commons for her own use, as she can use this possession to generate other resources that would not be otherwise created. Implicit in this notion is another idea that Locke demonstrated some understanding of; that a resource is often times more efficiently used when it is an individual’s property as opposed to in the commons. This is a big reason why private property is a useful institution to have in the first place. It allows a person to know her labor will not be wasted or taken away from her, and gives her more reason to want to acquire and use property for her own benefit. Merely because a person appropriates property to herself, it does not follow that the amount remaining in the commons has decreased, as the fruits of her ownership may result in a net increase of total resources. The objection to this may be raised that the products of a person’s property are not in the commons; they are her individual possession. While this is true, they still are in the common stock in some sense. Without the initial ownership of the land, these products would not even exist in the first place. Additionally, the fruits of a person’s property are subject to the same restrictions as any initial appropriation of property. This means that the no waste clause could apply in a situation where someone was hoarding her property. The application of Locke’s restrictions on private property is made with this consideration operating in the background. Even though taking something out of the commons reduces the availability of a resource to others, it also has the ability to increase the common stock of total resources.
The above are a few essential points to Locke’s theory of property. Mostly, they are restrictions on what and how much property a person can claim ownership of. The first important idea is that a person owns herself and her labor. She creates property by mixing her labor with some element of the land. In doing so, she takes this resource out of the commons and makes it her own. Secondly is Locke’s idea of waste. Someone may only appropriate as much property to herself as she can use without it spoiling or being destroyed. Even if a person uses her labor to pick all of the apples off of a tree, it does not justify her owning all of the fruit, as she cannot consume it before it spoils. Thirdly, and in many eyes most importantly, is the enough and as good clause. This states that appropriation of property must take into consideration the needs of others. A person cannot claim ownership of an entire lake if it results in others not being able to access it. Likewise, a person cannot take all of the land with the best soil and leave a rocky wasteland for everyone else. Yes, she has left enough land for others in terms of physical space, but it is not as good in the sense that is required by Locke’s provision. On the flipside of these restrictions is another strong idea in Locke’s theory of property. A person’s appropriation of property to herself has the potential to increase the total availability of resources available through the creations resulting from the initial ownership of property. All three of these aspects of his theory of property play critical roles in using his framework to justify a system of intellectual property.
An Explanation of Intellectual Property

This exploration of John Locke and intellectual property will continue with a discussion and explanation of the basic nature and issues surrounding intellectual property in the modern era. Strictly by definition, “intellectual property refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce” (What is Intellectual Property?). This definition allows for a wide scope of ideas, creative works, and inventions to qualify as intellectual property. Commodities like pieces of music do not exist in a traditional sense. Especially nowadays, technology enables music to be created and be shared entirely in the digital realm, without a physical copy ever being created. Intellectual property does not have to even be a commodity either. Extreme amounts of data are exchanged and transferred around on the internet every day, and many of the strings of code going from server to server are intellectual property. Ideas and theories can be as well in certain circumstances, such as software patents. The amount of things that fall into the category of intellectual property increases every day as technology expands and opens up new possibilities.

What qualifies as intellectual property is not the most troubling question, however. Intellectual property seems to in many respects be fundamentally different from other forms of property such as physical possessions and land. Characteristics of it and many of the norms surrounding it suggest that it is not the same as the other forms of property and should not be treated the same way. The real interest in intellectual property is to study systems of how it ought to be governed, what norms it operates by, and how generally it exists in the world. This has been humanity’s goal for a long time with respect to this subject. Society has attempted to create a correct framework of intellectual property that performs all the functions it ought to. Interesting
to point out, though, is that throughout all manifestations of intellectual property in history, no clear standard or doctrine has been put in place to govern it. Man recognizes intellectual property, but has not created a unified system to rule it. This is different from other forms of property such as land, which have been overseen by systems for as long as private property has existed. Especially in the present day, nonphysical intellectual property is very common and manifests itself in new forms of technology and media. This raises new questions about what rules should govern these forms of expression and creation. Many of the ideas of John Locke regarding property do not seem to as easily apply to these forms of intellectual property, as they do not exist in the physical realm. It is difficult to discuss taking something out of the commons and leaving enough and as good for others if no commons or set of total possessions exists for a person to claim a part of. A system of governing physical property will require modification to properly apply to nonphysical intellectual property creations. Man has, throughout history, attempted to make such a system a reality.

Notions of intellectual property exist all the way back to the times of the Greek and Roman empires. These particular examples, however, are more anecdotal than reflective of the sentiments of these societies towards intellectual property. The first widely accepted example of law protecting the rights comes in 1710 from England’s Statute of Anne, which “gave protection to the author by granting fourteen-year copyrights, with a fourteen-year renewal possible if the author was still alive” (Moore, Stanford Encyclopedia of Philosophy). This statute comes out of a recognition that copies of books were being made on a widespread scale without the consent of the authors. It concludes that a writer of a piece has the sole right to print or call for the printing of the work. The rights and interest of consumers was also taken into consideration, as it allows for official complaints to be filed if the author of a book set the price too high. While extremely
short and basic in its wording, the Statute of Anne reveals the initial motivation of intellectual property and copyright laws: to protect the creators of work. The statute, as a first system of intellectual property, reveals an incomplete picture of it by this idea of “too high” a price. Creators of this document wanted to protect creators from other stealing their work, but also saw the potential for abuse. A balance could not be found and so a general provision was put in place to be interpreted each time the issue came up. The Statue of Anne is not alone in having vague clauses govern issues of intellectual property. This idea is still present in all systems and theories of intellectual property that exist today.

The focus of discussion will continue in respect to intellectual property within the United States. It should be noted that many countries operate in a similar manner to the US and there exists a World Intellectual Property Organization which was created in 1883. Intellectual property, in a legal sense, is not one particular document or series of documents; “it encompasses several, partially overlapping doctrines” (Fisher III, The Growth of Intellectual Property). It is not one specific field of law. Rather, it has emerged by taking the pertinent pieces of different areas of legal text. The first of these is copyright law. Copyright extends to “original works of authorship fixed in any tangible medium of expression. Works that may be copyrighted included literary, musical, artistic, photographic, architectural, and cinematographic works; maps; and computer software” (Moore Stanford Encyclopedia of Philosophy). The law grants five exclusive rights to those who own copyrighted works. They are “1) to reproduce the copyrighted work; 2) to prepare derivative works based upon the copyrighted work; 3) to distribute copies of the copyrighted work to the public by sale or other transfer of ownership; 4) to perform the copyrighted work publicly; 5) to display the copyrighted work publicly” (17 US Code 106). These rights more or less prevent anyone but the creator from accessing the work unless granted
specific permission. The other situation in which these rights do not fully apply is when a person has purchased the commodity from the creator. At this point it is the property of the purchaser and so she is free to sell this copy or do with it whatever she pleases. Otherwise, the owner of a copyright enjoys these privileges. Such an owner could bar all others from accessing the copyrighted material if it seemed prudent. These rights for copyright holders address the same concerns as the Statute of Anne: to protect the interests of the creator of a work. Also similar to the statute, US copyright law has protections for consumers of copyrighted material.

A doctrine of fair use exists in US copyright law that provides exceptions to the rights listed above. These exceptions are occasions when other people may violate the rights given to copyright holders. The concept behind it is “any copying of copyrighted material done for a limited and transformative purpose, such as to comment upon, criticize, or parody a copyrighted work” (Stim, What is Fair Use?). The most interesting part of this description is the idea of a transformative purpose. This term does not have a hard and fast definition. It changes based on situation. Additionally, cases of dispute regarding fair use have over time built up a precedent on the subject. While there certainly are some clear cases of fair use and not, a large percentage are highly ambiguous and a tossup on either side. The vague and unspecific standard of a “transformative purpose” once again shows that the nature of copyright and intellectual property is not completely fleshed out or understood, in comparison to other realms of property.

Copyright is not the only area of law that pertains to intellectual property. One additional provision of US copyright law is that the work in question must serve a non-functional purpose. Creations that do not satisfy this are governed by a different set of rules.

Those ideas that do serve a utilitarian purpose go into the category of patents, which is the second aspect of law that pertains to intellectual property. Strictly speaking, a patent is “the
exclusive right granted by a government to an inventor to manufacture, use, or sell an invention for a certain number of years” (Dictionary.com). Patents and patent law are the result of the government attempting to protect those that generate new ideas. Most patents are for physical inventions, but nonphysical patents also exist. For instance, software is now widely accepted as patentable. This was not always the case, as “until the 1980s, both the Patent Office and the courts resisted the patenting of software programs, primarily on the ground that they constituted ‘mathematical algorithms’ and thus unpatentable ‘phenomena of nature’” (Fisher, The Growth of Intellectual Property). Over the last 30 years, though, courts have changed their stance on the issue to be what it is today. Their hesitation stemmed from concerns that the ideas patented by software are natural processes that cannot be owned by a person. Software patents mirrors all other kinds of intellectual property in that the trend has been moving towards more acknowledgement of it. Patent law has expanded to provide more protections and rights for owners. This is a general trend in intellectual property law; more rights are afforded to owners and it has become easier for a person to claim an idea as her own. The understanding of intellectual property humanity has taken is that owners of it should be given more rights as opposed to fewer, and this is reflected in patent law and how it has developed.

The other area of legal literature that contributes to the system of intellectual property in place in the United States is trademark law. This refers to “the notion that a manufacturer who places his goods on a particular mark can prevent others from using the same mark to sell similar goods” (The Growth of Intellectual Property). As with other forms of intellectual property in the United States framework, the scope of trademarks has expanded over time to include a large variety of creative enterprises. Trademarked intellectual property now ranges from “uniforms of the cheerleaders for the Dallas Cowboys football team” to “the layout and appearance of greeting
cards” (The Growth of Intellectual Property). Criteria for what constitutes something protectable by trademark have grown less restrictive in recent years, allowing people to claim more intellectual property in the form of trademarks. Of course, there are also limits on the power of trademarks, such as “whether or not the symbol is used in everyday language” (Stanford Encyclopedia of Philosophy). A word can become so associated with the product that it no longer can be the ownership of one person but rather the commons, such as the trademark of aspirin. The trademark became so connected to the product that the collective understanding of the meaning of aspirin had nothing to do with the brand, but the medication itself. Progression of the legal code has made it easier for a person to trademark a piece of intellectual property and afforded more rights to those who hold such ownership.

Intellectual property in the United States does not operate under a cohesively organized and thought out framework when compared with other property mediums. The system overseeing it is the result of different aspects of the legal system being compiled together, reflecting the nature of how people have dealt with the issue of intellectual property throughout time. It does not fall neatly into one category and has many features of it that distinguish it from other forms of ownership, though it does share some similarities. There are many notable traits of this intellectual property system, namely its inclination towards increasing the rights of the owners of it. Copyright law, patent law, and other legal literature have largely moved in the direction of allowing more things to qualify as intellectual property and restricting access and use of such property to those who are not the creators. A software algorithm now being classified as patentable is an example of such a shift. Additional provisions for holders of intellectual property give creators more security in their work and power over their material. All of this points towards a system that encourages privatization of nonphysical intellectual property.
It is a task in and of itself to understand exactly what intellectual property really is. A wide assortment of ideas such as music, movies, and some theories all are examples of intellectual property that often times does not present physically. One thing is clear, though: this kind of ownership exhibits many different characteristics compared with other kinds of property. Throughout history, especially in more recent times, man has tried to develop a system to govern intellectual property. Various frameworks all feature some kind of balance between protecting and advancing the rights of the owner and the interests of other people and society. The legal text on this subject in US law is not restricted to one area. Rules pertaining to nonphysical intellectual property come from copyright, patent, trademark law, and others. Throughout the development of this field of law in recent years, federal courts have routinely ruled in favor of the person making a claim to a piece of intellectual property, increasing the rights for property owners and making it easier for an individual to take an idea out of the commons for her own legal possession. The positives and negatives of this progression will be weighed later, but this is a general description of the kind of intellectual property that has been created by the system currently in place in the United States. This kind of property has become more topical in recent times for good reason. Technology has enabled a whole new variety of ideas to be created, expressed, and owned, many of which fall into the category of nonphysical intellectual property. As this amount continues to increase, the issue will become more pertinent. During earlier eras, however, property of this sort did not exist on as wide a scale. Intellectual property still was around, but not in as many forms as exist today, and without as complex and intricate a framework of governance. Consequently, many writers from history, such as John Locke, did not provide any specific provisions regarding this kind of property in their work. What those who wish to investigate property systems of nonphysical intellectual property are left to do, then, is
take the passages about general property and apply them to this specific form of it. There are many similarities between all forms of property and there is much to learn from looking at this kind of it through the perspective of John Locke.
Locke and Intellectual Property

With the background of John Locke’s theory of property and what intellectual property is explained, this discussion will now move forward to more interesting matters. Locke’s theory of property is in many respects the foundation of modern property and how the ownership and acquisition of it is viewed. Intellectual property is a particularly interesting branch of property for a number of reasons. It is not as easy to create a picture of what ownership and acquisition of intellectual property means compared to another form of property, such as land or food. One reason in particular for this is that intellectual property can, and often times does, manifest itself in a nonphysical manner. Ideas and theories are kinds of intellectual property that fall into this category. Additionally, the internet has created an entirely new way for intellectual property to present in a nonphysical manner via online storage and other methods. All of this, in conjunction with other factors, makes intellectual property, whether physical or nonphysical, a distinct area of property that does not operate under the same rules and constraints as other forms. John Locke speaks of his theory of property in terms of land, food, and other more traditional goods. He writing does not refer to or provide specific provisions about intellectual property. This is not to mean, however, that his work is useless here. Many aspects of property are identical between all forms of it. Applying the framework of Locke’s theory of property to intellectual property will result in a few things. Firstly, it will make clearer in what regards this kind of ownership is both similar and dissimilar from other forms of property. Secondly, this will reveal how Locke’s picture of property differs from the reality of the world and its limitations. Analyzing intellectual property through a Lockean lens creates a better picture of how the system
governing it ought to operate and also a greater perspective on Locke’s theory of property and its relevance to today.

Generally, when Locke’s theory of property comes up for discussion, focus typically revolves around his enough and as good clause. This clause is the basis of many different Lockean theories. Naturally, then, it is an important part of using Locke to justify a system of intellectual property. A central question to settle with respect to this clause is what constitutes the commons when it comes to matters of intellectual property. The question of what constitutes enough and as good becomes far more complex to answer when this is the topic at hand compared to something such as land or a natural resource. One question to ask is what constitutes the commons in the category of intellectual property and what the traits of this pool are. Of the commons, Locke says that “We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which begins the property; without which the common is of no use” (Locke LOC 2498). People implicitly consent to keeping unclaimed property under common ownership of all people. The commons exist because of property; people acquire their property from the commons. If private property was not around, there would be no need for the idea of the commons. Likewise, if all possible resources were appropriated, then the commons would cease to exist. In a natural state, all things are unowned and in the commons. This is the initial state. All ideas and possible creations that can be classified as intellectual property in some sense already exist in the commons. A person who makes a claim of ownership over something in this category has stumbled upon this idea and put her labor into it. This could be thinking about a concept, refining a piece of music, writing out a movie script, or any other sort of laboring. Upon working hard enough, the idea becomes the person’s own and is no longer a part of the commons. Under
Locke’s picture of property, this has occurred throughout history, where people have taken things they find use in and appropriated themselves property by virtue of putting labor into items and removing them from the commons. Barring other circumstances, a person is free to appropriate whatever she wishes to herself, as a person does not require the consent of all others in order to acquire property by labor. In the case of intellectual property, this means a person should not have to consult others in order to generate a specific idea or create a work of art or idea that is uniquely her own.

If the commons is infinite, then this implies that a person can take ownership of an infinite amount of intellectual property under the enough and as good clause because regardless of how much she takes enough supply will exist for others to obtain for themselves. This relates back to Locke’s metaphor regarding the river. A person cannot complain that enough and as good is not being left for her if the pool of resources is vast enough. Locke’s words could be looked at, on the other hand, under the assumption that a limited amount of intellectual property exists. The amount may be large, but it is small enough that a person’s appropriation of it out of the commons should be made while considering whether she is leaving enough and as good for others. Making this assumption subsequently raises even more questions regarding its implications. It is a very strong statement to interpret Locke in a way that means a great director cannot make any more films, as she must leave enough good movies for others to create. This presumption of limitation means that a thinker or inventor could eventually be prevented from creating a new system to improve some aspect of man’s life if she had been so prolific a creator during her previous years that concerns about whether enough potential improvements to life remain undiscovered proved compelling enough. Both of these are very difficult conclusions to accept, and adopting the position that a limited amount of intellectual property exists would have
other confusing conclusions as well. Implied that the commons are limited also implies that the total amount of resources has been set and humanity slowly pulls property out of the common pool until there is nothing left. In the context of intellectual property, this does not reflect the nature of this kind of ownership. A person has an idea which she then claims as her own. She then takes this idea and puts her labor into it, in many cases creating a new idea and commodity of intellectual property. Under a limited commons view, this new idea would already have existed before the person who first thought of it was inspired to do so. She merely discovered it out of the commons and was able to grab hold of it; it was always there before. This does not sit well with the nature of intellectual property, in that it is always expanding and a fluid body of resources. Additionally, Locke argues that a person’s appropriation of a resource out of the commons actually can increase the common pool, instead of taking away from it. These reasons all indicate that viewing the intellectual property commons as a limited body leads to undesirable effects. On the other hand, choosing to believe that the amount of nonphysical intellectual property is unlimited may provide no more desirable a solution to the problem.

The intellectual property commons could be thought to be infinite. Looking at them this way avoids the problem faced by viewing them as limited. An infinite commons allows for a person to actually create a new idea or invention as opposed to merely discovering one floating somewhere in the intellectual property pool. This perspective, however, poses a problem when related back to Locke’s enough and as good requirement. If the commons are infinite, how can anyone possibly make the complaint that enough has not been left? By definition, an infinite commons will always leave ample intellectual property available to other people and future generations. A proponent of this view could appeal to the as good requirement in order to restrict acquisition of property. Arguing this, however, is inconsistent with the idea of an infinite
commons. If the commons of intellectual property are infinite, than that means there should be an unlimited amount of the best intellectual property available for discovery. To complain that as good has not been left while claiming that the commons are infinite implies that the only intellectual property that exists limitlessly is that of the worst quality and least value. In this case, the commons of good ideas is actually finite, and the view runs into the same problems previously mentioned when viewing the commons as a limited pool. Thusly, arguing that the intellectual property commons is infinite is not an easy perspective to adopt.

Two different ways of interpreting the meaning of the commons with respect to intellectual property have been given. There are the ideas that the public pool either must be limited, or not. The first thought, that the intellectual property commons are limited presents many problems Saying this, however, there are also problems associated with adopting the opposite perspective as well. Enough and as good is a critical part of most Lockean theories of property, as it provides a strong justification for restriction of property appropriation out of the commons. When it comes to matters of intellectual property, however, the enough and as good clause is not enough. The notion of the commons is too abstract and vague a concept in this realm and it cannot be easily identified how a person’s labor mixes in order to create some kind of ownership. If Locke’s theory of property is to be used in order to justify a system of intellectual property, the force of the argument must come from another source.

Locke’s waste clause has far more explanatory force when trying to apply his philosophy to intellectual property. Since this form of ownership presents some separate concerns from other forms, it makes sense that a different clause from what is usually discussed when Locke is employed. Justifying a system of intellectual property on the basis of waste avoids many of the problems that the enough and as good clause is faced with, namely, the issue of the commons.
While determining what the intellectual property commons are is still an issue relevant to the waste clause, it’s argumentative forced is not dependent on having a strong notion of the commons. Recall then, Locke’s claim that “nothing was made by God for man to spoil or destroy” (Locke 2516). This raises a similar question to that facing the enough and as good clause; what constitutes spoiling or destruction of a commodity when the object in question is intellectual property? Fortunately, this question is far easier to answer than determining what the intellectual property commons are. It will help by first determining what waste is not. An idea cannot be destroyed in the way that other property can, so a requirement of non-waste must provide more restriction than just preventing the destruction of a piece of intellectual property. On the flipside, a non-waste requirement does not prevent a person from appropriating herself a piece of property. While intellectual property cannot be destroyed in a traditional sense, an idea certainly can be used in an inefficient manner which provides less benefit than it has the potential to. This is how waste of intellectual property should be viewed. A person’s ownership of intellectual property is limited by her ability to extract value from it.

The idea of waste in terms of efficiency of usage is reflected in the current system of intellectual property. Patent law is one example of this. When a person is given exclusive ownership over an idea or design, the duration of the license is limited, typically anywhere from six to 20 years. After this period has elapsed, the intellectual property transfers out of the individual’s possession and goes back into the public commons. Releasing ownership reflects an effort to promote efficiency in use of ideas. If a person is able to limitlessly restrict access to her patent for her whole life, many which would be able to work with her piece of property and improve it to the benefit of all would be unable to. Though someone may initially come up with a unique idea, over time other will come to understand that idea and be able to combine it with
some other piece of intellectual property. None of this is possible without a goal of efficient creation in mind. Even going back to the Statute of Anne in 1710, which allowed for a 14 year copyright, intellectual property systems have sought to promote efficient creation. These limits do not overly restrict the scope of a person’s ownership; they prevent a person from abusing her rights as an owner. Lengths of patent duration are substantially long enough to allow a person to promote, proliferate, and profit from her intellectual property. Also important to note is that once a patent expires, this does not mean a person is no longer able to use her property. It merely means that others are also permitted to attempt to use it. Intellectual property is not a zero sum game in the way many other kinds of property are. If someone eats an apple, that necessarily means that there is one less apply available for everyone else to consume. If one person latches onto an idea, it does not in the same way lessen the supply for others. Using an idea does not prevent someone else from also doing so. In fact, if multiple people work with a piece of intellectual property, it will likely be used more efficiently and explored in greater depth than if only one person was to. The notion of waste as based on inefficiency is also present in other areas of the modern intellectual property system.

A goal of minimizing waste also is evident in certain provisions of U.S. trademark law as well. Recall that a trademark can be revoked if a word becomes sufficiently popular in connection to the product compared to the brand itself. Doing this basically brings a word back into the intellectual property commons for all to use. Here is a clear example of an attempt to have intellectual property be more efficiently used. A person trademarks a word in order to help her sell a particular product, and more specifically to prevent her competition from using the same word for their own purposes. With certain trademarks, this initial purpose no longer is the focus after enough time has passed. When a consumer thinks of the trademarked word, she does
not associate it with the brand, just the product. An example of a trademarked that has over time become generalized is Kleenex. The word itself technically refers to a specific brand that makes tissues and other related products, but people use it in speech to refer to all tissues, not just those made by the brand Kleenex. As the common understanding changes in such a manner it becomes more efficient to make the trademark the property of the commons. Locke’s no-waste clause in his theory of property has a heavy force to help explain and justify the modern system of private property.

This interpretation of Locke’s waste clause is an especially strong one. In light of this, there are some objections to this perspective that ought to be addressed. Firstly, one can claim that Locke did not intend for his waste clause to be taken in such a far direction. It is supposed to serve as a limit on a person hoarding property out of the commons only to have it rot in her possession and be of no benefit to anyone. If Locke wanted property to be used according to a standard of efficiency, he would have explicitly said so in his theory of property. When this clause is played out in other categories of property, it does not operate in the same manner proposed here. Locke’s no-waste provision is not used to justify taking land away from someone who has not managed to use the resources as efficiently as she possibly could. Generally it is applied in clear cases where a resource is destroyed or spoiled while being in an individual’s possession because she has taken far too much for her own, not if she has taken slightly more than she needs or is not using her property as efficiently as she could. The same argument applies to physical property that does not spoil in the way that food or can. In this way, intellectual property is not extremely different. To these resources and goods, a no-waste clause does not mean an efficiency standard either. Since many of these pieces of property do not spoil when owned for a long time, Locke’s waste clause does not have a strong ability to restrict
appropriation and ownership over these types of goods because they do not spoil in a person’s possession over time. Adopting an interpretation of this provision that turns it into a requirement of how efficiently a piece of intellectual property is used does not reflect how this passage is applied to other forms of property.

There are a few ways to respond to the objection presented here. At its core, this complaint reflects a lack of understanding about what intellectual property is and how it should be viewed in the context of a theory of property. While this objection says that Locke’s waste provision is not applied to other forms of property in such a manner, this bears no relation to how it ought to be applied to intellectual property. This category of ownership is different from other forms of property and so rules must be adapted in order to fit the particular characteristics of it.

At this point the critic can appeal to the second part of the objection regarding kinds of property that do not spoil in a traditional way. Intellectual property cannot be distinguished from this category of it on the basis of whether it can spoil, and so the difference that makes intellectual property able to be governed by different rules must come from elsewhere. What this objection misses is an additional feature of intellectual property not present in other kinds, even those that do not spoil. Intellectual property is unique. When a person takes ownership of an idea, it is hers and nobody else’s. Other commodities may not decay over time, but they are not unique like intellectual property is. Because each piece of it is its own creation, the requirement to not waste it is even higher. In this response, one can see elements of Locke’s enough and as good clause coming into the picture, even though the clause on its own does not have great restrictive force over intellectual property. The uniqueness of each piece of intellectual property commits a person who appropriates it to herself a certain duty to utilize the resource as well as she can, since by taking ownership of it she prevents others from taking advantage of the piece of
property and creating benefit out of it. Objecting that Locke’s non-waste clause should be applied in the same way to intellectual property as other forms of ownership does not lessen the argument.

Another objection can be made that does not oppose the initial claim that efficiency is the pertinent measurement when discussing waste and intellectual property. This complaint is about the actual implementation of such a standard. Inefficiency and efficiency are very vague and general terms whose meaning most often depends on the perspective of the person using the word. Being that this is the case, how can this standard be applied in a practical manner to a system of intellectual property? Attempting to pin down what constitutes a sufficient level of efficiency in use of a piece of this kind of property is as difficult a question to answer as determining what constitutes the intellectual property commons. Calling for a particular standard of efficiency hedges the use of, and ultimately an entire system of intellectual property, on the discussion and debate between legislators and those who write the legal code. If the people in charge of making these decisions make the requirement either too weak or too strong, the entire framework of intellectual property will not work up to its full potential. This also opens the door for other political motivations to come into the picture and attempt to either increase or decrease the amount of intellectual property with the purpose of benefitting only a few. A standard of efficiency is a very fragile concept that can easily be manipulated. Turning the no-waste requirement of Locke into this kind of measurement creates the problem of determining what that standard ought to be, and this cannot be decided concretely.

It is difficult to deny the general appeal of this objection. Having waste be defined as an efficiency standard necessitates that some entity decide what the baseline ought to be inside of a society. This, however, does not create as large a problem for the view as a critic would argue.
Taking this interpretation of Locke does not solve all the issues surrounding intellectual property, but it at least makes the question an easier one to answer. Without this type of strong interpretation, it is difficult to restrict the ownership and acquisition of property within a Lockean framework. The enough and as good clause does not provide enough argumentative force on its own and so the waste clause must subsequently pull more weight. Additionally, the introduction of such a standard of measurement would make the intellectual property framework ultimately more productive. If the standard was too low and allowed for more appropriation of property than is actually optimal, it still is a step in the right direction. The excess of ownership would be even greater without such a standard in place. Alternatively, the standard could be too high, and people would be unable to obtain as much intellectual property as they would like. In this case, the net result is still an improvement from completely open appropriation. Even if a person is unable to copyright an idea, for example, she still can use the idea for almost all the same purposes she would if she owned it. Having a piece of intellectual property in the commons does not prevent people from using the idea in their own way. Contrast this with a piece of land, for example. A piece of land in the commons cannot be properly cultivated by anyone because each person will fear that others will come and steal the fruits of her labor. This is not a concern with intellectual property, because other people consuming the products of someone’s labor into an idea does not prevent the creator from also doing so. So while the general claim of the objection presented is not false, but it bears no great relevance to the impact of the view, as regardless of if a standard of efficiency is too low or too high, it will still produce better results than having no standard in place at all.

One additional Lockean idea bears great pertinence to the realm of intellectual property. Locke regards the taking of a resource out of the commons as having the potential to increase the
total available stock for humanity. While many of Locke’s principles deal with restricting appropriation and making sure people do not take too much, this particular idea provides a strong case to allow a person to acquire as much private property as she can reasonably use. In a way, this argument from Locke is an incentives based argument. People will cultivate and improve upon something if it is their own possession and they are confident that they will be able to reap the benefits of putting their labor into it. In as much as it does not interfere with the property acquisition of others, people should be encouraged to invest their labor into as many things as possible. All of this has been reflected in the development of intellectual property law, especially in recent times. Judges have attempted to give more incentives to inventors and creators to generate and claim ownership of more intellectual property because doing this, as Locke argues, it can increase the total available amount of it to society. In his writing Locke speaks with respect to appropriation of land, but this same principle also applies to intellectual property. Increasing rights to intellectual property owners reflects and acknowledgement of this idea.

It is a large undertaking to use Locke’s theory of property as a way to justify a system of intellectual property. The enough and as good clause is the natural section of the view to appeal to first. In most discussion of Locke and property, debate focuses on this particular clause. When it comes to intellectual property though, this argument of Locke does not prove to be of great use. Enough and as good hinges on what constitutes the commons, and this question is extremely difficult to answer when it comes to intellectual property. If the commons are viewed as infinite, than this clause cannot hope to justify any restriction on private appropriation of intellectual property. On the contrary, if the commons are viewed as limited, than undesirable implications also come into play. A limited commons means a creator potentially could be banned from owning an original work if she is viewed to be too prolific or if there is not enough space left in
the field for others to create their own work. Lockean justification for a system of intellectual property, in light of this, must come from interpretation of his waste clause. The way that this clause provides restriction of appropriation out of the commons is if it is interpreted as a standard of efficiency. When it comes to intellectual property, a person cannot be restricted merely by if her property will spoil or not, as ideas do not expire like other commodities do. Restricting ownership based on efficiency allows constraints to be put into place while also operating under a Lockean framework of no waste. A person’s ownership of a piece of intellectual property is conditional on the fact that she uses the idea in order to produce some sort of benefit and does not merely sit on it. Ultimately, though, this leaves a Locke-based argument for a system of intellectual property in a precarious position. Most justification under his view must come from an interpretation of his waste clause. While the objections to taking such a strong stance on this passage do not have any great bear on its ability to explain a system of private property, the view is still a somewhat extreme view to take. Using John Locke to justify a framework of intellectual property is ultimately a very difficult task, as his writing does not specifically pertain to this area of ownership. Because intellectual property is different in many substantive ways from other forms of property, his ideas must be interpreted in ways that cater more specifically to the concerns at hand. His arguments discussed here provide a foundation for a system, but the picture is incomplete by using Locke alone. The thoughts of other writers and thinkers on intellectual property must also be brought into consideration and combined with the ideas of Locke in order to create the full image of intellectual property and how it ought to be governed.
The State of Intellectual Property

The last main topic of discussion here will be an analysis of intellectual property and the systems it is governed by, without specific consideration to the ideas of John Locke. Intellectual property is indubitably an important topic of debate and of particular relevance to today. This is due to features of modern society such as the dissemination of ideas and information through the internet and the legal framework governing the appropriation and ownership of intellectual property. Laws, rules, and regulations create a web of governance that must address its own fragmented nature. All of this makes the question of what an ideal set of institutions to govern intellectual property would look like a pressing one to answer. What is the real goal that the system ought to try to reach? Once that is established, the task then becomes to evaluate today’s system in relation to the ideal. Doing so reveals a host of problems in the framework of intellectual property used today. Lawmakers and judges have erred in their emphasis of what the real goal of a system of private property ought to be. The result of this is an inefficient system of managing intellectual property that does not work to the best interest of creators or consumers of intellectual property. It is clear that a shift in the direction of today’s institutions ruling over this area of property must take place if the status of it is to be elevated and advanced.

In order to evaluate the intellectual property system presently in place, it will be useful to present a picture of what a more ideal system would look like. The most important question to keep in mind when imagining such a framework is what the initial purpose of private property ought to be in the first place. John Locke, to answer this, says “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” (Locke 2474). Private property allows people to live life more advantageously and
cultivate their own possessions in order to produce benefit. Because the world is a scarce place in terms of resources, it is important to appropriate it in a way that is reasonable to everyone in a society. To relate this idea back to intellectual property, it should be governed in a way that allows generates the most advantage for the most people, begging the question of what constitutes advantage, or benefit. The answer is to create the most ideas and intellectual property as reasonably possible, and promote a climate that allows people to do this. Whatever the specific policies and features of a system are, their ultimate purpose should be this. In a way, this is a utilitarian justification for property. One may think that advantage should be defined differently, and should be viewed as promoting the rights of property owners and protecting them from theft by the commons. This perspective has its merits, but it ultimately collapses into a motivation to generate more intellectual property. Why would someone want to maximize the rights of property owners? In order to allow them full reign over their property and allow them to labor over it and extract as much value as possible. Ideas and creations in the body of intellectual property build off and relate heavily to one another. This means that laboring over an idea will invariably create more. So even when a person wants to advance the rights of property owners, the explanation ultimately comes back to creating as much intellectual content as possible. A system of to govern intellectual property ought to always stay in consideration of the background consideration that it ought to be promoting the creation of as many ideas as possible.

Another characteristic an ideal system of intellectual property would have is sensitivity to the differences of this form of ownership compared with other ones, most specifically with respect to the commons and their abstract nature. Locke’s enough and as good clause has already been established as not being an effective tool to restrict the private appropriation of intellectual property because the concept of a commons is difficult to make concrete. Somehow, though, a
system to govern ownership must address this issue. Though it sounds paradoxical, the commons should be viewed as both limited and unlimited. It is unreasonable to imagine the pool of intellectual property resources as a strictly defined amount that decreases over time as individuals appropriate themselves portions of it. Likewise, viewing the commons as entirely unlimited is not a practical option. Instead of adopting either of these, the middle ground between them should be attained. The set of intellectual property commons is finite, but it also increases over time. Ideas and other creations that fall into this category build off of the already existing body of knowledge and then add to it. When a person has an idea that counts as intellectual property, it is the result of her applying her own labor into existing ideas until she comes up with something new and her own. If nobody invests their individual labor into creating a piece of intellectual property, then the total pool of resources will remain constant and not increase. The potential for its size, however, is limited only by how much a society creates. Thusly, this perspective manages to adopt aspects of both a limited and an unlimited commons. A system of governing intellectual property that is able to embody this idea further will be more able to achieve the primary goal of a system of ownership, to maximize benefit and the case of intellectual property, promote the creation of as much of it as possible.

Today’s system of intellectual property exhibits many flaws and mistakes, specifically with reference to the previous description of what such a framework ought to look like. Firstly is the underlying assumption governing the framework in place. It is operating on the mistaken premise that the goal of the rules ought to be to promote the rights of property owners, even though lawmakers may purport to be maximizing creation. As a result, access to intellectual property is being unnecessarily restricted, causing a less advantageous society to result. Trends in court decisions and laws indicate a clear shift in this direction and away from freer access to
intellectual property. While this may be to the benefit of copyright or patent holders, it is not a good thing for the whole of society, and by extension the owner of a piece of intellectual property. The rules in place prevent intellectual property from being accessed and utilized by the majority in favor of the advantage of a few. It does not matter greatly whether this is a result of a fundamental mistake in belief or the efforts of special interest groups and lobbyists to promote their own welfare at the expense of the whole. In either case, the rules of the current system ought to shift more towards the direction of more access for all people to intellectual property. Doing this will increase the creation and spread of it, generating a more productive and beneficial society for all.

Objection to this suggestion is obvious. One may raise the complaint that this view, if actually implemented into society, would undermine the basic ideas of private property and reduce the rights of intellectual property owners to close to zero. A critical point of rules about property is that it protects the individual from the will of the majority and prevents the latter from stealing the value the individual has created in an object by putting her labor into it. Reducing the amount of or strength of rights granted to owners of intellectual property is a slippery slope towards eliminating it and not providing any protection to creators, thinkers, and inventors. A person who has a unique idea ought to be entitled to take private ownership of her creation and use it to her advantage. If the farmer is entitled to own a shovel that she creates, why should she not be able to own her unique method of breeding plants in order to maximize her crop? The latter of these two is an example of an intellectual property creation that a person may want to restrict the access others have to. Additionally, this criticism can be raised from a standpoint of advantage. Though increasing common access to intellectual property has the goal of generating more of it, decreasing the rights of property owners would in reality have the
opposite effect. This is an incentives based argument, that people will not be inclined to invest their labor into creating ideas if they are fearful that they will be unable to reap the benefits of their labor. Without a strong enough system of rights in place, people will lack the incentive to labor, and so the pool of intellectual property resources will stagnate. The reason why the courts and legal precedence is moving in the direction of more rights is that this distribution promotes more creation of intellectual property than freer access to it. An ethos of fewer private rights for intellectual property has the opposite of its intended effect.

The criticism mentioned above raises a valid concern that should be kept under consideration when creating a system of property, but the critic’s worry is hyperbolic and larger than it needs to be. This view does not argue for the elimination of private property when it comes to intellectual property. It is clear that doing so would have extremely negative ramifications and, as the criticism says, go against the goal of promoting the creation of as much intellectual property as possible. Instead, the argument being made here is that the trend towards increasing rights for individual holders of intellectual property is not the correct direction to be moving in, and that the reins ought to be brought back. Numerous benefits stem from private ownership of property, going all the way back to Locke and his statement that a person, by appropriating a portion of the commons to herself, actually increases the total available pool of resources. This applies to this situation as well. People should be encouraged to create intellectual property and be protected as owners. The latter of these is not troublesome as long as it does not impede the larger goal of generating more. Once again, John Locke’s waste clause is relevant. A creator or inventor should keep in mind the general goal of efficiency in her appropriation and ownership of property. If it becomes clear that others would be able to make better use of her creation or idea than she can, she ought to acknowledge this and allow others to
access her property. Even in this case, it is not guaranteed that a person will not be able to benefit from her own idea. A person who is able to come up with an invention or idea that no other person can understand or exploit, she will be able reap the rewards of her ingenuity even if the idea exists in the commons. Intellectual property should involve a good faith effort on the part of property owners in order to not hoard their creative possessions and allow them to create benefit for as many in society as possible. There are many ways that today’s framework of intellectual property goes against these ideas and goals presented in ways that indicate that rights afforded to owners of it are too great.

The system of governing intellectual property has created many issues that could be fixed by granting less absolute power to owners of intellectual property. Because it has been so strongly incentivized within the framework, people have reason to acquire copyrights and patents for the sake of holding power over others and benefitting themselves over the whole. The concept known as “patent trolling” has become a large problem within the system of US intellectual property. Patent trolling occurs when an individual or company buys up patents from other firms wishing to liquidize their assets and then abusing their newfound ownership of these patents to sue any person viewed to be in violation of their ownership. This is able to occur because “the Patent Office has a habit of issuing patents for ideas that are neither new nor revolutionary, and these patents can be very broad…covering things that should never have been patented in the first place” (Patent Trolls 2014). Here is a clear example of today’s system of property having gone astray and afforded too much intellectual property to individuals and given too many rights to said owners. Instead of leaning towards less intellectual copyright and promoting free access to information, the courts and law have done the exact opposite. An inefficiency and burden on the system has been created as a result. Patents are being used against
their original intention in order to harm those who are attempting to create their own intellectual property or using an idea that a single entity should not have ownership rights over. As often times the patents in question here are very vague in their wording, it allows patent trolls to generalize their claims and attack a wide variety of inventors and creators. The individuals and corporations have more financial wherewithal than those facing litigation and so the latter often times cannot even hope to have a fighting chance in the court. Settling the case is often times easier, and so is in most cases the likely outcome. While the original effort may have been to allow a creator of intellectual property to use their ideas for her own benefit, the practice has moved far beyond this and now has created a large problem in the system of governance. This problem, in addition with many others, could be solved with a shift in intellectual property rights towards freer access and fewer exclusive rights granted to owners.

Patent trolling, along with other issues in the current framework ruling over intellectual property, show that it is foolish for a view to depend on the integrity and generosity of property owners in order to make a system work. If the incentive exists for people to exploit the system and take advantage of others, exploitation will happen. Restrictions must be institutionalized in order to give people less reason to abuse ownership of intellectual property. Systems of governing intellectual property ought to always keep in mind the background goal of promoting the most creation of it as possible and increasing efficiency. The framework of today, however, mistakenly has placed the emphasis on the rights and power of individual property holders to have more power. A proponent of this view can argue that decreasing the rights and ease of which one can acquire intellectual property will cause people to not want to create it and will stagnate the pool of resources. While this is a valid concern, the proposition here is not to completely eliminate privatization of intellectual property; it is to reduce back to the appropriate
levels. When a system generates issues such as patent trolling, which places a heavy burden on creators and heavily disincentives creation of intellectual property, a shift must be made in the other direction in order to correct this error. Such a change in direction, if taken by legislators and judges, would make the intellectual property community a more harmonious place and allow for the most creation of ideas and inventions to take place.
Conclusion

This discussion has centered on John Locke and intellectual property. His views on property have had a profound influence on the modern system of ruling over intellectual ownership, both in good and bad ways. Locke argues for a labor theory of property, that a person acquires property by investing her labor. The two most important ideas in his theory of property are his no-waste clause and enough and as good clause, both of which work in tandem to restrict appropriation of private property. These ideas, however, do not apply as easily to the category of private ownership known as intellectual property. This area of property exhibits many different characteristics from other forms of property such as land, making an application of Locke’s ideas to it a difficult task. When attempting to argue for a system of intellectual property under Lockean ideas, his enough and as good clause does not provide enough argumentative force, though this is contrary to most Lockean theories of property. Features of intellectual property such as the ambiguous nature of the commons makes it difficult to justify restriction of intellectual property using enough and as good. Instead, the crux of a Lockean argument about intellectual property must come from his no-waste clause. At least in the realm of intellectual property, this clause ought to be interpreted as advocating a standard of efficiency that owners should be held to. A person is wasting her intellectual property if she simply sits on the idea and does not use it to her advantage or to create another idea. In situations like these, this interpretation of the no-waste clause would require the owner to either allow others access to her property or begin using it in a more efficient manner. While the no-waste clause when interpreted this way does provide a strong justification for restriction of private intellectual property, it cannot fully explain the principles to govern a whole system. Locke’s ideas of
property need assistance and input from other sources in order to more fully explain how to govern intellectual property. His ideas are not fully sensitive to the differences between intellectual property and other forms of ownership.

Man has on some level recognized this important distinction in his formation of governance systems for intellectual property. For example, patents in the United States expire after a certain length of time. Equate this with the thought of a person’s ownership of a piece of land expiring after a period of time and it is clear the two areas are being ruled by different laws. Unfortunately, in many other respects, the incorrect view and perspective of intellectual property has been taken, resulting in many hardships and inefficiencies within the system. Additionally, the rule of law has been unable to keep up with the swift rate at which the intellectual property landscape evolves. New intellectual property and new ways of creating it come about every day. The system in many ways is looking at the issue through the wrong lens. This is not to say that the current system has it all wrong. A particular issue of relevance today is abstract ideas. On these, the Supreme Court has decided that “abstract ideas cannot be patented, because they are basic tools of scientific and technological activity” (Abstract Ideas Don’t Deserve Patents). It seems here that the legal community is beginning to acknowledge that advancement of individual ownership rights is not always the best course of action. The intellectual property community should not be viewed as a group of individuals, but rather a whole, with each person contributing to the greater output. A creator is dependent upon the work of others in order to generate any kind of new intellectual property. This gives reason to believe that it should be accessed more freely than it is now. Banning the patenting of abstract ideas is a step in the correct direction, but it is not enough. Upon consideration of the whole picture of intellectual
property, it is clear that the direction taken in recent years goes against the ideal of promoting its creation.

The goal of a system to govern intellectual property ought to be to maximize the creation of it. Doing so requires a different set of rules than what used to be called for in previous eras. Today’s system, as opposed to promoting creation of intellectual property, emphasizes the rights of individual owners instead, staying behind the curve of the development of intellectual property. The step to correct this is to move more of it back into the commons, and afford fewer privileges to owners. Some may object that reducing ownership rights will stifle the intellectual property community, but this is based on an old perspective. The existing body of intellectual property is already large and increasing in size constantly. Enough ideas already exist that it is unlikely that development will stagnate, even if private owners have slightly fewer rights. Additionally, this perspective has been accepted one for decades and its effect on the intellectual property community has been less than optimal. While shifting the focus of these rights may seem a difficult conclusion to accept, recall the point made many times in this discussion; intellectual property is different from other forms of ownership. A piece of intellectual property is unique and in many respects non-rival in consumption. One person garnering benefit from a piece of intellectual property does not result in another person losing the same amount. This form of property can be organized in a way that individual efforts can combine with each other to create a whole larger than the sum of its parts. As such, it should be governed by a set of rules different from other kinds of property, at least when it comes to relevant differences. Shifting the pendulum back in the direction of greater access to intellectual property will increase the amount of it being created in the world and will allow society to progress on further. While the work of John Locke provides compelling arguments with respect to other areas of private property, his
ideas do not prove as convincing when applied to intellectual property. There are too many factors impacting the current situation that were not in play during his time, and so additional consideration must be given to these provisions in order to arrive at a more effective picture of what a system of intellectual property ought to look like.
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